

**LA BUGAL-B'LAAN TRIBAL ASSOCIATION, INC., REPRESENTED BY
ITS CHAIRMAN F'LONG MIGUEL M. LUMAYONG; WIGBERTO E.
TAÑADA; PONCIANO BENNAGEN; JAIME TADEO; RENATO R.
CONSTANTINO JR.; F...**

G.R. No. 127882. December 01, 2004

Ponente: PANGANIBAN, J.

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PANGANIBAN, J.:

All mineral resources are owned by the State. Their exploration, development and utilization (EDU) must always be subject to the full control and supervision of the State. More specifically, given the inadequacy of Filipino capital and technology in large-scale EDU activities, the State may secure the help of foreign companies in all relevant matters -- especially financial and technical assistance -- provided that, at all times, the State maintains its right of full control. The foreign assistor or contractor assumes all financial, technical and entrepreneurial risks in the EDU activities; hence, it may be given reasonable management, operational, marketing, audit and other prerogatives to protect its investments and to enable the business to succeed.

Full control is not anathematic to day-to-day management by the contractor, provided that the State retains the power to direct overall strategy; and to set aside, reverse or modify plans and actions of the contractor. The idea of full control is similar to that which is exercised by the board of directors of a private corporation: the performance of managerial, operational, financial, marketing and other functions may be delegated to subordinate officers or given to contractual entities, but the board retains full residual control of the business.

Who or what organ of government actually exercises this power of control on behalf of the State? The Constitution is crystal clear: the President. Indeed, the Chief Executive is the official constitutionally mandated to "enter into agreements with foreign owned corporations." On the other hand, Congress may review the action of the President once it is notified of "every contract entered into in accordance with this [constitutional] provision within thirty days from its execution." In contrast to this express mandate of the President and Congress in the EDU of natural resources, Article XII of the Constitution is silent on the role of the judiciary. However, should the President and/or Congress gravely abuse their discretion in this regard, the courts may -- in a proper case -- exercise their residual duty under Article VIII. Clearly then, the judiciary should not inordinately interfere in the exercise of this presidential power of control over the EDU of our natural resources.

The Constitution should be read in broad, life-giving strokes. It should not be used to strangle economic growth or to serve narrow, parochial interests. Rather, it should be construed to grant the President and Congress sufficient discretion and reasonable leeway to enable them to attract foreign investments and expertise, as well as to secure for our people and our posterity the blessings of prosperity and peace.

On the basis of this control standard, this Court upholds the constitutionality of the Philippine Mining Law, its Implementing Rules and Regulations -- insofar as they relate to financial and technical agreements -- as well as the subject Financial and Technical Assistance Agreement (FTAA).[5]

Background

The Petition for Prohibition and Mandamus before the Court challenges the constitutionality of (1) Republic Act No. [RA] 7942 (The Philippine Mining Act of 1995); (2) its Implementing Rules and Regulations (DENR Administrative Order No. [DAO] 96-40); and (3) the FTAA dated March 30, 1995,[6]executed by the government with Western Mining Corporation (Philippines), Inc. (WMCP).[7]

On January 27, 2004, the Court en banc promulgated its Decision[8] granting the Petition and declaring the unconstitutionality of certain provisions of RA 7942, DAO 96-40, as well as of the entire FTAA executed between the government and WMCP, mainly on the finding that FTAA's are service contracts prohibited by the 1987 Constitution.

The Decision struck down the subject FTAA for being similar to service contracts,[9] which, though permitted under the 1973 Constitution,[10] were subsequently denounced for being antithetical to the principle of sovereignty over our natural resources, because they allowed foreign control over the exploitation of our natural resources, to the prejudice of the Filipino nation.

The Decision quoted several legal scholars and authors who had criticized service contracts for, inter alia, vesting in the foreign contractor exclusive management and control of the enterprise, including operation of the field in the event petroleum was discovered; control of production, expansion and development; nearly unfettered control over the disposition and sale of the products discovered/extracted; effective ownership of the natural resource at the point of extraction; and beneficial ownership of our economic resources. According to the Decision, the 1987 Constitution (Section 2 of Article XII) effectively banned such service contracts.

Subsequently, respondents filed separate Motions for Reconsideration. In a Resolution dated March 9, 2004, the Court required petitioners to comment thereon. In the Resolution of June 8, 2004, it set the case for Oral Argument on June 29, 2004.

After hearing the opposing sides, the Court required the parties to submit their respective Memoranda in amplification of their arguments. In a Resolution issued later the same day, June 29, 2004, the Court noted, inter alia, the Manifestation and Motion (in lieu of comment) filed by the Office of the Solicitor General (OSG) on behalf of public respondents. The OSG said that it was not interposing any objection to the Motion for Intervention filed by the Chamber of Mines of the Philippines, Inc. (CMP) and was in fact joining and adopting the latter's Motion for Reconsideration.

Memoranda were accordingly filed by the intervenor as well as by petitioners, public respondents, and private respondent, dwelling at length on the three issues discussed below. Later, WMCP submitted its Reply Memorandum, while the OSG -- in obedience to an Order of this Court -- filed a Compliance submitting copies of more FTAA's entered into by the government.

Three Issues Identified by the Court

During the Oral Argument, the Court identified the three issues to be resolved in the present controversy, as follows:

1. Has the case been rendered moot by the sale of WMC shares in WMCP to Sagittarius (60 percent of Sagittarius' equity is owned by Filipinos and/or Filipino-owned corporations while 40 percent is owned by Indophil Resources NL, an Australian company) and by the subsequent transfer and registration of the FTAA from WMCP to Sagittarius?
2. Assuming that the case has been rendered moot, would it still be proper to resolve the constitutionality of the

assailed provisions of the Mining Law, DAO 96-40 and the WMCP FTAA?

3. What is the proper interpretation of the phrase Agreements Involving Either Technical or Financial Assistance contained in paragraph 4 of Section 2 of Article XII of the Constitution?

Should the Motion for Reconsideration Be Granted?

Respondents' and intervenor's Motions for Reconsideration should be granted, for the reasons discussed below. The foregoing three issues identified by the Court shall now be taken up seriatim.

First Issue:

Mootness

In declaring unconstitutional certain provisions of RA 7942, DAO 96-40, and the WMCP FTAA, the majority Decision agreed with petitioners' contention that the subject FTAA had been executed in violation of Section 2 of Article XII of the 1987 Constitution. According to petitioners, the FTAA entered into by the government with foreign-owned corporations are limited by the fourth paragraph of the said provision to agreements involving only technical or financial assistance for large-scale exploration, development and utilization of minerals, petroleum and other mineral oils. Furthermore, the foreign contractor is allegedly permitted by the FTAA in question to fully manage and control the mining operations and, therefore, to acquire "beneficial ownership" of our mineral resources.

The Decision merely shrugged off the Manifestation by WMCP informing the Court (1) that on January 23, 2001, WMC had sold all its shares in WMCP to Sagittarius Mines, Inc., 60 percent of whose equity was held by Filipinos; and (2) that the assailed FTAA had likewise been transferred from WMCP to Sagittarius.[11] The ponencia declared that the instant case had not been rendered moot by the transfer and registration of the FTAA to a Filipino-owned corporation, and that the validity of the said transfer remained in dispute and awaited final judicial determination.[12] Patently therefore, the Decision is anchored on the assumption that WMCP had remained a foreign corporation.

The crux of this issue of mootness is the fact that WMCP, at the time it entered into the FTAA, happened to be wholly owned by WMC Resources International Pty., Ltd. (WMC), which in turn was a wholly owned subsidiary of Western Mining Corporation Holdings Ltd., a publicly listed major Australian mining and exploration company.

The nullity of the FTAA was obviously premised upon the contractor being a foreign corporation. Had the FTAA been originally issued to a Filipino-owned corporation, there would have been no constitutionality issue to speak of. Upon the other hand, the conveyance of the WMCP FTAA to a Filipino corporation can be likened to the sale of land to a foreigner who subsequently acquires Filipino citizenship, or who later resells the same land to a Filipino citizen. The conveyance would be validated, as the property in question would no longer be owned by a disqualified vendee.

And, inasmuch as the FTAA is to be implemented now by a Filipino corporation, it is no longer possible for the Court to declare it unconstitutional. The case pending in the Court of Appeals is a dispute between two Filipino companies (Sagittarius and Lepanto), both claiming the right to purchase the foreign shares in WMCP. So, regardless of which side eventually wins, the FTAA would still be in the hands of a qualified Filipino company. Considering that there is no longer any justiciable controversy, the plea to nullify the Mining Law has become a virtual petition for declaratory relief, over which this Court has no original jurisdiction.

In their Final Memorandum, however, petitioners argue that the case has not become moot, considering the

invalidity of the alleged sale of the shares in WMCP from WMC to Sagittarius, and of the transfer of the FTAA from WMCP to Sagittarius, resulting in the change of contractor in the FTAA in question. And even assuming that the said transfers were valid, there still exists an actual case predicated on the invalidity of RA 7942 and its Implementing Rules and Regulations (DAO 96-40). Presently, we shall discuss petitioners' objections to the transfer of both the shares and the FTAA. We shall take up the alleged invalidity of RA 7942 and DAO 96-40 later on in the discussion of the third issue.

No Transgression of the Constitution by the Transfer of the WMCP Shares

Petitioners claim, first, that the alleged invalidity of the transfer of the WMCP shares to Sagittarius violates the fourth paragraph of Section 2 of Article XII of the Constitution; second, that it is contrary to the provisions of the WMCP FTAA itself; and third, that the sale of the shares is suspect and should therefore be the subject of a case in which its validity may properly be litigated.

On the first ground, petitioners assert that paragraph 4 of Section 2 of Article XII permits the government to enter into FTAA's only with foreign-owned corporations. Petitioners insist that the first paragraph of this constitutional provision limits the participation of Filipino corporations in the exploration, development and utilization of natural resources to only three species of contracts -- production sharing, co-production and joint venture -- to the exclusion of all other arrangements or variations thereof, and the WMCP FTAA may therefore not be validly assumed and implemented by Sagittarius. In short, petitioners claim that a Filipino corporation is not allowed by the Constitution to enter into an FTAA with the government.

However, a textual analysis of the first paragraph of Section 2 of Article XII does not support petitioners' argument. The pertinent part of the said provision states: "Sec. 2. x x x The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. x x x." Nowhere in the provision is there any express limitation or restriction insofar as arrangements other than the three aforementioned contractual schemes are concerned.

Neither can one reasonably discern any implied stricture to that effect. Besides, there is no basis to believe that the framers of the Constitution, a majority of whom were obviously concerned with furthering the development and utilization of the country's natural resources, could have wanted to restrict Filipino participation in that area. This point is clear, especially in the light of the overarching constitutional principle of giving preference and priority to Filipinos and Filipino corporations in the development of our natural resources.

Besides, even assuming (purely for argument's sake) that a constitutional limitation barring Filipino corporations from holding and implementing an FTAA actually exists, nevertheless, such provision would apply only to the transfer of the FTAA to Sagittarius, but definitely not to the sale of WMC's equity stake in WMCP to Sagittarius. Otherwise, an unreasonable curtailment of property rights without due process of law would ensue. Petitioners' argument must therefore fail.

FTAA Not Intended Solely for Foreign Corporation

Equally barren of merit is the second ground cited by petitioners -- that the FTAA was intended to apply solely to a foreign corporation, as can allegedly be seen from the provisions therein. They manage to cite only one WMCP FTAA provision that can be regarded as clearly intended to apply only to a foreign contractor: Section 12, which

provides for international commercial arbitration under the auspices of the International Chamber of Commerce, after local remedies are exhausted. This provision, however, does not necessarily imply that the WMCP FTAA cannot be transferred to and assumed by a Filipino corporation like Sagittarius, in which event the said provision should simply be disregarded as a superfluity.

No Need for a Separate

Litigation of the Sale of Shares

Petitioners claim as third ground the “suspicious” sale of shares from WMC to Sagittarius; hence, the need to litigate it in a separate case. Section 40 of RA 7942 (the Mining Law) allegedly requires the President’s prior approval of a transfer.

A re-reading of the said provision, however, leads to a different conclusion. “Sec. 40. Assignment/Transfer -- A financial or technical assistance agreement may be assigned or transferred, in whole or in part, to a qualified person subject to the prior approval of the President: Provided, That the President shall notify Congress of every financial or technical assistance agreement assigned or converted in accordance with this provision within thirty (30) days from the date of the approval thereof.”

Section 40 expressly applies to the assignment or transfer of the FTAA, not to the sale and transfer of shares of stock in WMCP. Moreover, when the transferee of an FTAA is another foreign corporation, there is a logical application of the requirement of prior approval by the President of the Republic and notification to Congress in the event of assignment or transfer of an FTAA. In this situation, such approval and notification are appropriate safeguards, considering that the new contractor is the subject of a foreign government.

On the other hand, when the transferee of the FTAA happens to be a Filipino corporation, the need for such safeguard is not critical; hence, the lack of prior approval and notification may not be deemed fatal as to render the transfer invalid. Besides, it is not as if approval by the President is entirely absent in this instance. As pointed out by private respondent in its Memorandum,[13] the issue of approval is the subject of one of the cases brought by Lepanto against Sagittarius in GR No. 162331. That case involved the review of the Decision of the Court of Appeals dated November 21, 2003 in CA-GR SP No. 74161, which affirmed the DENR Order dated December 31, 2001 and the Decision of the Office of the President dated July 23, 2002, both approving the assignment of the WMCP FTAA to Sagittarius.

Petitioners also question the sale price and the financial capacity of the transferee. According to the Deed of Absolute Sale dated January 23, 2001, executed between WMC and Sagittarius, the price of the WMCP shares was fixed at US\$9,875,000, equivalent to P553 million at an exchange rate of 56:1. Sagittarius had an authorized capital stock of P250 million and a paid up capital of P60 million. Therefore, at the time of approval of the sale by the DENR, the debt-to-equity ratio of the transferee was over 9:1 -- hardly ideal for an FTAA contractor, according to petitioners.

However, private respondents counter that the Deed of Sale specifically provides that the payment of the purchase price would take place only after Sagittarius’ commencement of commercial production from mining operations, if at all. Consequently, under the circumstances, we believe it would not be reasonable to conclude, as petitioners did, that the transferee’s high debt-to-equity ratio per se necessarily carried negative implications for the enterprise; and it would certainly be improper to invalidate the sale on that basis, as petitioners propose.

FTAA Not Void,

Thus Transferrable

To bolster further their claim that the case is not moot, petitioners insist that the FTAA is void and, hence cannot

be transferred; and that its transfer does not operate to cure the constitutional infirmity that is inherent in it; neither will a change in the circumstances of one of the parties serve to ratify the void contract.

While the discussion in their Final Memorandum was skimpy, petitioners in their Comment (on the MR) did ratiocinate that this Court had declared the FTAA to be void because, at the time it was executed with WMCP, the latter was a fully foreign-owned corporation, in which the former vested full control and management with respect to the exploration, development and utilization of mineral resources, contrary to the provisions of paragraph 4 of Section 2 of Article XII of the Constitution. And since the FTAA was per se void, no valid right could be transferred; neither could it be ratified, so petitioners conclude.

Petitioners have assumed as fact that which has yet to be established. First and foremost, the Decision of this Court declaring the FTAA void has not yet become final. That was precisely the reason the Court still heard Oral Argument in this case. Second, the FTAA does not vest in the foreign corporation full control and supervision over the exploration, development and utilization of mineral resources, to the exclusion of the government. This point will be dealt with in greater detail below; but for now, suffice it to say that a perusal of the FTAA provisions will prove that the government has effective overall direction and control of the mining operations, including marketing and product pricing, and that the contractor's work programs and budgets are subject to its review and approval or disapproval.

As will be detailed later on, the government does not have to micro-manage the mining operations and dip its hands into the day-to-day management of the enterprise in order to be considered as having overall control and direction. Besides, for practical and pragmatic reasons, there is a need for government agencies to delegate certain aspects of the management work to the contractor. Thus the basis for declaring the FTAA void still has to be revisited, reexamined and reconsidered.

Petitioners sniff at the citation of *Chavez v. Public Estates Authority*,^[14] and *Halili v. CA*,^[15] claiming that the doctrines in these cases are wholly inapplicable to the instant case.

Chavez clearly teaches: "Thus, the Court has ruled consistently that where a Filipino citizen sells land to an alien who later sells the land to a Filipino, the invalidity of the first transfer is corrected by the subsequent sale to a citizen. Similarly, where the alien who buys the land subsequently acquires Philippine citizenship, the sale is validated since the purpose of the constitutional ban to limit land ownership to Filipinos has been achieved. In short, the law disregards the constitutional disqualification of the buyer to hold land if the land is subsequently transferred to a qualified party, or the buyer himself becomes a qualified party."^[16]

In their Comment, petitioners contend that in *Chavez* and *Halili*, the object of the transfer (the land) was not what was assailed for alleged unconstitutionality. Rather, it was the transaction that was assailed; hence subsequent compliance with constitutional provisions would cure its infirmity. In contrast, in the instant case it is the FTAA itself, the object of the transfer, that is being assailed as invalid and unconstitutional. So, petitioners claim that the subsequent transfer of a void FTAA to a Filipino corporation would not cure the defect.

Petitioners are confusing themselves. The present Petition has been filed, precisely because the grantee of the FTAA was a wholly owned subsidiary of a foreign corporation. It cannot be gainsaid that anyone would have asserted that the same FTAA was void if it had at the outset been issued to a Filipino corporation. The FTAA, therefore, is not per se defective or unconstitutional. It was questioned only because it had been issued to an allegedly non-qualified, foreign-owned corporation.

We believe that this case is clearly analogous to *Halili*, in which the land acquired by a non-Filipino was re-conveyed to a qualified vendee and the original transaction was thereby cured. Paraphrasing *Halili*, the same

rationale applies to the instant case: assuming *arguendo* the invalidity of its prior grant to a foreign corporation, the disputed FTAA -- being now held by a Filipino corporation -- can no longer be assailed; the objective of the constitutional provision -- to keep the exploration, development and utilization of our natural resources in Filipino hands -- has been served.

More accurately speaking, the present situation is one degree better than that obtaining in *Halili*, in which the original sale to a non-Filipino was clearly and indisputably violative of the constitutional prohibition and thus void *ab initio*. In the present case, the issuance/grant of the subject FTAA to the then foreign-owned WMCP was not illegal, void or unconstitutional at the time. The matter had to be brought to court, precisely for adjudication as to whether the FTAA and the Mining Law had indeed violated the Constitution. Since, up to this point, the decision of this Court declaring the FTAA void has yet to become final, to all intents and purposes, the FTAA must be deemed valid and constitutional.[17]

At bottom, we find completely outlandish petitioners' contention that an FTAA could be entered into by the government only with a foreign corporation, never with a Filipino enterprise. Indeed, the nationalistic provisions of the Constitution are all anchored on the protection of Filipino interests. How petitioners can now argue that foreigners have the exclusive right to FTAA's totally overturns the entire basis of the Petition -- preference for the Filipino in the exploration, development and utilization of our natural resources. It does not take deep knowledge of law and logic to understand that what the Constitution grants to foreigners should be equally available to Filipinos.

Second Issue:

Whether the Court Can Still Decide the Case,
Even Assuming It Is Moot

All the protagonists are in agreement that the Court has jurisdiction to decide this controversy, even assuming it to be moot.

Petitioners stress the following points. First, while a case becomes moot and academic when "there is no more actual controversy between the parties or no useful purpose can be served in passing upon the merits,"[18] what is at issue in the instant case is not only the validity of the WMCP FTAA, but also the constitutionality of RA 7942 and its Implementing Rules and Regulations. Second, the acts of private respondent cannot operate to cure the law of its alleged unconstitutionality or to divest this Court of its jurisdiction to decide. Third, the Constitution imposes upon the Supreme Court the duty to declare invalid any law that offends the Constitution.

Petitioners also argue that no amendatory laws have been passed to make the Mining Act of 1995 conform to constitutional strictures (assuming that, at present, it does not); that public respondents will continue to implement and enforce the statute until this Court rules otherwise; and that the said law continues to be the source of legal authority in accepting, processing and approving numerous applications for mining rights.

Indeed, it appears that as of June 30, 2002, some 43 FTAA applications had been filed with the Mines and Geosciences Bureau (MGB), with an aggregate area of 2,064,908.65 hectares -- spread over Luzon, the Visayas and Mindanao[19] -- applied for. It may be a bit far-fetched to assert, as petitioners do, that each and every FTAA that was entered into under the provisions of the Mining Act "invites potential litigation" for as long as the constitutional issues are not resolved with finality. Nevertheless, we must concede that there exists the distinct possibility that one or more of the future FTAA's will be the subject of yet another suit grounded on constitutional issues.

But of equal if not greater significance is the cloud of uncertainty hanging over the mining industry, which is even

now scaring away foreign investments. Attesting to this climate of anxiety is the fact that the Chamber of Mines of the Philippines saw the urgent need to intervene in the case and to present its position during the Oral Argument; and that Secretary General Romulo Neri of the National Economic Development Authority (NEDA) requested this Court to allow him to speak, during that Oral Argument, on the economic consequences of the Decision of January 27, 2004.[20]

We are convinced. We now agree that the Court must recognize the exceptional character of the situation and the paramount public interest involved, as well as the necessity for a ruling to put an end to the uncertainties plaguing the mining industry and the affected communities as a result of doubts cast upon the constitutionality and validity of the Mining Act, the subject FTAA and future FTAA's, and the need to avert a multiplicity of suits. Paraphrasing *Gonzales v. Commission on Elections*,[21] it is evident that strong reasons of public policy demand that the constitutionality issue be resolved now.[22]

In further support of the immediate resolution of the constitutionality issue, public respondents cite *Acop v. Guingona*,[23] to the effect that the courts will decide a question -- otherwise moot and academic -- if it is "capable of repetition, yet evading review." [24] Public respondents ask the Court to avoid a situation in which the constitutionality issue may again arise with respect to another FTAA, the resolution of which may not be achieved until after it has become too late for our mining industry to grow out of its infancy. They also recall *Salonga v. Cruz Paño*,[25] in which this Court declared that "(t)he Court also has the duty to formulate guiding and controlling constitutional principles, precepts, doctrines or rules. It has the symbolic function of educating the bench and bar on the extent of protection given by constitutional guarantees. x x x."

The mootness of the case in relation to the WMCP FTAA led the undersigned ponente to state in his dissent to the Decision that there was no more justiciable controversy and the plea to nullify the Mining Law has become a virtual petition for declaratory relief.[26] The entry of the Chamber of Mines of the Philippines, Inc., however, has put into focus the seriousness of the allegations of unconstitutionality of RA 7942 and DAO 96-40 which converts the case to one for prohibition[27] in the enforcement of the said law and regulations.

Indeed, this CMP entry brings to fore that the real issue in this case is whether paragraph 4 of Section 2 of Article XII of the Constitution is contravened by RA 7942 and DAO 96-40, not whether it was violated by specific acts implementing RA 7942 and DAO 96-40. "[W]hen an act of the legislative department is seriously alleged to have infringed the Constitution, settling the controversy becomes the duty of this Court. By the mere enactment of the questioned law or the approval of the challenged action, the dispute is said to have ripened into a judicial controversy even without any other overt act." [28] This ruling can be traced from *Tañada v. Angara*,[29] in which the Court said:

"In seeking to nullify an act of the Philippine Senate on the ground that it contravenes the Constitution, the petition no doubt raises a justiciable controversy. Where an action of the legislative branch is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to settle the dispute.

x x x x x x x x

"As this Court has repeatedly and firmly emphasized in many cases, it will not shirk, digress from or abandon its sacred duty and authority to uphold the Constitution in matters that involve grave abuse of discretion brought before it in appropriate cases, committed by any officer, agency, instrumentality or department of the government." [30]

Additionally, the entry of CMP into this case has also effectively forestalled any possible objections arising from the standing or legal interest of the original parties.

For all the foregoing reasons, we believe that the Court should proceed to a resolution of the constitutional issues in this case.

Third Issue:

The Proper Interpretation of the Constitutional Phrase

“Agreements Involving Either Technical or Financial Assistance”

The constitutional provision at the nucleus of the controversy is paragraph 4 of Section 2 of Article XII of the 1987 Constitution. In order to appreciate its context, Section 2 is reproduced in full:

“Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture or production-sharing agreements with Filipino citizens or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

“The State shall protect the nation’s marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

“The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays and lagoons.

“The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

“The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.”[31]

No Restriction of Meaning by a Verba Legis Interpretation

To interpret the foregoing provision, petitioners adamantly assert that the language of the Constitution should prevail; that the primary method of interpreting it is to seek the ordinary meaning of the words used in its provisions. They rely on rulings of this Court, such as the following:

“The fundamental principle in constitutional construction however is that the primary source from which to ascertain constitutional intent or purpose is the language of the provision itself. The presumption is that the words in which the constitutional provisions are couched express the objective sought to be attained. In other words, verba legis prevails. Only when the meaning of the words used is unclear and equivocal should resort be made to extraneous aids of construction and interpretation, such as the proceedings of the Constitutional Commission or Convention to shed light on and ascertain the true intent or purpose of the provision being construed.”[32]

Very recently, in *Francisco v. The House of Representatives*,[33] this Court indeed had the occasion to reiterate the well-settled principles of constitutional construction:

“First, verba legis, that is, wherever possible, the words used in the Constitution must be given their ordinary meaning except where technical terms are employed. x x x.

x x x x x x x x

“Second, where there is ambiguity, ratio legis est anima. The words of the Constitution should be interpreted in accordance with the intent of its framers. x x x.

x x x x x x x x

“Finally, ut magis valeat quam pereat. The Constitution is to be interpreted as a whole.”[34]

For ease of reference and in consonance with verba legis, we reconstruct and stratify the aforequoted Section 2 as follows:

- All natural resources are owned by the State. Except for agricultural lands, natural resources cannot be alienated by the State.

- The exploration, development and utilization (EDU) of natural resources shall be under the full control and supervision of the State.

- The State may undertake these EDU activities through either of the following:

(a)

By itself directly and solely

(b)

By (i) co-production; (ii) joint venture; or (iii) production sharing agreements with Filipino citizens or corporations, at least 60 percent of the capital of which is owned by such citizens

- Small-scale utilization of natural resources may be allowed by law in favor of Filipino citizens.

- For large-scale EDU of minerals, petroleum and other mineral oils, the President may enter into “agreements with foreign-owned corporations involving either technical or financial assistance according to the general terms and conditions provided by law x x x.”

Note that in all the three foregoing mining activities -- exploration, development and utilization -- the State may undertake such EDU activities by itself or in tandem with Filipinos or Filipino corporations, except in two instances: first, in small-scale utilization of natural resources, which Filipinos may be allowed by law to undertake; and second, in large-scale EDU of minerals, petroleum and mineral oils, which may be undertaken by the State via “agreements with foreign-owned corporations involving either technical or financial assistance” as provided by law.

Petitioners claim that the phrase “agreements x x x involving either technical or financial assistance” simply means technical assistance or financial assistance agreements, nothing more and nothing else. They insist that there is no ambiguity in the phrase, and that a plain reading of paragraph 4 quoted above leads to the inescapable conclusion that what a foreign-owned corporation may enter into with the government is merely an agreement for either financial or technical assistance only, for the large-scale exploration, development and utilization of minerals, petroleum and other mineral oils; such a limitation, they argue, excludes foreign management and operation of a mining enterprise.[35]

This restrictive interpretation, petitioners believe, is in line with the general policy enunciated by the Constitution

reserving to Filipino citizens and corporations the use and enjoyment of the country's natural resources. They maintain that this Court's Decision[36] of January 27, 2004 correctly declared the WMCP FTAA, along with pertinent provisions of RA 7942, void for allowing a foreign contractor to have direct and exclusive management of a mining enterprise. Allowing such a privilege not only runs counter to the "full control and supervision" that the State is constitutionally mandated to exercise over the exploration, development and utilization of the country's natural resources; doing so also vests in the foreign company "beneficial ownership" of our mineral resources. It will be recalled that the Decision of January 27, 2004 zeroed in on "management or other forms of assistance" or other activities associated with the "service contracts" of the martial law regime, since "the management or operation of mining activities by foreign contractors, which is the primary feature of service contracts, was precisely the evil that the drafters of the 1987 Constitution sought to eradicate."

On the other hand, the intervenor[37] and public respondents argue that the FTAA allowed by paragraph 4 is not merely an agreement for supplying limited and specific financial or technical services to the State. Rather, such FTAA is a comprehensive agreement for the foreign-owned corporation's integrated exploration, development and utilization of mineral, petroleum or other mineral oils on a large-scale basis. The agreement, therefore, authorizes the foreign contractor's rendition of a whole range of integrated and comprehensive services, ranging from the discovery to the development, utilization and production of minerals or petroleum products.

We do not see how applying a strictly literal or verba legis interpretation of paragraph 4 could inexorably lead to the conclusions arrived at in the ponencia. First, the drafters' choice of words -- their use of the phrase agreements x x x involving either technical or financial assistance -- does not indicate the intent to exclude other modes of assistance. The drafters opted to use involving when they could have simply said agreements for financial or technical assistance, if that was their intention to begin with. In this case, the limitation would be very clear and no further debate would ensue.

In contrast, the use of the word "involving" signifies the possibility of the inclusion of other forms of assistance or activities having to do with, otherwise related to or compatible with financial or technical assistance. The word "involving" as used in this context has three connotations that can be differentiated thus: one, the sense of "concerning," "having to do with," or "affecting"; two, "entailing," "requiring," "implying" or "necessitating"; and three, "including," "containing" or "comprising." [38]

Plainly, none of the three connotations convey a sense of exclusivity. Moreover, the word "involving," when understood in the sense of "including," as in including technical or financial assistance, necessarily implies that there are activities other than those that are being included. In other words, if an agreement includes technical or financial assistance, there is apart from such assistance -- something else already in, and covered or may be covered by, the said agreement.

In short, it allows for the possibility that matters, other than those explicitly mentioned, could be made part of the agreement. Thus, we are now led to the conclusion that the use of the word "involving" implies that these agreements with foreign corporations are not limited to mere financial or technical assistance. The difference in sense becomes very apparent when we juxtapose "agreements for technical or financial assistance" against "agreements including technical or financial assistance." This much is unalterably clear in a verba legis approach.

Second, if the real intention of the drafters was to confine foreign corporations to financial or technical assistance and nothing more, their language would have certainly been so unmistakably restrictive and stringent as to leave no doubt in anyone's mind about their true intent. For example, they would have used the sentence foreign corporations are absolutely prohibited from involvement in the management or operation of mining or similar ventures or words of similar import. A search for such stringent wording yields negative results. Thus, we come to

the inevitable conclusion that there was a conscious and deliberate decision to avoid the use of restrictive wording that bespeaks an intent not to use the expression “agreements x x x involving either technical or financial assistance” in an exclusionary and limiting manner.

Deletion of “Service Contracts” to
Avoid Pitfalls of Previous Constitutions,
Not to Ban Service Contracts Per Se

Third, we do not see how a verba legis approach leads to the conclusion that “the management or operation of mining activities by foreign contractors, which is the primary feature of service contracts, was precisely the evil that the drafters of the 1987 Constitution sought to eradicate.” Nowhere in the above-quoted Section can be discerned the objective to keep out of foreign hands the management or operation of mining activities or the plan to eradicate service contracts as these were understood in the 1973 Constitution. Still, petitioners maintain that the deletion or omission from the 1987 Constitution of the term “service contracts” found in the 1973 Constitution sufficiently proves the drafters’ intent to exclude foreigners from the management of the affected enterprises.

To our mind, however, such intent cannot be definitively and conclusively established from the mere failure to carry the same expression or term over to the new Constitution, absent a more specific, explicit and unequivocal statement to that effect. What petitioners seek (a complete ban on foreign participation in the management of mining operations, as previously allowed by the earlier Constitutions) is nothing short of bringing about a momentous sea change in the economic and developmental policies; and the fundamentally capitalist, free-enterprise philosophy of our government. We cannot imagine such a radical shift being undertaken by our government, to the great prejudice of the mining sector in particular and our economy in general, merely on the basis of the omission of the terms service contract from or the failure to carry them over to the new Constitution. There has to be a much more definite and even unarguable basis for such a drastic reversal of policies.

Fourth, a literal and restrictive interpretation of paragraph 4, such as that proposed by petitioners, suffers from certain internal logical inconsistencies that generate ambiguities in the understanding of the provision. As the intervenor pointed out, there has never been any constitutional or statutory provision that reserved to Filipino citizens or corporations, at least 60 percent of which is Filipino-owned, the rendition of financial or technical assistance to companies engaged in mining or the development of any other natural resource. The taking out of foreign-currency or peso-denominated loans or any other kind of financial assistance, as well as the rendition of technical assistance -- whether to the State or to any other entity in the Philippines -- has never been restricted in favor of Filipino citizens or corporations having a certain minimum percentage of Filipino equity. Such a restriction would certainly be preposterous and unnecessary. As a matter of fact, financial, and even technical assistance, regardless of the nationality of its source, would be welcomed in the mining industry anytime with open arms, on account of the dearth of local capital and the need to continually update technological know-how and improve technical skills.

There was therefore no need for a constitutional provision specifically allowing foreign-owned corporations to render financial or technical assistance, whether in respect of mining or some other resource development or commercial activity in the Philippines. The last point needs to be emphasized: if merely financial or technical assistance agreements are allowed, there would be no need to limit them to large-scale mining operations, as there would be far greater need for them in the smaller-scale mining activities (and even in non-mining areas). Obviously, the provision in question was intended to refer to agreements other than those for mere financial or technical assistance.

In like manner, there would be no need to require the President of the Republic to report to Congress, if only

financial or technical assistance agreements are involved. Such agreements are in the nature of foreign loans that -- pursuant to Section 20 of Article VII[39] of the 1987 Constitution -- the President may contract or guarantee, merely with the prior concurrence of the Monetary Board. In turn, the Board is required to report to Congress within thirty days from the end of every quarter of the calendar year, not thirty days after the agreement is entered into.

And if paragraph 4 permits only agreements for loans and other forms of financial, or technical assistance, what is the point of requiring that they be based on real contributions to the economic growth and general welfare of the country? For instance, how is one to measure and assess the “real contributions” to the “economic growth” and “general welfare” of the country that may ensue from a foreign-currency loan agreement or a technical-assistance agreement for, say, the refurbishing of an existing power generating plant for a mining operation somewhere in Mindanao? Such a criterion would make more sense when applied to a major business investment in a principal sector of the industry.

The conclusion is clear and inescapable -- a verba legis construction shows that paragraph 4 is not to be understood as one limited only to foreign loans (or other forms of financial support) and to technical assistance. There is definitely more to it than that. These are provisions permitting participation by foreign companies; requiring the President’s report to Congress; and using, as yardstick, contributions based on economic growth and general welfare. These were neither accidentally inserted into the Constitution nor carelessly cobbled together by the drafters in lip service to shallow nationalism. The provisions patently have significance and usefulness in a context that allows agreements with foreign companies to include more than mere financial or technical assistance.

Fifth, it is argued that Section 2 of Article XII authorizes nothing more than a rendition of specific and limited financial service or technical assistance by a foreign company. This argument begs the question “To whom or for whom would it be rendered”? or Who is being assisted? If the answer is “The State,” then it necessarily implies that the State itself is the one directly and solely undertaking the large-scale exploration, development and utilization of a mineral resource, so it follows that the State must itself bear the liability and cost of repaying the financing sourced from the foreign lender and/or of paying compensation to the foreign entity rendering technical assistance.

However, it is of common knowledge, and of judicial notice as well, that the government is and has for many many years been financially strapped, to the point that even the most essential services have suffered serious curtailments -- education and health care, for instance, not to mention judicial services -- have had to make do with inadequate budgetary allocations. Thus, government has had to resort to build-operate-transfer and similar arrangements with the private sector, in order to get vital infrastructure projects built without any governmental outlay.

The very recent brouhaha over the gargantuan “fiscal crisis” or “budget deficit” merely confirms what the ordinary citizen has suspected all along. After the reality check, one will have to admit the implausibility of a direct undertaking -- by the State itself -- of large-scale exploration, development and utilization of minerals, petroleum and other mineral oils. Such an undertaking entails not only humongous capital requirements, but also the attendant risk of never finding and developing economically viable quantities of minerals, petroleum and other mineral oils.[40]

It is equally difficult to imagine that such a provision restricting foreign companies to the rendition of only financial or technical assistance to the government was deliberately crafted by the drafters of the Constitution, who were all well aware of the capital-intensive and technology-oriented nature of large-scale mineral or

petroleum extraction and the country's deficiency in precisely those areas.[41] To say so would be tantamount to asserting that the provision was purposely designed to ladle the large-scale development and utilization of mineral, petroleum and related resources with impossible conditions; and to remain forever and permanently "reserved" for future generations of Filipinos.

A More Reasonable Look at the Charter's Plain Language

Sixth, we shall now look closer at the plain language of the Charter and examining the logical inferences. The drafters chose to emphasize and highlight agreements x x x involving either technical or financial assistance in relation to foreign corporations' participation in large-scale EDU. The inclusion of this clause on "technical or financial assistance" recognizes the fact that foreign business entities and multinational corporations are the ones with the resources and know-how to provide technical and/or financial assistance of the magnitude and type required for large-scale exploration, development and utilization of these resources.

The drafters -- whose ranks included many academicians, economists, businessmen, lawyers, politicians and government officials -- were not unfamiliar with the practices of foreign corporations and multinationals.

Neither were they so naïve as to believe that these entities would provide "assistance" without conditionalities or some quid pro quo. Definitely, as business persons well know and as a matter of judicial notice, this matter is not just a question of signing a promissory note or executing a technology transfer agreement. Foreign corporations usually require that they be given a say in the management, for instance, of day-to-day operations of the joint venture. They would demand the appointment of their own men as, for example, operations managers, technical experts, quality control heads, internal auditors or comptrollers. Furthermore, they would probably require seats on the Board of Directors -- all these to ensure the success of the enterprise and the repayment of the loans and other financial assistance and to make certain that the funding and the technology they supply would not go to waste. Ultimately, they would also want to protect their business reputation and bottom lines.[42]

In short, the drafters will have to be credited with enough pragmatism and savvy to know that these foreign entities will not enter into such "agreements involving assistance" without requiring arrangements for the protection of their investments, gains and benefits.

Thus, by specifying such "agreements involving assistance," the drafters necessarily gave implied assent to everything that these agreements necessarily entailed; or that could reasonably be deemed necessary to make them tenable and effective, including management authority with respect to the day-to-day operations of the enterprise and measures for the protection of the interests of the foreign corporation, PROVIDED THAT Philippine sovereignty over natural resources and full control over the enterprise undertaking the EDU activities remain firmly in the State.

Petitioners' Theory Deflated by the Absence of Closing-Out Rules or Guidelines

Seventh and final point regarding the plain-language approach, one of the practical difficulties that results from it is the fact that there is nothing by way of transitory provisions that would serve to confirm the theory that the omission of the term "service contract" from the 1987 Constitution signaled the demise of service contracts.

The framers knew at the time they were deliberating that there were various service contracts extant and in force and effect, including those in the petroleum industry. Many of these service contracts were long-term (25 years) and had several more years to run. If they had meant to ban service contracts altogether, they would have had to provide for the termination or pretermination of the existing contracts. Accordingly, they would have supplied the

specifics and the when and how of effecting the extinguishment of these existing contracts (or at least the mechanics for determining them); and of putting in place the means to address the just claims of the contractors for compensation for their investments, lost opportunities, and so on, if not for the recovery thereof.

If the framers had intended to put an end to service contracts, they would have at least left specific instructions to Congress to deal with these closing-out issues, perhaps by way of general guidelines and a timeline within which to carry them out. The following are some extant examples of such transitory guidelines set forth in Article XVIII of our Constitution:

“Section 23. Advertising entities affected by paragraph (2), Section 11 of Article XVI of this Constitution shall have five years from its ratification to comply on a graduated and proportionate basis with the minimum Filipino ownership requirement therein. x x x x x x x x

“Section 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning military bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

“Section 26. The authority to issue sequestration or freeze orders under Proclamation No. 3 dated March 25, 1986 in relation to the recovery of ill-gotten wealth shall remain operative for not more than eighteen months after the ratification of this Constitution. However, in the national interest, as certified by the President, the Congress may extend such period.

A sequestration or freeze order shall be issued only upon showing of a prima facie case. The order and the list of the sequestered or frozen properties shall forthwith be registered with the proper court. For orders issued before the ratification of this Constitution, the corresponding judicial action or proceeding shall be filed within six months from its ratification. For those issued after such ratification, the judicial action or proceeding shall be commenced within six months from the issuance thereof.

The sequestration or freeze order is deemed automatically lifted if no judicial action or proceeding is commenced as herein provided.”[43]

It is inconceivable that the drafters of the Constitution would leave such an important matter -- an expression of sovereignty as it were -- indefinitely hanging in the air in a formless and ineffective state. Indeed, the complete absence of even a general framework only serves to further deflate petitioners’ theory, like a child’s balloon losing its air.

Under the circumstances, the logical inconsistencies resulting from petitioners’ literal and purely verba legis approach to paragraph 4 of Section 2 of Article XII compel a resort to other aids to interpretation.

Petitioners’ Posture Also Negated
by Ratio Legis Et Anima

Thus, in order to resolve the inconsistencies, incongruities and ambiguities encountered and to supply the deficiencies of the plain-language approach, there is a need for recourse to the proceedings of the 1986 Constitutional Commission. There is a need for ratio legis et anima.

Service Contracts Not
“Deconstitutionalized”

Pertinent portions of the deliberations of the members of the Constitutional Commission (ConCom) conclusively show that they discussed agreements involving either technical or financial assistance in the same breadth as

service contracts and used the terms interchangeably. The following exchange between Commissioner Jamir (sponsor of the provision) and Commissioner Suarez irrefutably proves that the “agreements involving technical or financial assistance” were none other than service contracts.

THE PRESIDENT. Commissioner Jamir is recognized. We are still on Section 3.

MR. JAMIR. Yes, Madam President. With respect to the second paragraph of Section 3, my amendment by substitution reads: THE PRESIDENT MAY ENTER INTO AGREEMENTS WITH FOREIGN-OWNED CORPORATIONS INVOLVING EITHER TECHNICAL OR FINANCIAL ASSISTANCE FOR LARGE-SCALE EXPLORATION, DEVELOPMENT AND UTILIZATION OF NATURAL RESOURCES ACCORDING TO THE TERMS AND CONDITIONS PROVIDED BY LAW.

MR. VILLEGAS. The Committee accepts the amendment. Commissioner Suarez will give the background.

MR. JAMIR. Thank you.

THE PRESIDENT. Commissioner Suarez is recognized.

MR. SUAREZ. Thank you, Madam President.

Will Commissioner Jamir answer a few clarificatory questions?

MR. JAMIR. Yes, Madam President.

MR. SUAREZ. This particular portion of the section has reference to what was popularly known before as service contracts, among other things, is that correct?

MR. JAMIR. Yes, Madam President.

MR. SUAREZ. As it is formulated, the President may enter into service contracts but subject to the guidelines that may be promulgated by Congress?

MR. JAMIR. That is correct.

MR. SUAREZ. Therefore, that aspect of negotiation and consummation will fall on the President, not upon Congress?

MR. JAMIR. That is also correct, Madam President.

MR. SUAREZ. Except that all of these contracts, service or otherwise, must be made strictly in accordance with guidelines prescribed by Congress?

MR. JAMIR. That is also correct.

MR. SUAREZ. And the Gentleman is thinking in terms of a law that uniformly covers situations of the same nature?

MR. JAMIR. That is 100 percent correct.

MR. SUAREZ. I thank the Commissioner.

MR. JAMIR. Thank you very much.[44]

The following exchange leaves no doubt that the commissioners knew exactly what they were dealing with: service contracts.

THE PRESIDENT. Commissioner Gascon is recognized.

MR. GASCON. Commissioner Jamir had proposed an amendment with regard to special service contracts

which was accepted by the Committee. Since the Committee has accepted it, I would like to ask some questions.

THE PRESIDENT. Commissioner Gascon may proceed.

MR. GASCON. As it is proposed now, such service contracts will be entered into by the President with the guidelines of a general law on service contract to be enacted by Congress. Is that correct?

MR. VILLEGAS. The Commissioner is right, Madam President.

MR. GASCON. According to the original proposal, if the President were to enter into a particular agreement, he would need the concurrence of Congress. Now that it has been changed by the proposal of Commissioner Jamir in that Congress will set the general law to which the President shall comply, the President will, therefore, not need the concurrence of Congress every time he enters into service contracts. Is that correct?

MR. VILLEGAS. That is right.

MR. GASCON. The proposed amendment of Commissioner Jamir is in indirect contrast to my proposed amendment, so I would like to object and present my proposed amendment to the body.

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MR. GASCON. Yes, it will be up to the body.

I feel that the general law to be set by Congress as regard service contract agreements which the President will enter into might be too general or since we do not know the content yet of such a law, it might be that certain agreements will be detrimental to the interest of the Filipinos. This is in direct contrast to my proposal which provides that there be effective constraints in the implementation of service contracts.

So instead of a general law to be passed by Congress to serve as a guideline to the President when entering into service contract agreements, I propose that every service contract entered into by the President would need the concurrence of Congress, so as to assure the Filipinos of their interests with regard to the issue in Section 3 on all lands of the public domain. My alternative amendment, which we will discuss later, reads: THAT THE PRESIDENT SHALL ENTER INTO SUCH AGREEMENTS ONLY WITH THE CONCURRENCE OF TWO-THIRDS VOTE OF ALL THE MEMBERS OF CONGRESS SITTING SEPARATELY.

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MR. BENGZON. The reason we made that shift is that we realized the original proposal could breed corruption. By the way, this is not just confined to service contracts but also to financial assistance. If we are going to make every single contract subject to the concurrence of Congress – which, according to the Commissioner's amendment is the concurrence of two-thirds of Congress voting separately – then (1) there is a very great chance that each contract will be different from another; and (2) there is a great temptation that it would breed corruption because of the great lobbying that is going to happen. And we do not want to subject our legislature to that.

Now, to answer the Commissioner's apprehension, by "general law," we do not mean statements of motherhood. Congress can build all the restrictions that it wishes into that general law so that every contract entered into by the President under that specific area will have to be uniform. The President has no choice but to follow all the guidelines that will be provided by law.

MR. GASCON. But my basic problem is that we do not know as of yet the contents of such a general law as to how much constraints there will be in it. And to my mind, although the Committee's contention that the regular concurrence from Congress would subject Congress to extensive lobbying, I think that is a risk we will have to take since Congress is a body of representatives of the people whose membership will be changing

regularly as there will be changing circumstances every time certain agreements are made. It would be best then to keep in tab and attuned to the interest of the Filipino people, whenever the President enters into any agreement with regard to such an important matter as technical or financial assistance for large-scale exploration, development and utilization of natural resources or service contracts, the people's elected representatives should be on top of it.

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MR. OPLE. Madam President, we do not need to suspend the session. If Commissioner Gascon needs a few minutes, I can fill up the remaining time while he completes his proposed amendment. I just wanted to ask Commissioner Jamir whether he would entertain a minor amendment to his amendment, and it reads as follows: THE PRESIDENT SHALL SUBSEQUENTLY NOTIFY CONGRESS OF EVERY SERVICE CONTRACT ENTERED INTO IN ACCORDANCE WITH THE GENERAL LAW. I think the reason is, if I may state it briefly, as Commissioner Bengzon said, Congress can always change the general law later on to conform to new perceptions of standards that should be built into service contracts. But the only way Congress can do this is if there were a notification requirement from the Office of the President that such service contracts had been entered into, subject then to the scrutiny of the Members of Congress. This pertains to a situation where the service contracts are already entered into, and all that this amendment seeks is the reporting requirement from the Office of the President. Will Commissioner Jamir entertain that?

MR. JAMIR. I will gladly do so, if it is still within my power.

MR. VILLEGAS. Yes, the Committee accepts the amendment.

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SR. TAN. Madam President, may I ask a question?

THE PRESIDENT. Commissioner Tan is recognized.

SR. TAN. Am I correct in thinking that the only difference between these future service contracts and the past service contracts under Mr. Marcos is the general law to be enacted by the legislature and the notification of Congress by the President? That is the only difference, is it not?

MR. VILLEGAS. That is right.

SR. TAN. So those are the safeguards.

MR. VILLEGAS. Yes. There was no law at all governing service contracts before.

SR. TAN. Thank you, Madam President.[45]

More Than Mere Financial and Technical Assistance Entailed by the Agreements

The clear words of Commissioner Jose N. Nollado quoted below explicitly and eloquently demonstrate that the drafters knew that the agreements with foreign corporations were going to entail not mere technical or financial assistance but, rather, foreign investment in and management of an enterprise involved in large-scale exploration, development and utilization of minerals, petroleum, and other mineral oils.

THE PRESIDENT. Commissioner Nollado is recognized.

MR. NOLLEDO. Madam President, I have the permission of the Acting Floor Leader to speak for only two minutes in favor of the amendment of Commissioner Gascon.

THE PRESIDENT. Commissioner Nollado may proceed.

MR. NOLLEDO. With due respect to the members of the Committee and Commissioner Jamir, I am in favor of the objection of Commissioner Gascon.

Madam President, I was one of those who refused to sign the 1973 Constitution, and one of the reasons is that there were many provisions in the Transitory Provisions therein that favored aliens. I was shocked when I read a provision authorizing service contracts while we, in this Constitutional Commission, provided for Filipino control of the economy. We are, therefore, providing for exceptional instances where aliens may circumvent Filipino control of our economy. And one way of circumventing the rule in favor of Filipino control of the economy is to recognize service contracts.

As far as I am concerned, if I should have my own way, I am for the complete deletion of this provision. However, we are presenting a compromise in the sense that we are requiring a two-thirds vote of all the Members of Congress as a safeguard. I think we should not mistrust the future Members of Congress by saying that the purpose of this provision is to avoid corruption. We cannot claim that they are less patriotic than we are. I think the Members of this Commission should know that entering into service contracts is an exception to the rule on protection of natural resources for the interest of the nation, and therefore, being an exception it should be subject, whenever possible, to stringent rules. It seems to me that we are liberalizing the rules in favor of aliens.

I say these things with a heavy heart, Madam President. I do not claim to be a nationalist, but I love my country. Although we need investments, we must adopt safeguards that are truly reflective of the sentiments of the people and not mere cosmetic safeguards as they now appear in the Jamir amendment. (Applause)

Thank you, Madam President.[46]

Another excerpt, featuring then Commissioner (now Chief Justice) Hilario G. Davide Jr., indicates the limitations of the scope of such service contracts -- they are valid only in regard to minerals, petroleum and other mineral oils, not to all natural resources.

THE PRESIDENT. Commissioner Davide is recognized.

MR. DAVIDE. Thank you, Madam President. This is an amendment to the Jamir amendment and also to the Ople amendment. I propose to delete "NATURAL RESOURCES" and substitute it with the following: MINERALS, PETROLEUM AND OTHER MINERAL OILS. On the Ople amendment, I propose to add: THE NOTIFICATION TO CONGRESS SHALL BE WITHIN THIRTY DAYS FROM THE EXECUTION OF THE SERVICE CONTRACT.

THE PRESIDENT. What does the Committee say with respect to the first amendment in lieu of "NATURAL RESOURCES"?

MR. VILLEGAS. Could Commissioner Davide explain that?

MR. DAVIDE. Madam President, with the use of "NATURAL RESOURCES" here, it would necessarily include all lands of the public domain, our marine resources, forests, parks and so on. So we would like to limit the scope of these service contracts to those areas really where these may be needed, the exploitation, development and exploration of minerals, petroleum and other mineral oils. And so, we believe that we should really, if we want to grant service contracts at all, limit the same to only those particular areas where Filipino capital may not be sufficient, and not to all natural resources.

MR. SUAREZ. Just a point of clarification again, Madam President. When the Commissioner made those enumerations and specifications, I suppose he deliberately did not include "agricultural land"?

MR. DAVIDE. That is precisely the reason we have to enumerate what these resources are into which service

contracts may enter. So, beyond the reach of any service contract will be lands of the public domain, timberlands, forests, marine resources, fauna and flora, wildlife and national parks.[47]

After the Jamir amendment was voted upon and approved by a vote of 21 to 10 with 2 abstentions, Commissioner Davide made the following statement, which is very relevant to our quest:

THE PRESIDENT. Commissioner Davide is recognized.

MR. DAVIDE. I am very glad that Commissioner Padilla emphasized minerals, petroleum and mineral oils. The Commission has just approved the possible foreign entry into the development, exploration and utilization of these minerals, petroleum and other mineral oils by virtue of the Jamir amendment. I voted in favor of the Jamir amendment because it will eventually give way to vesting in exclusively Filipino citizens and corporations wholly owned by Filipino citizens the right to utilize the other natural resources. This means that as a matter of policy, natural resources should be utilized and exploited only by Filipino citizens or corporations wholly owned by such citizens. But by virtue of the Jamir amendment, since we feel that Filipino capital may not be enough for the development and utilization of minerals, petroleum and other mineral oils, the President can enter into service contracts with foreign corporations precisely for the development and utilization of such resources. And so, there is nothing to fear that we will stagnate in the development of minerals, petroleum and mineral oils because we now allow service contracts. x x x.”[48]

The foregoing are mere fragments of the framers’ lengthy discussions of the provision dealing with agreements x x x involving either technical or financial assistance, which ultimately became paragraph 4 of Section 2 of Article XII of the Constitution. Beyond any doubt, the members of the ConCom were actually debating about the martial-law-era service contracts for which they were crafting appropriate safeguards.

In the voting that led to the approval of Article XII by the ConCom, the explanations given by Commissioners Gascon, Garcia and Tadeo indicated that they had voted to reject this provision on account of their objections to the “constitutionalization” of the “service contract” concept.

Mr. Gascon said, “I felt that if we would constitutionalize any provision on service contracts, this should always be with the concurrence of Congress and not guided only by a general law to be promulgated by Congress.”[49] Mr. Garcia explained, “Service contracts are given constitutional legitimization in Sec. 3, even when they have been proven to be inimical to the interests of the nation, providing, as they do, the legal loophole for the exploitation of our natural resources for the benefit of foreign interests.”[50] Likewise, Mr. Tadeo cited inter alia the fact that service contracts continued to subsist, enabling foreign interests to benefit from our natural resources.[51] It was hardly likely that these gentlemen would have objected so strenuously, had the provision called for mere technical or financial assistance and nothing more.

The deliberations of the ConCom and some commissioners’ explanation of their votes leave no room for doubt that the service contract concept precisely underpinned the commissioners’ understanding of the “agreements involving either technical or financial assistance.”

Summation of the Concom Deliberations

At this point, we sum up the matters established, based on a careful reading of the ConCom deliberations, as follows:

- In their deliberations on what was to become paragraph 4, the framers used the term service contracts in referring to agreements x x x involving either technical or financial assistance.
- They spoke of service contracts as the concept was understood in the 1973 Constitution.

- It was obvious from their discussions that they were not about to ban or eradicate service contracts.
- Instead, they were plainly crafting provisions to put in place safeguards that would eliminate or minimize the abuses prevalent during the marital law regime. In brief, they were going to permit service contracts with foreign corporations as contractors, but with safety measures to prevent abuses, as an exception to the general norm established in the first paragraph of Section 2 of Article XII. This provision reserves or limits to Filipino citizens -- and corporations at least 60 percent of which is owned by such citizens -- the exploration, development and utilization of natural resources.
- This provision was prompted by the perceived insufficiency of Filipino capital and the felt need for foreign investments in the EDU of minerals and petroleum resources.
- The framers for the most part debated about the sort of safeguards that would be considered adequate and reasonable. But some of them, having more “radical” leanings, wanted to ban service contracts altogether; for them, the provision would permit aliens to exploit and benefit from the nation’s natural resources, which they felt should be reserved only for Filipinos.
- In the explanation of their votes, the individual commissioners were heard by the entire body. They sounded off their individual opinions, openly enunciated their philosophies, and supported or attacked the provisions with fervor. Everyone’s viewpoint was heard.
- In the final voting, the Article on the National Economy and Patrimony -- including paragraph 4 allowing service contracts with foreign corporations as an exception to the general norm in paragraph 1 of Section 2 of the same article -- was resoundingly approved by a vote of 32 to 7, with 2 abstentions.

Agreements Involving Technical
or Financial Assistance Are
Service Contracts With Safeguards

From the foregoing, we are impelled to conclude that the phrase agreements involving either technical or financial assistance, referred to in paragraph 4, are in fact service contracts. But unlike those of the 1973 variety, the new ones are between foreign corporations acting as contractors on the one hand; and on the other, the government as principal or “owner” of the works. In the new service contracts, the foreign contractors provide capital, technology and technical know-how, and managerial expertise in the creation and operation of large-scale mining/extractive enterprises; and the government, through its agencies (DENR, MGB), actively exercises control and supervision over the entire operation.

Such service contracts may be entered into only with respect to minerals, petroleum and other mineral oils. The grant thereof is subject to several safeguards, among which are these requirements:

(1)

The service contract shall be crafted in accordance with a general law that will set standard or uniform terms, conditions and requirements, presumably to attain a certain uniformity in provisions and avoid the possible insertion of terms disadvantageous to the country.

(2)

The President shall be the signatory for the government because, supposedly before an agreement is presented to the President for signature, it will have been vetted several times over at different levels to ensure that it conforms to law and can withstand public scrutiny.

(3)

Within thirty days of the executed agreement, the President shall report it to Congress to give that branch of government an opportunity to look over the agreement and interpose timely objections, if any.

Use of the Record of the ConCom to Ascertain Intent

At this juncture, we shall address, rather than gloss over, the use of the “framers’ intent” approach, and the criticism hurled by petitioners who quote a ruling of this Court:

“While it is permissible in this jurisdiction to consult the debates and proceedings of the constitutional convention in order to arrive at the reason and purpose of the resulting Constitution, resort thereto may be had only when other guides fail as said proceedings are powerless to vary the terms of the Constitution when the meaning is clear. Debates in the constitutional convention ‘are of value as showing the views of the individual members, and as indicating the reason for their votes, but they give us no light as to the views of the large majority who did not talk, much less the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law. We think it safer to construe the constitution from what appears upon its face.’ The proper interpretation therefore depends more on how it was understood by the people adopting it than in the framers’ understanding thereof.”[52]

The notion that the deliberations reflect only the views of those members who spoke out and not the views of the majority who remained silent should be clarified. We must never forget that those who spoke out were heard by those who remained silent and did not react. If the latter were silent because they happened not to be present at the time, they are presumed to have read the minutes and kept abreast of the deliberations. By remaining silent, they are deemed to have signified their assent to and/or conformity with at least some of the views propounded or their lack of objections thereto. It was incumbent upon them, as representatives of the entire Filipino people, to follow the deliberations closely and to speak their minds on the matter if they did not see eye to eye with the proponents of the draft provisions.

In any event, each and every one of the commissioners had the opportunity to speak out and to vote on the matter. Moreover, the individual explanations of votes are on record, and they show where each delegate stood on the issues. In sum, we cannot completely denigrate the value or usefulness of the record of the ConCom, simply because certain members chose not to speak out.

It is contended that the deliberations therein did not necessarily reflect the thinking of the voting population that participated in the referendum and ratified the Constitution. Verily, whether we like it or not, it is a bit too much to assume that every one of those who voted to ratify the proposed Charter did so only after carefully reading and mulling over it, provision by provision.

Likewise, it appears rather extravagant to assume that every one of those who did in fact bother to read the draft Charter actually understood the import of its provisions, much less analyzed it vis-à-vis the previous Constitutions. We believe that in reality, a good percentage of those who voted in favor of it did so more out of faith and trust. For them, it was the product of the hard work and careful deliberation of a group of intelligent, dedicated and trustworthy men and women of integrity and conviction, whose love of country and fidelity to duty could not be questioned.

In short, a large proportion of the voters voted “yes” because the drafters, or a majority of them, endorsed the proposed Constitution. What this fact translates to is the inescapable conclusion that many of the voters in the referendum did not form their own isolated judgment about the draft Charter, much less about particular provisions therein. They only relied or fell back and acted upon the favorable endorsement or recommendation of the framers as a group. In other words, by voting yes, they may be deemed to have signified their voluntary

adoption of the understanding and interpretation of the delegates with respect to the proposed Charter and its particular provisions. “If it’s good enough for them, it’s good enough for me;” or, in many instances, “If it’s good enough for President Cory Aquino, it’s good enough for me.”

And even for those who voted based on their own individual assessment of the proposed Charter, there is no evidence available to indicate that their assessment or understanding of its provisions was in fact different from that of the drafters. This unwritten assumption seems to be petitioners’ as well. For all we know, this segment of voters must have read and understood the provisions of the Constitution in the same way the framers had, an assumption that would account for the favorable votes.

Fundamentally speaking, in the process of rewriting the Charter, the members of the ConCom as a group were supposed to represent the entire Filipino people. Thus, we cannot but regard their views as being very much indicative of the thinking of the people with respect to the matters deliberated upon and to the Charter as a whole.

It is therefore reasonable and unavoidable to make the following conclusion, based on the above arguments. As written by the framers and ratified and adopted by the people, the Constitution allows the continued use of service contracts with foreign corporations -- as contractors who would invest in and operate and manage extractive enterprises, subject to the full control and supervision of the State -- sans the abuses of the past regime. The purpose is clear: to develop and utilize our mineral, petroleum and other resources on a large scale for the immediate and tangible benefit of the Filipino people.

In view of the foregoing discussion, we should reverse the Decision of January 27, 2004, and in fact now hold a view different from that of the Decision, which had these findings: (a) paragraph 4 of Section 2 of Article XII limits foreign involvement in the local mining industry to agreements strictly for either financial or technical assistance only; (b) the same paragraph precludes agreements that grant to foreign corporations the management of local mining operations, as such agreements are purportedly in the nature of service contracts as these were understood under the 1973 Constitution; (c) these service contracts were supposedly “de-constitutionalized” and proscribed by the omission of the term service contracts from the 1987 Constitution; (d) since the WMCP FTAA contains provisions permitting the foreign contractor to manage the concern, the said FTAA is invalid for being a prohibited service contract; and (e) provisions of RA 7942 and DAO 96-40, which likewise grant managerial authority to the foreign contractor, are also invalid and unconstitutional.

Ultimate Test: State’s “Control”
Determinative of Constitutionality

But we are not yet at the end of our quest. Far from it. It seems that we are confronted with a possible collision of constitutional provisions. On the one hand, paragraph 1 of Section 2 of Article XII explicitly mandates the State to exercise “full control and supervision” over the exploration, development and utilization of natural resources. On the other hand, paragraph 4 permits safeguarded service contracts with foreign contractors. Normally, pursuant thereto, the contractors exercise management prerogatives over the mining operations and the enterprise as a whole. There is thus a legitimate ground to be concerned that either the State’s full control and supervision may rule out any exercise of management authority by the foreign contractor; or, the other way around, allowing the foreign contractor full management prerogatives may ultimately negate the State’s full control and supervision.

Ut Magis Valeat
Quam Pereat

Under the third principle of constitutional construction laid down in Francisco -- *ut magis valeat quam pereat* -- every part of the Constitution is to be given effect, and the Constitution is to be read and understood as a

harmonious whole. Thus, “full control and supervision” by the State must be understood as one that does not preclude the legitimate exercise of management prerogatives by the foreign contractor. Before any further discussion, we must stress the primacy and supremacy of the principle of sovereignty and State control and supervision over all aspects of exploration, development and utilization of the country’s natural resources, as mandated in the first paragraph of Section 2 of Article XII.

But in the next breadth we have to point out that “full control and supervision” cannot be taken literally to mean that the State controls and supervises everything involved, down to the minutest details, and makes all decisions required in the mining operations. This strained concept of control and supervision over the mining enterprise would render impossible the legitimate exercise by the contractors of a reasonable degree of management prerogative and authority necessary and indispensable to their proper functioning.

For one thing, such an interpretation would discourage foreign entry into large-scale exploration, development and utilization activities; and result in the unmitigated stagnation of this sector, to the detriment of our nation’s development. This scenario renders paragraph 4 inoperative and useless. And as respondents have correctly pointed out, the government does not have to micro-manage the mining operations and dip its hands into the day-to-day affairs of the enterprise in order for it to be considered as having full control and supervision.

The concept of control^[53] adopted in Section 2 of Article XII must be taken to mean less than dictatorial, all-encompassing control; but nevertheless sufficient to give the State the power to direct, restrain, regulate and govern the affairs of the extractive enterprises. Control by the State may be on a macro level, through the establishment of policies, guidelines, regulations, industry standards and similar measures that would enable the government to control the conduct of affairs in various enterprises and restrain activities deemed not desirable or beneficial.

The end in view is ensuring that these enterprises contribute to the economic development and general welfare of the country, conserve the environment, and uplift the well-being of the affected local communities. Such a concept of control would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise it invested in, in order to ensure that it is operating efficiently and profitably, to protect its investments and to enable it to succeed.

The question to be answered, then, is whether RA 7942 and its Implementing Rules enable the government to exercise that degree of control sufficient to direct and regulate the conduct of affairs of individual enterprises and restrain undesirable activities.

On the resolution of these questions will depend the validity and constitutionality of certain provisions of the Philippine Mining Act of 1995 (RA 7942) and its Implementing Rules and Regulations (DAO 96-40), as well as the WMCP FTAA.

Indeed, petitioners charge^[54] that RA 7942, as well as its Implementing Rules and Regulations, makes it possible for FTAA contracts to cede full control and management of mining enterprises over to fully foreign-owned corporations, with the result that the State is allegedly reduced to a passive regulator dependent on submitted plans and reports, with weak review and audit powers. The State does not supposedly act as the owner of the natural resources for and on behalf of the Filipino people; it practically has little effective say in the decisions made by the enterprise. Petitioners then conclude that the law, the implementing regulations, and the WMCP FTAA cede “beneficial ownership” of the mineral resources to the foreign contractor.

A careful scrutiny of the provisions of RA 7942 and its Implementing Rules belies petitioners’ claims. Paraphrasing the Constitution, Section 4 of the statute clearly affirms the State’s control thus:

“Sec. 4. Ownership of Mineral Resources. – Mineral resources are owned by the State and the exploration, development, utilization and processing thereof shall be under its full control and supervision. The State may directly undertake such activities or it may enter into mineral agreements with contractors.

“The State shall recognize and protect the rights of the indigenous cultural communities to their ancestral lands as provided for by the Constitution.”

The aforementioned provision is substantively reiterated in Section 2 of DAO 96-40 as follows:

“Sec. 2. Declaration of Policy. All mineral resources in public and private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State. It shall be the responsibility of the State to promote their rational exploration, development, utilization and conservation through the combined efforts of the Government and private sector in order to enhance national growth in a way that effectively safeguards the environment and protects the rights of affected communities.”

Sufficient Control Over Mining Operations Vested in the State by RA 7942 and DAO 96-40

RA 7942 provides for the State’s control and supervision over mining operations. The following provisions thereof establish the mechanism of inspection and visitorial rights over mining operations and institute reportorial requirements in this manner:

- Sec. 8 which provides for the DENR’s power of over-all supervision and periodic review for “the conservation, management, development and proper use of the State’s mineral resources”;
- Sec. 9 which authorizes the Mines and Geosciences Bureau (MGB) under the DENR to exercise “direct charge in the administration and disposition of mineral resources”, and empowers the MGB to “monitor the compliance by the contractor of the terms and conditions of the mineral agreements”, “confiscate surety and performance bonds”, and deputize whenever necessary any member or unit of the Phil. National Police, barangay, duly registered non-governmental organization (NGO) or any qualified person to police mining activities;
- Sec. 66 which vests in the Regional Director “exclusive jurisdiction over safety inspections of all installations, whether surface or underground”, utilized in mining operations.
- Sec. 35, which incorporates into all FTAA’s the following terms, conditions and warranties:

“(g)

Mining operations shall be conducted in accordance with the provisions of the Act and its IRR.

“(h)

Work programs and minimum expenditures commitments.

x x x x x x x x

“(k)

Requiring proponent to effectively use appropriate anti-pollution technology and facilities to protect the environment and restore or rehabilitate mined-out areas.

“(l)

The contractors shall furnish the Government records of geologic, accounting and other relevant data for its mining operation, and that books of accounts and records shall be open for inspection by the government. x x x.

“(m)

Requiring the proponent to dispose of the minerals at the highest price and more advantageous terms and conditions.

“(n)

x x x x x x x x

“(o)

Such other terms and conditions consistent with the Constitution and with this Act as the Secretary may deem to be for the best interest of the State and the welfare of the Filipino people.”

The foregoing provisions of Section 35 of RA 7942 are also reflected and implemented in Section 56 (g), (h), (l), (m) and (n) of the Implementing Rules, DAO 96-40.

Moreover, RA 7942 and DAO 96-40 also provide various stipulations confirming the government’s control over mining enterprises:

- The contractor is to relinquish to the government those portions of the contract area not needed for mining operations and not covered by any declaration of mining feasibility (Section 35-e, RA 7942; Section 60, DAO 96-40).
- The contractor must comply with the provisions pertaining to mine safety, health and environmental protection (Chapter XI, RA 7942; Chapters XV and XVI, DAO 96-40).
- For violation of any of its terms and conditions, government may cancel an FTAA. (Chapter XVII, RA 7942; Chapter XXIV, DAO 96-40).
- An FTAA contractor is obliged to open its books of accounts and records for inspection by the government (Section 56-m, DAO 96-40).
- An FTAA contractor has to dispose of the minerals and by-products at the highest market price and register with the MGB a copy of the sales agreement (Section 56-n, DAO 96-40).
- MGB is mandated to monitor the contractor’s compliance with the terms and conditions of the FTAA; and to deputize, when necessary, any member or unit of the Philippine National Police, the barangay or a DENR-accredited nongovernmental organization to police mining activities (Section 7-d and -f, DAO 96-40).
- An FTAA cannot be transferred or assigned without prior approval by the President (Section 40, RA 7942; Section 66, DAO 96-40).
- A mining project under an FTAA cannot proceed to the construction/development/utilization stage, unless its Declaration of Mining Project Feasibility has been approved by government (Section 24, RA 7942).
- The Declaration of Mining Project Feasibility filed by the contractor cannot be approved without submission of the following documents:
 - Approved mining project feasibility study (Section 53-d, DAO 96-40)
 - Approved three-year work program (Section 53-a-4, DAO 96-40)

- Environmental compliance certificate (Section 70, RA 7942)
- Approved environmental protection and enhancement program (Section 69, RA 7942)
- Approval by the Sangguniang Panlalawigan/Bayan/Barangay (Section 70, RA 7942; Section 27, RA 7160)
- Free and prior informed consent by the indigenous peoples concerned, including payment of royalties through a Memorandum of Agreement (Section 16, RA 7942; Section 59, RA 8371)
- The FTAA contractor is obliged to assist in the development of its mining community, promotion of the general welfare of its inhabitants, and development of science and mining technology (Section 57, RA 7942).
- The FTAA contractor is obliged to submit reports (on quarterly, semi-annual or annual basis as the case may be; per Section 270, DAO 96-40), pertaining to the following:
 1. Exploration
 2. Drilling
 3. Mineral resources and reserves
 4. Energy consumption
 5. Production
 6. Sales and marketing
 7. Employment
 8. Payment of taxes, royalties, fees and other Government Shares
 9. Mine safety, health and environment
 10. Land use
 11. Social development
 12. Explosives consumption
- An FTAA pertaining to areas within government reservations cannot be granted without a written clearance from the government agencies concerned (Section 19, RA 7942; Section 54, DAO 96-40).
- An FTAA contractor is required to post a financial guarantee bond in favor of the government in an amount equivalent to its expenditures obligations for any particular year. This requirement is apart from the representations and warranties of the contractor that it has access to all the financing, managerial and technical expertise and technology necessary to carry out the objectives of the FTAA (Section 35-b, -e, and -f, RA 7942).
- Other reports to be submitted by the contractor, as required under DAO 96-40, are as follows: an environmental report on the rehabilitation of the mined-out area and/or mine waste/tailing covered area, and anti-pollution measures undertaken (Section 35-a-2); annual reports of the mining operations and records of geologic accounting (Section 56-m); annual progress reports and final report of exploration activities (Section 56-2).
- Other programs required to be submitted by the contractor, pursuant to DAO 96-40, are the following: a safety and health program (Section 144); an environmental work program (Section 168); an annual environmental

protection and enhancement program (Section 171).

The foregoing gamut of requirements, regulations, restrictions and limitations imposed upon the FTAA contractor by the statute and regulations easily overturns petitioners' contention. The setup under RA 7942 and DAO 96-40 hardly relegates the State to the role of a "passive regulator" dependent on submitted plans and reports. On the contrary, the government agencies concerned are empowered to approve or disapprove -- hence, to influence, direct and change -- the various work programs and the corresponding minimum expenditure commitments for each of the exploration, development and utilization phases of the mining enterprise.

Once these plans and reports are approved, the contractor is bound to comply with its commitments therein. Figures for mineral production and sales are regularly monitored and subjected to government review, in order to ensure that the products and by-products are disposed of at the best prices possible; even copies of sales agreements have to be submitted to and registered with MGB. And the contractor is mandated to open its books of accounts and records for scrutiny, so as to enable the State to determine if the government share has been fully paid.

The State may likewise compel the contractor's compliance with mandatory requirements on mine safety, health and environmental protection, and the use of anti-pollution technology and facilities. Moreover, the contractor is also obligated to assist in the development of the mining community and to pay royalties to the indigenous peoples concerned.

Cancellation of the FTAA may be the penalty for violation of any of its terms and conditions and/or noncompliance with statutes or regulations. This general, all-around, multipurpose sanction is no trifling matter, especially to a contractor who may have yet to recover the tens or hundreds of millions of dollars sunk into a mining project.

Overall, considering the provisions of the statute and the regulations just discussed, we believe that the State definitely possesses the means by which it can have the ultimate word in the operation of the enterprise, set directions and objectives, and detect deviations and noncompliance by the contractor; likewise, it has the capability to enforce compliance and to impose sanctions, should the occasion therefor arise.

In other words, the FTAA contractor is not free to do whatever it pleases and get away with it; on the contrary, it will have to follow the government line if it wants to stay in the enterprise. Ineluctably then, RA 7942 and DAO 96-40 vest in the government more than a sufficient degree of control and supervision over the conduct of mining operations.

Section 3(aq) of RA 7942

Not Unconstitutional

An objection has been expressed that Section 3(aq)[55] of RA 7942 -- which allows a foreign contractor to apply for and hold an exploration permit -- is unconstitutional. The reasoning is that Section 2 of Article XII of the Constitution does not allow foreign-owned corporations to undertake mining operations directly. They may act only as contractors of the State under an FTAA; and the State, as the party directly undertaking exploitation of its natural resources, must hold through the government all exploration permits and similar authorizations. Hence, Section 3(aq), in permitting foreign-owned corporations to hold exploration permits, is unconstitutional.

The objection, however, is not well-founded. While the Constitution mandates the State to exercise full control and supervision over the exploitation of mineral resources, nowhere does it require the government to hold all exploration permits and similar authorizations. In fact, there is no prohibition at all against foreign or local corporations or contractors holding exploration permits. The reason is not hard to see.

Pursuant to Section 20 of RA 7942, an exploration permit merely grants to a qualified person the right to conduct exploration for all minerals in specified areas. Such a permit does not amount to an authorization to extract and carry off the mineral resources that may be discovered. This phase involves nothing but expenditures for exploring the contract area and locating the mineral bodies. As no extraction is involved, there are no revenues or incomes to speak of. In short, the exploration permit is an authorization for the grantee to spend its own funds on exploration programs that are pre-approved by the government, without any right to recover anything should no minerals in commercial quantities be discovered. The State risks nothing and loses nothing by granting these permits to local or foreign firms; in fact, it stands to gain in the form of data generated by the exploration activities.

Pursuant to Section 24 of RA 7942, an exploration permit grantee who determines the commercial viability of a mining area may, within the term of the permit, file with the MGB a declaration of mining project feasibility accompanied by a work program for development. The approval of the mining project feasibility and compliance with other requirements of RA 7942 vests in the grantee the exclusive right to an MPSA or any other mineral agreement, or to an FTAA.

Thus, the permit grantee may apply for an MPSA, a joint venture agreement, a co-production agreement, or an FTAA over the permit area, and the application shall be approved if the permit grantee meets the necessary qualifications and the terms and conditions of any such agreement. Therefore, the contractor will be in a position to extract minerals and earn revenues only when the MPSA or another mineral agreement, or an FTAA, is granted. At that point, the contractor's rights and obligations will be covered by an FTAA or a mineral agreement.

But prior to the issuance of such FTAA or mineral agreement, the exploration permit grantee (or prospective contractor) cannot yet be deemed to have entered into any contract or agreement with the State, and the grantee would definitely need to have some document or instrument as evidence of its right to conduct exploration works within the specified area. This need is met by the exploration permit issued pursuant to Sections 3(aq), 20 and 23 of RA 7942.

In brief, the exploration permit serves a practical and legitimate purpose in that it protects the interests and preserves the rights of the exploration permit grantee (the would-be contractor) -- foreign or local -- during the period of time that it is spending heavily on exploration works, without yet being able to earn revenues to recoup any of its investments and expenditures. Minus this permit and the protection it affords, the exploration works and expenditures may end up benefiting only claim-jumpers. Such a possibility tends to discourage investors and contractors. Thus, Section 3(aq) of RA 7942 may not be deemed unconstitutional.

The Terms of the WMCP FTAA

A Deference to State Control

A perusal of the WMCP FTAA also reveals a slew of stipulations providing for State control and supervision:

- The contractor is obligated to account for the value of production and sale of minerals (Clause 1.4).
- The contractor's work program, activities and budgets must be approved by/on behalf of the State (Clause 2.1).
- The DENR secretary has the power to extend the exploration period (Clause 3.2-a).
- Approval by the State is necessary for incorporating lands into the FTAA contract area (Clause 4.3-c).
- The Bureau of Forest Development is vested with discretion in regard to approving the inclusion of forest reserves as part of the FTAA contract area (Clause 4.5).

- The contractor is obliged to relinquish periodically parts of the contract area not needed for exploration and development (Clause 4.6).
- A Declaration of Mining Feasibility must be submitted for approval by the State (Clause 4.6-b).
- The contractor is obligated to report to the State its exploration activities (Clause 4.9).
- The contractor is required to obtain State approval of its work programs for the succeeding two-year periods, containing the proposed work activities and expenditures budget related to exploration (Clause 5.1).
- The contractor is required to obtain State approval for its proposed expenditures for exploration activities (Clause 5.2).
- The contractor is required to submit an annual report on geological, geophysical, geochemical and other information relating to its explorations within the FTAA area (Clause 5.3-a).
- The contractor is to submit within six months after expiration of exploration period a final report on all its findings in the contract area (Clause 5.3-b).
- The contractor, after conducting feasibility studies, shall submit a declaration of mining feasibility, along with a description of the area to be developed and mined, a description of the proposed mining operations and the technology to be employed, and a proposed work program for the development phase, for approval by the DENR secretary (Clause 5.4).
- The contractor is obliged to complete the development of the mine, including construction of the production facilities, within the period stated in the approved work program (Clause 6.1).
- The contractor is obligated to submit for approval of the DENR secretary a work program covering each period of three fiscal years (Clause 6.2).
- The contractor is to submit reports to the DENR secretary on the production, ore reserves, work accomplished and work in progress, profile of its work force and management staff, and other technical information (Clause 6.3).
- Any expansions, modifications, improvements and replacements of mining facilities shall be subject to the approval of the secretary (Clause 6.4).
- The State has control with respect to the amount of funds that the contractor may borrow within the Philippines (Clause 7.2).
- The State has supervisory power with respect to technical, financial and marketing issues (Clause 10.1-a).
- The contractor is required to ensure 60 percent Filipino equity in the contractor, within ten years of recovering specified expenditures, unless not so required by subsequent legislation (Clause 10.1).
- The State has the right to terminate the FTAA for the contractor's unremedied substantial breach thereof (Clause 13.2);
- The State's approval is needed for any assignment of the FTAA by the contractor to an entity other than an affiliate (Clause 14.1).

We should elaborate a little on the work programs and budgets, and what they mean with respect to the State's ability to exercise full control and effective supervision over the enterprise. For instance, throughout the initial five-year exploration and feasibility phase of the project, the contractor is mandated by Clause 5.1 of the WMCP

FTAA to submit a series of work programs (copy furnished the director of MGB) to the DENR secretary for approval. The programs will detail the contractor's proposed exploration activities and budget covering each subsequent period of two fiscal years.

In other words, the concerned government officials will be informed beforehand of the proposed exploration activities and expenditures of the contractor for each succeeding two-year period, with the right to approve/disapprove them or require changes or adjustments therein if deemed necessary.

Likewise, under Clause 5.2(a), the amount that the contractor was supposed to spend for exploration activities during the first contract year of the exploration period was fixed at not less than P24 million; and then for the succeeding years, the amount shall be as agreed between the DENR secretary and the contractor prior to the commencement of each subsequent fiscal year. If no such agreement is arrived upon, the previous year's expenditure commitment shall apply.

This provision alone grants the government through the DENR secretary a very big say in the exploration phase of the project. This fact is not something to be taken lightly, considering that the government has absolutely no contribution to the exploration expenditures or work activities and yet is given veto power over such a critical aspect of the project. We cannot but construe as very significant such a degree of control over the project and, resultantly, over the mining enterprise itself.

Following its exploration activities or feasibility studies, if the contractor believes that any part of the contract area is likely to contain an economic mineral resource, it shall submit to the DENR secretary a declaration of mining feasibility (per Clause 5.4 of the FTAA), together with a technical description of the area delineated for development and production, a description of the proposed mining operations including the technology to be used, a work program for development, an environmental impact statement, and a description of the contributions to the economic and general welfare of the country to be generated by the mining operations (pursuant to Clause 5.5).

The work program for development is subject to the approval of the DENR secretary. Upon its approval, the contractor must comply with it and complete the development of the mine, including the construction of production facilities and installation of machinery and equipment, within the period provided in the approved work program for development (per Clause 6.1).

Thus, notably, the development phase of the project is likewise subject to the control and supervision of the government. It cannot be emphasized enough that the proper and timely construction and deployment of the production facilities and the development of the mine are of pivotal significance to the success of the mining venture. Any missteps here will potentially be very costly to remedy. Hence, the submission of the work program for development to the DENR secretary for approval is particularly noteworthy, considering that so many millions of dollars worth of investments -- courtesy of the contractor -- are made to depend on the State's consideration and action.

Throughout the operating period, the contractor is required to submit to the DENR secretary for approval, copy furnished the director of MGB, work programs covering each period of three fiscal years (per Clause 6.2). During the same period (per Clause 6.3), the contractor is mandated to submit various quarterly and annual reports to the DENR secretary, copy furnished the director of MGB, on the tonnages of production in terms of ores and concentrates, with corresponding grades, values and destinations; reports of sales; total ore reserves, total tonnage of ores, work accomplished and work in progress (installations and facilities related to mining operations), investments made or committed, and so on and so forth.

Under Section VIII, during the period of mining operations, the contractor is also required to submit to the DENR

secretary (copy furnished the director of MGB) the work program and corresponding budget for the contract area, describing the mining operations that are proposed to be carried out during the period covered. The secretary is, of course, entitled to grant or deny approval of any work program or budget and/or propose revisions thereto. Once the program/budget has been approved, the contractor shall comply therewith.

In sum, the above provisions of the WMCP FTAA taken together, far from constituting a surrender of control and a grant of beneficial ownership of mineral resources to the contractor in question, bestow upon the State more than adequate control and supervision over the activities of the contractor and the enterprise.

No Surrender of Control Under the WMCP FTAA

Petitioners, however, take aim at Clause 8.2, 8.3, and 8.5 of the WMCP FTAA which, they say, amount to a relinquishment of control by the State, since it “cannot truly impose its own discretion” in respect of the submitted work programs.

“8.2.

The Secretary shall be deemed to have approved any Work Programme or Budget or variation thereof submitted by the Contractor unless within sixty (60) days after submission by the Contractor the Secretary gives notice declining such approval or proposing a revision of certain features and specifying its reasons therefor (‘the Rejection Notice’).

8.3.

If the Secretary gives a Rejection Notice, the Parties shall promptly meet and endeavor to agree on amendments to the Work Programme or Budget. If the Secretary and the Contractor fail to agree on the proposed revision within 30 days from delivery of the Rejection Notice then the Work Programme or Budget or variation thereof proposed by the Contractor shall be deemed approved, so as not to unnecessarily delay the performance of the Agreement.

8.4.

x x x x x x x x

8.5.

So far as is practicable, the Contractor shall comply with any approved Work Programme and Budget. It is recognized by the Secretary and the Contractor that the details of any Work Programmes or Budgets may require changes in the light of changing circumstances. The Contractor may make such changes without approval of the Secretary provided they do not change the general objective of any Work Programme, nor entail a downward variance of more than twenty per centum (20percent) of the relevant Budget. All other variations to an approved Work Programme or Budget shall be submitted for approval of the Secretary.”

From the provisions quoted above, petitioners generalize by asserting that the government does not participate in making critical decisions regarding the operations of the mining firm. Furthermore, while the State can require the submission of work programs and budgets, the decision of the contractor will still prevail, if the parties have a difference of opinion with regard to matters affecting operations and management.

We hold, however, that the foregoing provisions do not manifest a relinquishment of control. For instance, Clause 8.2 merely provides a mechanism for preventing the business or mining operations from grinding to a complete halt as a result of possibly over-long and unjustified delays in the government’s handling, processing and approval of submitted work programs and budgets. Anyway, the provision does give the DENR secretary more

than sufficient time (60 days) to react to submitted work programs and budgets. It cannot be supposed that proper grounds for objecting thereto, if any exist, cannot be discovered within a period of two months.

On the other hand, Clause 8.3 seeks to provide a temporary, stop-gap solution in the event a disagreement over the submitted work program or budget arises between the State and the contractor and results in a stalemate or impasse, in order that there will be no unreasonably long delays in the performance of the works.

These temporary or stop-gap solutions are not necessarily evil or wrong. Neither does it follow that the government will inexorably be aggrieved if and when these temporary remedies come into play. First, avoidance of long delays in these situations will undoubtedly redound to the benefit of the State as well as the contractor. Second, who is to say that the work program or budget proposed by the contractor and deemed approved under Clause 8.3 would not be the better or more reasonable or more effective alternative? The contractor, being the “insider,” as it were, may be said to be in a better position than the State -- an outsider looking in -- to determine what work program or budget would be appropriate, more effective, or more suitable under the circumstances.

All things considered, we take exception to the characterization of the DENR secretary as a subservient nonentity whom the contractor can overrule at will, on account of Clause 8.3. And neither is it true that under the same clause, the DENR secretary has no authority whatsoever to disapprove the work program. As Respondent WMCP reasoned in its Reply-Memorandum, the State -- despite Clause 8.3 -- still has control over the contract area and it may, as sovereign authority, prohibit work thereon until the dispute is resolved. And ultimately, the State may terminate the agreement, pursuant to Clause 13.2 of the same FTAA, citing substantial breach thereof. Hence, it clearly retains full and effective control of the exploitation of the mineral resources.

On the other hand, Clause 8.5 is merely an acknowledgment of the parties’ need for flexibility, given that no one can accurately forecast under all circumstances, or predict how situations may change. Hence, while approved work programs and budgets are to be followed and complied with as far as practicable, there may be instances in which changes will have to be effected, and effected rapidly, since events may take shape and unfold with suddenness and urgency. Thus, Clause 8.5 allows the contractor to move ahead and make changes without the express or implicit approval of the DENR secretary. Such changes are, however, subject to certain conditions that will serve to limit or restrict the variance and prevent the contractor from straying very far from what has been approved.

Clause 8.5 provides the contractor a certain amount of flexibility to meet unexpected situations, while still guaranteeing that the approved work programs and budgets are not abandoned altogether. Clause 8.5 does not constitute proof that the State has relinquished control. And ultimately, should there be disagreement with the actions taken by the contractor in this instance as well as under Clause 8.3 discussed above, the DENR secretary may resort to cancellation/termination of the FTAA as the ultimate sanction.

Discretion to Select Contract

Area Not an Abdication of Control

Next, petitioners complain that the contractor has full discretion to select -- and the government has no say whatsoever as to -- the parts of the contract area to be relinquished pursuant to Clause 4.6 of the WMCP FTAA.[56] This clause, however, does not constitute abdication of control. Rather, it is a mere acknowledgment of the fact that the contractor will have determined, after appropriate exploration works, which portions of the contract area do not contain minerals in commercial quantities sufficient to justify developing the same and ought therefore to be relinquished. The State cannot just substitute its judgment for that of the contractor and dictate upon the latter which areas to give up.

Moreover, we can be certain that the contractor's self-interest will propel proper and efficient relinquishment. According to private respondent,[57] a mining company tries to relinquish as much non-mineral areas as soon as possible, because the annual occupation fees paid to the government are based on the total hectarage of the contract area, net of the areas relinquished. Thus, the larger the remaining area, the heftier the amount of occupation fees to be paid by the contractor. Accordingly, relinquishment is not an issue, given that the contractor will not want to pay the annual occupation fees on the non-mineral parts of its contract area. Neither will it want to relinquish promising sites, which other contractors may subsequently pick up.

Government Not a Subcontractor

Petitioners further maintain that the contractor can compel the government to exercise its power of eminent domain to acquire surface areas within the contract area for the contractor's use. Clause 10.2 (e) of the WMCP FTAA provides that the government agrees that the contractor shall "(e) have the right to require the Government at the Contractor's own cost, to purchase or acquire surface areas for and on behalf of the Contractor at such price and terms as may be acceptable to the contractor. At the termination of this Agreement such areas shall be sold by public auction or tender and the Contractor shall be entitled to reimbursement of the costs of acquisition and maintenance, adjusted for inflation, from the proceeds of sale."

According to petitioners, "government becomes a subcontractor to the contractor" and may, on account of this provision, be compelled "to make use of its power of eminent domain, not for public purposes but on behalf of a private party, i.e., the contractor." Moreover, the power of the courts to determine the amount corresponding to the constitutional requirement of just compensation has allegedly also been contracted away by the government, on account of the latter's commitment that the acquisition shall be at such terms as may be acceptable to the contractor.

However, private respondent has proffered a logical explanation for the provision.[58] Section 10.2(e) contemplates a situation applicable to foreign-owned corporations. WMCP, at the time of the execution of the FTAA, was a foreign-owned corporation and therefore not qualified to own land. As contractor, it has at some future date to construct the infrastructure -- the mine processing plant, the camp site, the tailings dam, and other infrastructure -- needed for the large-scale mining operations. It will then have to identify and pinpoint, within the FTAA contract area, the particular surface areas with favorable topography deemed ideal for such infrastructure and will need to acquire the surface rights. The State owns the mineral deposits in the earth, and is also qualified to own land.

Section 10.2(e) sets forth the mechanism whereby the foreign-owned contractor, disqualified to own land, identifies to the government the specific surface areas within the FTAA contract area to be acquired for the mine infrastructure. The government then acquires ownership of the surface land areas on behalf of the contractor, in order to enable the latter to proceed to fully implement the FTAA.

The contractor, of course, shoulders the purchase price of the land. Hence, the provision allows it, after termination of the FTAA, to be reimbursed from proceeds of the sale of the surface areas, which the government will dispose of through public bidding. It should be noted that this provision will not be applicable to Sagittarius as the present FTAA contractor, since it is a Filipino corporation qualified to own and hold land. As such, it may therefore freely negotiate with the surface rights owners and acquire the surface property in its own right.

Clearly, petitioners have needlessly jumped to unwarranted conclusions, without being aware of the rationale for the said provision. That provision does not call for the exercise of the power of eminent domain -- and determination of just compensation is not an issue -- as much as it calls for a qualified party to acquire the surface

rights on behalf of a foreign-owned contractor.

Rather than having the foreign contractor act through a dummy corporation, having the State do the purchasing is a better alternative. This will at least cause the government to be aware of such transaction/s and foster transparency in the contractor's dealings with the local property owners. The government, then, will not act as a subcontractor of the contractor; rather, it will facilitate the transaction and enable the parties to avoid a technical violation of the Anti-Dummy Law.

Absence of Provision

Requiring Sale at Posted

Prices Not Problematic

The supposed absence of any provision in the WMCP FTAA directly and explicitly requiring the contractor to sell the mineral products at posted or market prices is not a problem. Apart from Clause 1.4 of the FTAA obligating the contractor to account for the total value of mineral production and the sale of minerals, we can also look to Section 35 of RA 7942, which incorporates into all FTAA's certain terms, conditions and warranties, including the following:

“(l) The contractors shall furnish the Government records of geologic, accounting and other relevant data for its mining operation, and that books of accounts and records shall be open for inspection by the government. x x x

(m) Requiring the proponent to dispose of the minerals at the highest price and more advantageous terms and conditions.”

For that matter, Section 56(n) of DAO 99-56 specifically obligates an FTAA contractor to dispose of the minerals and by-products at the highest market price and to register with the MGB a copy of the sales agreement. After all, the provisions of prevailing statutes as well as rules and regulations are deemed written into contracts.

Contractor's Right to Mortgage

Not Objectionable Per Se

Petitioners also question the absolute right of the contractor under Clause 10.2 (l) to mortgage and encumber not only its rights and interests in the FTAA and the infrastructure and improvements introduced, but also the mineral products extracted. Private respondents do not touch on this matter, but we believe that this provision may have to do with the conditions imposed by the creditor-banks of the then foreign contractor WMCP to secure the lendings made or to be made to the latter. Ordinarily, banks lend not only on the security of mortgages on fixed assets, but also on encumbrances of goods produced that can easily be sold and converted into cash that can be applied to the repayment of loans. Banks even lend on the security of accounts receivable that are collectible within 90 days.[59]

It is not uncommon to find that a debtor corporation has executed deeds of assignment “by way of security” over the production for the next twelve months and/or the proceeds of the sale thereof -- or the corresponding accounts receivable, if sold on terms -- in favor of its creditor-banks. Such deeds may include authorizing the creditors to sell the products themselves and to collect the sales proceeds and/or the accounts receivable.

Seen in this context, Clause 10.2(l) is not something out of the ordinary or objectionable. In any case, as will be explained below, even if it is allowed to mortgage or encumber the mineral end-products themselves, the contractor is not freed of its obligation to pay the government its basic and additional shares in the net mining revenue, which is the essential thing to consider.

In brief, the alarm raised over the contractor's right to mortgage the minerals is simply unwarranted. Just the

same, the contractor must account for the value of mineral production and the sales proceeds therefrom. Likewise, under the WMCP FTAA, the government remains entitled to its sixty percent share in the net mining revenues of the contractor. The latter's right to mortgage the minerals does not negate the State's right to receive its share of net mining revenues.

Shareholders Free to Sell Their Stocks

Petitioners likewise criticize Clause 10.2(k), which gives the contractor authority "to change its equity structure at any time." This provision may seem somewhat unusual, but considering that WMCP then was 100 percent foreign-owned, any change would mean that such percentage would either stay unaltered or be decreased in favor of Filipino ownership. Moreover, the foreign-held shares may change hands freely. Such eventuality is as it should be.

We believe it is not necessary for government to attempt to limit or restrict the freedom of the shareholders in the contractor to freely transfer, dispose of or encumber their shareholdings, consonant with the unfettered exercise of their business judgment and discretion. Rather, what is critical is that, regardless of the identity, nationality and percentage ownership of the various shareholders of the contractor -- and regardless of whether these shareholders decide to take the company public, float bonds and other fixed-income instruments, or allow the creditor-banks to take an equity position in the company -- the foreign-owned contractor is always in a position to render the services required under the FTAA, under the direction and control of the government.

Contractor's Right to Ask For Amendment Not Absolute

With respect to Clauses 10.4(e) and (i), petitioners complain that these provisions bind government to allow amendments to the FTAA if required by banks and other financial institutions as part of the conditions for new lendings. However, we do not find anything wrong with Clause 10.4(e), which only states that "if the Contractor seeks to obtain financing contemplated herein from banks or other financial institutions, (the Government shall) cooperate with the Contractor in such efforts provided that such financing arrangements will in no event reduce the Contractor's obligations or the Government's rights hereunder." The *colatilla* obviously safeguards the State's interests; if breached, it will give the government cause to object to the proposed amendments.

On the other hand, Clause 10.4(i) provides that "the Government shall favourably consider any request from [the] Contractor for amendments of this Agreement which are necessary in order for the Contractor to successfully obtain the financing." Petitioners see in this provision a complete renunciation of control. We disagree.

The proviso does not say that the government shall grant any request for amendment. Clause 10.4(i) only obliges the State to favorably consider any such request, which is not at all unreasonable, as it is not equivalent to saying that the government must automatically consent to it. This provision should be read together with the rest of the FTAA provisions instituting government control and supervision over the mining enterprise. The clause should not be given an interpretation that enables the contractor to wiggle out of the restrictions imposed upon it by merely suggesting that certain amendments are requested by the lenders.

Rather, it is up to the contractor to prove to the government that the requested changes to the FTAA are indispensable, as they enable the contractor to obtain the needed financing; that without such contract changes, the funders would absolutely refuse to extend the loan; that there are no other sources of financing available to the contractor (a very unlikely scenario); and that without the needed financing, the execution of the work programs will not proceed. But the bottom line is, in the exercise of its power of control, the government has the final say

on whether to approve or disapprove such requested amendments to the FTAA. In short, approval thereof is not mandatory on the part of the government.

In fine, the foregoing evaluation and analysis of the aforementioned FTAA provisions sufficiently overturns petitioners' litany of objections to and criticisms of the State's alleged lack of control.

Financial Benefits Not Surrendered to the Contractor

One of the main reasons certain provisions of RA 7942 were struck down was the finding mentioned in the Decision that beneficial ownership of the mineral resources had been conveyed to the contractor. This finding was based on the underlying assumption, common to the said provisions, that the foreign contractor manages the mineral resources in the same way that foreign contractors in service contracts used to. "By allowing foreign contractors to manage or operate all the aspects of the mining operation, the above-cited provisions of R.A. No. 7942 have in effect conveyed beneficial ownership over the nation's mineral resources to these contractors, leaving the State with nothing but bare title thereto." [60] As the WMCP FTAA contained similar provisions deemed by the ponente to be abhorrent to the Constitution, the Decision struck down the Contract as well.

Beneficial ownership has been defined as ownership recognized by law and capable of being enforced in the courts at the suit of the beneficial owner. [61] Black's Law Dictionary indicates that the term is used in two senses: first, to indicate the interest of a beneficiary in trust property (also called "equitable ownership"); and second, to refer to the power of a corporate shareholder to buy or sell the shares, though the shareholder is not registered in the corporation's books as the owner. [62] Usually, beneficial ownership is distinguished from naked ownership, which is the enjoyment of all the benefits and privileges of ownership, as against possession of the bare title to property.

An assiduous examination of the WMCP FTAA uncovers no indication that it confers upon WMCP ownership, beneficial or otherwise, of the mining property it is to develop, the minerals to be produced, or the proceeds of their sale, which can be legally asserted and enforced as against the State.

As public respondents correctly point out, any interest the contractor may have in the proceeds of the mining operation is merely the equivalent of the consideration the government has undertaken to pay for its services. All lawful contracts require such mutual prestations, and the WMCP FTAA is no different. The contractor commits to perform certain services for the government in respect of the mining operation, and in turn it is to be compensated out of the net mining revenues generated from the sale of mineral products. What would be objectionable is a contractual provision that unduly benefits the contractor far in excess of the service rendered or value delivered, if any, in exchange therefor.

A careful perusal of the statute itself and its implementing rules reveals that neither RA 7942 nor DAO 99-56 can be said to convey beneficial ownership of any mineral resource or product to any foreign FTAA contractor.

Equitable Sharing of Financial Benefits

On the contrary, DAO 99-56, entitled "Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements" aims to ensure an equitable sharing of the benefits derived from mineral resources. These benefits are to be equitably shared among the government (national and local), the FTAA contractor, and the affected communities. The purpose is to ensure sustainable mineral resources development; and a fair, equitable, competitive and stable investment regime for the large-scale exploration, development and commercial utilization of minerals. The general framework or concept followed in crafting the fiscal regime of the FTAA is based on the

principle that the government expects real contributions to the economic growth and general welfare of the country, while the contractor expects a reasonable return on its investments in the project.[63]

Specifically, under the fiscal regime, the government's expectation is, inter alia, the receipt of its share from the taxes and fees normally paid by a mining enterprise. On the other hand, the FTAA contractor is granted by the government certain fiscal and non-fiscal incentives[64] to help support the former's cash flow during the most critical phase (cost recovery) and to make the Philippines competitive with other mineral-producing countries. After the contractor has recovered its initial investment, it will pay all the normal taxes and fees comprising the basic share of the government, plus an additional share for the government based on the options and formulae set forth in DAO 99-56.

The said DAO spells out the financial benefits the government will receive from an FTAA, referred to as "the Government Share," composed of a basic government share and an additional government share.

The basic government share is comprised of all direct taxes, fees and royalties, as well as other payments made by the contractor during the term of the FTAA. These are amounts paid directly to (i) the national government (through the Bureau of Internal Revenue, Bureau of Customs, Mines & Geosciences Bureau and other national government agencies imposing taxes or fees), (ii) the local government units where the mining activity is conducted, and (iii) persons and communities directly affected by the mining project. The major taxes and other payments constituting the basic government share are enumerated below:[65]

Payments to the National Government:

- Excise tax on minerals - 2 percent of the gross output of mining operations
- Contractor' income tax - maximum of 32 percent of taxable income for corporations
- Customs duties and fees on imported capital equipment -the rate is set by the Tariff and Customs Code (3-7 percent for chemicals; 3-10 percent for explosives; 3-15 percent for mechanical and electrical equipment; and 3-10 percent for vehicles, aircraft and vessels
- VAT on imported equipment, goods and services – 10 percent of value
- Royalties due the government on minerals extracted from mineral reservations, if applicable – 5 percent of the actual market value of the minerals produced
- Documentary stamp tax - the rate depends on the type of transaction
- Capital gains tax on traded stocks - 5 to 10 percent of the value of the shares
- Withholding tax on interest payments on foreign loans -15 percent of the amount of interest
- Withholding tax on dividend payments to foreign stockholders – 15 percent of the dividend
- Wharfage and port fees
- Licensing fees (for example, radio permit, firearms permit, professional fees)
- Other national taxes and fees.

Payments to Local Governments:

- Local business tax - a maximum of 2 percent of gross sales or receipts (the rate varies among local government units)

- Real property tax - 2 percent of the fair market value of the property, based on an assessment level set by the local government
- Special education levy - 1 percent of the basis used for the real property tax
- Occupation fees - PhP50 per hectare per year; PhP100 per hectare per year if located in a mineral reservation
- Community tax - maximum of PhP10,500 per year
- All other local government taxes, fees and imposts as of the effective date of the FTAA - the rate and the type depend on the local government

Other Payments:

- Royalty to indigenous cultural communities, if any – 1 percent of gross output from mining operations
- Special allowance - payment to claim owners and surface rights holders

Apart from the basic share, an additional government share is also collected from the FTAA contractor in accordance with the second paragraph of Section 81 of RA 7942, which provides that the government share shall be comprised of, among other things, certain taxes, duties and fees. The subject proviso reads:

“The Government share in a financial or technical assistance agreement shall consist of, among other things, the contractor’s corporate income tax, excise tax, special allowance, withholding tax due from the contractor’s foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.” (Italics types supplied.)

The government, through the DENR and the MGB, has interpreted the insertion of the phrase among other things as signifying that the government is entitled to an “additional government share” to be paid by the contractor apart from the “basic share,” in order to attain a fifty-fifty sharing of net benefits from mining.

The additional government share is computed by using one of three options or schemes presented in DAO 99-56: (1) a fifty-fifty sharing in the cumulative present value of cash flows; (2) the share based on excess profits; and (3) the sharing based on the cumulative net mining revenue. The particular formula to be applied will be selected by the contractor, with a written notice to the government prior to the commencement of the development and construction phase of the mining project.[66]

Proceeds from the government shares arising from an FTAA contract are distributed to and received by the different levels of government in the following proportions:

National Government 50 percent

Provincial Government 10 percent

Municipal Government 20 percent

Affected Barangays 20 percent

The portion of revenues remaining after the deduction of the basic and additional government shares is what goes

to the contractor.

Government's Share in an
FTAA Not Consisting Solely
of Taxes, Duties and Fees

In connection with the foregoing discussion on the basic and additional government shares, it is pertinent at this juncture to mention the criticism leveled at the second paragraph of Section 81 of RA 7942, quoted earlier. The said proviso has been denounced, because, allegedly, the State's share in FTAA's with foreign contractors has been limited to taxes, fees and duties only; in effect, the State has been deprived of a share in the after-tax income of the enterprise. In the face of this allegation, one has to consider that the law does not define the term among other things; and the Office of the Solicitor General, in its Motion for Reconsideration, appears to have erroneously claimed that the phrase refers to indirect taxes.

The law provides no definition of the term among other things, for the reason that Congress deliberately avoided setting unnecessary limitations as to what may constitute compensation to the State for the exploitation and use of mineral resources. But the inclusion of that phrase clearly and unmistakably reveals the legislative intent to have the State collect more than just the usual taxes, duties and fees. Certainly, there is nothing in that phrase -- or in the second paragraph of Section 81 -- that would suggest that such phrase should be interpreted as referring only to taxes, duties, fees and the like.

Precisely for that reason, to fulfill the legislative intent behind the inclusion of the phrase among other things in the second paragraph of Section 81,[67] the DENR structured and formulated in DAO 99-56 the said additional government share. Such a share was to consist not of taxes, but of a share in the earnings or cash flows of the mining enterprise. The additional government share was to be paid by the contractor on top of the basic share, so as to achieve a fifty-fifty sharing -- between the government and the contractor -- of net benefits from mining. In the Ramos-DeVera paper, the explanation of the three options or formulas[68] -- presented in DAO 99-56 for the computation of the additional government share -- serves to debunk the claim that the government's take from an FTAA consists solely of taxes, fees and duties.

Unfortunately, the Office of the Solicitor General -- although in possession of the relevant data -- failed to fully replicate or echo the pertinent elucidation in the Ramos-DeVera paper regarding the three schemes or options for computing the additional government share presented in DAO 99-56. Had due care been taken by the OSG, the Court would have been duly apprised of the real nature and particulars of the additional share.

But, perhaps, on account of the esoteric discussion in the Ramos-DeVera paper, and the even more abstruse mathematical jargon employed in DAO 99-56, the OSG omitted any mention of the three options. Instead, the OSG skipped to a side discussion of the effect of indirect taxes, which had nothing at all to do with the additional government share, to begin with. Unfortunately, this move created the wrong impression, pointed out in Justice Antonio T. Carpio's Opinion, that the OSG had taken the position that the additional government share consisted of indirect taxes.

In any event, what is quite evident is the fact that the additional government share, as formulated, has nothing to do with taxes -- direct or indirect -- or with duties, fees or charges. To repeat, it is over and above the basic government share composed of taxes and duties. Simply put, the additional share may be (a) an amount that will result in a 50-50 sharing of the cumulative present value of the cash flows[69] of the enterprise; (b) an amount equivalent to 25 percent of the additional or excess profits of the enterprise, reckoned against a benchmark return on investments; or (c) an amount that will result in a fifty-fifty sharing of the cumulative net mining revenue from the end of the recovery period up to the taxable year in question. The contractor is required to select one of the

three options or formulae for computing the additional share, an option it will apply to all of its mining operations.

As used above, “net mining revenue” is defined as the gross output from mining operations for a calendar year, less deductible expenses (inclusive of taxes, duties and fees). Such revenue would roughly be equivalent to “taxable income” or income before income tax. Definitely, as compared with, say, calculating the additional government share on the basis of net income (after income tax), the net mining revenue is a better and much more reasonable basis for such computation, as it gives a truer picture of the profitability of the company.

To demonstrate that the three options or formulations will operate as intended, Messrs. Ramos and de Vera also performed some quantifications of the government share via a financial modeling of each of the three options discussed above. They found that the government would get the highest share from the option that is based on the net mining revenue, as compared with the other two options, considering only the basic and the additional shares; and that, even though production rate decreases, the government share will actually increase when the net mining revenue and the additional profit-based options are used.

Furthermore, it should be noted that the three options or formulae do not yet take into account the indirect taxes^[70] and other financial contributions^[71] of mining projects. These indirect taxes and other contributions are real and actual benefits enjoyed by the Filipino people and/or government. Now, if some of the quantifiable items are taken into account in the computations, the financial modeling would show that the total government share increases to 60 percent or higher -- in one instance, as much as 77 percent and even 89 percent -- of the net present value of total benefits from the project. As noted in the Ramos-DeVera paper, these results are not at all shabby, considering that the contractor puts in all the capital requirements and assumes all the risks, without the government having to contribute or risk anything.

Despite the foregoing explanation, Justice Carpio still insisted during the Court’s deliberations that the phrase among other things refers only to taxes, duties and fees. We are bewildered by his position. On the one hand, he condemns the Mining Law for allegedly limiting the government’s benefits only to taxes, duties and fees; and on the other, he refuses to allow the State to benefit from the correct and proper interpretation of the DENR/MGB. To remove all doubts then, we hold that the State’s share is not limited to taxes, duties and fees only and that the DENR/MGB interpretation of the phrase among other things is correct. Definitely, this DENR/MGB interpretation is not only legally sound, but also greatly advantageous to the government.

One last point on the subject. The legislature acted judiciously in not defining the terms among other things and, instead, leaving it to the agencies concerned to devise and develop the various modes of arriving at a reasonable and fair amount for the additional government share. As can be seen from DAO 99-56, the agencies concerned did an admirable job of conceiving and developing not just one formula, but three different formulae for arriving at the additional government share. Each of these options is quite fair and reasonable; and, as Messrs. Ramos and De Vera stated, other alternatives or schemes for a possible improvement of the fiscal regime for FTAA’s are also being studied by the government.

Besides, not locking into a fixed definition of the term among other things will ultimately be more beneficial to the government, as it will have that innate flexibility to adjust to and cope with rapidly changing circumstances, particularly those in the international markets. Such flexibility is especially significant for the government in terms of helping our mining enterprises remain competitive in world markets despite challenging and shifting economic scenarios.

In conclusion, we stress that we do not share the view that in FTAA’s with foreign contractors under RA 7942, the government’s share is limited to taxes, fees and duties. Consequently, we find the attacks on the second paragraph of Section 81 of RA 7942 totally unwarranted.

Collections Not Made Uncertain by the Third Paragraph of Section 81

The third or last paragraph of Section 81[72] provides that the government share in FTAA's shall be collected when the contractor shall have recovered its pre-operating expenses and exploration and development expenditures. The objection has been advanced that, on account of the proviso, the collection of the State's share is not even certain, as there is no time limit in RA 7942 for this grace period or recovery period.

We believe that Congress did not set any time limit for the grace period, preferring to leave it to the concerned agencies, which are, on account of their technical expertise and training, in a better position to determine the appropriate durations for such recovery periods. After all, these recovery periods are determined, to a great extent, by technical and technological factors peculiar to the mining industry. Besides, with developments and advances in technology and in the geosciences, we cannot discount the possibility of shorter recovery periods. At any rate, the concerned agencies have not been remiss in this area. The 1995 and 1996 Implementing Rules and Regulations of RA 7942 specify that the period of recovery, reckoned from the date of commercial operation, shall be for a period not exceeding five years, or until the date of actual recovery, whichever comes earlier.

Approval of Pre-Operating Expenses Required by RA 7942

Still, RA 7942 is criticized for allegedly not requiring government approval of pre-operating, exploration and development expenses of the foreign contractors, who are in effect given unfettered discretion to determine the amounts of such expenses. Supposedly, nothing prevents the contractors from recording such expenses in amounts equal to the mining revenues anticipated for the first 10 or 15 years of commercial production, with the result that the share of the State will be zero for the first 10 or 15 years. Moreover, under the circumstances, the government would be unable to say when it would start to receive its share under the FTAA.

We believe that the argument is based on incorrect information as well as speculation. Obviously, certain crucial provisions in the Mining Law were overlooked. Section 23, dealing with the rights and obligations of the exploration permit grantee, states: "The permittee shall undertake exploration work on the area as specified by its permit based on an approved work program." The next proviso reads: "Any expenditure in excess of the yearly budget of the approved work program may be carried forward and credited to the succeeding years covering the duration of the permit. x x x." (*Italics supplied*)

Clearly, even at the stage of application for an exploration permit, the applicant is required to submit -- for approval by the government -- a proposed work program for exploration, containing a yearly budget of proposed expenditures. The State has the opportunity to pass upon (and approve or reject) such proposed expenditures, with the foreknowledge that -- if approved -- these will subsequently be recorded as pre-operating expenses that the contractor will have to recoup over the grace period. That is not all.

Under Section 24, an exploration permit holder who determines the commercial viability of a project covering a mining area may, within the term of the permit, file with the Mines and Geosciences Bureau a declaration of mining project feasibility. This declaration is to be accompanied by a work program for development for the Bureau's approval, the necessary prelude for entering into an FTAA, a mineral production sharing agreement (MPSA), or some other mineral agreement. At this stage, too, the government obviously has the opportunity to approve or reject the proposed work program and budgeted expenditures for development works on the project. Such expenditures will ultimately become the pre-operating and development costs that will have to be recovered by the contractor.

Naturally, with the submission of approved work programs and budgets for the exploration and the development/construction phases, the government will be able to scrutinize and approve or reject such expenditures. It will be well-informed as to the amounts of pre-operating and other expenses that the contractor may legitimately recover and the approximate period of time needed to effect such a recovery. There is therefore no way the contractor can just randomly post any amount of pre-operating expenses and expect to recover the same.

The aforecited provisions on approved work programs and budgets have counterparts in Section 35, which deals with the terms and conditions exclusively applicable to FTAAAs. The said provision requires certain terms and conditions to be incorporated into FTAAAs; among them, “a firm commitment x x x of an amount corresponding to the expenditure obligation that will be invested in the contract area” and “representations and warranties x x x to timely deploy these [financing, managerial and technical expertise and technological] resources under its supervision pursuant to the periodic work programs and related budgets x x x,” as well as “work programs and minimum expenditures commitments.” (Italics supplied)

Unarguably, given the provisions of Section 35, the State has every opportunity to pass upon the proposed expenditures under an FTAA and approve or reject them. It has access to all the information it may need in order to determine in advance the amounts of pre-operating and developmental expenses that will have to be recovered by the contractor and the amount of time needed for such recovery.

In summary, we cannot agree that the third or last paragraph of Section 81 of RA 7942 is in any manner unconstitutional.

No Deprivation of Beneficial Rights

It is also claimed that aside from the second and the third paragraphs of Section 81 (discussed above), Sections 80, 84 and 112 of RA 7942 also operate to deprive the State of beneficial rights of ownership over mineral resources; and give them away for free to private business enterprises (including foreign owned corporations). Likewise, the said provisions have been construed as constituting, together with Section 81, an ingenious attempt to resurrect the old and discredited system of “license, concession or lease.”

Specifically, Section 80 is condemned for limiting the State’s share in a mineral production-sharing agreement (MPSA) to just the excise tax on the mineral product. Under Section 151(A) of the Tax Code, such tax is only 2 percent of the market value of the gross output of the minerals. The colatilla in Section 84, the portion considered offensive to the Constitution, reiterates the same limitation made in Section 80.[73]

It should be pointed out that Section 80 and the colatilla in Section 84 pertain only to MPSAs and have no application to FTAAAs. These particular statutory provisions do not come within the issues that were defined and delineated by this Court during the Oral Argument -- particularly the third issue, which pertained exclusively to FTAAAs. Neither did the parties argue upon them in their pleadings. Hence, this Court cannot make any pronouncement in this case regarding the constitutionality of Sections 80 and 84 without violating the fundamental rules of due process. Indeed, the two provisos will have to await another case specifically placing them in issue.

On the other hand, Section 112[74] is disparaged for allegedly reverting FTAAAs and all mineral agreements to the old and discredited “license, concession or lease” system. This Section states in relevant part that “the provisions of Chapter XIV [which includes Sections 80 to 82] on government share in mineral production-sharing agreement x x x shall immediately govern and apply to a mining lessee or contractor.” (Italics supplied) This provision is

construed as signifying that the 2 percent excise tax which, pursuant to Section 80, comprises the government share in MPSAs shall now also constitute the government share in FTAAAs -- as well as in co-production agreements and joint venture agreements -- to the exclusion of revenues of any other nature or from any other source.

Apart from the fact that Section 112 likewise does not come within the issues delineated by this Court during the Oral Argument, and was never touched upon by the parties in their pleadings, it must also be noted that the criticism hurled against this Section is rooted in unwarranted conclusions made without considering other relevant provisions in the statute. Whether Section 112 may properly apply to co-production or joint venture agreements, the fact of the matter is that it cannot be made to apply to FTAAAs.

First, Section 112 does not specifically mention or refer to FTAAAs; the only reason it is being applied to them at all is the fact that it happens to use the word “contractor.” Hence, it is a bit of a stretch to insist that it covers FTAAAs as well. Second, mineral agreements, of which there are three types -- MPSAs, co-production agreements, and joint venture agreements -- are covered by Chapter V of RA 7942. On the other hand, FTAAAs are covered by and in fact are the subject of Chapter VI, an entirely different chapter altogether. The law obviously intends to treat them as a breed apart from mineral agreements, since Section 35 (found in Chapter VI) creates a long list of specific terms, conditions, commitments, representations and warranties -- which have not been made applicable to mineral agreements -- to be incorporated into FTAAAs.

Third, under Section 39, the FTAA contractor is given the option to “downgrade” -- to convert the FTAA into a mineral agreement at any time during the term if the economic viability of the contract area is inadequate to sustain large-scale mining operations. Thus, there is no reason to think that the law through Section 112 intends to exact from FTAA contractors merely the same government share (a 2 percent excise tax) that it apparently demands from contractors under the three forms of mineral agreements. In brief, Section 112 does not apply to FTAAAs.

Notwithstanding the foregoing explanation, Justices Carpio and Morales maintain that the Court must rule now on the constitutionality of Sections 80, 84 and 112, allegedly because the WMCP FTAA contains a provision which grants the contractor unbridled and “automatic” authority to convert the FTAA into an MPSA; and should such conversion happen, the State would be prejudiced since its share would be limited to the 2 percent excise tax. Justice Carpio adds that there are five MPSAs already signed just awaiting the judgment of this Court on respondents’ and intervenor’s Motions for Reconsideration. We hold however that, at this point, this argument is based on pure speculation. The Court cannot rule on mere surmises and hypothetical assumptions, without firm factual anchor. We repeat: basic due process requires that we hear the parties who have a real legal interest in the MPSAs (i.e. the parties who executed them) before these MPSAs can be reviewed, or worse, struck down by the Court. Anything less than that requirement would be arbitrary and capricious.

In any event, the conversion of the present FTAA into an MPSA is problematic. First, the contractor must comply with the law, particularly Section 39 of RA 7942; inter alia, it must convincingly show that the “economic viability of the contract is found to be inadequate to justify large-scale mining operations;” second, it must contend with the President’s exercise of the power of State control over the EDU of natural resources; and third, it will have to risk a possible declaration of the unconstitutionality (in a proper case) of Sections 80, 84 and 112.

The first requirement is not as simple as it looks. Section 39 contemplates a situation in which an FTAA has already been executed and entered into, and is presumably being implemented, when the contractor “discovers” that the mineral ore reserves in the contract area are not sufficient to justify large-scale mining, and thus the contractor requests the conversion of the FTAA into an MPSA. The contractor in effect needs to explain why,

despite its exploration activities, including the conduct of various geologic and other scientific tests and procedures in the contract area, it was unable to determine correctly the mineral ore reserves and the economic viability of the area. The contractor must explain why, after conducting such exploration activities, it decided to file a declaration of mining feasibility, and to apply for an FTAA, thereby leading the State to believe that the area could sustain large-scale mining. The contractor must justify fully why its earlier findings, based on scientific procedures, tests and data, turned out to be wrong, or were way off. It must likewise prove that its new findings, also based on scientific tests and procedures, are correct. Right away, this puts the contractor's technical capabilities and expertise into serious doubt. We wonder if anyone would relish being in this situation. The State could even question and challenge the contractor's qualification and competence to continue the activity under an MPSA.

All in all, while there may be cogent grounds to assail the aforecited Sections, this Court -- on considerations of due process -- cannot rule upon them here. Anyway, if later on these Sections are declared unconstitutional, such declaration will not affect the other portions since they are clearly separable from the rest.

Our Mineral Resources Not

Given Away for Free by RA 7942

Nevertheless, if only to disabuse our minds, we should address the contention that our mineral resources are effectively given away for free by the law (RA 7942) in general and by Sections 80, 81, 84 and 112 in particular.

Foreign contractors do not just waltz into town one day and leave the next, taking away mineral resources without paying anything. In order to get at the minerals, they have to invest huge sums of money (tens or hundreds of millions of dollars) in exploration works first. If the exploration proves unsuccessful, all the cash spent thereon will not be returned to the foreign investors; rather, those funds will have been infused into the local economy, to remain there permanently. The benefits therefrom cannot be simply ignored. And assuming that the foreign contractors are successful in finding ore bodies that are viable for commercial exploitation, they do not just pluck out the minerals and cart them off. They have first to build camp sites and roadways; dig mine shafts and connecting tunnels; prepare tailing ponds, storage areas and vehicle depots; install their machinery and equipment, generator sets, pumps, water tanks and sewer systems, and so on.

In short, they need to expend a great deal more of their funds for facilities, equipment and supplies, fuel, salaries of local labor and technical staff, and other operating expenses. In the meantime, they also have to pay taxes,[75] duties, fees, and royalties. All told, the exploration, pre-feasibility, feasibility, development and construction phases together add up to as many as eleven years.[76] The contractors have to continually shell out funds for the duration of over a decade, before they can commence commercial production from which they would eventually derive revenues. All that money translates into a lot of "pump-priming" for the local economy.

Granted that the contractors are allowed subsequently to recover their pre-operating expenses, still, that eventuality will happen only after they shall have first put out the cash and fueled the economy. Moreover, in the process of recouping their investments and costs, the foreign contractors do not actually pull out the money from the economy. Rather, they recover or recoup their investments out of actual commercial production by not paying a portion of the basic government share corresponding to national taxes, along with the additional government share, for a period of not more than five years[77] counted from the commencement of commercial production.

It must be noted that there can be no recovery without commencing actual commercial production. In the meantime that the contractors are recouping costs, they need to continue operating; in order to do so, they have to disburse money to meet their various needs. In short, money is continually infused into the economy.

The foregoing discussion should serve to rid us of the mistaken belief that, since the foreign contractors are allowed to recover their investments and costs, the end result is that they practically get the minerals for free, which leaves the Filipino people none the better for it.

All Businesses Entitled to Cost Recovery

Let it be put on record that not only foreign contractors, but all businessmen and all business entities in general, have to recoup their investments and costs. That is one of the first things a student learns in business school. Regardless of its nationality, and whether or not a business entity has a five-year cost recovery period, it will -- must -- have to recoup its investments, one way or another. This is just common business sense. Recovery of investments is absolutely indispensable for business survival; and business survival ensures soundness of the economy, which is critical and contributory to the general welfare of the people. Even government corporations must recoup their investments in order to survive and continue in operation. And, as the preceding discussion has shown, there is no business that gets ahead or earns profits without any cost to it.

It must also be stressed that, though the State owns vast mineral wealth, such wealth is not readily accessible or transformable into usable and negotiable currency without the intervention of the credible mining companies. Those untapped mineral resources, hidden beneath tons of earth and rock, may as well not be there for all the good they do us right now. They have first to be extracted and converted into marketable form, and the country needs the foreign contractor's funds, technology and know-how for that.

After about eleven years of pre-operation and another five years for cost recovery, the foreign contractors will have just broken even. Is it likely that they would at that point stop their operations and leave? Certainly not. They have yet to make profits. Thus, for the remainder of the contract term, they must strive to maintain profitability. During this period, they pay the whole of the basic government share and the additional government share which, taken together with indirect taxes and other contributions, amount to approximately 60 percent or more of the entire financial benefits generated by the mining venture.

In sum, we can hardly talk about foreign contractors taking our mineral resources for free. It takes a lot of hard cash to even begin to do what they do. And what they do in this country ultimately benefits the local economy, grows businesses, generates employment, and creates infrastructure, as discussed above. Hence, we definitely disagree with the sweeping claim that no FTAA under Section 81 will ever make any real contribution to the growth of the economy or to the general welfare of the country. This is not a plea for foreign contractors. Rather, this is a question of focusing the judicial spotlight squarely on all the pertinent facts as they bear upon the issue at hand, in order to avoid leaping precipitately to ill-conceived conclusions not solidly grounded upon fact.

Repatriation of After-Tax Income

Another objection points to the alleged failure of the Mining Law to ensure real contributions to the economic growth and general welfare of the country, as mandated by Section 2 of Article XII of the Constitution. Pursuant to Section 81 of the law, the entire after-tax income arising from the exploitation of mineral resources owned by the State supposedly belongs to the foreign contractors, which will naturally repatriate the said after-tax income to their home countries, thereby resulting in no real contribution to the economic growth of this country. Clearly, this contention is premised on erroneous assumptions.

First, as already discussed in detail hereinabove, the concerned agencies have correctly interpreted the second paragraph of Section 81 of RA 7942 to mean that the government is entitled to an additional share, to be

computed based on any one of the following factors: net mining revenues, the present value of the cash flows, or excess profits reckoned against a benchmark rate of return on investments. So it is not correct to say that all of the after-tax income will accrue to the foreign FTAA contractor, as the government effectively receives a significant portion thereof.

Second, the foreign contractors can hardly “repatriate the entire after-tax income to their home countries.” Even a bit of knowledge of corporate finance will show that it will be impossible to maintain a business as a “going concern” if the entire “net profit” earned in any particular year will be taken out and repatriated. The “net income” figure reflected in the bottom line is a mere accounting figure not necessarily corresponding to cash in the bank, or other quick assets. In order to produce and set aside cash in an amount equivalent to the bottom line figure, one may need to sell off assets or immediately collect receivables or liquidate short-term investments; but doing so may very likely disrupt normal business operations.

In terms of cash flows, the funds corresponding to the net income as of a particular point in time are actually in use in the normal course of business operations. Pulling out such net income disrupts the cash flows and cash position of the enterprise and, depending on the amount being taken out, could seriously cripple or endanger the normal operations and financial health of the business enterprise. In short, no sane business person, concerned with maintaining the mining enterprise as a going concern and keeping a foothold in its market, can afford to repatriate the entire after-tax income to the home country.

The State’s Receipt of Sixty Percent of an FTAA Contractor’s After-Tax Income Not Mandatory

We now come to the next objection which runs this way: In FTAAAs with a foreign contractor, the State must receive at least 60 percent of the after-tax income from the exploitation of its mineral resources. This share is the equivalent of the constitutional requirement that at least 60 percent of the capital, and hence 60 percent of the income, of mining companies should remain in Filipino hands.

First, we fail to see how we can properly conclude that the Constitution mandates the State to extract at least 60 percent of the after-tax income from a mining company run by a foreign contractor. The argument is that the Charter requires the State’s partner in a co-production agreement, joint venture agreement or MPSA to be a Filipino corporation (at least 60 percent owned by Filipino citizens).

We question the logic of this reasoning, premised on a supposedly parallel or analogous situation. We are, after all, dealing with an essentially different equation, one that involves different elements. The Charter did not intend to fix an iron-clad rule on the 60 percent share, applicable to all situations at all times and in all circumstances. If ever such was the intention of the framers, they would have spelt it out in black and white. Verba legis will serve to dispel unwarranted and untenable conclusions.

Second, if we would bother to do the math, we might better appreciate the impact (and reasonableness) of what we are demanding of the foreign contractor. Let us use a simplified illustration. Let us base it on gross revenues of, say, P500. After deducting operating expenses, but prior to income tax, suppose a mining firm makes a taxable income of P100. A corporate income tax of 32 percent results in P32 of taxable income going to the government, leaving the mining firm with P68. Government then takes 60 percent thereof, equivalent to P40.80, leaving only P27.20 for the mining firm.

At this point the government has pocketed P32.00 plus P40.80, or a total of P72.80 for every P100 of taxable income, leaving the mining firm with only P27.20. But that is not all. The government has also taken 2 percent

excise tax “off the top,” equivalent to another P10. Under the minimum 60 percent proposal, the government nets around P82.80 (not counting other taxes, duties, fees and charges) from a taxable income of P100 (assuming gross revenues of P500, for purposes of illustration). On the other hand, the foreign contractor, which provided all the capital, equipment and labor, and took all the entrepreneurial risks -- receives P27.20. One cannot but wonder whether such a distribution is even remotely equitable and reasonable, considering the nature of the mining business. The amount of P82.80 out of P100.00 is really a lot – it does not matter that we call part of it excise tax or income tax, and another portion thereof income from exploitation of mineral resources. Some might think it wonderful to be able to take the lion’s share of the benefits. But we have to ask ourselves if we are really serious in attracting the investments that are the indispensable and key element in generating the monetary benefits of which we wish to take the lion’s share. Fairness is a credo not only in law, but also in business.

Third, the 60 percent rule in the petroleum industry cannot be insisted upon at all times in the mining business. The reason happens to be the fact that in petroleum operations, the bulk of expenditures is in exploration, but once the contractor has found and tapped into the deposit, subsequent investments and expenditures are relatively minimal. The crude (or gas) keeps gushing out, and the work entailed is just a matter of piping, transporting and storing. Not so in mineral mining. The ore body does not pop out on its own. Even after it has been located, the contractor must continually invest in machineries and expend funds to dig and build tunnels in order to access and extract the minerals from underneath hundreds of tons of earth and rock.

As already stated, the numerous intrinsic differences involved in their respective operations and requirements, cost structures and investment needs render it highly inappropriate to use petroleum operations FTAAAs as benchmarks for mining FTAAAs. Verily, we cannot just ignore the realities of the distinctly different situations and stubbornly insist on the “minimum 60 percent.”

The Mining and the Oil Industries Different From Each Other

To stress, there is no independent showing that the taking of at least a 60 percent share in the after-tax income of a mining company operated by a foreign contractor is fair and reasonable under most if not all circumstances. The fact that some petroleum companies like Shell acceded to such percentage of sharing does not ipso facto mean that it is per se reasonable and applicable to non-petroleum situations (that is, mining companies) as well. We can take judicial notice of the fact that there are, after all, numerous intrinsic differences involved in their respective operations and equipment or technological requirements, costs structures and capital investment needs, and product pricing and markets.

There is no showing, for instance, that mining companies can readily cope with a 60 percent government share in the same way petroleum companies apparently can. What we have is a suggestion to enforce the 60 percent quota on the basis of a disjointed analogy. The only factor common to the two disparate situations is the extraction of natural resources.

Indeed, we should take note of the fact that Congress made a distinction between mining firms and petroleum companies. In Republic Act No. 7729 -- “An Act Reducing the Excise Tax Rates on Metallic and Non-Metallic Minerals and Quarry Resources, Amending for the Purpose Section 151(a) of the National Internal Revenue Code, as amended” -- the lawmakers fixed the excise tax rate on metallic and non-metallic minerals at two percent of the actual market value of the annual gross output at the time of removal. However, in the case of petroleum, the lawmakers set the excise tax rate for the first taxable sale at fifteen percent of the fair international market price thereof.

There must have been a very sound reason that impelled Congress to impose two very dissimilar excise tax rate.

We cannot assume, without proof, that our honorable legislators acted arbitrarily, capriciously and whimsically in this instance. We cannot just ignore the reality of two distinctly different situations and stubbornly insist on going “minimum 60 percent.”

To repeat, the mere fact that gas and oil exploration contracts grant the State 60 percent of the net revenues does not necessarily imply that mining contracts should likewise yield a minimum of 60 percent for the State. Jumping to that erroneous conclusion is like comparing apples with oranges. The exploration, development and utilization of gas and oil are simply different from those of mineral resources.

To stress again, the main risk in gas and oil is in the exploration. But once oil in commercial quantities is struck and the wells are put in place, the risk is relatively over and black gold simply flows out continuously with comparatively less need for fresh investments and technology.

On the other hand, even if minerals are found in viable quantities, there is still need for continuous fresh capital and expertise to dig the mineral ores from the mines. Just because deposits of mineral ores are found in one area is no guarantee that an equal amount can be found in the adjacent areas. There are simply continuing risks and need for more capital, expertise and industry all the time.

Note, however, that the indirect benefits -- apart from the cash revenues -- are much more in the mineral industry. As mines are explored and extracted, vast employment is created, roads and other infrastructure are built, and other multiplier effects arise. On the other hand, once oil wells start producing, there is less need for employment. Roads and other public works need not be constructed continuously. In fine, there is no basis for saying that government revenues from the oil industry and from the mineral industries are to be identical all the time.

Fourth, to our mind, the proffered “minimum 60 percent” suggestion tends to limit the flexibility and tie the hands of government, ultimately hampering the country’s competitiveness in the international market, to the detriment of the Filipino people. This “you-have-to-give-us-60-percent-of-after-tax-income-or-we-don’t-do-business-with-you” approach is quite perilous. True, this situation may not seem too unpalatable to the foreign contractor during good years, when international market prices are up and the mining firm manages to keep its costs in check. However, under unfavorable economic and business conditions, with costs spiraling skywards and minerals prices plummeting, a mining firm may consider itself lucky to make just minimal profits.

The inflexible, carved-in-granite demand for a 60 percent government share may spell the end of the mining venture, scare away potential investors, and thereby further worsen the already dismal economic scenario. Moreover, such an unbending or unyielding policy prevents the government from responding appropriately to changing economic conditions and shifting market forces. This inflexibility further renders our country less attractive as an investment option compared with other countries.

And fifth, for this Court to decree imperiously that the government’s share should be not less than 60 percent of the after-tax income of FTAA contractors at all times is nothing short of dictating upon the government. The result, ironically, is that the State ends up losing control. To avoid compromising the State’s full control and supervision over the exploitation of mineral resources, this Court must back off from insisting upon a “minimum 60 percent” rule. It is sufficient that the State has the power and means, should it so decide, to get a 60 percent share (or more) in the contractor’s net mining revenues or after-tax income, or whatever other basis the government may decide to use in reckoning its share. It is not necessary for it to do so in every case, regardless of circumstances.

In fact, the government must be trusted, must be accorded the liberty and the utmost flexibility to deal, negotiate and transact with contractors and third parties as it sees fit; and upon terms that it ascertains to be most favorable

or most acceptable under the circumstances, even if it means agreeing to less than 60 percent. Nothing must prevent the State from agreeing to a share less than that, should it be deemed fit; otherwise the State will be deprived of full control over mineral exploitation that the Charter has vested in it.

To stress again, there is simply no constitutional or legal provision fixing the minimum share of the government in an FTAA at 60 percent of the net profit. For this Court to decree such minimum is to wade into judicial legislation, and thereby inordinately impinge on the control power of the State. Let it be clear: the Court is not against the grant of more benefits to the State; in fact, the more the better. If during the FTAA negotiations, the President can secure 60 percent,[78] or even 90 percent, then all the better for our people. But, if under the peculiar circumstances of a specific contract, the President could secure only 50 percent or 55 percent, so be it. Needless to say, the President will have to report (and be responsible for) the specific FTAA to Congress, and eventually to the people.

Finally, if it should later be found that the share agreed to is grossly disadvantageous to the government, the officials responsible for entering into such a contract on its behalf will have to answer to the courts for their malfeasance. And the contract provision voided. But this Court would abuse its own authority should it force the government's hand to adopt the 60 percent demand of some of our esteemed colleagues.

Capital and Expertise Provided,
Yet All Risks Assumed by Contractor

Here, we will repeat what has not been emphasized and appreciated enough: the fact that the contractor in an FTAA provides all the needed capital, technical and managerial expertise, and technology required to undertake the project.

In regard to the WMCP FTAA, the then foreign-owned WMCP as contractor committed, at the very outset, to make capital investments of up to US\$50 million in that single mining project. WMCP claims to have already poured in well over P800 million into the country as of February 1998, with more in the pipeline. These resources, valued in the tens or hundreds of millions of dollars, are invested in a mining project that provides no assurance whatsoever that any part of the investment will be ultimately recouped.

At the same time, the contractor must comply with legally imposed environmental standards and the social obligations, for which it also commits to make significant expenditures of funds. Throughout, the contractor assumes all the risks[79] of the business, as mentioned earlier. These risks are indeed very high, considering that the rate of success in exploration is extremely low. The probability of finding any mineral or petroleum in commercially viable quantities is estimated to be about 1:1,000 only. On that slim chance rides the contractor's hope of recouping investments and generating profits. And when the contractor has recouped its initial investments in the project, the government share increases to sixty percent of net benefits -- without the State ever being in peril of incurring costs, expenses and losses.

And even in the worst possible scenario -- an absence of commercial quantities of minerals to justify development -- the contractor would already have spent several million pesos for exploration works, before arriving at the point in which it can make that determination and decide to cut its losses. In fact, during the first year alone of the exploration period, the contractor was already committed to spend not less than P24 million. The FTAA therefore clearly ensures benefits for the local economy, courtesy of the contractor.

All in all, this setup cannot be regarded as disadvantageous to the State or the Filipino people; it certainly cannot be said to convey beneficial ownership of our mineral resources to foreign contractors.

Deductions Allowed by the

WMCP FTAA Reasonable

Petitioners question whether the State's weak control might render the sharing arrangements ineffective. They cite the so-called "suspicious" deductions allowed by the WMCP FTAA in arriving at the net mining revenue, which is the basis for computing the government share. The WMCP FTAA, for instance, allows expenditures for "development within and outside the Contract Area relating to the Mining Operations,"[80] "consulting fees incurred both inside and outside the Philippines for work related directly to the Mining Operations,"[81] and "the establishment and administration of field offices including administrative overheads incurred within and outside the Philippines which are properly allocatable to the Mining Operations and reasonably related to the performance of the Contractor's obligations and exercise of its rights under this Agreement." [82]

It is quite well known, however, that mining companies do perform some marketing activities abroad in respect of selling their mineral products and by-products. Hence, it would not be improper to allow the deduction of reasonable consulting fees incurred abroad, as well as administrative expenses and overheads related to marketing offices also located abroad -- provided that these deductions are directly related or properly allocatable to the mining operations and reasonably related to the performance of the contractor's obligations and exercise of its rights. In any event, more facts are needed. Until we see how these provisions actually operate, mere "suspensions" will not suffice to propel this Court into taking action.

Section 7.9 of the WMCP FTAA

Invalid and Disadvantageous

Having defended the WMCP FTAA, we shall now turn to two defective provisos. Let us start with Section 7.9 of the WMCP FTAA. While Section 7.7 gives the government a 60 percent share in the net mining revenues of WMCP from the commencement of commercial production, Section 7.9 deprives the government of part or all of the said 60 percent. Under the latter provision, should WMCP's foreign shareholders -- who originally owned 100 percent of the equity -- sell 60 percent or more of its outstanding capital stock to a Filipino citizen or corporation, the State loses its right to receive its 60 percent share in net mining revenues under Section 7.7.

Section 7.9 provides:

The percentage of Net Mining Revenues payable to the Government pursuant to Clause 7.7 shall be reduced by 1percent of Net Mining Revenues for every 1percent ownership interest in the Contractor (i.e., WMCP) held by a Qualified Entity.[83]

Evidently, what Section 7.7 grants to the State is taken away in the next breath by Section 7.9 without any offsetting compensation to the State. Thus, in reality, the State has no vested right to receive any income from the FTAA for the exploitation of its mineral resources. Worse, it would seem that what is given to the State in Section 7.7 is by mere tolerance of WMCP's foreign stockholders, who can at any time cut off the government's entire 60 percent share. They can do so by simply selling 60 percent of WMCP's outstanding capital stock to a Philippine citizen or corporation. Moreover, the proceeds of such sale will of course accrue to the foreign stockholders of WMCP, not to the State.

The sale of 60 percent of WMCP's outstanding equity to a corporation that is 60 percent Filipino-owned and 40 percent foreign-owned will still trigger the operation of Section 7.9. Effectively, the State will lose its right to receive all 60 percent of the net mining revenues of WMCP; and foreign stockholders will own beneficially up to 64 percent of WMCP, consisting of the remaining 40 percent foreign equity therein, plus the 24 percent pro-rata share in the buyer-corporation.[84]

In fact, the January 23, 2001 sale by WMCP's foreign stockholder of the entire outstanding equity in WMCP to

Sagittarius Mines, Inc. -- a domestic corporation at least 60 percent Filipino owned -- may be deemed to have automatically triggered the operation of Section 7.9, without need of further action by any party, and removed the State's right to receive the 60 percent share in net mining revenues.

At bottom, Section 7.9 has the effect of depriving the State of its 60 percent share in the net mining revenues of WMCP without any offset or compensation whatsoever. It is possible that the inclusion of the offending provision was initially prompted by the desire to provide some form of incentive for the principal foreign stockholder in WMCP to eventually reduce its equity position and ultimately divest in favor of Filipino citizens and corporations. However, as finally structured, Section 7.9 has the deleterious effect of depriving government of the entire 60 percent share in WMCP's net mining revenues, without any form of compensation whatsoever. Such an outcome is completely unacceptable.

The whole point of developing the nation's natural resources is to benefit the Filipino people, future generations included. And the State as sovereign and custodian of the nation's natural wealth is mandated to protect, conserve, preserve and develop that part of the national patrimony for their benefit. Hence, the Charter lays great emphasis on "real contributions to the economic growth and general welfare of the country"[85] as essential guiding principles to be kept in mind when negotiating the terms and conditions of FTAA's.

Earlier, we held (1) that the State must be accorded the liberty and the utmost flexibility to deal, negotiate and transact with contractors and third parties as it sees fit, and upon terms that it ascertains to be most favorable or most acceptable under the circumstances, even if that should mean agreeing to less than 60 percent; (2) that it is not necessary for the State to extract a 60 percent share in every case and regardless of circumstances; and (3) that should the State be prevented from agreeing to a share less than 60 percent as it deems fit, it will be deprived of the full control over mineral exploitation that the Charter has vested in it.

That full control is obviously not an end in itself; it exists and subsists precisely because of the need to serve and protect the national interest. In this instance, national interest finds particular application in the protection of the national patrimony and the development and exploitation of the country's mineral resources for the benefit of the Filipino people and the enhancement of economic growth and the general welfare of the country. Undoubtedly, such full control can be misused and abused, as we now witness.

Section 7.9 of the WMCP FTAA effectively gives away the State's share of net mining revenues (provided for in Section 7.7) without anything in exchange. Moreover, this outcome constitutes unjust enrichment on the part of the local and foreign stockholders of WMCP. By their mere divestment of up to 60 percent equity in WMCP in favor of Filipino citizens and/or corporations, the local and foreign stockholders get a windfall. Their share in the net mining revenues of WMCP is automatically increased, without their having to pay the government anything for it. In short, the provision in question is without a doubt grossly disadvantageous to the government, detrimental to the interests of the Filipino people, and violative of public policy.

Moreover, it has been reiterated in numerous decisions[86] that the parties to a contract may establish any agreements, terms and conditions that they deem convenient; but these should not be contrary to law, morals, good customs, public order or public policy.[87] Being precisely violative of anti-graft provisions and contrary to public policy, Section 7.9 must therefore be stricken off as invalid.

Whether the government officials concerned acceded to that provision by sheer mistake or with full awareness of the ill consequences, is of no moment. It is hornbook doctrine that the principle of estoppel does not operate against the government for the act of its agents,[88] and that it is never estopped by any mistake or error on their part.[89] It is therefore possible and proper to rectify the situation at this time. Moreover, we may also say that the FTAA in question does not involve mere contractual rights; being impressed as it is with public interest, the

contractual provisions and stipulations must yield to the common good and the national interest.

Since the offending provision is very much separable^[90] from Section 7.7 and the rest of the FTAA, the deletion of Section 7.9 can be done without affecting or requiring the invalidation of the WMCP FTAA itself. Such a deletion will preserve for the government its due share of the benefits. This way, the mandates of the Constitution are complied with and the interests of the government fully protected, while the business operations of the contractor are not needlessly disrupted.

Section 7.8(e) of the WMCP FTAA

Also Invalid and Disadvantageous

Section 7.8(e) of the WMCP FTAA is likewise invalid. It provides thus:

“7.8

The Government Share shall be deemed to include all of the following sums:

“(a)

all Government taxes, fees, levies, costs, imposts, duties and royalties including excise tax, corporate income tax, customs duty, sales tax, value added tax, occupation and regulatory fees, Government controlled price stabilization schemes, any other form of Government backed schemes, any tax on dividend payments by the Contractor or its Affiliates in respect of revenues from the Mining Operations and any tax on interest on domestic and foreign loans or other financial arrangements or accommodations, including loans extended to the Contractor by its stockholders;

“(b)

any payments to local and regional government, including taxes, fees, levies, costs, imposts, duties, royalties, occupation and regulatory fees and infrastructure contributions;

“(c)

any payments to landowners, surface rights holders, occupiers, indigenous people or Claimowners;

“(d)

costs and expenses of fulfilling the Contractor's obligations to contribute to national development in accordance with Clause 10.1(i) (1) and 10.1(i) (2);

“(e)

an amount equivalent to whatever benefits that may be extended in the future by the Government to the Contractor or to financial or technical assistance agreement contractors in general;

“(f)

all of the foregoing items which have not previously been offset against the Government Share in an earlier Fiscal Year, adjusted for inflation.” (Italics supplied)

Section 7.8(e) is out of place in the FTAA. It makes no sense why, for instance, money spent by the government for the benefit of the contractor in building roads leading to the mine site should still be deductible from the State’s share in net mining revenues. Allowing this deduction results in benefiting the contractor twice over. It constitutes unjust enrichment on the part of the contractor at the expense of the government, since the latter is effectively being made to pay twice for the same item.[91] For being grossly disadvantageous and prejudicial to the government and contrary to public policy, Section 7.8(e) is undoubtedly invalid and must be declared to be without effect. Fortunately, this provision can also easily be stricken off without affecting the rest of the FTAA.

Nothing Left Over After Deductions?

In connection with Section 7.8, an objection has been raised: Specified in Section 7.8 are numerous items of deduction from the State’s 60 percent share. After taking these into account, will the State ever receive anything for its ownership of the mineral resources?

We are confident that under normal circumstances, the answer will be yes. If we examine the various items of “deduction” listed in Section 7.8 of the WMCP FTAA, we will find that they correspond closely to the components or elements of the basic government share established in DAO 99-56, as discussed in the earlier part of this Opinion.

Likewise, the balance of the government’s 60 percent share -- after netting out the items of deduction listed in Section 7.8 --corresponds closely to the additional government share provided for in DAO 99-56 which, we once again stress, has nothing at all to do with indirect taxes. The Ramos-DeVera paper[92] concisely presents the fiscal contribution of an FTAA under DAO 99-56 in this equation:

Receipts from an FTAA = basic gov’t share + add’l gov’t share

Transposed into a similar equation, the fiscal payments system from the WMCP FTAA assumes the following formulation:

Government’s 60 percent share in net mining revenues of WMCP = items listed in Sec. 7.8 of the FTAA + balance of Gov’t share, payable 4 months from the end of the fiscal year

It should become apparent that the fiscal arrangement under the WMCP FTAA is very similar to that under DAO 99-56, with the “balance of government share payable 4 months from end of fiscal year” being the equivalent of the additional government share computed in accordance with the “net-mining-revenue-based option” under DAO 99-56, as discussed above. As we have emphasized earlier, we find each of the three options for computing the additional government share -- as presented in DAO 99-56 -- to be sound and reasonable.

We therefore conclude that there is nothing inherently wrong in the fiscal regime of the WMCP FTAA, and certainly nothing to warrant the invalidation of the FTAA in its entirety.

Section 3.3 of the WMCP FTAA Constitutional

Section 3.3 of the WMCP FTAA is assailed for violating supposed constitutional restrictions on the term of FTAA’s. The provision in question reads:

“3.3

This Agreement shall be renewed by the Government for a further period of twenty-five (25) years under the same terms and conditions provided that the Contractor lodges a request for renewal with the Government not less than sixty (60) days prior to the expiry of the initial term of this Agreement and provided that the Contractor is not in breach of any of the requirements of this Agreement.”

Allegedly, the above provision runs afoul of Section 2 of Article XII of the 1987 Constitution, which states:

“Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture or production-sharing agreements with Filipino citizens or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant. “The State shall protect the nation’s marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

“The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays and lagoons.

“The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

“The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.”[93]

We hold that the term limitation of twenty-five years does not apply to FTAAAs. The reason is that the above provision is found within paragraph 1 of Section 2 of Article XII, which refers to mineral agreements -- co-production agreements, joint venture agreements and mineral production-sharing agreements -- which the government may enter into with Filipino citizens and corporations, at least 60 percent owned by Filipino citizens. The word “such” clearly refers to these three mineral agreements -- CPAs, JVAAs and MPAsAs -- not to FTAAAs.

Specifically, FTAAAs are covered by paragraphs 4 and 5 of Section 2 of Article XII of the Constitution. It will be noted that there are no term limitations provided for in the said paragraphs dealing with FTAAAs. This shows that FTAAAs are sui generis, in a class of their own. This omission was obviously a deliberate move on the part of the framers. They probably realized that FTAAAs would be different in many ways from MPAsAs, JVAAs and CPAs. The reason the framers did not fix term limitations applicable to FTAAAs is that they preferred to leave the matter to the discretion of the legislature and/or the agencies involved in implementing the laws pertaining to FTAAAs, in order to give the latter enough flexibility and elbow room to meet changing circumstances.

Note also that, as previously stated, the exploratory phases of an FTAA lasts up to eleven years. Thereafter, a few more years would be gobbled up in start-up operations. It may take fifteen years before an FTAA contractor can start earning profits. And thus, the period of 25 years may really be short for an FTAA. Consider too that in this kind of agreement, the contractor assumes all entrepreneurial risks. If no commercial quantities of minerals are

found, the contractor bears all financial losses. To compensate for this long gestation period and extra business risks, it would not be totally unreasonable to allow it to continue EDU activities for another twenty five years.

In any event, the complaint is that, in essence, Section 3.3 gives the contractor the power to compel the government to renew the WMCP FTAA for another 25 years and deprives the State of any say on whether to renew the contract.

While we agree that Section 3.3 could have been worded so as to prevent it from favoring the contractor, this provision does not violate any constitutional limits, since the said term limitation does not apply at all to FTAA's. Neither can the provision be deemed in any manner to be illegal, as no law is being violated thereby. It is certainly not illegal for the government to waive its option to refuse the renewal of a commercial contract.

Verily, the government did not have to agree to Section 3.3. It could have said "No" to the stipulation, but it did not. It appears that, in the process of negotiations, the other contracting party was able to convince the government to agree to the renewal terms. Under the circumstances, it does not seem proper for this Court to intervene and step in to undo what might have perhaps been a possible miscalculation on the part of the State. If government believes that it is or will be aggrieved by the effects of Section 3.3, the remedy is the renegotiation of the provision in order to provide the State the option to not renew the FTAA.

Financial Benefits for Foreigners

Not Forbidden by the Constitution

Before leaving this subject matter, we find it necessary for us to rid ourselves of the false belief that the Constitution somehow forbids foreign-owned corporations from deriving financial benefits from the development of our natural or mineral resources.

The Constitution has never prohibited foreign corporations from acquiring and enjoying "beneficial interest" in the development of Philippine natural resources. The State itself need not directly undertake exploration, development, and utilization activities. Alternatively, the Constitution authorizes the government to enter into joint venture agreements (JVAs), co-production agreements (CPAs) and mineral production sharing agreements (MPSAs) with contractors who are Filipino citizens or corporations that are at least 60 percent Filipino-owned. They may do the actual "dirty work" -- the mining operations.

In the case of a 60 percent Filipino-owned corporation, the 40 percent individual and/or corporate non-Filipino stakeholders obviously participate in the beneficial interest derived from the development and utilization of our natural resources. They may receive by way of dividends, up to 40 percent of the contractor's earnings from the mining project. Likewise, they may have a say in the decisions of the board of directors, since they are entitled to representation therein to the extent of their equity participation, which the Constitution permits to be up to 40 percent of the contractor's equity. Hence, the non-Filipino stakeholders may in that manner also participate in the management of the contractor's natural resource development work. All of this is permitted by our Constitution, for any natural resource, and without limitation even in regard to the magnitude of the mining project or operations (see paragraph 1 of Section 2 of Article XII).

It is clear, then, that there is nothing inherently wrong with or constitutionally objectionable about the idea of foreign individuals and entities having or enjoying "beneficial interest" in -- and participating in the management of operations relative to -- the exploration, development and utilization of our natural resources.

FTAA More Advantageous

Than Other Schemes

Like CPA, JVA and MPSA

A final point on the subject of beneficial interest. We believe the FTAA is a more advantageous proposition for the government as compared with other agreements permitted by the Constitution. In a CPA that the government enters into with one or more contractors, the government shall provide inputs to the mining operations other than the mineral resource itself.[94]

In a JVA, a JV company is organized by the government and the contractor, with both parties having equity shares (investments); and the contractor is granted the exclusive right to conduct mining operations and to extract minerals found in the area.[95] On the other hand, in an MPSA, the government grants the contractor the exclusive right to conduct mining operations within the contract area and shares in the gross output; and the contractor provides the necessary financing, technology, management and manpower.

The point being made here is that, in two of the three types of agreements under consideration, the government has to ante up some risk capital for the enterprise. In other words, government funds (public moneys) are withdrawn from other possible uses, put to work in the venture and placed at risk in case the venture fails. This notwithstanding, management and control of the operations of the enterprise are -- in all three arrangements -- in the hands of the contractor, with the government being mainly a silent partner. The three types of agreement mentioned above apply to any natural resource, without limitation and regardless of the size or magnitude of the project or operations.

In contrast to the foregoing arrangements, and pursuant to paragraph 4 of Section 2 of Article XII, the FTAA is limited to large-scale projects and only for minerals, petroleum and other mineral oils. Here, the Constitution removes the 40 percent cap on foreign ownership and allows the foreign corporation to own up to 100 percent of the equity. Filipino capital may not be sufficient on account of the size of the project, so the foreign entity may have to ante up all the risk capital.

Correlatively, the foreign stakeholder bears up to 100 percent of the risk of loss if the project fails. In respect of the particular FTAA granted to it, WMCP (then 100 percent foreign owned) was responsible, as contractor, for providing the entire equity, including all the inputs for the project. It was to bear 100 percent of the risk of loss if the project failed, but its maximum potential "beneficial interest" consisted only of 40 percent of the net beneficial interest, because the other 60 percent is the share of the government, which will never be exposed to any risk of loss whatsoever.

In consonance with the degree of risk assumed, the FTAA vested in WMCP the day-to-day management of the mining operations. Still such management is subject to the overall control and supervision of the State in terms of regular reporting, approvals of work programs and budgets, and so on.

So, one needs to consider in relative terms, the costs of inputs for, degree of risk attendant to, and benefits derived or to be derived from a CPA, a JVA or an MPSA vis-à-vis those pertaining to an FTAA. It may not be realistically asserted that the foreign grantee of an FTAA is being unduly favored or benefited as compared with a foreign stakeholder in a corporation holding a CPA, a JVA or an MPSA. Seen the other way around, the government is definitely better off with an FTAA than a CPA, a JVA or an MPSA.

Developmental Policy on the Mining Industry

During the Oral Argument and in their Final Memorandum, petitioners repeatedly urged the Court to consider whether mining as an industry and economic activity deserved to be accorded priority, preference and government support as against, say, agriculture and other activities in which Filipinos and the Philippines may have an "economic advantage." For instance, a recent US study[96] reportedly examined the economic performance of all

local US counties that were dependent on mining and 20 percent of whose labor earnings between 1970 and 2000 came from mining enterprises.

The study -- covering 100 US counties in 25 states dependent on mining -- showed that per capita income grew about 30 percent less in mining-dependent communities in the 1980s and 25 percent less for the entire period 1980 to 2000; the level of per capita income was also lower. Therefore, given the slower rate of growth, the gap between these and other local counties increased.

Petitioners invite attention to the OXFAM America Report's warning to developing nations that mining brings with it serious economic problems, including increased regional inequality, unemployment and poverty. They also cite the final report^[97] of the Extractive Industries Review project commissioned by the World Bank (the WB-EIR Report), which warns of environmental degradation, social disruption, conflict, and uneven sharing of benefits with local communities that bear the negative social and environmental impact. The Report suggests that countries need to decide on the best way to exploit their natural resources, in order to maximize the value added from the development of their resources and ensure that they are on the path to sustainable development once the resources run out.

Whatever priority or preference may be given to mining vis-à-vis other economic or non-economic activities is a question of policy that the President and Congress will have to address; it is not for this Court to decide. This Court declares what the Constitution and the laws say, interprets only when necessary, and refrains from delving into matters of policy.

Suffice it to say that the State control accorded by the Constitution over mining activities assures a proper balancing of interests. More pointedly, such control will enable the President to demand the best mining practices and the use of the best available technologies to protect the environment and to rehabilitate mined-out areas. Indeed, under the Mining Law, the government can ensure the protection of the environment during and after mining. It can likewise provide for the mechanisms to protect the rights of indigenous communities, and thereby mold a more socially-responsive, culturally-sensitive and sustainable mining industry.

Early on during the launching of the Presidential Mineral Industry Environmental Awards on February 6, 1997, then President Fidel V. Ramos captured the essence of balanced and sustainable mining in these words:

“Long term, high profit mining translates into higher revenues for government, more decent jobs for the population, more raw materials to feed the engines of downstream and allied industries, and improved chances of human resource and countryside development by creating self-reliant communities away from urban centers.

x x x x x x x x

“Against a fragile and finite environment, it is sustainability that holds the key. In sustainable mining, we take a middle ground where both production and protection goals are balanced, and where parties-in-interest come to terms.”

Neither has the present leadership been remiss in addressing the concerns of sustainable mining operations. Recently, on January 16, 2004 and April 20, 2004, President Gloria Macapagal Arroyo issued Executive Orders Nos. 270 and 270-A, respectively, “to promote responsible mineral resources exploration, development and utilization, in order to enhance economic growth, in a manner that adheres to the principles of sustainable development and with due regard for justice and equity, sensitivity to the culture of the Filipino people and respect for Philippine sovereignty.”^[98]

REFUTATION OF DISSENTS

The Court will now take up a number of other specific points raised in the dissents of Justices Carpio and Morales.

1. Justice Morales introduced us to Hugh Morgan, former president and chief executive officer of Western Mining Corporation (WMC) and former president of the Australian Mining Industry Council, who spearheaded the vociferous opposition to the filing by aboriginal peoples of native title claims against mining companies in Australia in the aftermath of the landmark Mabo decision by the Australian High Court. According to sources quoted by our esteemed colleague, Morgan was also a racist and a bigot. In the course of protesting Mabo, Morgan allegedly uttered derogatory remarks belittling the aboriginal culture and race.

An unwritten caveat of this introduction is that this Court should be careful not to permit the entry of the likes of Hugh Morgan and his hordes of alleged racist-bigots at WMC. With all due respect, such scare tactics should have no place in the discussion of this case. We are deliberating on the constitutionality of RA 7942, DAO 96-40 and the FTAA originally granted to WMCP, which had been transferred to Sagittarius Mining, a Filipino corporation. We are not discussing the apparition of white Anglo-Saxon racists/bigots massing at our gates.

2. On the proper interpretation of the phrase agreements involving either technical or financial assistance, Justice Morales points out that at times we “conveniently omitted” the use of the disjunctive either . . . or, which according to her denotes restriction; hence the phrase must be deemed to connote restriction and limitation.

But, as Justice Carpio himself pointed out during the Oral Argument, the disjunctive phrase either technical or financial assistance would, strictly speaking, literally mean that a foreign contractor may provide only one or the other, but not both. And if both technical and financial assistance were required for a project, the State would have to deal with at least two different foreign contractors -- one for financial and the other for technical assistance. And following on that, a foreign contractor, though very much qualified to provide both kinds of assistance, would nevertheless be prohibited from providing one kind as soon as it shall have agreed to provide the other.

But if the Court should follow this restrictive and literal construction, can we really find two (or more) contractors who are willing to participate in one single project -- one to provide the “financial assistance” only and the other the “technical assistance” exclusively; it would be excellent if these two or more contractors happen to be willing and are able to cooperate and work closely together on the same project (even if they are otherwise competitors). And it would be superb if no conflicts would arise between or among them in the entire course of the contract. But what are the chances things will turn out this way in the real world? To think that the framers deliberately imposed this kind of restriction is to say that they were either exceedingly optimistic, or incredibly naïve. This begs the question -- What laudable objective or purpose could possibly be served by such strict and restrictive literal interpretation?

3. Citing *Oposa v. Factoran Jr.*, Justice Morales claims that a service contract is not a contract or property right which merits protection by the due process clause of the Constitution, but merely a license or privilege which may be validly revoked, rescinded or withdrawn by executive action whenever dictated by public interest or public welfare.

Oposa cites *Tan v. Director of Forestry* and *Ysmael v. Deputy Executive Secretary* as authority. The latter cases dealt specifically with timber licenses only. Oposa allegedly reiterated that a license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right; nor is it taxation. Thus this Court held that the granting of license does not create irrevocable

rights, neither is it property or property rights.

Should Oposa be deemed applicable to the case at bar, on the argument that natural resources are also involved in this situation? We do not think so. A grantee of a timber license, permit or license agreement gets to cut the timber already growing on the surface; it need not dig up tons of earth to get at the logs. In a logging concession, the investment of the licensee is not as substantial as the investment of a large-scale mining contractor. If a timber license were revoked, the licensee packs up its gear and moves to a new area applied for, and starts over; what it leaves behind are mainly the trails leading to the logging site.

In contrast, the mining contractor will have sunk a great deal of money (tens of millions of dollars) into the ground, so to speak, for exploration activities, for development of the mine site and infrastructure, and for the actual excavation and extraction of minerals, including the extensive tunneling work to reach the ore body. The cancellation of the mining contract will utterly deprive the contractor of its investments (i.e., prevent recovery of investments), most of which cannot be pulled out.

To say that an FTAA is just like a mere timber license or permit and does not involve contract or property rights which merit protection by the due process clause of the Constitution, and may therefore be revoked or cancelled in the blink of an eye, is to adopt a well-nigh confiscatory stance; at the very least, it is downright dismissive of the property rights of businesspersons and corporate entities that have investments in the mining industry, whose investments, operations and expenditures do contribute to the general welfare of the people, the coffers of government, and the strength of the economy. Such a pronouncement will surely discourage investments (local and foreign) which are critically needed to fuel the engine of economic growth and move this country out of the rut of poverty. In sum, Oposa is not applicable.

4. Justice Morales adverts to the supposedly “clear intention” of the framers of the Constitution to reserve our natural resources exclusively for the Filipino people. She then quoted from the records of the ConCom deliberations a passage in which then Commissioner Davide explained his vote, arguing in the process that aliens ought not be allowed to participate in the enjoyment of our natural resources. One passage does not suffice to capture the tenor or substance of the entire extensive deliberations of the commissioners, or to reveal the clear intention of the framers as a group. A re-reading of the entire deliberations (quoted here earlier) is necessary if we are to understand the true intent of the framers.

5. Since 1935, the Filipino people, through their Constitution, have decided that the retardation or delay in the exploration, development or utilization of the nation’s natural resources is merely secondary to the protection and preservation of their ownership of the natural resources, so says Justice Morales, citing Aruego. If it is true that the framers of the 1987 Constitution did not care much about alleviating the retardation or delay in the development and utilization of our natural resources, why did they bother to write paragraph 4 at all? Were they merely paying lip service to large-scale exploration, development and utilization? They could have just completely ignored the subject matter and left it to be dealt with through a future constitutional amendment. But we have to harmonize every part of the Constitution and to interpret each provision in a manner that would give life and meaning to it and to the rest of the provisions. It is obvious that a literal interpretation of paragraph 4 will render it utterly inutile and inoperative.

6. According to Justice Morales, the deliberations of the Constitutional Commission do not support our contention that the framers, by specifying such agreements involving financial or technical assistance, necessarily gave implied assent to everything that these agreements implicitly entailed, or that could reasonably be deemed necessary to make them tenable and effective, including management authority in the day-to-day operations. As proof thereof, she quotes one single passage from the ConCom deliberations, consisting of an exchange among

Commissioners Tingson, Garcia and Monsod.

However, the quoted exchange does not serve to contradict our argument; it even bolsters it. Comm. Christian Monsod was quoted as saying: “xxx I think we have to make a distinction that it is not really realistic to say that we will borrow on our own terms. Maybe we can say that we inherited unjust loans, and we would like to repay these on terms that are not prejudicial to our own growth. But the general statement that we should only borrow on our own terms is a bit unrealistic.” Comm. Monsod is one who knew whereof he spoke.

7. Justice Morales also declares that the optimal time for the conversion of an FTAA into an MPSA is after completion of the exploration phase and just before undertaking the development and construction phase, on account of the fact that the requirement for a minimum investment of \$50 million is applicable only during the development, construction and utilization phase, but not during the exploration phase, when the foreign contractor need merely comply with minimum ground expenditures. Thus by converting, the foreign contractor maximizes its profits by avoiding its obligation to make the minimum investment of \$50 million.

This argument forgets that the foreign contractor is in the game precisely to make money. In order to come anywhere near profitability, the contractor must first extract and sell the mineral ore. In order to do that, it must also develop and construct the mining facilities, set up its machineries and equipment and dig the tunnels to get to the deposit. The contractor is thus compelled to expend funds in order to make profits. If it decides to cut back on investments and expenditures, it will necessarily sacrifice the pace of development and utilization; it will necessarily sacrifice the amount of profits it can make from the mining operations. In fact, at certain less-than-optimal levels of operation, the stream of revenues generated may not even be enough to cover variable expenses, let alone overhead expenses; this is a dismal situation anyone would want to avoid. In order to make money, one has to spend money. This truism applies to the mining industry as well.

8. Mortgaging the minerals to secure a foreign FTAA contractor's obligations is anomalous, according to Justice Morales since the contractor was from the beginning obliged to provide all financing needed for the mining operations. However, the mortgaging of minerals by the contractor does not necessarily signify that the contractor is unable to provide all financing required for the project, or that it does not have the financial capability to undertake large-scale operations. Mortgaging of mineral products, just like the assignment (by way of security) of manufactured goods and goods in inventory, and the assignment of receivables, is an ordinary requirement of banks, even in the case of clients with more than sufficient financial resources. And nowadays, even the richest and best managed corporations make use of bank credit facilities -- it does not necessarily signify that they do not have the financial resources or are unable to provide the financing on their own; it is just a manner of maximizing the use of their funds.

9. Does the contractor in reality acquire the surface rights “for free,” by virtue of the fact that it is entitled to reimbursement for the costs of acquisition and maintenance, adjusted for inflation? We think not. The “reimbursement” is possible only at the end of the term of the contract, when the surface rights will no longer be needed, and the land previously acquired will have to be disposed of, in which case the contractor gets reimbursement from the sales proceeds. The contractor has to pay out the acquisition price for the land. That money will belong to the seller of the land. Only if and when the land is finally sold off will the contractor get any reimbursement. In other words, the contractor will have been cash-out for the entire duration of the term of the contract -- 25 or 50 years, depending. If we calculate the cost of money at say 12 percent per annum, that is the cost or opportunity loss to the contractor, in addition to the amount of the acquisition price. 12 percent per annum for 50 years is 600 percent; this, without any compounding yet. The cost of money is therefore at least 600 percent of the original acquisition cost; it is in addition to the acquisition cost. “For free”? Not by a long shot.

10. The contractor will acquire and hold up to 5,000 hectares? We doubt it. The acquisition by the State of land for the contractor is just to enable the contractor to establish its mine site, build its facilities, establish a tailings pond, set up its machinery and equipment, and dig mine shafts and tunnels, etc. It is impossible that the surface requirement will aggregate 5,000 hectares. Much of the operations will consist of the tunneling and digging underground, which will not require possessing or using any land surface. 5,000 hectares is way too much for the needs of a mining operator. It simply will not spend its cash to acquire property that it will not need; the cash may be better employed for the actual mining operations, to yield a profit.

11. Justice Carpio claims that the phrase among other things (found in the second paragraph of Section 81 of the Mining Act) is being incorrectly treated as a delegation of legislative power to the DENR secretary to issue DAO 99-56 and prescribe the formulae therein on the State's share from mining operations. He adds that the phrase among other things was not intended as a delegation of legislative power to the DENR secretary, much less could it be deemed a valid delegation of legislative power, since there is nothing in the second paragraph of Section 81 which can be said to grant any delegated legislative power to the DENR secretary. And even if there were, such delegation would be void, for lack of any standards by which the delegated power shall be exercised.

While there is nothing in the second paragraph of Section 81 which can directly be construed as a delegation of legislative power to the DENR secretary, it does not mean that DAO 99-56 is invalid per se, or that the secretary acted without any authority or jurisdiction in issuing DAO 99-56. As we stated earlier in our Prologue, "Who or what organ of government actually exercises this power of control on behalf of the State? The Constitution is crystal clear: the President. Indeed, the Chief Executive is the official constitutionally mandated to 'enter into agreements with foreign owned corporations.' On the other hand, Congress may review the action of the President once it is notified of 'every contract entered into in accordance with this [constitutional] provision within thirty days from its execution.'" It is the President who is constitutionally mandated to enter into FTAA's with foreign corporations, and in doing so, it is within the President's prerogative to specify certain terms and conditions of the FTAA's, for example, the fiscal regime of FTAA's -- i.e., the sharing of the net mining revenues between the contractor and the State.

Being the President's alter ego with respect to the control and supervision of the mining industry, the DENR secretary, acting for the President, is necessarily clothed with the requisite authority and power to draw up guidelines delineating certain terms and conditions, and specifying therein the terms of sharing of benefits from mining, to be applicable to FTAA's in general. It is important to remember that DAO 99-56 has been in existence for almost six years, and has not been amended or revoked by the President.

The issuance of DAO 99-56 did not involve the exercise of delegated legislative power. The legislature did not delegate the power to determine the nature, extent and composition of the items that would come under the phrase among other things. The legislature's power pertains to the imposition of taxes, duties and fees. This power was not delegated to the DENR secretary. But the power to negotiate and enter into FTAA's was withheld from Congress, and reserved for the President. In determining the sharing of mining benefits, i.e., in specifying what the phrase among other things include, the President (through the secretary acting in his/her behalf) was not determining the amount or rate of taxes, duties and fees, but rather the amount of INCOME to be derived from minerals to be extracted and sold, income which belongs to the State as owner of the mineral resources. We may say that, in the second paragraph of Section 81, the legislature in a sense intruded partially into the President's sphere of authority when the former provided that

"The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a

foreign national and all such other taxes, duties and fees as provided for under existing laws.” (Italics supplied)

But it did not usurp the President’s authority since the provision merely included the enumerated items as part of the government share, without foreclosing or in any way preventing (as in fact Congress could not validly prevent) the President from determining what constitutes the State’s compensation derived from FTAA’s. In this case, the President in effect directed the inclusion or addition of “other things,” viz., INCOME for the owner of the resources, in the government’s share, while adopting the items enumerated by Congress as part of the government share also.

12. Justice Carpio’s insistence on applying the ejusdem generis rule of statutory construction to the phrase among other things is therefore useless, and must fall by the wayside. There is no point trying to construe that phrase in relation to the enumeration of taxes, duties and fees found in paragraph 2 of Section 81, precisely because “the constitutional power to prescribe the sharing of mining income between the State and mining companies,” to quote Justice Carpio pursuant to an FTAA is constitutionally lodged with the President, not with Congress. It thus makes no sense to persist in giving the phrase among other things a restricted meaning referring only to taxes, duties and fees.

13. Strangely, Justice Carpio claims that the DENR secretary can change the formulae in DAO 99-56 any time even without the approval of the President, and the secretary is the sole authority to determine the amount of consideration that the State shall receive in an FTAA, because Section 5 of the DAO states that “xxx any amendment of an FTAA other than the provision on fiscal regime shall require the negotiation with the Negotiation Panel and the recommendation of the Secretary for approval of the President xxx”. Allegedly, because of that provision, if an amendment in the FTAA involves non-fiscal matters, the amendment requires approval of the President, but if the amendment involves a change in the fiscal regime, the DENR secretary has the final authority, and approval of the President may be dispensed with; hence the secretary is more powerful than the President.

We believe there is some distortion resulting from the quoted provision being taken out of context. Section 5 of DAO 99-56 reads as follows:

“Section 5. Status of Existing FTAA’s. All FTAA’s approved prior to the effectivity of this Administrative Order shall remain valid and be recognized by the Government: Provided, That should a Contractor desire to amend its FTAA, it shall do so by filing a Letter of Intent (LOI) to the Secretary thru the Director. Provided, further, That if the Contractor desires to amend the fiscal regime of its FTAA, it may do so by seeking for the amendment of its FTAA’s whole fiscal regime by adopting the fiscal regime provided hereof: Provided, finally, That any amendment of an FTAA other than the provision on fiscal regime shall require the negotiation with the Negotiating Panel and the recommendation of the Secretary for approval of the President of the Republic of the Philippines.” (Italics supplied)

It looks like another case of misapprehension. The proviso being objected to by Justice Carpio is actually preceded by a phrase that requires a contractor desiring to amend the fiscal regime of its FTAA, to amend the same by adopting the fiscal regime prescribed in DAO 99-56 -- i.e., solely in that manner, and in no other. Obviously, since DAO 99-56 was issued by the secretary under the authority and with the presumed approval of the President, the amendment of an FTAA by merely adopting the fiscal regime prescribed in said DAO 99-56 (and nothing more) need not have the express clearance of the President anymore. It is as if the same had been pre-approved. We cannot fathom the complaint that that makes the secretary more powerful than the President, or that the former is trying to hide things from the President or Congress.

14. Based on the first sentence of Section 5 of DAO 99-56, which states “[A]ll FTAA’s approved prior to the effectivity of this Administrative Order shall remain valid and be recognized by the Government”, Justice Carpio

concludes that said Administrative Order allegedly exempts FTAA's approved prior to its effectivity -- like the WMCP FTAA -- from having to pay the State any share from their mining income, apart from taxes, duties and fees.

We disagree. What we see in black and white is the statement that the FTAA's approved before the DAO came into effect are to continue to be valid and will be recognized by the State. Nothing is said about their fiscal regimes. Certainly, there is no basis to claim that the contractors under said FTAA's were being exempted from paying the government a share in their mining incomes.

For the record, the WMCP FTAA is NOT and has never been exempt from paying the government share. The WMCP FTAA has its own fiscal regime -- Section 7.7 -- which gives the government a 60 percent share in the net mining revenues of WMCP from the commencement of commercial production.

For that very reason, we have never said that DAO 99-56 is the basis for claiming that the WMCP FTAA has a consideration. Hence, we find quite out of place Justice Carpio's statement that ironically, DAO 99-56, the very authority cited to support the claim that the WMCP FTAA has a consideration, does not apply to the WMCP FTAA. By its own express terms, DAO 99-56 does not apply to FTAA's executed before the issuance of DAO 99-56, like the WMCP FTAA. The majority's position has allegedly no leg to stand on since even DAO 99-56, assuming it is valid, cannot save the WMCP FTAA from want of consideration. Even assuming *arguendo* that DAO 99-56 does not apply to the WMCP FTAA, nevertheless, the WMCP FTAA has its own fiscal regime, found in Section 7.7 thereof. Hence, there is no such thing as "want of consideration" here.

Still more startling is this claim: The majority supposedly agrees that the provisions of the WMCP FTAA, which grant a sham consideration to the State, are void. Since the majority agrees that the WMCP FTAA has a sham consideration, the WMCP FTAA thus lacks the third element of a valid contract. The Decision should declare the WMCP FTAA void for want of consideration unless it treats the contract as an MPSA under Section 80. Indeed the only recourse of WMCP to save the validity of its contract is to convert it into an MPSA.

To clarify, we said that Sections 7.9 and 7.8(e) of the WMCP FTAA are provisions grossly disadvantageous to government and detrimental to the interests of the Filipino people, as well as violative of public policy, and must therefore be stricken off as invalid. Since the offending provisions are very much separable from Section 7.7 and the rest of the FTAA, the deletion of Sections 7.9 and 7.8(e) can be done without affecting or requiring the invalidation of the WMCP FTAA itself, and such deletion will preserve for government its due share of the 60 percent benefits. Therefore, the WMCP FTAA is NOT bereft of a valid consideration (assuming for the nonce that indeed this is the "consideration" of the FTAA).

SUMMATION

To conclude, a summary of the key points discussed above is now in order.

The Meaning of "Agreements Involving Either Technical or Financial Assistance"

Applying familiar principles of constitutional construction to the phrase agreements involving either technical or financial assistance, the framers' choice of words does not indicate the intent to exclude other modes of assistance, but rather implies that there are other things being included or possibly being made part of the agreement, apart from financial or technical assistance. The drafters avoided the use of restrictive and stringent phraseology; a *verba legis* scrutiny of Section 2 of Article XII of the Constitution discloses not even a hint of a desire to prohibit foreign involvement in the management or operation of mining activities, or to eradicate service contracts. Such moves would necessarily imply an underlying drastic shift in fundamental economic and

developmental policies of the State. That change requires a much more definite and irrefutable basis than mere omission of the words “service contract” from the new Constitution.

Furthermore, a literal and restrictive interpretation of this paragraph leads to logical inconsistencies. A constitutional provision specifically allowing foreign-owned corporations to render financial or technical assistance in respect of mining or any other commercial activity was clearly unnecessary; the provision was meant to refer to more than mere financial or technical assistance.

Also, if paragraph 4 permits only agreements for financial or technical assistance, there would be no point in requiring that they be “based on real contributions to the economic growth and general welfare of the country.” And considering that there were various long-term service contracts still in force and effect at the time the new Charter was being drafted, the absence of any transitory provisions to govern the termination and closing-out of the then existing service contracts strongly militates against the theory that the mere omission of “service contracts” signaled their prohibition by the new Constitution.

Resort to the deliberations of the Constitutional Commission is therefore unavoidable, and a careful scrutiny thereof conclusively shows that the ConCom members discussed agreements involving either technical or financial assistance in the same sense as service contracts and used the terms interchangeably. The drafters in fact knew that the agreements with foreign corporations were going to entail not mere technical or financial assistance but, rather, foreign investment in and management of an enterprise for large-scale exploration, development and utilization of minerals.

The framers spoke about service contracts as the concept was understood in the 1973 Constitution. It is obvious from their discussions that they did not intend to ban or eradicate service contracts. Instead, they were intent on crafting provisions to put in place safeguards that would eliminate or minimize the abuses prevalent during the martial law regime. In brief, they were going to permit service contracts with foreign corporations as contractors, but with safety measures to prevent abuses, as an exception to the general norm established in the first paragraph of Section 2 of Article XII, which reserves or limits to Filipino citizens and corporations at least 60 percent owned by such citizens the exploration, development and utilization of mineral or petroleum resources. This was prompted by the perceived insufficiency of Filipino capital and the felt need for foreign expertise in the EDU of mineral resources.

Despite strong opposition from some ConCom members during the final voting, the Article on the National Economy and Patrimony -- including paragraph 4 allowing service contracts with foreign corporations as an exception to the general norm in paragraph 1 of Section 2 of the same Article -- was resoundingly and overwhelmingly approved.

The drafters, many of whom were economists, academicians, lawyers, businesspersons and politicians knew that foreign entities will not enter into agreements involving assistance without requiring measures of protection to ensure the success of the venture and repayment of their investments, loans and other financial assistance, and ultimately to protect the business reputation of the foreign corporations. The drafters, by specifying such agreements involving assistance, necessarily gave implied assent to everything that these agreements entailed or that could reasonably be deemed necessary to make them tenable and effective -- including management authority with respect to the day-to-day operations of the enterprise, and measures for the protection of the interests of the foreign corporation, at least to the extent that they are consistent with Philippine sovereignty over natural resources, the constitutional requirement of State control, and beneficial ownership of natural resources remaining vested in the State.

From the foregoing, it is clear that agreements involving either technical or financial assistance referred to in

paragraph 4 are in fact service contracts, but such new service contracts are between foreign corporations acting as contractors on the one hand, and on the other hand government as principal or “owner” (of the works), whereby the foreign contractor provides the capital, technology and technical know-how, and managerial expertise in the creation and operation of the large-scale mining/extractive enterprise, and government through its agencies (DENR, MGB) actively exercises full control and supervision over the entire enterprise.

Such service contracts may be entered into only with respect to minerals, petroleum and other mineral oils. The grant of such service contracts is subject to several safeguards, among them: (1) that the service contract be crafted in accordance with a general law setting standard or uniform terms, conditions and requirements; (2) the President be the signatory for the government; and (3) the President report the executed agreement to Congress within thirty days.

Ultimate Test:

Full State Control

To repeat, the primacy of the principle of the State’s sovereign ownership of all mineral resources, and its full control and supervision over all aspects of exploration, development and utilization of natural resources must be upheld. But “full control and supervision” cannot be taken literally to mean that the State controls and supervises everything down to the minutest details and makes all required actions, as this would render impossible the legitimate exercise by the contractor of a reasonable degree of management prerogative and authority, indispensable to the proper functioning of the mining enterprise. Also, government need not micro-manage mining operations and day-to-day affairs of the enterprise in order to be considered as exercising full control and supervision.

Control, as utilized in Section 2 of Article XII, must be taken to mean a degree of control sufficient to enable the State to direct, restrain, regulate and govern the affairs of the extractive enterprises. Control by the State may be on a macro level, through the establishment of policies, guidelines, regulations, industry standards and similar measures that would enable government to regulate the conduct of affairs in various enterprises, and restrain activities deemed not desirable or beneficial, with the end in view of ensuring that these enterprises contribute to the economic development and general welfare of the country, conserve the environment, and uplift the well-being of the local affected communities. Such a degree of control would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise it has invested in, to ensure efficient and profitable operation.

Government Granted Full Control

by RA 7942 and DAO 96-40

Baseless are petitioners’ sweeping claims that RA 7942 and its Implementing Rules and Regulations make it possible for FTAA contracts to cede full control and management of mining enterprises over to fully foreign owned corporations. Equally wobbly is the assertion that the State is reduced to a passive regulator dependent on submitted plans and reports, with weak review and audit powers and little say in the decision-making of the enterprise, for which reasons “beneficial ownership” of the mineral resources is allegedly ceded to the foreign contractor.

As discussed hereinabove, the State’s full control and supervision over mining operations are ensured through the following provisions in RA 7942: Sections 8, 9, 16, 19, 24, 35[(b), (e), (f), (g), (h), (k), (l), (m) and (o)], 40, 57, 66, 69, 70, and Chapters XI and XVII; as well as the following provisions of DAO 96-40: Sections 7[(d) and (f)], 35(a-2), 53[(a-4) and (d)], 54, 56[(g), (h), (l), (m) and (n)], 56(2), 60, 66, 144, 168, 171 and 270, and also Chapters XV, XVI and XXIV.

Through the foregoing provisions, the government agencies concerned are empowered to approve or disapprove -- hence, in a position to influence, direct, and change -- the various work programs and the corresponding minimum expenditure commitments for each of the exploration, development and utilization phases of the enterprise. Once they have been approved, the contractor's compliance with its commitments therein will be monitored. Figures for mineral production and sales are regularly monitored and subjected to government review, to ensure that the products and by-products are disposed of at the best prices; copies of sales agreements have to be submitted to and registered with MGB.

The contractor is mandated to open its books of accounts and records for scrutiny, to enable the State to determine that the government share has been fully paid. The State may likewise compel compliance by the contractor with mandatory requirements on mine safety, health and environmental protection, and the use of anti-pollution technology and facilities. The contractor is also obligated to assist the development of the mining community, and pay royalties to the indigenous peoples concerned. And violation of any of the FTAA's terms and conditions, and/or non-compliance with statutes or regulations, may be penalized by cancellation of the FTAA. Such sanction is significant to a contractor who may have yet to recover the tens or hundreds of millions of dollars sunk into a mining project.

Overall, the State definitely has a pivotal say in the operation of the individual enterprises, and can set directions and objectives, detect deviations and non-compliances by the contractor, and enforce compliance and impose sanctions should the occasion arise. Hence, RA 7942 and DAO 96-40 vest in government more than a sufficient degree of control and supervision over the conduct of mining operations.

Section 3(aq) of RA 7942 was objected to as being unconstitutional for allowing a foreign contractor to apply for and hold an exploration permit. During the exploration phase, the permit grantee (and prospective contractor) is spending and investing heavily in exploration activities without yet being able to extract minerals and generate revenues. The exploration permit issued under Sections 3(aq), 20 and 23 of RA 7942, which allows exploration but not extraction, serves to protect the interests and rights of the exploration permit grantee (and would-be contractor), foreign or local. Otherwise, the exploration works already conducted, and expenditures already made, may end up only benefiting claim-jumpers. Thus, Section 3(aq) of RA 7942 is not unconstitutional.

WMCP FTAA Likewise Gives the State Full Control and Supervision

The WMCP FTAA obligates the contractor to account for the value of production and sale of minerals (Clause 1.4); requires that the contractor's work program, activities and budgets be approved by the State (Clause 2.1); gives the DENR secretary power to extend the exploration period (Clause 3.2-a); requires approval by the State for incorporation of lands into the contract area (Clause 4.3-c); requires Bureau of Forest Development approval for inclusion of forest reserves as part of the FTAA contract area (Clause 4.5); obligates the contractor to periodically relinquish parts of the contract area not needed for exploration and development (Clause 4.6); requires submission of a declaration of mining feasibility for approval by the State (Clause 4.6-b); obligates the contractor to report to the State the results of its exploration activities (Clause 4.9); requires the contractor to obtain State approval for its work programs for the succeeding two year periods, containing the proposed work activities and expenditures budget related to exploration (Clause 5.1); requires the contractor to obtain State approval for its proposed expenditures for exploration activities (Clause 5.2); requires the contractor to submit an annual report on geological, geophysical, geochemical and other information relating to its explorations within the FTAA area (Clause 5.3-a); requires the contractor to submit within six months after expiration of exploration period a final report on all its findings in the contract area (Clause 5.3-b); requires the contractor after conducting feasibility studies to submit a declaration of mining feasibility, along with a description of the area to be

developed and mined, a description of the proposed mining operations and the technology to be employed, and the proposed work program for the development phase, for approval by the DENR secretary (Clause 5.4); obligates the contractor to complete the development of the mine, including construction of the production facilities, within the period stated in the approved work program (Clause 6.1); requires the contractor to submit for approval a work program covering each period of three fiscal years (Clause 6.2); requires the contractor to submit reports to the secretary on the production, ore reserves, work accomplished and work in progress, profile of its work force and management staff, and other technical information (Clause 6.3); subjects any expansions, modifications, improvements and replacements of mining facilities to the approval of the secretary (Clause 6.4); subjects to State control the amount of funds that the contractor may borrow within the Philippines (Clause 7.2); subjects to State supervisory power any technical, financial and marketing issues (Clause 10.1-a); obligates the contractor to ensure 60 percent Filipino equity in the contractor within ten years of recovering specified expenditures unless not so required by subsequent legislation (Clause 10.1); gives the State the right to terminate the FTAA for unremedied substantial breach thereof by the contractor (Clause 13.2); requires State approval for any assignment of the FTAA by the contractor to an entity other than an affiliate (Clause 14.1).

In short, the aforementioned provisions of the WMCP FTAA, far from constituting a surrender of control and a grant of beneficial ownership of mineral resources to the contractor in question, vest the State with control and supervision over practically all aspects of the operations of the FTAA contractor, including the charging of pre-operating and operating expenses, and the disposition of mineral products.

There is likewise no relinquishment of control on account of specific provisions of the WMCP FTAA. Clause 8.2 provides a mechanism to prevent the mining operations from grinding to a complete halt as a result of possible delays of more than 60 days in the government's processing and approval of submitted work programs and budgets. Clause 8.3 seeks to provide a temporary, stop-gap solution in case a disagreement between the State and the contractor (over the proposed work program or budget submitted by the contractor) should result in a deadlock or impasse, to avoid unreasonably long delays in the performance of the works.

The State, despite Clause 8.3, still has control over the contract area, and it may, as sovereign authority, prohibit work thereon until the dispute is resolved, or it may terminate the FTAA, citing substantial breach thereof. Hence, the State clearly retains full and effective control.

Clause 8.5, which allows the contractor to make changes to approved work programs and budgets without the prior approval of the DENR secretary, subject to certain limitations with respect to the variance/s, merely provides the contractor a certain amount of flexibility to meet unexpected situations, while still guaranteeing that the approved work programs and budgets are not abandoned altogether. And if the secretary disagrees with the actions taken by the contractor in this instance, he may also resort to cancellation/termination of the FTAA as the ultimate sanction.

Clause 4.6 of the WMCP FTAA gives the contractor discretion to select parts of the contract area to be relinquished. The State is not in a position to substitute its judgment for that of the contractor, who knows exactly which portions of the contract area do not contain minerals in commercial quantities and should be relinquished. Also, since the annual occupation fees paid to government are based on the total hectarage of the contract area, net of the areas relinquished, the contractor's self-interest will assure proper and efficient relinquishment.

Clause 10.2(e) of the WMCP FTAA does not mean that the contractor can compel government to use its power of eminent domain. It contemplates a situation in which the contractor is a foreign-owned corporation, hence, not qualified to own land. The contractor identifies the surface areas needed for it to construct the infrastructure for mining operations, and the State then acquires the surface rights on behalf of the former. The provision does not

call for the exercise of the power of eminent domain (or determination of just compensation); it seeks to avoid a violation of the anti-dummy law.

Clause 10.2(l) of the WMCP FTAA giving the contractor the right to mortgage and encumber the mineral products extracted may have been a result of conditions imposed by creditor-banks to secure the loan obligations of WMCP. Banks lend also upon the security of encumbrances on goods produced, which can be easily sold and converted into cash and applied to the repayment of loans. Thus, Clause 10.2(l) is not something out of the ordinary. Neither is it objectionable, because even though the contractor is allowed to mortgage or encumber the mineral end-products themselves, the contractor is not thereby relieved of its obligation to pay the government its basic and additional shares in the net mining revenue. The contractor's ability to mortgage the minerals does not negate the State's right to receive its share of net mining revenues.

Clause 10.2(k) which gives the contractor authority "to change its equity structure at any time," means that WMCP, which was then 100 percent foreign owned, could permit Filipino equity ownership. Moreover, what is important is that the contractor, regardless of its ownership, is always in a position to render the services required under the FTAA, under the direction and control of the government.

Clauses 10.4(e) and (i) bind government to allow amendments to the FTAA if required by banks and other financial institutions as part of the conditions of new lendings. There is nothing objectionable here, since Clause 10.4(e) also provides that such financing arrangements should in no event reduce the contractor's obligations or the government's rights under the FTAA. Clause 10.4(i) provides that government shall "favourably consider" any request for amendments of this agreement necessary for the contractor to successfully obtain financing. There is no renunciation of control, as the proviso does not say that government shall automatically grant any such request. Also, it is up to the contractor to prove the need for the requested changes. The government always has the final say on whether to approve or disapprove such requests.

In fine, the FTAA provisions do not reduce or abdicate State control.

No Surrender of Financial Benefits

The second paragraph of Section 81 of RA 7942 has been denounced for allegedly limiting the State's share in FTAA's with foreign contractors to just taxes, fees and duties, and depriving the State of a share in the after-tax income of the enterprise. However, the inclusion of the phrase "among other things" in the second paragraph of Section 81 clearly and unmistakably reveals the legislative intent to have the State collect more than just the usual taxes, duties and fees.

Thus, DAO 99-56, the "Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements," spells out the financial benefits government will receive from an FTAA, as consisting of not only a basic government share, comprised of all direct taxes, fees and royalties, as well as other payments made by the contractor during the term of the FTAA, but also an additional government share, being a share in the earnings or cash flows of the mining enterprise, so as to achieve a fifty-fifty sharing of net benefits from mining between the government and the contractor.

The additional government share is computed using one of three (3) options or schemes detailed in DAO 99-56, viz., (1) the fifty-fifty sharing of cumulative present value of cash flows; (2) the excess profit-related additional government share; and (3) the additional sharing based on the cumulative net mining revenue. Whichever option or computation is used, the additional government share has nothing to do with taxes, duties, fees or charges. The portion of revenues remaining after the deduction of the basic and additional government shares is what goes to

the contractor.

The basic government share and the additional government share do not yet take into account the indirect taxes and other financial contributions of mining projects, which are real and actual benefits enjoyed by the Filipino people; if these are taken into account, total government share increases to 60 percent or higher (as much as 77 percent, and 89 percent in one instance) of the net present value of total benefits from the project.

The third or last paragraph of Section 81 of RA 7942 is slammed for deferring the payment of the government share in FTAA's until after the contractor shall have recovered its pre-operating expenses, exploration and development expenditures. Allegedly, the collection of the State's share is rendered uncertain, as there is no time limit in RA 7942 for this grace period or recovery period. But although RA 7942 did not limit the grace period, the concerned agencies (DENR and MGB) in formulating the 1995 and 1996 Implementing Rules and Regulations provided that the period of recovery, reckoned from the date of commercial operation, shall be for a period not exceeding five years, or until the date of actual recovery, whichever comes earlier.

And since RA 7942 allegedly does not require government approval for the pre-operating, exploration and development expenses of the foreign contractors, it is feared that such expenses could be bloated to wipe out mining revenues anticipated for 10 years, with the result that the State's share is zero for the first 10 years. However, the argument is based on incorrect information.

Under Section 23 of RA 7942, the applicant for exploration permit is required to submit a proposed work program for exploration, containing a yearly budget of proposed expenditures, which the State passes upon and either approves or rejects; if approved, the same will subsequently be recorded as pre-operating expenses that the contractor will have to recoup over the grace period.

Under Section 24, when an exploration permittee files with the MGB a declaration of mining project feasibility, it must submit a work program for development, with corresponding budget, for approval by the Bureau, before government may grant an FTAA or MPSA or other mineral agreements; again, government has the opportunity to approve or reject the proposed work program and budgeted expenditures for development works, which will become the pre-operating and development costs that will have to be recovered. Government is able to know ahead of time the amounts of pre-operating and other expenses to be recovered, and the approximate period of time needed therefor. The aforecited provisions have counterparts in Section 35, which deals with the terms and conditions exclusively applicable to FTAA's. In sum, the third or last paragraph of Section 81 of RA 7942 cannot be deemed defective.

Section 80 of RA 7942 allegedly limits the State's share in a mineral production-sharing agreement (MPSA) to just the excise tax on the mineral product, i.e., only 2 percent of market value of the minerals. The colatilla in Section 84 reiterates the same limitation in Section 80. However, these two provisions pertain only to MPSA's, and have no application to FTAA's. These particular provisions do not come within the issues defined by this Court. Hence, on due process grounds, no pronouncement can be made in this case in respect of the constitutionality of Sections 80 and 84.

Section 112 is disparaged for reverting FTAA's and all mineral agreements to the old "license, concession or lease" system, because it allegedly effectively reduces the government share in FTAA's to just the 2 percent excise tax which pursuant to Section 80 comprises the government share in MPSA's. However, Section 112 likewise does not come within the issues delineated by this Court, and was never touched upon by the parties in their pleadings. Moreover, Section 112 may not properly apply to FTAA's. The mining law obviously meant to treat FTAA's as a breed apart from mineral agreements. There is absolutely no basis to believe that the law intends to exact from FTAA contractors merely the same government share (i.e., the 2 percent excise tax) that it apparently demands

from contractors under the three forms of mineral agreements.

While there is ground to believe that Sections 80, 84 and 112 are indeed unconstitutional, they cannot be ruled upon here. In any event, they are separable; thus, a later finding of nullity will not affect the rest of RA 7942.

In fine, the challenged provisions of RA 7942 cannot be said to surrender financial benefits from an FTAA to the foreign contractors.

Moreover, there is no concrete basis for the view that, in FTAA's with a foreign contractor, the State must receive at least 60 percent of the after-tax income from the exploitation of its mineral resources, and that such share is the equivalent of the constitutional requirement that at least 60 percent of the capital, and hence 60 percent of the income, of mining companies should remain in Filipino hands. Even if the State is entitled to a 60 percent share from other mineral agreements (CPA, JVA and MPSA), that would not create a parallel or analogous situation for FTAA's. We are dealing with an essentially different equation. Here we have the old apples and oranges syndrome.

The Charter did not intend to fix an iron-clad rule of 60 percent share, applicable to all situations, regardless of circumstances. There is no indication of such an intention on the part of the framers. Moreover, the terms and conditions of petroleum FTAA's cannot serve as standards for mineral mining FTAA's, because the technical and operational requirements, cost structures and investment needs of off-shore petroleum exploration and drilling companies do not have the remotest resemblance to those of on-shore mining companies.

To take the position that government's share must be not less than 60 percent of after-tax income of FTAA contractors is nothing short of this Court dictating upon the government. The State resultantly ends up losing control. To avoid compromising the State's full control and supervision over the exploitation of mineral resources, there must be no attempt to impose a "minimum 60 percent" rule. It is sufficient that the State has the power and means, should it so decide, to get a 60 percent share (or greater); and it is not necessary that the State does so in every case.

Invalid Provisions of the WMCP FTAA

Section 7.9 of the WMCP FTAA clearly renders illusory the State's 60 percent share of WMCP's revenues. Under Section 7.9, should WMCP's foreign stockholders (who originally owned 100 percent of the equity) sell 60 percent or more of their equity to a Filipino citizen or corporation, the State loses its right to receive its share in net mining revenues under Section 7.7, without any offsetting compensation to the State. And what is given to the State in Section 7.7 is by mere tolerance of WMCP's foreign stockholders, who can at any time cut off the government's entire share by simply selling 60 percent of WMCP's equity to a Philippine citizen or corporation.

In fact, the sale by WMCP's foreign stockholder on January 23, 2001 of the entire outstanding equity in WMCP to Sagittarius Mines, Inc., a domestic corporation at least 60 percent Filipino owned, can be deemed to have automatically triggered the operation of Section 7.9 and removed the State's right to receive its 60 percent share. Section 7.9 of the WMCP FTAA has effectively given away the State's share without anything in exchange.

Moreover, it constitutes unjust enrichment on the part of the local and foreign stockholders in WMCP, because by the mere act of divestment, the local and foreign stockholders get a windfall, as their share in the net mining revenues of WMCP is automatically increased, without having to pay anything for it.

Being grossly disadvantageous to government and detrimental to the Filipino people, as well as violative of public policy, Section 7.9 must therefore be stricken off as invalid. The FTAA in question does not involve mere

contractual rights but, being impressed as it is with public interest, the contractual provisions and stipulations must yield to the common good and the national interest. Since the offending provision is very much separable from the rest of the FTAA, the deletion of Section 7.9 can be done without affecting or requiring the invalidation of the entire WMCP FTAA itself.

Section 7.8(e) of the WMCP FTAA likewise is invalid, since by allowing the sums spent by government for the benefit of the contractor to be deductible from the State's share in net mining revenues, it results in benefiting the contractor twice over. This constitutes unjust enrichment on the part of the contractor, at the expense of government. For being grossly disadvantageous and prejudicial to government and contrary to public policy, Section 7.8(e) must also be declared without effect. It may likewise be stricken off without affecting the rest of the FTAA.

EPILOGUE

AFTER ALL IS SAID AND DONE, it is clear that there is unanimous agreement in the Court upon the key principle that the State must exercise full control and supervision over the exploration, development and utilization of mineral resources.

The crux of the controversy is the amount of discretion to be accorded the Executive Department, particularly the President of the Republic, in respect of negotiations over the terms of FTAA's, particularly when it comes to the government share of financial benefits from FTAA's. The Court believes that it is not unconstitutional to allow a wide degree of discretion to the Chief Executive, given the nature and complexity of such agreements, the humongous amounts of capital and financing required for large-scale mining operations, the complicated technology needed, and the intricacies of international trade, coupled with the State's need to maintain flexibility in its dealings, in order to preserve and enhance our country's competitiveness in world markets.

We are all, in one way or another, sorely affected by the recently reported scandals involving corruption in high places, duplicity in the negotiation of multi-billion peso government contracts, huge payoffs to government officials, and other malfeasances; and perhaps, there is the desire to see some measures put in place to prevent further abuse. However, dictating upon the President what minimum share to get from an FTAA is not the solution. It sets a bad precedent since such a move institutionalizes the very reduction if not deprivation of the State's control. The remedy may be worse than the problem it was meant to address. In any event, provisions in such future agreements which may be suspected to be grossly disadvantageous or detrimental to government may be challenged in court, and the culprits haled before the bar of justice.

Verily, under the doctrine of separation of powers and due respect for co-equal and coordinate branches of government, this Court must restrain itself from intruding into policy matters and must allow the President and Congress maximum discretion in using the resources of our country and in securing the assistance of foreign groups to eradicate the grinding poverty of our people and answer their cry for viable employment opportunities in the country.

"The judiciary is loath to interfere with the due exercise by coequal branches of government of their official functions." [99] As aptly spelled out seven decades ago by Justice George Malcolm, "Just as the Supreme Court, as the guardian of constitutional rights, should not sanction usurpations by any other department of government, so should it as strictly confine its own sphere of influence to the powers expressly or by implication conferred on it by the Organic Act." [100] Let the development of the mining industry be the responsibility of the political branches of government. And let not this Court interfere inordinately and unnecessarily.

The Constitution of the Philippines is the supreme law of the land. It is the repository of all the aspirations and

hopes of all the people. We fully sympathize with the plight of Petitioner La Bugal B'laan and other tribal groups, and commend their efforts to uplift their communities. However, we cannot justify the invalidation of an otherwise constitutional statute along with its implementing rules, or the nullification of an otherwise legal and binding FTAA contract.

We must never forget that it is not only our less privileged brethren in tribal and cultural communities who deserve the attention of this Court; rather, all parties concerned -- including the State itself, the contractor (whether Filipino or foreign), and the vast majority of our citizens -- equally deserve the protection of the law and of this Court. To stress, the benefits to be derived by the State from mining activities must ultimately serve the great majority of our fellow citizens. They have as much right and interest in the proper and well-ordered development and utilization of the country's mineral resources as the petitioners.

Whether we consider the near term or take the longer view, we cannot overemphasize the need for an appropriate balancing of interests and needs -- the need to develop our stagnating mining industry and extract what NEDA Secretary Romulo Neri estimates is some US\$840 billion (approx. PhP47.04 trillion) worth of mineral wealth lying hidden in the ground, in order to jumpstart our floundering economy on the one hand, and on the other, the need to enhance our nationalistic aspirations, protect our indigenous communities, and prevent irreversible ecological damage.

This Court cannot but be mindful that any decision rendered in this case will ultimately impact not only the cultural communities which lodged the instant Petition, and not only the larger community of the Filipino people now struggling to survive amidst a fiscal/budgetary deficit, ever increasing prices of fuel, food, and essential commodities and services, the shrinking value of the local currency, and a government hamstrung in its delivery of basic services by a severe lack of resources, but also countless future generations of Filipinos.

For this latter group of Filipinos yet to be born, their eventual access to education, health care and basic services, their overall level of well-being, the very shape of their lives are even now being determined and affected partly by the policies and directions being adopted and implemented by government today. And in part by the this Resolution rendered by this Court today.

Verily, the mineral wealth and natural resources of this country are meant to benefit not merely a select group of people living in the areas locally affected by mining activities, but the entire Filipino nation, present and future, to whom the mineral wealth really belong. This Court has therefore weighed carefully the rights and interests of all concerned, and decided for the greater good of the greatest number. JUSTICE FOR ALL, not just for some; JUSTICE FOR THE PRESENT AND THE FUTURE, not just for the here and now.

WHEREFORE, the Court RESOLVES to GRANT the respondents' and the intervenors' Motions for Reconsideration; to REVERSE and SET ASIDE this Court's January 27, 2004 Decision; to DISMISS the Petition; and to issue this new judgment declaring CONSTITUTIONAL (1) Republic Act No. 7942 (the Philippine Mining Law), (2) its Implementing Rules and Regulations contained in DENR Administrative Order (DAO) No. 9640 -- insofar as they relate to financial and technical assistance agreements referred to in paragraph 4 of Section 2 of Article XII of the Constitution; and (3) the Financial and Technical Assistance Agreement (FTAA) dated March 30, 1995 executed by the government and Western Mining Corporation Philippines Inc. (WMCP), except Sections 7.8 and 7.9 of the subject FTAA which are hereby INVALIDATED for being contrary to public policy and for being grossly disadvantageous to the government.

SO ORDERED.

Davide Jr., C.J., Sandoval-Gutierrez, Austria-Martinez, and Garcia, JJ., concur. Corona, J., Davide, Jr., C.J., certifies that Justice Corona voted affirmatively with the majority and he was allowed to do so although he is on leave.

Chico-Nazario, J., concurs. Please see separate opinion.

Tinga, J., concurs with a separate opinion.

Puno, J., concurs in the result and vote to invalidate Sections 3.3; 7.8 and 7.9 of the WMCP FTAA.

Quisumbing, J., concurs in the result.

Ynares-Santiago, J., joins the dissenting opinion of JJ., Carpio and Carpio-Morales.

Carpio, J., see dissenting opinion.

Carpio Morales, J., please see my dissenting opinion.

Callejo, Sr., J., concurs with dissenting opinion of J. Carpio.

Azcuna, J., took no part - same reason.

[1] Spelled as “Nequito” in the caption of the Petition, but “Nequinto” in the body. Rollo, p. 12.

[2] As spelled in the body of the Petition. Id., p. 13. The caption of the Petition does not include Louel A. Peria as one of the petitioners; only the name of his father, Elpidio V. Peria, appears therein.

[3] Stated as “Kaisahan Tungo sa Kaunlaran at Repormang Pansakahan (KAISAHAN)” in the caption of the Petition, but “Philippine Kaisahan Tungo sa Kaunlaran at Repormang Pansakahan (KAISAHAN)” in the body. Id., p. 14.

[4] Erroneously designated in the Petition as “Western Mining Philippines Corporation.” Id., p. 212.

[5] This is dependent upon the discussion, *infra*, of the invalidity of Sections 7.8(e) and 7.9 of the subject FTAA, for violation of the Civil Code and the Anti-Graft Law -- these provisions being contrary to public policy and grossly disadvantageous to the government.

[6] The FTAA is for the exploration, development and commercial exploitation of mineral deposits in South Cotabato, Sultan Kudarat, Davao del Sur and North Cotabato, covering an area of 99,387 hectares.

[7] At the time of execution of the subject FTAA in 1995, WMCP was owned by WMC Resources International Pty., Ltd. (WMC) -- “a wholly owned subsidiary of Western Mining Corporation Holdings Limited, a publicly listed major Australian mining and exploration company.” See WMCP FTAA, p. 2.

On Jan. 23, 2001, WMC sold all its shares in WMCP to Sagittarius Mines, Inc. (Sagittarius), a corporation organized under Philippine laws, 60% the equity of which is owned by Filipino citizens or Filipino-owned corporations and 40% by Indophil Resources, NL, an Australian company. WMCP was then renamed “Tampakan Mineral Resources Corporation,” and now it claims that by virtue of the sale and transfer of shares, it has ceased to be connected in any way with WMC. On account of such sale and transfer of shares, the then DENR Secretary approved by Order dated Dec. 18, 2001 the transfer and registration of the subject FTAA from WMCP to Sagittarius (Tampakan). Lepanto Consolidated Mining Co., which was interested in acquiring the shares in WMCP, appealed this Order of the DENR Secretary, but the Office of the President, and subsequently, the Court of Appeals (CA), upheld said Order.

[8] Penned by the esteemed Justice Conchita Carpio Morales, the Decision was promulgated on a vote of 8-5-1. Chief Justice Davide and Justices Puno, Quisumbing, Carpio, Corona, Callejo, and Tinga concurred. Justices

Santiago, Gutierrez, and Martinez joined the Dissent of Justice Panganiban, while Justice Vitug wrote a separate Dissent. Justice Azcuna took no part.

[9] Promulgated on Dec. 31, 1972, Presidential Decree No. 87 (PD 87, otherwise known as “The Oil Exploration and Development Act of 1972” in §1 thereof) permitted the government to explore for and produce indigenous petroleum through service contracts. A service contract has been defined as a contractual arrangement for engaging in the exploitation and development of petroleum, mineral, energy, land and other natural resources, whereby a government or an agency thereof, or a private person granted a right or privilege by said government, authorizes the other party -- the service contractor -- to engage or participate in the exercise of such right or the enjoyment of the privilege, by providing financial or technical resources, undertaking the exploitation or production of a given resource, or directly managing the productive enterprise, operations of the exploration and exploitation of the resources, or the disposition or marketing of said resources. See Prof. M. Magallona, *Service Contracts in Philippine Natural Resources*, 9 *World Bulletin* 1, 4 (1993).

Under PD 87, the service contractor undertook and managed the petroleum operations subject to government oversight. The service contractor was required to be technically competent and financially capable to undertake the necessary operations, as it provided all needed services, technology and financing; performed the exploration work obligations; and assumed all related risks. It could not recover any of its expenditures, if no petroleum was produced. In the event petroleum is discovered in commercial quantity, the contractor operated the field for the government. Proceeds of sale of the petroleum produced under the contract were then applied to pay the service fee due the contractor and reimburse it for its operating expenses incurred.

[10] Sec. 9 of Art. XIV (National Economy and Patrimony) of the 1973 Constitution allowed Filipino citizens, with the approval of the Batasang Pambansa, to enter into service contracts with any person or entity for the exploration and utilization of natural resources.

“Sec. 9. The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens, or to corporations or associations at least sixty per centum of which is owned by such citizens. The Batasang Pambansa, in the national interest, may allow such citizens, corporations or associations to enter into service contracts for financial, technical, management or other forms of assistance with any person or entity for the exploration or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management or other forms of assistance are hereby recognized as such.”

The intention behind the provision, according to a delegate, was to promote proper development of the natural resources, given the lack of Filipino capital and technical skills needed therefor. The original proposal was to authorize government to enter into such service contracts with foreign entities, but as finally approved, the provision permitted the Batasang Pambansa to authorize a citizen or private entity to be party to such contract. Following the ratification of the 1973 Charter, PD Nos. 151, 463, 704, 705, 1442 were promulgated, authorizing service contracts for exploration, development, exploitation or utilization of lands of the public domain; exploration, development, etc. of a lessee’s mining claims and the processing and marketing of the products thereof; production, storage, marketing and processing of fish and fishery/aquatic products; exploration, development, and utilization of forest resources; and exploration, development, and exploitation of geothermal resources, respectively.

[11] Renamed Tampakan Mineral Resources Corporation.

[12] That is, the Court of Appeals’ resolution of the petition for review -- docketed as CA-GR No. 74161 and lodged by Lepanto Consolidated Mining -- of the decision of the Office of the President which upheld the order of

the DENR Secretary approving the transfer and registration of the FTAA to Sagittarius Mines, Inc.

[13] At p. 68.

[14] 433 Phil. 506, July 9, 2002; 403 SCRA 1, May 6, 2003; and 415 SCRA 403, November 11, 2003.

[15] 300 Phil. 906, March 12, 1998.

[16] Chavez v. Public Estates Authority, 403 SCRA, 1, 28-29, supra, per Carpio, J.

[17] The pendency of a motion for reconsideration shall stay the final resolution sought to be reconsidered. §4 of Rule 52, and §4 of Rule 56B of the Rules of Court.

[18] See Enrile v. Senate Electoral Tribunal, GR No. 132986, May 19, 2004.

[19] Per the “List of Financial/Technical Assistance Agreement (FTAA applications)” as of June 30, 2002 prepared by the Mines and Geosciences Bureau’s (MGB) Mining Tenements Management Division, cited in petitioners’ Final Memorandum.

[20] Instead of allowing Sec. Gen. Neri to speak during the Oral Argument, the Court in its Resolution of June 29, 2004 required him to submit his Position Paper through the Office of the Solicitor General. Said paper was made part of the Memorandum of the public respondents.

[21] 27 SCRA 853, April 18, 1969.

[22] Gonzales v. COMELEC, 137 Phil. 471, 489, April 18, 1969, per Fernando, J. (later C.J.), citing People v. Vera, 65 Phil. 56, 94, November 16, 1937, per Laurel, J.

[23] 433 Phil. 62, 68, July 2, 2002, citing Alunan III v. Mirasol, 342 Phil. 467, 477, July 31, 1997 and Viola v. Alunan III, 343 Phil. 184, 191, August 15, 1997.

[24] Southern Pacific Terminal Co. v. ICC, 219 US 498, 31 S.Ct. 279, 283, February 20, 1911, per McKenna, J.

[25] 134 SCRA 438, 463-464, February 18, 1985, per Gutierrez Jr., J.

[26] §1 of Rule 63 of the Rules of Court:

”Section 1. Who may file petition. – Any person interested under a deed, will, contract or other written instrument, whose rights are affected by a statute, executive order or regulation, ordinance, or any other governmental regulation may, before breach or violation thereof, bring an action in the appropriate Regional Trial Court to determine any question of construction or validity arising, and for a declaration of his rights or duties, thereunder.”

[27] §2 of Rule 65 of the Rules of Court:

”Section 2. Petition for prohibition. – When the proceedings of any tribunal, corporation, board, officer or person, whether exercising judicial, quasi-judicial or ministerial functions, are without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent to desist from further proceedings in the action or matter specified therein, or otherwise granting such incidental reliefs as law and justice may require.”

[28] Pimentel Jr. v. Aguirre, 391 Phil. 84, 107, July 19, 2000, per Panganiban, J.

[29] 338 Phil. 546, May 2, 1997.

[30] Tañada v. Angara, pp. 47-49, per Panganiban, J. Italics supplied.

[31] Italics supplied.

[32] Ang Bagong Bayani v. COMELEC, 412 Phil. 308, 338-339, June 26, 2001, per Panganiban, J., citing JM Tuason & Co., Inc. v. LTA, 31 SCRA 413, 422-423, February 18, 1970, as cited in Agpalo, Statutory Construction (1990), pp. 311 and 313.

[33] GR Nos. 160261, 160262, 160263, 160277, 160292, 160295, 160310, 160318, 160342, 160343, 160360, 160365, 160370, 160376, 160392, 160397, 160403, and 160405, November 10, 2003, per Carpio Morales, J.

[34] Francisco v. The House of Representatives, 415 SCRA 44, 126-127, November 10, 2003, per Carpio Morales, J. Citations omitted.

[35] During the Oral Argument, petitioner's counsel, Atty. Marvic Leonen conceded that the foreign contractor may exercise limited management prerogatives to the extent of the financial or technical assistance given. TSN, pp. 181-186. How such "limited management" can be operationalized was not explained.

[36] In the January 27, 2004 Decision, this Court held that the fourth paragraph of Section 2 of Art. XII limits foreign involvement in the local mining industry to agreements strictly for financial and/or technical assistance only, and precludes agreements which grant to foreign corporations the management of local mining operations, since the latter agreements are purportedly in the nature of service contracts, as this concept was understood under the 1973 Constitution. Such contracts were supposedly deconstitutionalized and proscribed by the omission of the phrase "service contracts" from the 1987 Constitution. Since the WMCP FTAA contains provisions that permit the contractor's management of the concern, the Decision struck down the FTAA for being a prohibited service contract. Provisions of RA 7942 which granted managerial authority to the foreign contractor were also declared unconstitutional.

[37] Intervenor's Memorandum, pp. 7, 11 and 12.

[38] www.dictionary.com provides the following meanings for "involving":

1. To contain as a part; include.
2. To have as a necessary feature or consequence; entail: was told that the job would involve travel.
3. To engage as a participant; embroil: involved the bystanders in his dispute with the police.
4. a. To connect closely and often incriminatingly; implicate: evidence that involved the governor in the scandal.
b. To influence or affect: The matter is serious because it involves your reputation.
5. To occupy or engage the interest of: a story that completely involved me for the rest of the evening.
6. To make complex or intricate; complicate.
7. To wrap; envelop: a castle that was involved in mist.
8. Archaic. To wind or coil about.

[39] It reads as follows: "Section 20. The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decision on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect

of increasing the foreign debt, and containing other matters as may be provided by law.”

[40] According to estimates by the MGB, the success-to-failure ratio of large-scale mining or hydrocarbon projects is about 1:1,000. It goes without saying that such a miniscule success ratio hardly encourages the investment of tremendous amounts of risk capital and modern technology required for the discovery, extraction and treatment of mineral ores, and oil and gas deposits.

[41] The Constitutional Commission (ConCom) began its work in 1986, three short years after the assassination in August 21, 1983 of former Senator Benigno “Ninoy” Aquino, Jr. During the early part of this three-year period, the country underwent a wracking economic crisis characterized by scarcity of funds, capital flight, stringent import controls, grave lack of foreign exchange needed to fund critical importations of raw materials, panic-buying, hoarding of commodities, and grave lack of foreign exchange needed to fund critical importations of raw materials. Many businesses were on the verge of failure and collapse, and many in fact did. The members of the ConCom were unlikely to forget the critical condition of the Philippine economy and the penury of its government.

[42] The management of every business has two primary objectives. The first is to earn profit. The second is to stay solvent, that is, to have on hand sufficient cash to pay debts as they fall due. Other objectives may be targeted, but a business cannot hope to accomplish them, unless it meets these two basic tests of survival -- operating profitably and staying solvent. Meigs and Meigs, *Accounting: The Basis for Business Decisions* (5th ed., 1982), p. 11.

[43] Art. XVIII, “Transitory Provisions,” of the 1987 Constitution.

[44] III Record of the Constitutional Commission, p. 348. Italics supplied.

[45] *Id.*, pp. 349-352. Italics supplied.

[46] *Id.*, p. 354. Italics supplied.

[47] *Id.*, pp. 355-356. Italics supplied.

[48] *Id.*, p. 361. Italics supplied.

[49] V Records of the Constitutional Commission, p. 845.

[50] *Id.*, p. 841.

[51] *Id.*, p. 844.

[52] *Civil Liberties Union v. Executive Secretary*, 194 SCRA 317, 337-338, February 22, 1991, per Fernan, CJ.

[53] The transitive verb ‘control’ has the following meanings -- to exercise restraining or directing influence over; to regulate; to have power over; to rule; to govern. The noun ‘control’ refers to an act or instance of controlling; the power or authority to guide or manage; and the regulation of economic activity especially by government directive (as in price controls). From Merriam-Webster Online, Online Dictionary, www.m-w.com.

[54] On p. 2 of the Final Memorandum for Petitioners.

[55] Sec. 3(aq) of RA 7942 reads as follows: “aq. Qualified person means any citizen of the Philippines with capacity to contract, or a corporation, partnership, association, or cooperative organized or authorized for the purpose of engaging in mining, with technical and financial capability to undertake mineral resources development and duly registered in accordance with law at least sixty per centum (60 percent) of the capital of which is owned by citizens of the Philippines: Provided, That a legally organized foreign-owned corporation shall

be deemed a qualified person for purposes of granting an exploration permit, financial or technical assistance agreement or mineral processing permit.” Italics supplied.

[56] Per Clause 4.6 of the WMCP FTAA, the contractor is required to relinquish each year during the exploration period at least ten percent (10%) of the original contract area, by identifying and dropping from the FTAA coverage those areas which do not have mineral potentials, in order that by the time actual mining operations commence, the FTAA contract area shall have been reduced to only 5,000 hectares.

[57] Memorandum (in support of WMCP’s Motion and Supplemental Motion for Reconsideration), p. 61.

[58] *Id.*, pp. 63-64.

[59] Accounts receivable may be converted to cash in one of three ways: (1) assignment of receivables, which is a borrowing arrangement with receivables pledged as security on the loan; (2) factoring receivables, which is a sale of receivables without recourse for cash to a third party, usually a bank or other financial institution; and (3) the transfer of receivables with recourse, which is a hybrid of the other two forms of receivable financing. Smith and Skousen, *Intermediate Accounting*, (1992, 11th ed.), pp. 317-321.

Banks usually prefer lending against the security of accounts receivable backed up by postdated checks. They refer to these facilities as “bills discounting lines.”

[60] Decision, p. 83; *Italic types supplied.*

[61] “Beneficial interest has been defined as the profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.” *Christiansen v. Department of Social Security*, 131 P. 2d 189, 191, 15 Wash. 2d 465, 467, November 25, 1942, per Driver, J.

Beneficial use, ownership or interest in property means “such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another x x x.” *Montana Catholic Missions v. Missoula County*, 26 S Ct. 197, 200, 200 U.S. 118, 127-128, January 2, 1906, per Peckham, J.

[62] See p. 1138 thereof.

[63] Ramos and De Vera, “The Fiscal Regime of Financial or Technical Assistance Agreements”, p. 2. A photocopy of their paper is attached as Annex 2 to the Motion for Reconsideration of public respondents.

[64] These incentives consist principally of the waiver of national taxes during the cost recovery period of the FTAA. During such period, the contractor pays only part of the basic government’s share in taxes consisting of local government taxes and fees. These are the local business tax, real property tax, community tax, occupation fees, regulatory fees, all other local taxes and fees in force, and royalty payments to indigenous cultural communities, if any.

These national taxes, however, are not to be paid by the contractor: (i) excise tax on minerals; (ii) contractor’s income tax; (iii) customs duties and fees on imported capital equipment; (iv) value added tax on purchases of imported equipment, goods and services; (v) withholding tax on interest payments on foreign loans; (vi) withholding tax on dividends to foreign stockholders; and (vii) royalties due the government on mineral reservations.

Other incentives to the contractor include those under the Omnibus Investment Code of 1997; those for the use of pollution control devices and facilities; income tax carry-forward of losses (five-year net loss carry forward); and income tax accelerated depreciation.

[65] See §3(g), DAO 99-56. According to the paper by Messrs. Ramos and De Vera, *supra*, who are, respectively,

the director of the MGB and chief of the Mineral Economics, Information and Publication Division of the MGB, majority of the payments listed under Sec. 3(g) are relatively small in value. The most significant payments in terms of amount are the excise tax, royalties to mineral reservations and indigenous cultural communities, income tax and real property tax.

[66] Per Messrs. Ramos and De Vera, *supra*, “(t)he term of a successful FTAA may be divided into a pre-operating period, a cost recovery period and a post recovery period. The pre-operating period consists of the exploration, pre-feasibility, feasibility, development and construction phases. The aggregate of this period is a maximum of eleven (11) years. The cost recovery period, on the other hand, consists of the initial years of commercial operation where the contractor is allowed to recover its pre-operating expenses. The end of this period is when the aggregate of the net cash flow from the mining operation becomes equal to the total pre-operating expenses or a maximum of five (5) years from commencement of commercial production, whichever comes first. The post recovery period is the remaining term of the FTAA immediately following the cost recovery period. The additional government share from an FTAA is collected after the cost recovery period.”

[67] Ramos and De Vera, *supra*, pp. 3-4.

[68] The discussion on pp. 4-7 of the Ramos-DeVera report, focusing on the modes of computation of the additional government share as spelled out in DAO 99-56, is significant:

The phrase “among other things” demands that Government is entitled to additional share aside from the normal taxes and fees paid during operation. Simple as it was formulated, the phrase is another challenging task to operationalize. In 1997, the Philippine government conducted several consultative meetings with various investor groups, national government agencies concerned with taxation and incentives and other stakeholders of the mining industry to formulate the possible modes of determining the additional government share for FTAA. The negotiation took into consideration the following:

- Capital investment in the project;
- Risks involved;
- Contribution of the project to the economy;
- Contribution of the project to community and local government;
- Technical complexity of the project; and
- Other factors that will provide for a fair and equitable sharing between the government and the contractor.

During these consultations, some investor groups have repeatedly expressed their objections to the imposition of an additional government share. However, since Government is firmly committed to adhere to its interpretation of Section 81 of the mining law on government share in an FTAA, it decided to push through with the collection of this additional government share by formally making part of the mining regulation through the issuance by the Department of Environment and Natural Resources of Administrative Order No. 99-56 providing for the guidelines in establishing the fiscal regime of Financial or Technical Assistance Agreements.

There were three schemes for computing the additional government share presented in the administrative order.

5.1 Net Mining Revenue-Based Option

Net mining revenue means the gross output from mining operations during a calendar year less deductible expenses. These deductible expenses consist of expenses incurred by the Contractor directly, reasonably and necessarily related to mining operations in the contract area during a calendar year, namely:

- Mining, milling, transport and handling expenses together with smelting and refining costs other than smelting and refining costs paid to third parties;
- General and administrative expenses actually incurred by the Contractor in the Philippines;
- Consulting fees incurred for work related to the project; provided that those expenses incurred outside of the Philippines are justifiable and allowable subject to the approval of the Director of Mines and Geosciences Bureau;
- Environmental expenses of the Contractor including such expenses necessary to fully comply with its environmental obligations;
- Expenses for the development of host and neighboring communities and for the development of geoscience and mining technology together with training costs and expenses;
- Royalty payments to claim owners or surface land owners relating to the Contract Area during the Operating Phase;
- Continuing exploration and mine development expenses within the Contract Area after the pre-operating period; and
- Interest expenses charged on loans or such other financing-related expenses incurred by the Contractor subject to limitations in debt/equity ratio as given in the contract and which shall not be more than the prevailing international rates charged for similar types of transactions at the time the financing was arranged, and where such loans are necessary for the operations; and
- Government taxes, duties and fees.

The additional government share from this option for any year i is the difference between 50% of the cumulative annual net mining revenues CNi and the cumulative total government share CGi (basic and additional). The intention is to distribute the cumulative net mining revenue equally between the Government and the contractor. It can be expressed through the following formula:

If $50\% \text{ of } CNi < CGi$

Additional Government Share = 0

Else, if $50\% \text{ of } CNi > CGi$

Additional Gov't Share = $(50\% \times CNi) - CGi$

5.2 Cash Flow-Based Option

Project cash flow before financing and tax (CFi) is calculated as follows:

$$CFi = GO - DE + I - PE - OC$$

In this formula, GO is the gross output; DE are the deductible expenses; I is the interest expense; PE is unrecovered pre-operating expense; and OC is on-going capital expenditures. This option provides that Government gets an additional share from the project cash flow if the cumulative present value of the previous total government share collected (basic and additional) is less than 50% of the cumulative present value of the project cash flows. The additional government share AGS is therefore the difference between 50% and the percentage of the cumulative present value of total government shares CGA over the cumulative present value of the project cash flows CP . The cumulative present value of project cash flow for any year i is given by the following formula:

$$CPI = CPI-1 \times (1.10) + CF_i$$

The factor 1.10 is a future value factor based on the cost of borrowed money with allowance for inflation of the US dollar. The cumulative present value of the total government share before additional government share CGB for year i is:

$$CGB_i = CGA_{i-1} \times (1 + \text{Cost of Capital}) + BGS_i$$

where CGA_i is the cumulative present value of total government share inclusive of the additional government share during the year is $CGA_i = CGB_i + AGS_i$.

If $CGB_i > 50\%$ of CPI :

Additional Government Share = 0

Else, if $CGB_i < 50\%$ of CPI :

Additional Government Share = $(50\% \times CPI) - CGB_i$

5.3 Profit-Based Option

This third option provides that Government shall receive an additional share of twenty-five percent (25%) of the additional or excess profits during a taxable year when the two-year average ratio of the net income after tax (NIAT) to gross output (GO) is 0.40 or better. The trigger level of 0.40 ratio is approximately equivalent to a 20% return on investment when computed based on the life of the project. Investors have indicated that their minimum return on investment before they would invest on a mining project in the Philippine is 15%. It was agreed upon that a return on investment below 20% but not lower than 15% is normal profit. If the project reaches 20% or better, there is then an additional or excess profits. The computation of the 0.40 trigger shall be based on a 2-year moving average which is the average of the previous year's ratio and the current year's ratio. The additional or excess profit is computed using the following formula:

$$\text{Additional Profits} = [NIAT - (0.40 \times GO)] / (1 - ITR)$$

In the above formula, ITR refers to the prevailing income tax rate applied by the Bureau of Internal Revenue in computing the income tax of the contractor during a taxable year.

If the two-year average ratio is less than 0.40:

Additional Government Share = 0

Else, if the two-year average ratio is 0.40 or better:

Additional Government Share = $25\% \times \text{Excess Profits}$

The government shares 25% of any marginal profit derived by the contractor at 20% or higher return on investment.

In all of these three options, the basis of computation are all in US dollars based on prevailing foreign exchange rate at the time the expenses were incurred. Alternatives or options aside from these three schemes are studied by Government for possible improvement of the current fiscal system. The basic guideline, however, is that the total government share should not be less than fifty percent of the sharing.

6. Collection of the Additional Government Share

The term of a successful FTAA may be divided into a pre-operating period, a cost recovery period and a post

recovery period. The pre-operating period consists of the exploration, pre-feasibility, feasibility, development and construction phases. The aggregate of this period is a maximum of eleven (11) years. The cost recovery period, on the other hand, consists of the initial years of commercial operation where the contractor is allowed to recover its pre-operating expenses. The end of this period is when the aggregate of the net cash flow from the mining operation becomes equal to the total pre-operating expenses or a maximum of five (5) years from commencement of commercial production, whichever comes first. The post recovery period is the remaining term of the FTAA immediately following the cost recovery period. The additional government share from an FTAA is collected after the cost recovery period. (*Italics supplied*)

[69] The cash flows of a business concern tend to be more accurate and realistic indicia of the financial capacity of the enterprise, rather than net income or taxable income, which are arrived at after netting out non-cash items like depreciation, doubtful accounts expense for probable losses, and write-offs of bad debts.

Cash flows provide relevant information about the cash effects of an entity's operations, and its investing and financing transactions. Smith and Skousen, *supra*, p. 184.

[70] Some of these indirect taxes are: fuel taxes; withholding tax on payrolls, on royalty payments to claim owners and surface owners and on royalty payments for technology transfer; value added tax on local equipment, supplies and services.

[71] Other contributions of mining projects include: infrastructure (hospitals, roads, schools, public markets, churches, and the like) and social development projects; payroll and fringe benefits (direct and indirect employment); expenditures by the contractor for development of host and neighboring communities; expenditures for the development of geosciences/mining technology; expenditures for social infrastructures; and the resulting multiplier effects of mining operations.

[72] The third paragraph of §81, RA 7942 states: "The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive."

[73] §§80 and 84 of RA 7942 are reproduced below:

Sec. 80. Government Share in Mineral Production Sharing Agreement. – The total government share in a mineral production sharing agreement shall be the excise tax on mineral products as provided in Republic Act No. 7729, amending Section 151(a) of the National Internal Revenue Code, as amended.

Sec. 84. Excise Tax on Mineral Products. – The contractor shall be liable to pay the excise tax on mineral products as provided for under Section 151 of the National Internal Revenue Code: Provided, however, That with respect to a mineral production sharing agreement, the excise tax on mineral products shall be the government share under said agreement. (*Italics supplied*)

[74] §112 of RA 7942 is reproduced below:

Sec. 112. Non-impairment of Existing Mining/Quarrying Rights. – All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production-sharing agreements granted under Exec. Order No. 279, at the date of effectivity of this Act, shall remain valid, shall not be impaired, and shall be recognized by the Government: Provided, That the provisions of Chapter XIV on government share in mineral production sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the Secretary, in writing, not to avail of such provisions: Provided, further, That no renewal of mining lease contracts shall be made after the expiration of

its term: Provided, finally, That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations. (Italics supplied)

[75] Even during the cost recovery period, the contractor will still have to pay a portion of the basic government share consisting of local government taxes and fees, such as local business taxes, real property taxes, community taxes, occupation fees, regulatory fees, and all other local taxes and fees, plus royalty payments to indigenous cultural communities, if any.

[76] Ramos and DeVera, *supra*, p. 7.

[77] *Ibid.*, p. 11. See also §3e of DAO 99-56.

[78] Justice Carpio argues thus: The WMCP FTAA grants the State 60 percent of net profit; CMP likewise agrees to 60 percent; the Malampaya-Shell FTAA provides for 60 percent also; so the Court should decree a minimum of 60 percent. Our answer: no law authorizes this Court to issue such a decree. It is up to the State to negotiate the most advantageous percentage. This Court cannot be stampeded into the realm of legislation.

[79] Clause 1.2 thereof states: “All financing, technology, management and personnel necessary for the Mining Operations shall be provided by the Contractor in accordance with the provisions of this Agreement. If no Minerals in commercial quantity are developed and produced, the Contractor acknowledges that it will not be entitled to reimbursement of its expenses incurred in conducting the Mining Operations.”

[80] WMCP FTAA Clause 2.1 (iv), p. 6.

[81] *Id.*, Clause 2.1 (v), p. 6.

[82] *Id.*, Clause 2.1 (vii), p. 6.

[83] “Qualified Entity” is defined as “an entity that at the relevant time is qualified to enter into a mineral production sharing agreement with the Government under the laws restricting foreign ownership and equity in natural resource projects.” §2 -- Definitions, WMCP FTAA, p. 10. (Italics supplied)

Pursuant to §26a in relation to §§3g and 3aq of RA 7942, a contractor in an MPSA should be a citizen of the Philippines or a corporation at least 60 percent of the capital of which is owned by citizens of the Philippines.

[84] Since we assume that the buyer-corporation, which buys up 60% equity in WMCP, is 60% Filipino-owned and 40% foreign-owned, therefore, the foreign stockholders in such buyer-corporation hold 24% beneficial interest in WMCP.

[85] Fourth paragraph of Sec. 2, Art. XII of the 1987 Constitution.

[86] See, for instance, *Maestrado v. CA*, 327 SCRA 678, 692, March 9, 2000 and *Philippine Telegraph and Telephone Co. v. NLRC*, 338 Phil. 1093, 1111, May 23, 1997.

[87] Art. 1306 of the Civil Code provides: “The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.”.

[88] *Republic v. CA*, 354 SCRA 148, March 9, 2001, per Ynares-Santiago, J.

[89] *Philippine Basketball Association v. CA*, 337 SCRA 358, 369, August 8, 2000. Likewise, §11 of Book I of Chapter 3 of Exec. Order No. 292, otherwise known as “The Administrative Code of 1987,” states: “Sec. 11. The State’s Responsibility for Acts of Agents. – (1) The State shall be legally bound and responsible only through the

acts performed in accordance with the Constitution and the laws by its duly authorized representatives. (2) The State shall not be bound by the mistakes or errors of its officers or agents in the exercise of their functions.”

[90] Art. 1420 of the Civil Code provides: “In case of a divisible contract, if the illegal terms can be separated from the legal ones, the latter may be enforced.”

[91] *Sarmiento v. CA*, 353 Phil. 834, 853, July 2, 1998.

[92] *Ramos-DeVera*, supra, p. 2.

[93] Italics types supplied.

[94] §3 [h] in relation to §26 [b] of RA 7942.

[95] §26 [c] of RA 7942.

[96] OXFAM America Research Report, September 2002.

[97] Dated December 2003.

[98] §1 of EO 270.

[99] *Decena v. Malayaon*, AM No. RTJ-02-1669, April 14, 2004, per Tinga, J.

[100] *Manila Electric Company v. Pasay Transportation*, 57 Phil. 600, 605, November 25, 1932, per Malcolm, J.

SEPARATE OPINION

TINGA, J.:

The Constitution was crafted by men and women of divergent backgrounds and varying ideologies. Understandably, the resultant document is accommodative of these distinct, at times competing philosophies. Untidy as any *mélange* would seem, our fundamental law nevertheless hearkens to the core democratic ethos over and above the obvious inconveniences it spawns.

However, when the task of judicial construction of the Constitution comes to fore, clarity is demanded from this Court. In turn, there is a need to balance and reconcile the diverse views that animate the provisions of the Constitution, so as to effectuate its true worth as an instrument of national unity and progress.

The variances and consequent challenges are vividly reflected in Article XII of the Constitution on National Patrimony, in a manner akin to Article II on Declaration of Principles and State Policies. Some of the provisions impress as protectionist, yet there is also an undisguised accommodation of liberal economic policies. Section 2, Article XII,[1] the provision key to this case, is one such Janus-faced creature. It seems to close the door on foreign handling of our natural resources, but at the same time it leaves open a window for alien participation in some aspects. The central question before us is how wide is the entry of opportunity created by the provision.

My vote on the motions for reconsideration is hinged on a renewed exegesis of Section 2[2] of Article XII in conjunction with the proper understanding of the nature of the power vested on the President under Section 2. It has to be appreciated in relation to the inherent functions of the executive branch of government.

The Contract-Making Power of the President

While all government authority emanates from the people, the breadth and depth of such authority are not brought to bear by direct popular action, but through representative government in accord with the principles of

republicanism.[3] By investiture of the Constitution, the function of executive power is parceled solely to the duly elected President.[4] The Constitution contains several express manifestations of executive power, such as the provision on control over all executive departments, bureaus and offices,[5] as well as the so-called “Commander-in-Chief” clause.[6]

Yet it has likewise been recognized in this jurisdiction that “executive power” is not limited to such powers as are expressly granted by the Constitution. *Marcos v. Manglapus*[7] concedes that the President has powers other than those expressly stated under the Constitution,[8] and thus implies that these powers may be exercised without being derivative from constitutional authority.[9] The precedential value of *Marcos v. Manglapus* may be controvertible,[10] but the cogency of its analysis of the scope of executive power is indisputable. Neither is the concept of plenary executive power novel, as discussed by Justice Irene Cortes in her ponencia:

It has been advanced that whatever power inherent in the government that is neither legislative nor judicial has to be executive. Thus, in the landmark decision of *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), on the issue of who between the Governor-General of the Philippines and the Legislature may vote the shares of stock held by the Government to elect directors in the National Coal Company and the Philippine National Bank, the U.S. Supreme Court, in upholding the power of the Governor-General to do so, said:

. . . Here the members of the legislature who constitute a majority of the "board" and "committee" respectively, are not charged with the performance of any legislative functions or with the doing of anything which is in aid of performance of any such functions by the legislature. Putting aside for the moment the question whether the duties devolved upon these members are vested by the Organic Act in the Governor-General, it is clear that they are not legislative in character, and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one among which the powers of government are divided . . . [At 202-203; italics supplied.]

We are not unmindful of Justice Holmes' strong dissent. But in his enduring words of dissent we find reinforcement for the view that it would indeed be a folly to construe the powers of a branch of government to embrace only what are specifically mentioned in the Constitution:

The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. . . .

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It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires. [At 210-211.][11]

Such general power has not been diminished notwithstanding the avowed intent of some of the framers of the 1987 Constitution to limit the powers of the President as a reaction to abuses under President Marcos, for as the Court noted, “the result was a limitation of the specific powers of the President, particularly those relating to the commander-in-chief clause, but not a diminution of the general grant of executive power.”[12] The critical perspective of this case should spring from a recognition of this elemental fact.

Undeniably, the particular power now in question is expressly provided for by Section 2, Article XII of the Constitution. Still, it originates from the concept of executive power that is not explicitly provided for by the Constitution. As a necessary incident of the functions of the executive office, it can be concluded that the President has the authority to enter into contracts in behalf of the State in matters which are not denied him or her or not otherwise assigned to the other great branches of government, even if such general power is not

categorically recognized in the Constitution. Among these traditional functions of the executive branch is the power to determine economic policy.

As once noted by Justice Feliciano, the Republic of the Philippines is itself a body corporate and juridical person vested with the full panoply of powers and attributes which are compendiously described as “legal personality.”[13] As “Chief of State” the President is also regarded as the head of this body corporate,[14] and thus is capacitated to represent the State when engaging with other entities. Such executive function, in theory, does not require a constitutional provision, or even a Constitution, in order to be operative. It is a power possessed by every duly constituted presidency starting with Aguinaldo’s. This faculty is complementary to the traditional regard of a Head of State as emblematic of the State he/she represents.

The power to contract in behalf of the State is clearly an executive function, as opposed to legislative or judicial. This is easily discernible through the process of exclusion. The other branches of government — the legislative and the judiciary — are not similarly capacitated since their core functions pertain to legislating and adjudicating respectively.

However, I am not making any pretense that such executive power to contract is unimpeachable or limitless. The Constitution frowns on unchecked executive power, mandating in broad strokes, the power of judicial review[15] and legislative oversight.[16] The Constitution itself may expressly restrict the exercise of any sort of executive function. Section 2 undeniably constrains the exercise of the executive power to contract in several regards.

Constitutional Limitations under Section 2, Article XII

What are the express limitations under Section 2 on the power of the executive to contract with foreign corporations regarding the exploration, development and utilization of our natural resources?

There are two fundamental restrictions, both of which are asserted in the second paragraph of Section 2. These are that the State retains legal ownership of all natural resources,[17] and that the State shall have full control and supervision over the exploration, development and utilization of natural resources.[18] These key postulates are facially broad and warrant clarification. They also predicate several specific restrictions laid down in the fourth paragraph of Section 2 on the power of the President to enter into agreements with foreign corporations. These specific limitations are as follows:

First, the natural resources that may be subject of the agreement are a limited class, particularly minerals, petroleum, and other mineral oils. Among the natural resources which are excluded from these agreements are lands of the public domain, waters, coal, fisheries, forests or timbers, wildlife, flora and fauna. Most notable of the exclusions are forests and timbers which are in all respects expressly limited to Filipinos.

It is noteworthy that a previous version of the fourth paragraph of Section 2 deliberated upon during the 1987 Constitutional Commission allowed agreements with foreign-owned corporations with respect to all classes of natural resources.[19] However, on the initiative of Commissioner (now Chief Justice) Davide, the provision was amended to limit the scope of such agreements to minerals, petroleum and other mineral oils, which Commissioner Davide recognized as “those particular areas where Filipino capital may not be sufficient.”[20]

The exclusion of timber resources from the scope of financial/technical assistance agreements marks a significant distinction from the service contracts of old. This does not come as a surprise, considering well-reported abuses under the old regime of issuing timber licensing agreements, which numbered in the thousands prior to the 1987 Constitution. On the other hand, no similar extensive collateral damage has been reported for the petroleum and mining industry, capital-intensive industries whose potential for government revenues in billions of pesos has long been sought after by the State.[21] Hence, the variance in treatment from the timber industry and the rest of

the natural resources.

Second, these agreements with foreign-owned corporations can only be entered into for only large-scale exploration, development and utilization of minerals, petroleum, and other mineral oils.

Third, it is only the President who may enter into these agreements. This is another pronounced change from the 1973 Constitution, which allowed private persons to enter into service contracts with foreign corporations.

Fourth, these agreements must be in accord with the general terms and conditions provided by law. This proviso by itself, and more so when taken together, as it should, with another provision,[22] entails legislative intervention and affirmance in the exercise of this executive power. While it is the President who enters into these contracts, he/she must act within such terms and conditions as may be prescribed by Congress through legislation. The value of legislative input as a means of influencing policy should not be discounted. Policy initiatives grounded on particular economic ideologies may find enactment through legislation when approved by the necessary majorities in Congress. Legislative work includes consultative processes with persons of diverse interests, assuring that economic decisions need not be made solely from an ivory tower. There is also the possible sanction of repudiation by the voters of legislators who prove insensate to the economic concerns of their constituents.

Fifth, the President is mandated to base the decision of entering into these agreements on “real contributions to the economic growth and general welfare of the country.” In terms of real limitations, this condition has admittedly little effect. The discretion as to whether or not to enter into these agreements is vested solely by the Constitution in the President, and such exercise of discretion, pertaining as it does to the political wisdom of a co-equal branch, generally deserves respect from the courts.

The above conditionalities, particularly the first three, effect the desire of the framers of the 1987 Constitution to limit foreign participation in natural resource-oriented enterprises. They provide a vivid contrast to the 1973 Constitution, which permitted private persons to enter into service contracts for financial, technical, management, or other forms of assistance with any person or entity, including foreigners, and for the exploration or utilization of any of the natural resources.[23] These requisites imposed by the 1987 Constitution, which are significantly more onerous than those laid down in the 1973 Constitution, warrant obeisance by the executive branch and recognition by this Court.

Not Strictly Technical or Financial Assistance

The Court’s previous Decision, now for reconsideration, insisted on another restriction purportedly imposed by the fourth paragraph of Section 2. It is argued that foreign-owned corporations are allowed to render only technical or financial assistance in the large-scale exploration, development and utilization of minerals, petroleum and mineral oils. This conservative view is premised on the sentiment that the Constitution limits foreign involvement only to areas where they are needed, the overpowering intent being to allow Filipinos to benefit from Filipino resources.[24] Towards that end, the perception arises that the power of the executive to enter into agreements with foreign-owned corporations is an executive privilege, hampered by the limitations that generally attach to the grant of privileges.

On the fundamental nature of this power, I harbor an entirely different view. The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single articles torn from context.[25] The previously adopted approach is rigidly formalist, and impervious to the traditional prerogatives of executive power.

As I stated earlier, the executive authority to contract is a right emanating from traditional executive functions, and is connected with the power of the executive branch to determine economic policy. Hence, the proper

approach in interpreting Section 2, Article XII is to tilt in favor of asserting the right rather than view the provision as a limitation on a privilege. To subscribe to the Court's previous view will necessitate adopting as a fundamental premise that absent an express grant of power, the executive branch has no capacity to contract since such capacity arises from a privilege.

Had the provision been worded to state that the President may enter into agreements for technical or financial assistance only, then this unambiguous limitation should be affirmed. Yet the Constitution does not express such an intent. The controversial provision is crafted in such a way that allows any type of agreement, so long as they involve either technical or financial assistance. In fact, the provision does not restrict the scope of the agreement so as to pertain exclusively either to technical or financial assistance.

The Constitution, in allowing foreign participation specifically in the large scale exploration, development and utilization of natural resources, is cognizant of the sad truth that such activities entail significant outlay of capital and advanced technological know-how that domestic corporations may not yet have.[26] The provision expressly adverts to "technical" and "financial" assistance in recognition of the reality that these two facets are the indispensable requisites to qualify foreign participants in the exploration, development, and utilization of mineral and petroleum resources.

Had the framers chosen to restrict all aspects of all mining activities to domestic persons, the real fear would have materialized that our mineral reserves could remain untapped for a significant period of time, owing to the paucity of venture capital. There was a real option to heed dogmatic guns who insisted that the mineral resources remain unutilized until the day when the domestic mining industry becomes capacitated to undertake the extraction without need of foreign aid. Obviously, the more pragmatic view won the day.

If indeed the foreign entity is limited only to technical or financial participation, the implication is that it is up to the State to do all the rest. Considering the lack of know-how and financial capital, matters which were appreciated by the framers of the Constitution, this intended effect is preposterous. Even the State itself would hesitate to undertake such extractive activities owing to the intensive capital and extensive training such enterprise would entail. By allowing this expansive set-up under Section 2, the Constitution enables the minimization of risk on the part of the State should it desire to undertake large-scale mineral extractive activities. The pay-off though, understandably, is an atypical cession of several State prerogatives in the development of its mineral and petroleum resources.

Perhaps there is need to be explicit and incisive about the implications of Section 2. The word "assistance," shorn of context, implies a charitable grant offered without any quid pro quo attached. Unconditional foreign aid may be more prevalent this day and age with the acceptance of the notion that there are base minimum standards of decent living which all persons are entitled to. However, such concept is alien to the mining industry. There is no such entity as an International Benevolent Association for Extraction of Minerals. If "assistance" is to be restrictively interpreted according to ordinary parlance, no entity would be interested in undertaking this regulated industry.

Any decision by any enterprise to assist in the exploration, development or utilization of mineral resources does not arise from a philanthropic impulse. It is a pure and simple investment, and one that is not engaged in unless there is the expectation or hope of a reasonable return. I hasten to add that the deliberate incorporation of the fourth paragraph of Section 2 has created a window of opportunity for foreign investments in the extractive enterprises involving petroleum and other mineral oils, subject of course to limitations under the law. The term may prove discomfiting to the ideologically committed, the sentimental nationalist or the visceral oppositionist. Still, the notion is not inconsistent with the general power of the executive to enter into agreements for the

purpose of enticing foreign investments.

Why then the term “assistance?” Apart from its apparent political palatability in comparison with “investment,” as intimated before, the term is useful in underscoring the essential facets of the foreign investment which is assistance in the financial or technical areas, as well as the fundamental limitations and conditionalities of the investment. What is allowed is participation, though limited, by foreign corporations which in turn are entitled to expect a return on their investments.

The Court had earlier premised the invalidity of several provisions of the Mining Act on the argument that those provisions authorized service contracts. But while the 1987 Constitution does not utilize the term “service contracts,” it actually contemplates a broader expanse of agreements beyond mere contracts for services rendered. Still, although the provision sanctions a more numerous class of agreements, these are subjected to more stringent restrictions than what had been allowed under the 1973 Constitution. Thus, the test should be whether the law and the contract take away the State’s full control and supervision over the exploration, development and utilization of the country’s mineral resources and negate or defeat the State’s ownership thereof.

In line with the test, Section 2 should be accorded a liberal interpretation so as to recognize this fundamental prerogative of the presidency. Such “liberal interpretation” does not equate to a wholesale concession of mining resources to foreigners, much less to an atmosphere of complaisance, whether from their perception or the Filipinos.’ The fourth paragraph sets specific limitations on the exercise by the President of this contract-making power. On the other hand, the second paragraph of Section 2 lays down the fundamental limitations which likewise may not be countermanded.

On the basis of the foregoing discussion, and as a necessary consequence of my view that the agreements under Section 2 are not strictly limited to financial or technical assistance, I would consider the following questioned provisions of Republic Act No. 7942 as valid —Sections 3 (g), 34 to 38, 40 to 41, 56 and 90. These provisions were struck down on the premise that they allowed the constitution of “service contracts,” an agreement which to my mind is still within the contemplation of Section 2, Article XII.

State Ownership over Mineral and Petroleum Resources

There is need to clarify the specific meaning of these general limitations arising from the State’s assertion of ownership, full control and supervision.

In respect to the petition, the question of ownership has become material to the proper share the State should receive from the exploration, development and utilization of mineral resources. I perceive that all the members of the Court agree that such profit may not be limited to only such revenue derived from the taxation of the mining activities. Since the right of the State to obtain a share in the net proceeds and not merely through taxes arises as an attribute of ownership unequivocally reserved by the Constitution for the State, such right may not be proscribed either by legislative provision or contractual stipulation.

Yet it should be conceded that the State has the right to enter into an agreement concerning such profits. There are, as probably should be, political consequences if the President opts to surrender all of the State’s profits to a foreign corporation, yet in bare theory, the right to bargain profits pertains to the wisdom of a political act not ordinarily justiciable before this Court. Still, the overriding adherence of the Constitution to the regalian doctrine should be given due respect, and an interpretation allowing “beneficial ownership” by the foreign corporation should not be favored.

For purposes of the present judicial review, I would consider it prudent to limit myself to conceding that the Court had previously erred in invalidating certain provisions of Rep. Act No. 7942 and the WMC FTAA on the

mistaken notion that the law and the agreement cede beneficial ownership of mineral resources to a foreign corporation.

Section 4 of Rep. Act No. 7942 expressly recognizes State ownership over mineral resources, though it is silent on the operational terms of such ownership. Of course, such general submission would not be in itself curative of whatever contraventions to State ownership are contained in the same law; hence, the need for deeper inquiry.

The dissenters wish to strike down the second paragraph of Section 81 of Rep. Act No. 7942 because it purportedly precludes the Government from obtaining profits under the agreement from sources other than its share in taxation. However, as the ponencia points out, the phrase “among other things” sufficiently allows the government from demanding a share in the cash flow or earnings of the mining enterprise. A contrary view is anchored on a rule of statutory construction that concludes that “among other things” refers only to taxes. Yet, there is also a rule of construction that laws should be interpreted with a view of upholding rather than destroying it. Thus, the ponencia’s formulation, which achieves the result of the minority without need of statutory invalidation, is highly preferable.

The provisions of Rep. Act No. 7942 which authorize the conversion of a financial or technical assistance into a mineral production sharing agreement (MPSA) turned out to be just as controversial. In this regard, the minority wishes to strike down Section 39, which in conjunction with Sections 80 and 84 of the law would purportedly allow such conversion, in that it would effectively limit the government share in the profits to only the excise tax on mineral products under internal revenue law.

These concerns are valid and raise troubling questions. Yet equally troubling is that the Court is being called upon to rule on a premature question. There is no such creature yet as an FTAA converted into an MPSA, and so there is no occasion that calls for the application of Sections 39, 80 and 84. I do not subscribe to judicial pre-emptive strikes, as they preclude the application of still undisclosed considerations which may prove illuminating and even crucial to the proper disposition of the case. By seeking invalidation of these “MPSA provisions,” the Court is also asked to strike down an enactment of a co-equal branch which has not given rise to an actual case or controversy. After all, such enactment deserves due respect from this branch of government. Assuming that the provisions are indeed invalid, the Court will not hesitate, at the proper time, to strike them down or at least impose a proper interpretation that does not run afoul of the Constitution.^[27] However, in the absence of any actual attempt to convert an FTAA to an MPSA, the time is not now.

I likewise agree with the ponencia that Section 7.9 deprives the State of its rightful share as an incident of ownership without offsetting compensation. The provisions of the FTAA are fair game for judicial review considering their present applicability. In fact, the invalidation of Section 7.9 becomes even more proper now under the circumstances since the provision has become effectual considering the sale of the foreign equity in WMCP to a domestic corporation. It is within the competence of this Court to invalidate Section 7.9 here and now. For that matter, Section 7.8(e) of the FTAA may be similarly invalidated as it can already serve to unduly deprive the Government of its proper share by allowing double recovery by WMC.

“Full Control and Supervision” of the State

The matter of “full control and supervision” emerges just as controversial. Does this grant of power mandate that the State exercise management over the activity, or exclude the exercise of managerial control by the foreign corporation?

I don’t think it proper to construe the word “full” as implying that such control or supervision may not be at all yielded or delegated, for reasons I shall elaborate upon. Instead, “full” should be read as pertaining to the

encompassing scope of the concerns of the State relating to the extractive enterprises on which it may interfere or impose its will.

It must be conceded that whichever party obtains managerial control must be allowed considerable elbow room in the exercise of management prerogatives. Management is in the most informed position to make resources productive in the pursuit of the enterprise's objectives.[28] In this age of specialization, corporations have benefited with the devolution of operational control to specialists, rather than generalists. The era of the buccaneer entrepreneur chartering his industry solely on gut feel is over. The vagaries of international finance have dictated that prudent capitalists cede to the opinion of their experts who are hired because they trained within their particular fields to know better than the persons who employ them. The Constitution does not prescribe a particular manner of management; thus, we can conclude that the State is not compelled to adopt outmoded methods that could tend to minimize profits.

Still, the question as to who should exercise management is best left to the parties of the agreement, namely the President and the foreign corporations. They would be in the best position to determine who is best qualified to exert managerial control. This prerogative of management can be exercised by the State if it so insists and the co-parties agree, and the wisdom of such arrogation is ultimately a policy question this Court has little control over. And even if the State cedes management to a different entity such as the foreign corporation, it has the duty to safeguard that the actual exercise of managerial power does not contravene our laws and public policy.

There is barely any support of the view that only the State may exert managerial control. Even the minority concede that these foreign corporations are not precluded from participating in the management of the project. I think it unwise to construe "full supervision and control" to the effect that the State's assent or opinion is necessary before any day-to-day operational questions may be resolved. There is neither an express rule to that effect, nor any law of construction that necessitates such interpretation. Ideally of course, the most qualified party should be allowed to manage the enterprise, and we should not allow an interpretation that compels a possibly unsuited entity, such as the State, to operationalize the business.[29] Such a limited construction would be inconvenient and absurd,[30] not to mention potentially wasteful.

The Constitution itself concedes that the State may not have the best sense as to how to undertake large-scale exploration, development and utilization of mineral and petroleum resources. This is evinced by the allowance of foreign technical assistance and foreign participation in the extractive enterprise. Had the Constitution recognized that the State was supremely qualified to undertake the operational aspects of the activity, then it could have phrased the provision in such a way that would strictly limit the foreign participation to monetary investment or a financial grant of assistance.

The absence of an express provision on management permits consideration of the following sensible critique on yielding too many management prerogatives to a remote overseer such as the State. An early United Nations report once noted that while it is theoretically possible to endow a government department with a high degree of operating flexibility, it is in practice difficult to do so.[31] It has been proposed that the further away a decision-maker is to the market, the higher the information cost, or the opportunity cost to the gaining of information.[32] Remoteness can be achieved through the layering of bureaucratic structure, and because of the information loss that accompanies the transmission of information and judgments from lower levels of the hierarchy to higher levels, the ultimate basis of a decision may be misleading at best and erroneous at worst.[33]

The same conclusion arises from the view that what the provision authorizes is foreign investment. The foreign player necessarily at least has a reasonable say in how the mining venture is run. The interest of the investor in seeing that the investment is not wasted should be recognized not only as a right available to the investor, but

from the broader view that such say would lead to a more prudent management of the project. It must be noted that mineral and petroleum resources are non-renewable, thus a paramount interest arises to ensure against wasteful exploitation.

Next for consideration is the situation, as in this case, if management is ceded to the foreign corporation, or even to a private domestic corporation for that matter. What should be the proper dichotomy, if any, between the private entity's exercise of managerial control, and the State's full control and supervision?

The President may insist on conditions into the agreement pertaining to the State's degree of control and supervision in the mining activity. This was certainly done with the WMC FTAA, which is replete with stipulations delineating the State's control which are judicially enforceable, imposed presumably at the President's call. But the FTAA itself is not the only vehicle by which State control and supervision is exercised. These can similarly be enforced through statutes, as well as executive or administrative issuances. The Mining Act itself is an expression of State control and supervision, implemented in coordination with the executive and legislative branches.

As a general point, I believe that State control and supervision is unconstitutionally yielded if either of the Mining Act or the FTAA precludes the application of the laws and regulations of the Philippines, enunciatory as they are of State policy. Neither the Mining Act nor the WMC FTAA are flawed in that regard. The agreements under contemplation are not beyond the ambit of our regular laws, or regulatory enactments pertaining to such areas as environmental concerns. Violations of these laws uttered in the name of the FTAA are punishable in this jurisdiction.

Still, the fact that the Constitution requires "full control and supervision" indicates an expectation of a more activist role on the part of the State in the operations of the mining enterprise, perhaps to the prejudice of the laissez-faire capitalist. Most importantly, the State cannot abdicate its traditional functions by contractual limitations. It could compel the mining operations to comply with existing environmental regulations, as well as with future issuances. It may compel the foreign corporation payment of all assessable levies. It may evict officers of the foreign corporation for violation of immigration laws. It may preclude mining operations that affect prerogatives granted by law to indigenous peoples. It could restrict particular mining operations which are established to be disasters or nuisances to the affected communities. The power of the State to enforce its police powers needs no statutory grant and are certainly not limited either by the Mining Act or the WMC FTAA.

As to "business decisions," I think that the State may exercise control for the purpose of ensuring profit of the enterprise as a whole. This may involve visitorial activity, the conduct of periodic audits, and such powers normally attributed to an overseer of a business. Just as the foreign corporation is expected to guard against waste of financial capital, the State is expected likewise to guard against the waste of resource capital.

I might as well add that, in my view, the constitutional objective of maintaining full control and supervision over the exploration, development and utilization of the country's mineral resources in the State would be best served by the creation of a public corporation for the development and utilization of these resources, accountable to the State for all actions in its behalf. The device of a corporation properly utilized provides sufficient protection to the State's interests while affording flexibility and efficiency in the conduct of mining operations.[34]

The creation of a public corporation could remedy a number of potential problems regarding full State control and supervision of extractive activities concerning our mineral resources by entities which have the funds and/or technical know-how but which cannot have a great degree of control and supervision over such activities. Persons knowledgeable and competent in mining operations may sit in the corporation's board of directors and craft policies which implement and further concretize the broad aims of R.A. No. 7942, taking into consideration the

nature of the mining industry. The Board would also be in charge of studying existing contracts for mining activities, and approving proposed contracts. The Board may also employ corporate officers and employees to take charge of the day-to-day operations of the mining activities pursuant to the corporation's contracts with other entities.

Under such a scheme, the perceived abdication by the State of control and supervision over mining activities in favor of the foreign entities rendering financial and/or technical assistance would be greatly diminished. It would be the public corporation which would principally undertake mining activities and contract with foreign entities for financial and/or technical assistance if necessary. The foreign contractor in such cases would not have the power to determine the course of the project or the major policies involved therein because these functions would belong to the public corporation as the agent of the State.

A public corporation would also have the additional benefit of compelling the input of not only the executive branch, but also that of the legislative. Such executive-legislative coordination is necessary since public corporations may only be created through statute.

Section 3.3 of WMC FTAA Constitutional

Finally, it is argued that Section 3.3 of the WMC FTAA violates paragraph 1, Section 2, Article XII of the Constitution, which imposes a limitation on the term of mineral agreements. I agree with the ponencia that the constitutional provision does not pertain to FTAA's. It is clear from reading Section 1 that the agreements limited in term therein are co-production agreements, joint venture agreements, and mineral production-sharing agreements, which are all referred to in Section 1, and not the FTAA's mentioned only in Section 4. Accordingly, Section 3.3 of the WMC FTAA is not infirm.

Epilogue

Behind the legal issues presented by the petition are fundamental policy questions from which highly opinionated views can develop, even from the members of this Court. The promise brought about by the large-scale exploitation of our mineral and petroleum resources may bring in much needed revenue, but Filipinos should properly inquire at what cost. As a Filipino, I am distressed whenever the government crosses the line from cooperation to subservience to foreign partners in development. Popular Western wisdom aside, what is good for General Motors is not necessarily good for the country. The propagation of a foreign-influenced mining industry may lead to a whole slew of social problems^[35] which shall be exacerbated if the government is complicit, either through active participation or benign neglect, to abuses committed by the mining industry against the Filipino people. Unlike the foreign corporation, the bottom line which the State should consider is not found below a ledger, but in the socio-economic dynamic that will confront the government as a result of the large-scale mining venture. Political capital is more fickle than financial capital.

Still, the right to vote I exercise today is that as of a member of the Court, and not that of the general electorate. The limits of judicial power would exasperate any well-meaning judge who feels duty-bound to affirm a constitutionally valid law or principle he or she may otherwise disagree with. My views on how the government should act are segregate from my view on whether the government has the power to act at all.

My conclusions are borne out of a close textual analysis of Section 2 in light of my fundamental understanding of the constitutional powers of the executive branch. This is in line with my perception of the judicial duty as being limited to charting the scope and boundaries of the law. The philosophy of inclusiveness that drives my interpretation of Section 2 is bolstered not because it might lead to benefits to the economy, but because it gives due regard to the discretion of the Executive to determine what is good for the economy. This judicial attitude

may not always ensure the economic good. But before we carve that judicial path out of what we believe are good intentions, restraint is imperative out of due deference to our co-equal branches, since the duty of formulating and implementing economic policies falls exclusively within their purview.

In view of the foregoing, I concur with the opinion of Justice Panganiban.

[1] SECTION 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution. (*Italics supplied*)

[2] Each time Sec. 2 is hereafter mentioned, it is understood to be Sec. 2, Art. XII of the Constitution.

[3] "The Philippines is a democratic and republican State. xxx" See Section 1, Article II, Constitution. "Republicanism, in so far as it implies the adoption of a representative type of government, necessarily points to the enfranchised citizen as a particle of popular sovereignty and as the ultimate source of the established authority." *Moya v. Del Fierro*, 69 Phil. 199, 204 (1939), See also *Badelles v. Cabili*, 136 Phil. 383, 395-396 (1969).

[4] Section 1, Article VII of the Constitution states: "The executive power shall be vested in the President of the Philippines."

[5] See Section 17, Article VII, Constitution, which reads: "The President shall have control of all the executive departments, bureaus and offices. He shall ensure that the laws be faithfully executed."

[6] See Section 18, Article VII, Constitution, which begins: "The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. xxx"

[7] G.R. No. 88211, 27 October 1989, 178 SCRA 760.

[8] Id. at 764. Citing the eminent American legal scholar Laurence Tribe, who notes that US jurisprudence makes clear “that the constitutional concept of inherent power is not a synonym for power without limit; rather, the concept suggests only that not all powers granted in the Constitution are themselves exhausted by internal enumeration, so that, within a sphere properly regarded as one of “executive” power, authority is implied unless there or elsewhere expressly limited.” Ibid.

[9] Justice Irene Cortes, who penned the Court’s decision in *Marcos v. Manglapus*, has opined elsewhere on the grant of plenary executive powers on the President, “[who] personifies the executive branch. There is a unity in the executive branch absent from the two other branches of government. The president is not the chief of many executives. He is the executive. His direction of the executive branch can be more immediate and direct than the United States president because he is given by express provision of the constitution control over all executive departments, bureaus and offices.” I. Cortes, *The Philippine Presidency: A Study of Executive Power*, pp. 68-69; cited in *Sanlakas v. Executive Secretary et al.*, G.R. Nos. 159086, 159103, 159185, 159196, 3 February 2004.

[10] “This case is unique. It should not create a precedent, for the case of a dictator forced out of office and into exile after causing twenty years of political, economic and social havoc in the country and who within the short space of three years seeks to return, is in a class by itself.” *Marcos v. Manglapus*, supra note 7, at 682.

[11] Id. at 692. See also supra note 8. In light of the U.S. Supreme Court decision in the famed *Steel Seizure* case, *Youngstown Sheet v. Sawyer*, supra note 2, and the competing analyses of Justice Black (whose “formalist” approach led to rigid categorization of separate legislative, executive and judicial functions), and Justices Frankfurter and Jackson (who opted for a more flexible, functional approach), Gunther and Sullivan note that “[m]uch scholarly commentary on separation of powers has endorsed the functional approach, and cite this following argument for the “functional” view: “When the Constitution confers power, it confers power on the three generalist political heads of authority, not on branches as such. [Its] silence about the shape of the inevitable, actual government was a product both of drafting compromises and of the explicit purpose to leave Congress free to make whatever arrangements it deemed ‘necessary and proper’ for the detailed pursuit of government purposes.” G. Gunther and K. Sullivan, *Constitutional Law* (14th ed., 2001), at 342; citing Strauss, “Formal and Functional Approaches to Separation of Powers Questions – A Foolish Inconsistency,” 72 *Corn.L.Rev.* 488 (1987).

Another analysis is proffered by Chemerinsky, who acknowledges that the debate on inherent presidential power has existed “from the earliest days of the country.” E. Chemerinsky, *Constitutional Law: Principles and Policies* (2nd ed., 2002), at 329. In analyzing the U.S. Supreme Court’s divided opinions in the seminal case of *Youngstown Sheet*, supra note 2, he notes that while the majority opinion of Justice Black seems to deny the existence of any inherent presidential power, the concurring opinions of Justices Douglas, Frankfurter and Jackson do seem to acknowledge the existence of such power, albeit subject to proscription by the legislative branch. Chemerinsky also notes that the view of inherent presidential authority had been affirmed in the earlier case of *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936), which pertained to the presidential power to conduct foreign policy. Id. at 334.

[12] Ibid. See also *Sanlakas v. Executive Secretary*; supra note 9.

[13] *Iron and Steel Authority v. Court of Appeals*, 319 Phil. 648, 658 (1995).

[14] Apropos to the nature of the Filipino presidency is the following comment on the U.S. presidency by an American historian, “As our Chief of State, and as such the embodiment of the people’s elective will, the

President is clad with the prerogative of the office, and possesses more actual sovereign power than any British king since George III. In his role as Chief of Foreign Relations, from the beginning he has been the sole organ of the nation in its external relations, and its sole representative with foreign nations. While the Senate must advise and consent to any treaty, the President has exclusive initiative in their negotiation.” G.F. Milton, *The Use of Presidential Power: 1789-1943* (1980 ed.), at 3.

[15] Section 1, Article VIII, Constitution enables the courts to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the executive, a duty which is made easier if there is a specifically prescribed constitutional standard which warrants obeisance by the executive branch.

[16] See Secs. 21 and 22, Art. VI, Const., which read:

Sec. 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

Sec. 22. The heads of departments may upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House or any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the State or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session.

[17] See Section 2, Article XII, Constitution, which states in part, “All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State.” An offshoot of the long-standing Regalian doctrine recognized in this jurisdiction.

[18] “The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.” *Id.*

[19] The so-called “Jamir amendment,” proposed by Commissioner Alberto M.K. Jamir, which read “The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development and utilization of natural resources according to the general terms and conditions provided by law based on real contributions to the long-term growth of the economy.” 3 *Record of the Constitutional Commission: Proceedings and Debates* (1987), at 351.

[20] *Id.* at 356.

[21] Indeed, since 1973 when the service contract system for petroleum was implemented, the government has earned over 1.882 Billion Pesos and 10.160 Billion Pesos in revenues from oil and natural gas production, respectively. Based on data provided by the Department of Energy.

[22] Paragraph 5, Sec. 2, Art. XII. It provides: The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

[23] See Section 9, Article XIV, 1973 Constitution.

[24] Resolution, p. 26.

[25] Per Jackson, J., concurring, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[26] The following exchanges during the debates of the 1987 Constitutional Commission indicate that the absence of domestic capital for mineral and petroleum development was duly considered by the framers.

MR. GASCON. As far as investment is concerned in developing certain priority areas for our economic development, are there areas where there is much need for foreign investments?

MR. VILLEGAS. During the public hearings, we heard people from the mining and oil exploration industries, who presented a very strong case, that foreign investment is actually indispensable because there is no risk capital available in the Philippines. If the Gentleman will remember, the figure cited over the last ten years is that P800 million literally went down the drain in oil exploration and up to now, no oil has been found, and all that money was foreign money. These people asked a rhetorical question: Can you imagine if that money belonged to Filipinos? 3 Record of the Constitutional Commission: Proceedings and Debates (1987), at 310.

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MR. DAVIDE. I am very glad that Commissioner Padilla emphasized minerals, petroleum and mineral oils. The Commission has just approved the possible foreign entry into the development, exploration and utilization of these minerals, petroleum and other mineral oils by virtue of the Jamir amendment. I voted in favor of the Jamir amendment because it will eventually give way to vesting in exclusively Filipino citizens and corporations wholly owned by Filipino citizens the right to utilize the other natural resources. This means that as a matter of policy, natural resources should be utilized and exploited only by Filipino citizens or corporations wholly owned by such citizens. But by virtue of the Jamir amendment, since we feel that Filipino capital may not be enough for the development and utilization of minerals, petroleum and other mineral oils, the President can enter into service contracts with foreign corporations precisely for the development and utilization of such resources. 3 Record of the Constitutional Commission: Proceedings and Debates (1987), at 361.

[27] Invalidity of provisions which do not adequately assert constitutional rights or prerogatives need not always be the proper remedy, considering, as Justice Vitug noted in his separate opinion in this case, that “[t]he fundamental law is deemed written in every contract.” Vitug, J., Separate Opinion, *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, G.R. No. 127882, 27 January 2004.

[28] N. Hamilton, *The Iron Range Resources and Rehabilitation Board: An Unconstitutional and Confused Delegation of Executive Power to Legislators*, 25 William Mitchell Law Rev. 1204, 1235 (1999).

[29] The following traditional observation of John Thurston, as cited in a periodical article, bears noting:

[Thurston] explained that the day-to-day administration of the corporation should be independent of the executive and the legislature, but “[I]n matters of general and public policy, the corporation must necessarily be subject to executive and legislative control.” In addition to having control over “general and public policy,” the executive and legislature also should monitor the efficiency of the public corporation. However, Thurston perceived a dilemma in balancing the need “to ensure that the corporation functions efficiently and without waste,” and the problem of “preventing unnecessary interference with details of administration.” xxx *Id.*, at 1231.

[30] *Interpretatio talis in ambiguis semper fienda est, ut evitetur inconveniens et absurdum*. Where there is ambiguity, such interpretation as will avoid inconvenience and absurdity is to be adopted. *Cosico v. NLRC*, 338 Phil. 1080, 1089 (1997); citing *Commissioner of Internal Revenue v. TMX Sales, Inc.*, 205 SCRA 184, 188 (1992).

[31] United Nations Technical Assistance Administration, *Some Problems in the Organization and Administration*

of Public Enterprise in the Industrial Field 8 (1954), cited in Hamilton, *supra* note 35, at 1230. “As long as an enterprise is not clearly differentiated from other types of governmental activity, strong pressures will be brought to make it conform to standard government regulations and procedures.” *Ibid*.

[32] *Id.* at 1228.

[33] *Ibid*.

[34] The employment of the corporate entity was suggested by Neil W. Hamilton, a Professor of Regulatory Policy in the William Mitchell College of Law, in his article analyzing the effectiveness and economic efficiency of a government board for the rehabilitation iron mines in Minnesota, U.S.A. which were being depleted. Professor Hamilton proffered the view that the executive and the legislative branches of government would have control over the general and public policy concerning the operation of iron mines and should monitor the efficiency of the public corporation created to take care of the operation of iron mines, but the corporation, through its board of directors and officers, would have control over day-to-day operations. (“The Iron Range Resources and Rehabilitation Board: An Unconstitutional and Confused Delegation of Executive Power to Legislators,” 25 William Mitchell Law Review 1203 [1999]).

[35] The following perspective from sectors not affiliated with the business community deserve contemplation:

“Creating a favorable investment climate for foreign mining companies has led to new social problems, namely human rights problems and dislocation of indigenous peoples. The country has experienced incidents of armed violence from mining guards and military personnel assigned to assist the mining companies. Indigenous tribes have been displaced as military operations facilitate the entry of corporations into mining areas. Mining operations are severely infringing on communities and their livelihoods. In 1996, a mining tailings spill from the Marcopper tailing dam in Marinduque seriously polluted the Boac River and Calancan Bay on which the local communities depend.” See <http://www.foe.org/camps/intl/imf/selling/asia4.html>.

“At risk to the peoples of the Philippines is their remaining patrimony and economic sovereignty. Mining legislation opens up the country to further foreign domination and control. It perpetuates the semi-feudal, semi-capitalist neocolonial character of the economy. It is creating mass displacement, especially of indigenous communities and upland farmers. Foreign companies have an abominable history of creating environmental disasters as well, and turning virgin forests and clean water sources and farming lands into wastelands and deserts. They also have a terrible reputation for excessive exploitation of workers and mass unemployment. Finally, foreign owned mines will bring militarization as the owners will guard mining areas.” B.J. Warden, at <http://www.canadianliberty.bcca/relatedinfo/miningco.html>.

CONCURRING OPINION

CHICO-NAZARIO, J.:

I concur in the well-reasoned ponencia of my esteemed colleague Mr. Justice Artemio V. Panganiban. I feel obligated, however, to add the following observations:

I. RE “FULL CONTROL AND SUPERVISION”

With all due respect, I believe that the issue of unconstitutionality of Republic Act No. 7942, its implementing rules, and the Financial Assistance Agreement between the Philippine Government and WMPC (Philippines) Inc. (WMPC FTAA) executed pursuant to Rep. Act No. 7942 hinges, to a large extent, on the interpretation of the phrase in Section 2, Article XII of the 1987 Constitution, which states:

(T)he exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. x x x. (Italics supplied)

Construing said phrase vis-à-vis the entire provision, it appears from the deliberations in the Constitutional Commission that the term “control” does not have the meaning it ordinarily has in political law which is the power of a superior to substitute his judgment for that of an inferior.[1] Thus –

MR. NOLLEDO: Suppose a judicial entity is given the power to exploit natural resources and, of course, there are decisions made by the governing board of that judicial entity, can the state change the decisions of the governing board of that entity based on the words “full control”.

MR. VILLEGAS: If it is within the context of the contract, I think the State cannot violate the laws of the land.[2]

Moreover, “full control and supervision” does not mean that foreign stockholders cannot be legally elected as members of the board of a corporation doing business under, say, a co-production, joint venture or profit-sharing agreement, 40% of whose capital is foreign owned. Otherwise, and as Commissioner Romulo declared, it would be unfair to the foreign stockholder[3] and, per Commissioner Padilla, “refusing them a voice in management would make a co-production, joint venture and production sharing illusory.”[4]

It is apparently for the foregoing reasons that there was a disapproval of the amendment proposed by Commissioner, now Mr. Chief Justice Davide, that the governing and managing bodies of such corporations shall be vested exclusively in citizens of the Philippines[5] so that control of all corporations involved in the business of utilizing our natural resources would always be in Filipino hands.

The disapproval must be juxtaposed with the fact that a provision substantially similar to the proposed Davide amendment was approved with regard to educational institutions, viz:

Section 4 (2). Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions.

The control and administration of educational institutions shall be vested in citizens of the Philippines. (Italics supplied)

From the foregoing, it can be clearly inferred that it was NOT the intention of the framers of the Constitution to deprive governing boards of domestic corporations with non-Filipino members, the right to control and administer the corporation that explores, develops and utilizes natural resources insofar as agreements with the State for co-production, joint venture and production-sharing are concerned, otherwise the Davide amendment would have been approved and, like the prohibition in above-quoted Section 4(2), Article XIV, control and supervision of all business involved in the exploration and development of mineral resources would have been left solely in Filipino hands.

Accordingly, to the extent that the corporate board governs and manages the operations for the exploration and use of natural resources, to that extent the “full control and supervision” thereof by the State is diminished.

In effect, therefore, when the State enters into such agreements as provided in the Constitution, it allows itself to surrender part of its sovereign right to full control and supervision of said activities, the State having the right to partly surrender the exercise of sovereign powers under the doctrine of auto-limitation.[6]

If foreigners (under joint ventures etc.) have a say in the management of the business of utilizing natural resources

as corporate directors of domestic corporations, there is no justification for holding that foreign corporations who put in considerably large amounts of money under agreements involving either technical or financial assistance for large scale exploration, development and utilization of minerals, petroleum and other mineral oils are prohibited from managing such business.

Indeed, to say that the Constitution requires the State to have full and total control and supervision of the exploration, development and utilization of minerals when undertaken in a large scale under agreements with foreign corporations involving huge amounts of money is to divorce oneself from reality. As Mr. Justice Panganiban said, no firm would invest funds in such enterprise unless it has a say in the management of the business.

To paraphrase this Court in one of its landmark cases, the fundamental law does not intend an impossible undertaking.[7] It must therefore be presumed that the Constitution did not at all intend an interpretation of Section 2, Article XII which deprives the foreign corporation engaged in large scale mining activities a measure of control in the management and operation of such activities, and in said manner, remove from the realm of the possible the enterprise the Constitution envisions thereunder.

This brings me to the final point raised by my esteemed colleague, Mme. Justice Conchita Carpio Morales, that it is of no moment that the declaration of Rep. Act No. 7942 may discourage foreign assistance and/or retard or delay the exploration, development or utilization of the nation's natural resources as the Filipino people, as early as the 1935 Constitution, have determined such matters as secondary to the protection and preservation of their ownership of these natural resources. With due respect, I find such proposition not legally justifiable as it looks backward to the justification in the 1935 Constitution instead of forward under the 1987 Constitution which expressly allows foreign participation in the exploration, development or utilization of the nation's marine wealth to allow the State to take advantage of foreign funding or technical assistance. As long as the means employed by such foreign assistance result in real contributions to the economic growth of our country and enhance the general welfare of our people, the development of our mineral resources by and through foreign corporations, such FTAAAs are not unconstitutional.

II. RE: REQUIREMENT THAT FTAAAs MUST BE "BASED ON REAL CONTRIBUTIONS TO THE ECONOMIC GROWTH AND GENERAL WELFARE OF THE COUNTRY"

The policy behind Rep. Act No. 7942 is to promote the "rational exploration, development, utilization and conservation" of the State-owned mineral resources "through the combined efforts of government and the private sector in order to enhance national growth in a way that effectively safe-guards the environment and protect the rights of affected communities".[8] This policy, with reference specifically to FTAAAs, is in keeping with the constitutional precept that FTAAAs must be based on real contributions to the economic growth and general welfare of the country. As has been said, "a statute derives its vitality from the purpose for which it is enacted and to construe it in a manner that disregards or defeats such purpose is to nullify or destroy the law."[9] In this regard, much has been said about the alleged unconstitutionality of Section 81 of Rep. Act No. 7942 as it allegedly allows for the waiver of the State's right to receive income from the exploitation of its mineral resources as it limits the State's share in FTAAAs with foreign contractors to taxes, duties and fees. For clarity, the provision states –

SEC. 81. Government Share in Other Mineral Agreements. -- The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the: (a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, and (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor. The

Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders, arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of foreign national and all such other taxes, duties and fees as provided for under existing laws.

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive. (*Italics supplied*)

The controversy revolves around the proper interpretation of "among other things" stated in the second paragraph of Section 81. Mr. Justice Carpio is of the opinion that "among other things" could only mean "among other taxes", referring to the unnamed "other taxes, duties, and fees as provided for under existing laws" contained in the last clause of Section 81, paragraph 2. If such were the correct interpretation, then truly, the provision is unconstitutional as a sharing based only on taxes cannot be considered as contributing to the economic growth and general welfare of the country. I am bothered, however, by the interpretation that the phrase "among other things" refers to "and all such other taxes, duties and fees as provided for under existing laws" since it would render the former phrase superfluous. In other words, there would have been no need to include the phrase "among other things" if all it means is "all other taxes" since the latter is already expressly stated in the provision. As it is a truism that all terms/phrases used in a statute has relevance to the object of the law, then I find the view of Mr. Justice Panganiban – that "all other things" means "additional government share" in the form of "earnings or cash flow of the mining enterprise" as interpreted by the DENR -- more compelling. Besides, such an interpretation would affirm the constitutionality of the provision which would then be in keeping with the rudimentary principle that a law shall not be declared invalid unless the conflict with the Constitution is clear beyond reasonable doubt.[10] To justify nullification of a law, there must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication.[11]

Finally, I wish to stress that it would appear that the constitutional mandate that large-scale mining activities under FTAA's must be based on real contributions to the economic growth and general welfare of the country is both a standard for the statute required to implement subject provision as well as the vehicle for the exercise of the State's resultant residual control and supervision of the mining activities.

In all FTAA's, the State is deemed to reserve its right to control the end to be achieved so that real contributions to the economy can be realized and, in the final analysis, the business will redound to the general welfare of the country.

However, the question of whether or not the FTAA will, in fact, redound to the general welfare of the public involves a "judgment call" by our policy makers who are answerable to our people during the appropriate electoral exercises and are not subject to judicial pronouncements based on grave abuse of discretion.[12]

For the foregoing reasons, I vote to grant the motion for reconsideration.

[1] Mondano v. Silvosa, GR No. L-7708, 30 May 1955, 97 Phil. 143

[2] J. Bernas, S.J. The Intent of the 1987 Constitution Writers, 1995 Ed., p. 812.

[3] Id. at 818

[4] Ibid.

[5] Id. at 817-818.

[6] In *Reagan v. Commission on Internal Revenue* (L-26379, 27 December 1969, 30 SCRA 968,973) the Court discussed the concept of auto-limitation in this wise: “It is to be admitted that any State may by its consent, express or implied, submit to a restriction of its sovereignty rights. That is the concept of sovereignty as auto-limitation which, in the succinct language of Jellinek, ‘is the property of a state-force due to which it has the exclusive capacity of legal-self determination and self-restriction.’ A State then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence.” See also *Tañada v. Angara*, GR No. 118295, 2 May 1997, 272 SCRA 18

[7] Cf. *Akbayan-Youth v. Commission on Elections*, 355 SCRA 318 (2001).

[8] Section 2, Rep. Act. No. 7942

[9] *Pilipinas Kao, Inc. vs. Court of Appeals*, G.R. No. 105014, 18 December 2001, 372 SCRA 548

[10] *Aris (Phis.) Inc. v. National Labor Relations Commission*, G.R. No. 90501, 05 August 1991, 200 SCRA 246

[11] Ibid.

[12] See *Tanada v. Angara*, 272 SCRA 18.

DISSENTING OPINION

CARPIO, J.:

I dissent and vote to deny respondents’ motions for reconsideration. I find that Section 3(aq), Section 39, Section 80, the second paragraph of Section 81, the proviso in Section 84, and the first proviso in Section 112 of Republic Act No. 7942[1] (“RA 7942”) violate Section 2, Article XII of the 1987 Constitution and are therefore unconstitutional.

In essence, these provisions of RA 7942 waive the State’s ownership rights under the Constitution over mineral resources. These provisions also abdicate the State’s constitutional duty to control and supervise fully the exploitation of mineral resources.

A. The Threshold Issue for Resolution

Petitioners claim that respondent Department of Environment and Natural Resources Secretary Victor O. Ramos, in issuing the rules to implement RA 7942, gravely abused his discretion amounting to lack or excess of jurisdiction. Petitioners assert that RA 7942 is unconstitutional for the following reasons:

1. RA 7942 “allows fully foreign owned corporations to explore, develop, utilize and exploit mineral resources in a manner contrary to Section 2, paragraph 4, Article XII of the Constitution”;
2. RA 7942 “allows enjoyment by foreign citizens as well as fully foreign owned corporations of the nation’s marine wealth contrary to Section 2, paragraph 2 of Article XII of the Constitution”;
3. RA 7942 “violates Section 1, Article III of the Constitution”;

4. RA 7942 “allows priority to foreign and fully foreign owned corporations in the exploration, development and utilization of mineral resources contrary to Article XII of the Constitution”;

5. RA 7942 “allows the inequitable sharing of wealth contrary to Section 1, paragraph 1, and Section 2, paragraph 4, Article XII of the Constitution.”[2] (Italics supplied)

Petitioners also assail the validity of the Financial and Technical Assistance Agreement between the Philippine Government and WMCP (Philippines), Inc. dated 2 March 1995[3] (“WMCP FTAA”) for violation of Section 2, Article XII of the 1987 Constitution.

The issues that petitioners raise boil down to whether RA 7942 and the WMCP FTAA violate Section 2, Article XII of the 1987 Constitution.

B. The Constitutional Declaration and Mandate

Section 2, Article XII of the 1987 Constitution[4] provides as follows:

All x x x minerals, x x x petroleum, and other mineral oils, x x x and other natural resources are owned by the State. x x x The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. x x x. (Italics supplied)

Two basic principles flow from this constitutional provision. First, the Constitution vests in the State ownership of all mineral resources. Second, the Constitution mandates the State to exercise full control and supervision over the exploitation of mineral resources.

The first principle reiterates the Regalian doctrine, which established State ownership of natural resources since the arrival of the Spaniards in the Philippines in the 16th century. The 1935, 1973 and 1987 Constitutions incorporate the Regalian doctrine.[5] The State, as owner of the nation’s natural resources, exercises the attributes of ownership over its natural resources.[6] An important attribute of ownership is the right to receive the income from any commercial exploitation of the natural resources.[7]

The second principle insures that the benefits of State ownership of natural resources accrue to the Filipino people. The framers of the 1987 Constitution introduced the second principle to avoid the adverse effects of the “license, concession or lease”[8] system of exploitation under the 1935 and 1973 Constitutions.[9] The “license, concession or lease” system enriched the private concessionaires who controlled the exploitation of natural resources. However, the “license, concession or lease” system left the Filipino people impoverished, starkly exemplified by the nation’s denuded forests whose exploitation did not benefit the Filipino people.

The framers of the 1987 Constitution clearly intended to abandon the “license, concession or lease” system prevailing under the 1935 and 1973 Constitutions. This exchange in the deliberations of the Constitutional Commission reveals this clear intent:

MR. DAVIDE: Thank you, Mr. Vice-President. I would like to seek some clarifications.

MR. VILLEGAS: Yes.

MR. DAVIDE: Under the proposal, I notice that except for the lands of the public domain, all the other natural resources cannot be alienated and in respect to lands of the public domain, private corporations with the required ownership by Filipino citizens can only lease the same. Necessarily, insofar as other natural resources are concerned, it would only be the State which can exploit, develop, explore and utilize the same. However, the State may enter into a joint venture, co-production or production-sharing. Is that not correct?

MR. VILLEGAS: Yes.

MR. DAVIDE: Consequently, henceforth upon the approval of this Constitution, no timber or forest concessions, permits or authorization can be exclusively granted to any citizen of the Philippines nor to any corporation qualified to acquire lands of the public domain?

MR. VILLEGAS: Would Commissioner Monsod like to comment on that? I think his answer is “yes.”

MR. DAVIDE: So, what will happen now to licenses or concessions earlier granted by the Philippine government to private corporations or to Filipino citizens? Would they be deemed repealed?

MR. VILLEGAS: This is not applied retroactively. They will be respected.[10] (*Italics supplied*)

To carry out this intent, the 1987 Constitution uses a different phraseology from that used in the 1935 and 1973 Constitutions. The previous Constitutions used the phrase “license, concession or lease” in referring to exploitation of natural resources. The 1987 Constitution uses the phrase “co-production, joint venture or production-sharing agreements,” with “full control and supervision” by the State. The change in language was a clear rejection of the old system of “license, concession or lease.”

The 1935 and 1973 Constitutions also used the words “belong to” in stating the Regalian doctrine, thus declaring that natural resources “belong to the State.” The 1987 Constitution uses the word “owned,” thus prescribing that natural resources are “owned” by the State. In using the word “owned,” the 1987 Constitution emphasizes the attributes of ownership, among which is the right to the income of the property owned.[11]

The State as owner of the natural resources must receive income from the exploitation of its natural resources. The payment of taxes, fees and charges, derived from the taxing or police power of the State, is not a substitute. The State is duty bound to secure for the Filipino people a fair share of the income from any exploitation of the nation’s precious and exhaustible natural resources. As explained succinctly by a textbook writer:

Under the former licensing, concession, or lease schemes, the government benefited from such activities only through fees, charges and taxes. Such benefits were very minimal compared with the enormous profits reaped by the licensees, concessionaires or lessees who had control over the particular resources over which they had been given exclusive right to exploit. Moreover, some of them disregarded the conservation of natural resources. With the new role, the State will be able to obtain a greater share in the profits. It can also actively husband our natural resources and engage in development programs that will be beneficial to the nation.[12](*Italics supplied*)

Thus, the 1987 Constitution commands the State to exercise full control and supervision over the exploitation of natural resources to insure that the State receives its fair share of the income. In *Miners Association of the Philippines v. Hon. Factoran, Jr., et al.*,[13] the Court ruled that “the old system of exploration, development and utilization of natural resources through ‘license, concession or lease’ x x x has been disallowed by Article XII, Section 2 of the 1987 Constitution.” The Court explained:

Upon the effectivity of the 1987 Constitution on February 2, 1987, the State assumed a more dynamic role in the exploration, development and utilization of the natural resources of the country. Article XII, Section 2 of the said Charter explicitly ordains that the exploration, development and utilization of natural resources shall be under the full control and supervision of the State. Consonant therewith, the exploration, development and utilization of natural resources may be undertaken by means of direct act of the State, or it may opt to enter into co-production, joint venture, or production-sharing agreements, or it may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. (*Italics supplied*)

The old system of “license, concession or lease” which merely gave the State a pittance in the form of taxes, fees and charges is now buried in history. Any attempt to resurrect it is unconstitutional and deserves outright rejection by this Court.

The Constitution prohibits the alienation of all natural resources except agricultural lands.[14] The Constitution, however, allows the State to exploit commercially its natural resources and sell the marketable products from such exploitation. This the State may do through a co-production, joint venture or production-sharing arrangement with companies at least 60% Filipino owned. The necessary implication is that the State, as owner of the natural resources, must receive a fair share of the income from such commercial operation. The State may receive its share of the net income in cash or in kind.

The State may also directly exploit its natural resources in either of two ways. The State may set up its own company to engage in the exploitation of natural resources. Alternatively, the State may enter into a financial or technical assistance agreement (“FTAA”) with private companies who act as contractors of the State. The State may seek from such contractors either financial or technical assistance, or both, depending on the State’s own needs. Under an FTAA, the contractor, foreign or local, manages the contracted work or operations to the extent of its financial or technical contribution, subject to the State’s control and supervision.

Except in large-scale exploitation of certain minerals, the State’s contractors must be 60% Filipino owned companies. The State pays such contractors, for their technical services or financial assistance, a share of the income from the exploitation of the natural resources. The State retains the remainder of the income after paying the Filipino owned contractor.

In large-scale exploitation of minerals, petroleum and other mineral oils, the Constitution allows the State to contract with “foreign-owned corporations” under an FTAA. This is still a direct exploitation by the State but using a foreign instead of a local contractor. However, the Constitution requires that the participation of foreign contractors must make a real contribution to the national economy and the general welfare. The State pays the foreign contractor, for its technical services or financial assistance, a share of the income from the exploitation of the minerals, petroleum or other mineral oils. The State retains the rest of the income after paying the foreign contractor.

Whether the FTAA contractor is local or foreign, the State must retain its fair share of the income from the exploitation of the natural resources that it owns. To insure it retains its fair share of the income, the State must exercise full control and supervision over the exploitation of its natural resources. And whether the FTAA contractor is local or foreign, the State is directly undertaking the exploitation of its natural resources, with the FTAA contractor providing technical services or financing to the State. Since the State is directly undertaking the exploitation, all exploration permits and similar authorizations are in the name of the Philippine Government, which then authorizes the contractor to act on its behalf.

The State exercises full control and supervision over the mining operations in the Philippines of the foreign contractor. However, the State does not exercise control and supervision over the foreign contractor itself or its board of directors. The State does not also exercise any control or supervision over the foreign contractor’s mining operations in other countries, or even its non-mining operations in the Philippines. There is no conflict of power between the State and the foreign contractor’s board of directors. By entering into an FTAA, the foreign contractor, through its board of directors, agrees to manage the contracted work or operations to the extent of its financial or technical contribution subject to the State’s control and supervision.

No government should contract with a corporation, local or foreign, to exploit commercially the nation’s natural resources without the State receiving any income as owner of the natural resources. Natural resources are

non-renewable and exhaustible assets of the State. Certainly, no government in its right mind should give away for free its natural resources to private business enterprises, local or foreign, amidst widespread poverty among its people.

In sum, two basic constitutional principles govern the exploitation of natural resources in the country. First, the State owns the country's natural resources and must benefit as owner from any exploitation of its natural resources. Second, to insure that it receives its fair share as owner of the natural resources, the State must exercise full control and supervision over the exploitation of its natural resources.

We shall subject RA 7942 to constitutional scrutiny based on these two basic principles.

C. Waiver of Beneficial Rights from Ownership of Mineral Resources

RA 7942 contains five provisions which waive the State's right to receive income from the exploitation of its mineral resources. These provisions are Sections 39, 80, 81, 84 and 112:

Section 39. Option to Convert into a Mineral Agreement. — The contractor has the option to convert the financial or technical assistance agreement to a mineral agreement at any time during the term of the agreement, if the economic viability of the contract area is found to be inadequate to justify large-scale mining operations, after proper notice to the Secretary as provided for under the implementing rules and regulations: Provided, That the mineral agreement shall only be for the remaining period of the original agreement.

In the case of a foreign contractor, it shall reduce its equity to forty percent (40%) in the corporation, partnership, association, or cooperative. Upon compliance with this requirement by the contractor, the Secretary shall approve the conversion and execute the mineral production-sharing agreement.

Section 80. Government Share in Mineral Production Sharing Agreement. — The total government share in a mineral production sharing agreement shall be the excise tax on mineral products as provided in Republic Act No. 7729, amending Section 151(a) of the National Internal Revenue Code, as amended.

Section 81. Government Share in Other Mineral Agreements. — The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the: (a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, and (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor. The Government shall also be entitled to compensation for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.

Section 84. Excise Tax on Mineral Products. — The contractor shall be liable to pay the excise tax on mineral products as provided for under Section 151 of the National Internal Revenue Code: Provided, however, That with respect to a mineral production sharing agreement, the excise tax on mineral products shall be the government share under said agreement.

Section 112. Non-impairment of Existing Mining/Quarrying Rights. - All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production-sharing agreements granted under Executive Order No. 279, at the date of effectivity of this Act, shall remain valid x x x Provided, That the provisions of Chapter XIV[15] on government share in mineral production-sharing agreement x x x shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the Secretary, in writing, not to avail of said provisions: x x x. (Italics supplied)

Section 80 of RA 7942 limits to the excise tax the State's share in a mineral production-sharing agreement ("MPSA"). Section 80 expressly states that the excise tax on mineral products shall constitute the "total government share in a mineral production sharing agreement." Under Section 151(A) of the Tax Code, this excise tax on metallic and non-metallic minerals is only 2% of the market value, as follows:

Section 151. Mineral Products. —

(A) Rates of Tax. — There shall be levied, assessed and collected on minerals, mineral products and quarry resources, excise tax as follows:

(1) On coal and coke, a tax of Ten pesos (P10.00) per metric ton;

(2) On all nonmetallic minerals and quarry resources, a tax of two percent (2%) based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; or the value used by the Bureau of Customs in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation.

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(3) On all metallic minerals, a tax based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; or the value used by the Bureau of Customs in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation, in accordance with the following schedule:

(a) Copper and other metallic minerals:

(i) On the first three (3) years upon the effectivity of Republic Act No. 7729, one percent (1%);

(ii) On the fourth and the fifth years, one and a half percent (1½%); and

(iii) On the sixth year and thereafter, two percent (2%).

(b) Gold and chromite, two percent (2%).

x x x. (Italics supplied)

Section 80 of RA 7942 does not allow the State to receive any income as owner of the mineral resources. The proviso in Section 84 of RA 7942 reiterates this when it states that "the excise tax on mineral products shall be the government share under said agreement." [16] The State receives only an excise tax flowing from its taxing power, not from its ownership of the mineral resources. The excise tax is imposed not only on mineral products, but also on alcohol, tobacco and automobiles [17] produced by companies that do not exploit natural resources owned by the State. The excise tax is not payment for the exploitation of the State's natural resources, but payment for the "privilege of engaging in business." [18] Clearly, under Section 80 of RA 7942, the State does not receive as owner of the mineral resources any income from the exploitation of its mineral resources.

The second paragraph of Section 81 of RA 7942 also limits the State's share in FTAA's with foreign contractors to taxes, duties and fees. Section 81 of RA 7942 provides that the State's share in FTAA's with foreign contractors

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shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws. (*Italics supplied*)

RA 7942 does not explain the phrase "among other things." The Solicitor General states correctly that the phrase refers to taxes.[19] The phrase is an ejusdem generis phrase, and means "among other taxes, duties and fees" since the items specifically enumerated are all taxes, duties and fees. The last phrase "all such other taxes, duties and fees as provided for under existing laws" at the end of the sentence clarifies further that the phrase "among other things" refers to taxes, duties and fees.

The second paragraph of Section 81 does not require the Government and the foreign FTAA contractor to negotiate the State's share. In contrast, the first paragraph of Section 81 expressly provides that the "share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor" which is 60% Filipino owned.

In a co-production or joint venture agreement, the Government contributes other inputs or equity in addition to its mineral resources.[20] Thus, the first paragraph of Section 81 requires the Government and the 60% Filipino owned company to negotiate the State's share. However, in an FTAA with a foreign contractor under the second paragraph of Section 81, the Government's contribution is only the mineral resources. Section 81 does not require the Government and the foreign contractor to negotiate the State's share from the net proceeds because there is no share for the State. Section 81 does not recognize the State's contribution of mineral resources as worthy of any share of the net proceeds from the mining operations.

Thus, in FTAA's with foreign contractors under RA 7942, the State's share is limited to taxes, fees and duties. The taxes include "withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments." All these taxes, fees and duties are imposed pursuant to the State's taxing power. The tax on income, including dividend and interest income, is imposed on all taxpayers whether or not they are stockholders of mining companies. These taxes, fees and duties are not contractual payments to the State as owner of the mineral resources but are mandatory exactions based on the taxing power of the State.

Section 112 of RA 7942 is another provision that violates Section 2, Article XII of the 1987 Constitution. Section 112 "immediately" reverts all mineral agreements to the old and discredited "license, concession or lease" system outlawed by the 1987 Constitution. Section 112 states that "the provisions of Chapter XIV[21] on government share in mineral production-sharing agreement x x x shall immediately govern and apply to a mining lessee or contractor." The contractor, local or foreign, will now pay only the "government share in a mineral production-sharing agreement" under RA 7942. Section 80 of RA 7942, which specifically governs MPSAs, limits the "government share" solely to the excise tax on mineral products - 2% on metallic and non-metallic minerals and 3% on indigenous petroleum.

In allowing the payment of the excise tax as the only share of the government in any mineral agreement, whether co-production, joint venture or production-sharing, Section 112 of RA 7942 reinstates the old "license, concession or lease" system where the State receives only minimal taxes, duties and fees. This clearly violates Section 2, Article XII of the Constitution and is therefore unconstitutional. Section 112 of RA 7942 is a sweeping negation of the clear letter and intent of the 1987 Constitution that the exploitation of the State's natural resources must benefit primarily the Filipino people.

Of course, Section 112 gives contractors the option not to avail of the benefit of Section 112. This is in the guise

that the enactment of RA 7942 shall not impair pre-existing mining rights, as the heading of Section 112 states. It is doubtful, however, if any contractor of sound mind would refuse to receive 100% rather than only 40% of the net proceeds from the exploitation of minerals under the FTAA.

Another provision that violates Section 2, Article XII of the Constitution is Section 39 of RA 7942. Section 39 grants the foreign contractor the option to convert the FTAA into a “mineral production-sharing agreement” if the foreign contractor finds that the mineral deposits do not justify large-scale mining operations. Section 39 of RA 7942 operates to deprive the State of income from the mining operations and limits the State to the excise tax on mineral products.

Section 39 grants the foreign contractor the option to revert to the “license, concession or lease” system which the 1987 Constitution has banned. The only requirement for the exercise of the option is for the foreign contractor to divest 60% of its equity to a Philippine citizen or to a corporation 60% Filipino owned. Section 39 states, “Upon compliance with this requirement by the contractor, the Secretary shall approve the conversion and execute the mineral production-sharing agreement.” The foreign contractor only needs to give “proper notice to the Secretary as provided for under the implementing rules and regulations” if the contractor finds the contract area not viable for large-scale mining. Thus, Section 39 of RA 7942 is unconstitutional.

Sections 39, 80, 81, 84 and 112 of RA 7942 operate to deprive the State of the beneficial rights arising from its ownership of mineral resources. What Section 2, Article XII of the 1987 Constitution vests in absolute ownership to the State, Sections 80, 81, 84 and 112 of RA 7942 take away and give for free to private business enterprises, including foreign-owned companies.

The legislature has discretion whether to tax a business or product. If the legislature chooses to tax a business or product, it is free to determine the rate or amount of the tax, provided it is not confiscatory.[22] The legislature has the discretion to impose merely a 2% excise tax on mineral products. Courts cannot inquire into the wisdom of the amount of such tax, no matter how meager it may be. This discretion of the legislature emanates from the State’s taxing power, a power vested solely in the legislature.

However, the legislature has no power to waive for free the benefits accruing to the State from its ownership of mineral resources. Absent considerations of social justice, the legislature has no power to give away for free what forms part of the national patrimony of the State. Any surrender by the legislature of the nation’s mineral resources, especially to foreign private enterprises, is repugnant to the concept of national patrimony. Mineral resources form part of the national patrimony under Article XII (National Economy and Patrimony) of the 1987 Constitution.

Under the last paragraph of Section 81, the collection of the State’s so-called “share” (consisting of taxes) in FTAAAs with foreign contractors is not even certain. This paragraph provides that the State’s “share x x x shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures.” There is no time limit in RA 7942 for this grace period when the collection of the State’s “share” does not run.[23]

RA 7942 itself does not require government approval for the pre-operating, exploration and development expenses of the foreign contractor. The determination of the amount of pre-operating, exploration and development expenses is left solely to the discretion of the foreign contractor. Nothing prevents the foreign contractor from recording pre-operating, exploration and development expenses equal to the mining revenues it anticipates for the first 10 years. If that happens, the State’s share is ZERO for the first 10 years.

The Government cannot tell the Filipino people when the State will start to receive its “share” (consisting of

taxes) in mining revenues under the FTAA. The Executive Department cannot correct these deficiencies in RA 7942 through remedial implementing rules. The correction involves substantive legislation, not merely filling in the implementing details of the law.

Taxes, fees and duties cannot constitute payment for the State's share as owner of the mineral resources. This was the mode of payment used under the old system of "license, concession or lease" which the 1987 Constitution abrogated. Obviously, Sections 80, 81, 84 and 112 of RA 7942 constitute an ingenious attempt to resurrect the old and discredited system, which the 1987 Constitution has now outlawed. Under the 1987 Constitution, the State must receive its fair share as owner of the mineral resources, separate from taxes, fees and duties paid by taxpayers. The legislature may waive taxes, fees and duties, but it cannot waive the State's share in mining operations.

Any law waiving for free the State's right to the benefits arising from its ownership of mineral resources is unconstitutional. Such law negates Section 2, Article XII of the 1987 Constitution vesting ownership of mineral resources in the State. Such law will not contribute to "economic growth and the general welfare of the country" as required in the fourth paragraph of Section 2. Thus, in waiving the State's income from the exploitation of mineral resources, Section 80, the second paragraph of Section 81, the proviso in Section 84, and Section 112 of RA 7942 violate the Constitution and are therefore void.

D. Abdication of the State's Duty to Control and Supervise Fully the Exploitation of Mineral Resources

The 1987 Constitution commands the State to exercise "full control and supervision" over the exploitation of natural resources. The purpose of this mandatory directive is to insure that the State receives its fair share in the exploitation of natural resources. The framers of the Constitution were determined to avoid the disastrous mistakes of the past. Under the old system of "license, concession or lease," the State gave full control to the concessionaires who enriched themselves while paying the State minimal taxes, fees and charges.

Under the 1987 Constitution, for a co-production, joint venture or production-sharing agreement to be valid the State must exercise full control and supervision over the mining operations. This means that the State should approve all capital and operating expenses in the exploitation of the natural resources. Approval of capital expenses determines how much capital is recoverable by the mining contractor. Approval of operating expenses determines the reasonable amounts deductible from the annual income from mining operations. Such approvals are essential because the net income from mining operations, which is the basis of the State's share, depends on the allowable amount of capital and operating expenses. There is approval of capital and operating expenses when the State approves them, or if the State disapproves them and a dispute arises, when their final allowance is subject to arbitration.

The provisions of RA 7942 on MPSAs and FTAA's do not give the State any control and supervision over mining operations. The reason is obvious. The State's so-called "share" in a mineral production-sharing agreement under Section 80 is limited solely to the excise tax on mineral products. This excise tax is based on the market value of the mineral product determined without reference to the capital or operating expenses of the mining contractor.

Likewise, the State's "share" in an FTAA under Section 81 has no relation to the capital or operating expenses of the foreign contractor. The State's "share" constitutes the same excise tax on mineral products, in addition to other direct and indirect taxes. The basis of the excise tax is the selling price of the mineral product. Hence, there is no reason for the State to approve or disapprove the capital or operating expenses of the mining contractor. Consequently, RA 7942 does not give the State any control and supervision over mining operations contrary to the express command of the Constitution. This makes Section 80, the second paragraph of Section 81, the proviso in Section 84, and Section 112 of RA 7942 unconstitutional.

E. RA 7942 Will Not Contribute to Economic Growth or General Welfare of the Country

The fourth paragraph of Section 2, Article XII of the 1987 Constitution requires that FTAA's with foreign contractors must make "real contributions to the economic growth and general welfare of the country." Under Section 81 of RA 7942, all the net proceeds arising from the exploitation of mineral resources accrue to the foreign contractor even if the State owns the mineral resources. The foreign contractor will naturally repatriate the entire after-tax net proceeds to its home country. Sections 94(a) and 94(b) of RA 7942 guarantee the foreign contractor the right to repatriate its after-tax net proceeds, as well as its entire capital investment, after the termination of its mining operations in the country.[24]

Clearly, no FTAA under Section 81 will ever make any real contribution to the growth of the economy or to the general welfare of the country. The foreign contractor, after it ceases to operate in the country, can even remit to its home country the scrap value of its capital equipment. Thus, the second paragraph of Section 81 of RA 7942 is unconstitutional for failure to meet the constitutional requirement that the FTAA with a foreign contractor should make a real contribution to the national economy and general welfare.

F. Example of FTAA that Complies with Section 2, Article XII of the 1987 Constitution

The Solicitor General warns that declaring unconstitutional RA 7942 or its provisions will endanger the Philippine Government's contract with the foreign contractor extracting petroleum in Malampaya, Palawan.[25] On the contrary, the FTAA with the foreign petroleum contractor meets the essential constitutional requirements since the State receives a fair share of the income from the petroleum operations. The State also exercises control and supervision over the exploitation of the petroleum. The petroleum FTAA provides enough safeguards to insure that the petroleum operations will make a real contribution to the national economy and general welfare.

The Service Contract dated 11 December 1990 between the Philippine Government as the first party, and Occidental Philippines, Inc. and Shell Exploration B.V. as the second party[26] ("Occidental-Shell FTAA"), covering offshore exploitation of petroleum in Northwest Palawan, contains the following provisions:

- There is express recognition that the "conduct of Petroleum Operations shall be under the full control and supervision of the Office of Energy Affairs,"[27] now Department of Energy ("DOE"), and that the "CONTRACTOR shall undertake and execute the Petroleum Operations contemplated hereunder under the full control and supervision of the OFFICE OF ENERGY AFFAIRS;"[28]
- The State receives 60% of the net proceeds from the petroleum operations, while the foreign contractor receives the remaining 40%;[29]
- The DOE has a right to inspect and audit every year the foreign contractor's books and accounts relating to the petroleum operations, and object in writing to any expense (operating and capital expenses)[30] within 60 days from completion of the audit, and if there is no amicable settlement, the dispute goes to arbitration;[31]
- The operating expenses in any year cannot exceed 70% of the gross proceeds from the sale of petroleum in the same year, and any excess may be carried over in succeeding years;[32]
- The Bureau of Internal Revenue ("BIR") can inspect and examine all the accounts, books and records of the foreign contractor relating to the petroleum operations upon 24 hours written notice;[33]
- The petroleum output is sold at posted or market prices;[34]
- The foreign contractor pays the 32% Philippine corporate income tax on its 40% share of the net proceeds, including withholding tax on dividends or remittances of profits.[35] (*Italics supplied*)

The Occidental-Shell FTAA gives the State its fair share of the income from the petroleum operations of the

foreign contractor. There is no question that the State receives its rightful share, amounting to 60% of the net proceeds, in recognition of its ownership of the petroleum resources. In addition, Occidental-Shell's 40% share in the net proceeds is subject to the 32% Philippine income tax. The Occidental-Shell FTAA also gives the State, through the DOE and BIR, full control and supervision over the petroleum operations of the foreign contractor. The foreign contractor can recover only the capital and operating expenses approved by the DOE or by the arbitral panel.[36] The Occidental-Shell FTAA also contains other safeguards to protect the interest of the State as owner of the petroleum resources. While the foreign contractor manages the contracted work or operations to the extent of its financial or technical contribution, there are sufficient safeguards in the FTAA to insure compliance with the constitutional requirements. The terms of the Occidental-Shell FTAA are fair to the State and to Occidental-Shell.

In FTAA's with a foreign contractor, the State must receive at least 60% percent of the net proceeds from the exploitation of its mineral resources. This share is the equivalent of the constitutional requirement that at least 60% of the capital, and hence 60% of the income, of mining companies should remain in Filipino hands. Intervenor CMP and even respondent WMCP agree that the State has a 60% interest in the mining operations under an FTAA with a foreign contractor. Intervenor CMP asserts that the Philippine Government "stands in the place of the 60% Filipino-owned company." [37] Intervenor CMP also states that "the contractor will get 40% of the financial benefits," [38] admitting that the State, which is the owner of the mineral resources, will retain the remaining 60% of the net proceeds.

Respondent WMCP likewise admits that the 60%-40% "sharing ratio between the Philippine Government and the Contractor is also in accordance with the 60%-40% equity requirement for Filipino-owned corporations." [39] Respondent WMCP even adds that the 60%-40% sharing ratio is "in line with the intent behind Section 2 of Article XII that the Filipino people, as represented by the State, benefit primarily from the exploration, development, and utilization of the Philippines' natural resources." [40] If the State has a 60% interest in the mining operations under an FTAA, then it must retain at least 60% of the net proceeds.

Otherwise, there is no sense exploiting the State's natural resources if all or a major part of the profits are remitted abroad, precluding any real contribution to the national economy or the general welfare. The constitutional requirement of full control and supervision necessarily means that the State must receive the income that corresponds to the party exercising full control, and this logically means a majority of the income.

The Occidental-Shell FTAA satisfies these constitutional requirements because the State receives 60% of the net proceeds and exercises full control and supervision of the petroleum operations. The State's right to receive 60% of the net proceeds and its exercise of full control and supervision are the essential constitutional requirements for the validity of any FTAA. The name given to the contract is immaterial – whether a "Service Contract" or any other name - provided these two essential constitutional requirements are present. Thus, the designation of the Occidental-Shell FTAA as a "Service Contract" is inconsequential since the two essential constitutional requirements for the validity of the contract as an FTAA are present.

With the State's right to receive 60% of the net proceeds, coupled with its control and supervision, the petroleum operations in the Occidental-Shell FTAA are legally and in fact 60% owned and controlled by Filipinos. Indeed, the State is directly undertaking the petroleum exploitation with Occidental-Shell as the foreign contractor. The Occidental-Shell FTAA does not provide for the issuance of exploration permits to Occidental-Shell precisely because the State itself is directly undertaking the petroleum exploitation.

Section 3(aq) of RA 7942 allows the foreign contractor to hold the exploration permit under the FTAA. However, Section 2, Article XII of the 1987 Constitution does not allow foreign owned corporations to undertake directly mining operations. Foreign owned corporations can only act as contractors of the State under the FTAA, which is

one method for the State to undertake directly the exploitation of its natural resources. The State, as the party directly undertaking the exploitation of its natural resources, must hold through the Government all exploration permits and similar authorizations. Section 3(aq) of RA 7942, in allowing foreign owned corporations to hold exploration permits, is unconstitutional.

The Occidental-Shell FTAA, involving a far riskier offshore venture than land-based mining operations, is a model for emulation if foreign contractors want to comply with the constitutional requirements. Section 112 of RA 7942, however, negates the benefits of the State from the Occidental-Shell FTAA.

Occidental-Shell can invoke Section 112 of RA 7942 and deny the State its 60% share of the net proceeds from the exploitation of petroleum. Section 112 allows the foreign contractor to pay only the “government share in a mineral production-sharing agreement” under RA 7942. Section 80 of RA 7942 on MPSAs limits the “government share” solely to the excise tax – 2% on metallic and non-metallic mineral products and 3% on petroleum. Section 112 of RA 7942 is unconstitutional since it is contrary to Section 2, Article XII of the 1987 Constitution.

G. The WMCP FTAA Violates Section 2, Article XII of the 1987 Constitution

The WMCP FTAA^[41] ostensibly gives the State 60% share of the net mining revenue. In reality, this 60% share is illusory. Section 7.7 of the WMCP FTAA provides that:

From the Commencement of Commercial Production, the Contractor shall pay a government share of sixty per centum (60%) of Net Mining Revenues, calculated in accordance with the following provisions (the Government Share). The Contractor shall be entitled to retain the balance of all revenues from the Mining Operations. (*Italics supplied*)

However, under Section 7.9 of the WMCP FTAA, if WMCP’s foreign stockholders sell 60% of their equity to a Philippine citizen or corporation, the State loses its right to receive its 60% share of the net mining revenues under Section 7.7. Thus, Section 7.9 provides:

The percentage of Net Mining Revenues payable to the Government pursuant to Clause 7.7 shall be reduced by 1% of Net Mining Revenues for every 1% ownership interest in the Contractor held by a Qualified Entity. (*Italics supplied*)

What Section 7.7 gives to the State, Section 7.9 takes away without any offsetting compensation to the State. In reality, the State has no vested right to receive any income from the exploitation of its mineral resources. What the WMCP FTAA gives to the State in Section 7.7 is merely by tolerance of WMCP’s foreign stockholders, who can at anytime cut off the State’s entire 60% share by selling 60% of WMCP’s equity to a Philippine citizen or corporation.^[42] The proceeds of such sale do not accrue to the State but belong entirely to the foreign stockholders of WMCP.

Section 2.1 of the WMCP FTAA defines a “Qualified Entity” to include a corporation 60% Filipino owned and 40% foreign owned.^[43] WMCP’s foreign stockholders can sell 60% of WMCP’s equity to such corporation and the sale will still trigger the operation of Section 7.9 of the WMCP FTAA. Thus, the State will receive ZERO percent of the income but the foreign stockholders will own beneficially 64% of WMCP, consisting of their remaining 40% equity and 24% pro-rata share in the buyer-corporation. WMCP will then invoke Section 39 of RA 7942 allowing it to convert the FTAA into an MPSA, thus subjecting WMCP to pay only 2% excise tax on mineral products in lieu of sharing its mining income with the State. This violates Section 2, Article XII of the 1987 Constitution requiring that only corporations “at least sixty per centum of whose capital is owned by such citizens” can enter into co-production, joint venture or production-sharing agreements with the State.

The State, as owner of the mineral resources, must receive a fair share of the income from any commercial exploitation of its mineral resources. Mineral resources form part of the national patrimony, and so are the net proceeds from such resources. The Legislature or Executive Department cannot waive the State's right to receive a fair share of the income from such mineral resources.

The intervenor Chamber of Mines of the Philippines ("CMP") admits that under an FTAA with a foreign contractor, the Philippine Government "stands in the place of the 60% Filipino owned company" and hence must retain 60% of the net proceeds. Thus, intervenor CMP concedes that:

x x x In other words, in the FTAA situation, the Government stands in the place of the 60% Filipino-owned company, and the 100% foreign-owned contractor company takes all the risks of failure to find a commercially viable large-scale ore body or oil deposit, for which the contractor will get 40% of the financial benefits.[44](Italics supplied)

For this reason, intervenor CMP asserts that the "contractor's stipulated share under the WMCP FTAA is limited to a maximum of 40% of the net production." [45] Intervenor CMP further insists that "60% of its (contractor's) net returns from mining, if any, will go to the Government under the WMCP FTAA." [46] Intervenor CMP, however, fails to consider that the Government's 60% share is illusory because under Section 7.9 of the WMCP FTAA the foreign stockholders of WMCP can reduce at any time to ZERO percent the Government's share.

If WMCP's foreign stockholders do not immediately sell 60% of WMCP's equity to a Philippine citizen or corporation, the State in the meantime receives its 60% share. However, under Section 7.10 of the WMCP FTAA, the State shall receive its share "after the offsetting of the items referred to in Clauses 7.8 and 7.9," namely:

7.8. The Government Share shall be deemed to include all of the following sums:

(a)

all Government taxes, fees, levies, costs, imposts, duties and royalties including excise tax, corporate income tax, customs duty, sales tax, value added tax, occupation and regulatory fees, Government controlled price stabilization schemes, any other form of Government backed schemes, any tax on dividend payments by the Contractor or its Affiliates in respect of revenues from the Mining Operations and any tax on interest on domestic and foreign loans or other financial arrangements or accommodation, including loans extended to the Contractor by its stockholders;

(b)

any payments to local and regional government, including taxes, fees, levies, costs, imposts, duties, royalties, occupation and regulatory fees and infrastructure contributions;

(c)

any payments to landowners, surface rights holders, occupiers, indigenous people or Claim-owners;

(d)

costs and expenses of fulfilling the Contractor's obligations to contribute to national development in accordance with Clause 10.1(i)(1) and 10.1(i)(2);

(e)

an amount equivalent to whatever benefits that may be extended in the future by the Government to the Contractor or to financial or technical assistance agreement contractors in general;

(f)

all of the foregoing items which have not previously been offset against the Government Share in an earlier Fiscal year, adjusted for inflation.

7.9. The percentage of Net Mining Revenues payable to the Government pursuant to Clause 7.7 shall be reduced by 1% of Net Mining Revenues for every 1% ownership interest in the Contractor held by a Qualified Entity.

It makes no sense why under Section 7.8(e) money spent by the Government for the benefit of the contractor, like building roads leading to the mine site, is deductible from the State's 60% share of the Net Mining Revenues. Unless of course the purpose is solely to reduce further the State's share regardless of any reason. In any event, the numerous deductions from the State's 60% share make one wonder if the State will ever receive anything for its ownership of the mineral resources. Even assuming the State will receive something, the foreign stockholders of WMCP can at anytime take it away by selling 60% of WMCP's equity to a Philippine citizen or corporation.

In short, the State does not have any right to any share in the net income from the mining operations under the WMCP FTAA. The stipulated 60% share of the Government is illusory. The State is left to collect only the 2% excise tax as its sole share from the mining operations.

Indeed, on 23 January 2001, WMCP's foreign stockholders sold 100% of WMCP's equity to Sagittarius Mines, Inc., a domestic corporation 60% Filipino owned and 40% foreign owned.[47] This sale automatically triggered the operation of Section 7.9 of the WMCP FTAA reducing the State's share in the Net Mining Revenues to ZERO percent without any offsetting compensation to the State. Thus, as of now, the State has no right under the WMCP FTAA to receive any share in the mining revenues of the contractor, even though the State owns the mineral resources being exploited under the WMCP FTAA.

Intervenor CMP anchors its arguments on the erroneous interpretation that the WMCP FTAA gives the State 60% of the net income of the foreign contractor. Thus, intervenor CMP states that "60% of its (WMCP's) net returns from mining, if any, will go to the Government under the WMCP FTAA." [48] This basic error in interpretation leads intervenor CMP to erroneous conclusions of law and fact.

Like intervenor CMP, respondent WMCP also maintains that under the WMCP FTAA, the State is "guaranteed" a 60% share of the foreign contractor's Net Mining Revenues. Respondent WMCP contends, after quoting Section 7.7 of the WMCP FTAA, that:

In other words, the State is guaranteed a sixty per centum (60%) share of the Mining Revenues, or 60% of the actual fruits of the endeavor. This is in line with the intent behind Section 2 of Article XII that the Filipino people, as represented by the State, benefit primarily from the exploration, development, and utilization of the Philippines' natural resources.

Incidentally, this sharing ratio between the Philippine Government and the Contractor is also in accordance with the 60%-40% equity requirement for Filipino-owned corporations in Paragraph 1 of Section 2 of Article XII.[49] (*Italics and underscoring in the original*)

This so-called "guarantee" is a sham. Respondent WMCP gravely misleads this Court. Section 7.9 of the WMCP FTAA provides that the State's share "shall be reduced by 1% of Net Mining Revenues for every 1% ownership interest in the Contractor held by a Qualified Entity." This reduction is without any offsetting compensation to the State and constitutes a waiver of the State's share to WMCP's foreign stockholders. The Executive Department cannot give away for free, especially to foreigners, what forms part of the national patrimony. This negates the constitutionally mandated State ownership of mineral resources for the benefit of the Filipino people.

WMCP's stockholders may also invoke Section 112 of RA 7942 allowing a mining contractor to pay the State's

share in accordance with Section 80 of RA 7942. WMCP will end up paying only the 2% excise tax to the Philippine Government for the exploitation of the mineral resources the State owns. In short, the old and discredited system of “license, concession or lease” will govern the WMCP FTAA.

The WMCP FTAA is also emphatic in stating that WMCP shall have exclusive right to exploit, utilize, process and dispose of all mineral products produced under the WMCP FTAA. Section 1.3 of the WMCP FTAA provides:

The Contractor shall have the exclusive right to explore, exploit, utilise, process and dispose of all Mineral products and by-products thereof that may be derived or produced from the Contract Area but shall not, by virtue only of this Agreement, acquire any title to lands encompassed within the Contract Area.

Under the WMCP FTAA, the contractor has exclusive right to exploit, utilize and process the mineral resources to the exclusion of third parties and even the Philippine Government. Since WMCP’s right is exclusive, the Government has no participation in approving the operating expenses of the foreign contractor relating to the exploitation, utilization, and processing of mineral resources. The Government will have to accept whatever operating expenses the contractor decides to incur in exploiting, utilizing and processing mineral resources.

Under the WMCP FTAA, the contractor has exclusive right to dispose of the minerals recovered in the mining operations. This means that the contractor can sell the minerals to any buyer, local or foreign, at the price and terms the contractor chooses without any intervention from the State. There is no requirement in the WMCP FTAA that the contractor must sell the minerals at posted or market prices. The contractor has the sole right to “mortgage, charge or encumber” the “Minerals produced from the Mining Operations.”[50]

Section 8.3 of the WMCP FTAA also makes a sham of the DENR Secretary’s authority to approve the foreign contractor’s Work Program. Section 8.3 provides:

If the Secretary gives a Rejection Notice the Parties shall promptly meet and endeavour to agree on amendments to the Work Program or budget. If the Secretary and the Contractor fail to agree on the proposed revision within 30 days from delivery of the Rejection Notice then the Work Programme or Budget or variation thereof proposed by the Contractor shall be deemed approved, so as not to unnecessarily delay the performance of the Agreement. (Italics supplied)

The DENR Secretary is the representative of the State which owns the mineral resources. The DENR Secretary implements the mining laws, including RA 7942. Section 8.3, however, treats the DENR Secretary like a subservient non-entity whom the contractor can overrule at will. Under Section 8.3 of the WMCP FTAA, the DENR Secretary has no authority whatsoever to disapprove the Work Program. This is not what the Constitution means by full control and supervision by the State of mining operations.

Section 10.4(i) of the WMCP FTAA compels the Philippine Government to agree to any request by the foreign contractor to amend the WMCP FTAA to satisfy the conditions of creditors of the contractor. Thus, Section 10.4(i) states:

(i)

the Government shall favourably consider any request, from Contractor for amendments of this Agreement which are necessary in order for the Contractor to successfully obtain the financing;

x x x. (Italics supplied)

This provision requires the Government to favorably consider any request from the contractor - which means that

the Government must render a response favorable to the contractor. In effect, the contractor has the right to amend the WMCP FTAA even against the will of the Philippine Government just so the contractor can borrow money from banks.

True, the preceding Section 10.4(e) of the WMCP FTAA provides that “such financing arrangements will in no event reduce the Contractor’s obligations or the Government’s rights.” However, Section 10.4(i) binds the Government to agree to any future amendment requested by the foreign contractor even if the Government does not agree with the wisdom of the amendment. This provision is contrary to the State’s full control and supervision in the exploitation of mineral resources.

Clearly, under the WMCP FTAA the State has no full control and supervision over the mining operations of the contractor. Provisions in the WMCP FTAA that grant the State full control and supervision are negated by other provisions that take away such control and supervision.

The WMCP FTAA also violates the constitutional limits on the term of an FTAA. Section 2, Article XII of the 1987 Constitution limits the term of a mineral agreement to “a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law.” The original term cannot exceed 25 years, and at the end of such term, either the Government or the contracting party may decide not to renew the mineral agreement. However, both the Government and the contracting party may also decide to renew the agreement, in which case the renewal cannot exceed another 25 years. What is essential is that either party has the option to renew or not to renew the mineral agreement at the end of the original term.

However, Section 3.3 of the WMCP FTAA binds the Philippine Government to an ironclad 50-year term. Section 3.3 compels the Government to renew the FTAA for another 25 years after the original 25-year term expires. Thus, Section 3.3 states:

This Agreement shall be renewed by the Government for a further period of twenty-five (25) years under the same terms and conditions provided that the Contractor lodges a request for a renewal with the Government not less than sixty (60) days prior to the expiry of the initial term of this Agreement and provided that the Contractor is not in breach of any of the requirements of this Agreement. (*Italics supplied*)

Under Section 3.3, the contractor has the option to renew or not to renew the agreement. The Government has no such option and must renew the agreement once the contractor makes a request for renewal. Section 3.3 violates the constitutional limits because it binds the Government to a 50-year FTAA at the sole option of the contractor.

H. Arguments of the Solicitor General and the NEDA Secretary

The Solicitor General states that the “basic share” of the State in FTAA’s involving large-scale exploitation of minerals, petroleum and other mineral oils –

x x x consists of all direct taxes, fees and royalties, as well as other payments made by the Contractor during the term of the FTAA. The amounts are paid to the (i) national government, (ii) local governments, and (iii) persons directly affected by the mining project. Some of the major taxes paid are as follows Section 3(g) of DAO-99-56:

A. Payments to National Government

- Excise tax on minerals – 2% of gross output of mining operations
- Contractor’s income tax – 32% of taxable income for corporation
- Customs duties and fees - rate is set by Tariff and Customs Code

- VAT on imported equipment, goods and services - 10% of value
- Royalty on minerals extracted from mineral reservations, if applicable – 5% of the actual market value of the minerals produced
- Documentary stamp tax – rate depends on the type of transaction
- Capital gains tax on traded stocks – 5 to 10% of the value
- Tax on interest payments on foreign loans – 15% of the interest
- Tax on foreign stockholders dividends - 15% of the dividend
- Wharfage and port fees
- Licensing fees (e.g., radio permit, firearms permit, professional fees)

B. Payments to Local Governments

- Local business tax - maximum of 2% of gross sale or receipt
- Real property tax - 2% of the fair market value of property based on an assessment level set by the local government
- Local business tax - maximum of 2% of gross sale or receipt
- Special education levy - 1% of the basis used in real property tax
- Occupation tax - 50 pesos per hectare per year; 100 pesos per hectare per year if located in a mineral concession
- Community tax - 10,500 pesos maximum per year
- Other local taxes and fees - rate and type depends on the local government

C. Other Payments

- Royalty to indigenous cultural communities, if any - not less than 1% of the gross output from mining operations
- Special allowance – payment to claim owners or surface right owners

The Solicitor General argues that the phrase “among other things” in the second paragraph of Section 81 of RA 7942 means that the State “is entitled to an additional government share to be paid by the Contractor.” The Solicitor General explains:

An additional government share is collected from an FTAA contractor to fulfill the intent of Section 81 of RA No. 7942, to wit:

Sec. 81. The Government share in an FTAA shall consist of, among other things, the Contractor’s corporate income tax, excise tax, special allowance, withholding tax due from the Contractor’s foreign stockholders arising from dividends or interest payments to the said foreign stockholders in case of a foreign-owned corporation and all such other taxes, duties and fees as provided for in existing laws. (*Italics supplied*)

The phrase “among other things” indicates that the Government is entitled to an additional share to be paid by the Contractor, aside from the basic share in order to achieve the fifty-fifty sharing of net benefits from mining.

By including indirect taxes and other financial contributions in the form of fuel tax; employees’ payroll and fringe benefits; various withholding taxes on royalties to land owners and claim owners, and employees’ income;

value added tax on local goods, equipment, supplies and services; and expenditures for social infrastructures in the mine site (hospitals, schools, etc.) and development of host and neighboring communities, geosciences and mining technology, the government share will be in the range of 60% or more of the total financial benefits. (Emphasis and italics in the original)

The Solicitor General enumerates this “additional government share” as “indirect taxes and other financial contributions in the form of fuel tax; employees’ payroll and fringe benefits; various withholding taxes on royalties to land owners and claim owners, and employees’ income; value added tax on local goods, equipment, supplies and services; x x x.” The Solicitor General’s argument merely confirms that under Section 81 of RA 7942 the State only receives taxes, duties and fees under the FTAA. The State does not receive, as owner of the mineral resources, any income from the mining operations of the contractor.

In short, the “basic share” of the State consists of direct taxes by the national and local governments. The “additional share” of the State consists of indirect taxes including even fringe benefits to employees and compensation to private surface right owners. Direct and indirect taxes, however, are impositions by the taxing authority, a burden borne by all taxpayers whether or not they exploit the State’s mineral resources. Fringe benefits of employees are compensation for services rendered under an employer-employee relationship. Compensation to surface right owners is payment for the damage suffered by private landowners arising from the mining operations. All these direct and indirect taxes, as well as other expenses of the contractor, do not constitute payment for the share of the State as owner of the mineral resources.

Clearly, the so-called “share” of the State consists only of direct and indirect taxes, as well as other operating expenses not even payable to the State. The Solicitor General in effect concedes that under the second paragraph of Section 81, the State does not receive any share of the net proceeds from the mining operations of the FTAA contractor. Despite this, the Solicitor General insists that the State remains the owner of the mineral resources and exercises full control over the mining operations of the FTAA contractor. The Solicitor General has redefined the civil law concept of ownership,[51] by giving the owner full control in the exploitation of the property he owns but denying him the fruits or income from such exploitation. The only satisfaction of the owner is that the FTAA contractor pays taxes to the Government.

However, even this psychological satisfaction is dubious. Under the third paragraph of Section 81 of RA 7942, the “collection of Government share in financial and technical assistance agreement shall commence after the financial and technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.” This provision does not defer the collection of the State’s “share,” but prevents the accrual of the State’s “share” until the contractor has fully recovered all its pre-operating, exploration and development expenditures. This provision exempts for an undefined period the contractor from all existing taxes that are part of the Government’s so-called “share” under Section 81.[52] The Solicitor General has interpreted these taxes to include “other national taxes and fees” as well as “other local taxes and fees.”

Secretary Romulo L. Neri of the National Economic and Development Authority (“NEDA”) has warned this Court of the supposed dire repercussions to the nation’s long-term economic growth if this Court declares the assailed provisions of RA 7942 unconstitutional.[53] Under the Constitution, the NEDA is the “independent (economic) planning agency of the government.”[54] However, in this case the NEDA Secretary has joined the chorus of the foreign chambers of commerce to uphold the validity of RA 7942 as essential to entice foreign investors to exploit the nation’s mineral resources.

We cannot fault the foreign chambers of commerce for driving a hard bargain to maximize the profits of foreign

investors. We are, however, saddened that the NEDA Secretary is willing to give away for free to foreign investors the State's share of the income from its ownership of mineral resources. If the NEDA Secretary owns the mineral resources instead of the State, will he allow the foreign contractor to exploit his mineral resources for free, the only obligation of the foreign contractor being to pay taxes to the Government?

Secretary Neri claims that the potential tax collection from the mining industry alone is P57 billion as against the present collection of P2 billion. Secretary Neri adds that the potential tax collection from incremental activities linked to mining is another P100 billion, thus putting the total potential tax collection from mining and related industries at P157 billion.[55] Secretary Neri also estimates the "potential mining wealth in the Philippines" at P47 trillion or US\$840 billion, 15 times our total foreign debt of US\$56 billion.[56]

If all that the State will receive from its P47 trillion potential mineral wealth is the P157 billion in direct and indirect taxes, then the State will truly receive only a pittance. The P157 billion in taxes constitute a mere .33% or a third of 1% of the total mineral wealth of P47 trillion. Even if the P157 billion is collected annually over 25 years, the original term of an FTAA, the total tax collection will amount to only P3.92 trillion, or a mere 8.35% of the total mineral wealth. The rest of the country's mineral wealth will flow out of the country if foreign contractors exploit our mineral resources under FTAA's pursuant to RA 7942.

Secretary Neri also warns that foreign investors who have acquired local cement factories in the last ten years will find their investments illegal if the Court declares unconstitutional the assailed provisions of RA 7942.[57] Such specious arguments deserve scant consideration. Cement manufacturing is not a nationalized activity. Hence, foreigners can own 100% of cement companies in this country. When the foreign investors acquired the local cement factories, they spun off the quarry operations into separate companies 60% owned by Filipino citizens. The foreign investors knew the constitutional requirements of holding quarry permits.

Besides, the quarrying requirement of cement companies is just a simple surface mining of limestone. Such activity does not constitute large-scale exploitation of mineral resources. It definitely cannot qualify for FTAA's with foreign contractors under the fourth paragraph of Section 2, Article XII of the Constitution. Obviously, only a company at least 60% Filipino owned can engage in such mining activity.

The offshore Occidental-Shell FTAA shows that even in riskier ventures involving far more capital investments, the State can negotiate and secure at least 60% of the net proceeds from the exploitation of mineral resources. Foreign contractors like Occidental-Shell are willing to pay the State 60% of the net proceeds from petroleum operations, in addition to paying the Government the 32% corporate income tax on its 40% share of the net proceeds. Even intervenor CMP and respondent WMCP agree that the State has a 60% interest in mining operations under an FTAA. I simply cannot fathom why the NEDA Secretary is willing to accept a ZERO percent share in the income from the exploitation of inland mineral resources.

FTAA's like the WMCP FTAA, which gives the State an illusory 60% share of the net proceeds from mining revenues, will only impoverish further the Filipino people. The nation's potential mineral wealth of P47 trillion will contribute to economic development only if the bulk of the wealth remains in the country, not if remitted abroad by foreign contractors.

I. Refutation of Arguments of Majority Opinion

The majority opinion advances the following arguments:

1. DENR Department Administrative Order No. 56-99 ("DAO 56-99") is the basis for determining the State's share in the mining income of the foreign FTAA contractor. The DENR Secretary issued DAO 56-99 pursuant to the phrase "among other things" in Section 81 of RA 7942. The majority opinion claims that the phrase "among

other things” “clearly and unmistakably reveals the legislative intent to have the State collect more than just the usual taxes, duties and fees.” The majority opinion anchors on the phrase “among other things” its argument that RA 7942 allows the State to collect a share in the mining income of the foreign FTAA contractor, in addition to taxes, duties and fees. Thus, on the phrase “among other things” depends whether the State and the Filipino people are entitled under RA 7942 to share in the vast mineral wealth of the nation, estimated by NEDA at P47 trillion or US\$840 billion.

2. FTAA, like the WMCP FTAA, are not subject to the term limit in Section 2, Article XII of the 1987 Constitution. In short, while co-production, joint venture and production-sharing agreements cannot exceed 25 years, renewable for another 25 years, as provided in Section 2, Article XII of the 1987 Constitution, the WMCP FTAA is not governed by the constitutional limitation. The majority opinion states that the “constitutional term limitations do not apply to FTAA.” Thus, the majority opinion upholds the validity of Section 3.3 of the WMCP FTAA providing for a 50-year term at the sole option of WMCP.

3. Section 112 of RA 7942, placing “all valid and existing” mining agreements under the fiscal regime prescribed in Section 80 of RA 7942, does not apply to FTAA. Thus, the majority opinion states, “[W]hether Section 112 may properly apply to co-production or joint venture agreements, the fact of the matter is that it cannot be made to apply to FTAA.”

4. Foreign FTAA contractors and even foreign corporations can hold exploration permits, despite Section 2, Article XII of the 1987 Constitution reserving to Philippine citizens and to corporations 60% Filipino owned the “exploration, development and utilization of natural resources.” Thus, the majority opinion states that “there is no prohibition at all against foreign or holding exploration permits.”

5. The Constitution does not require that the State’s share in FTAA or other mineral agreements should be at least 60% of the net mining revenues. Thus, the majority opinion states that “the Charter did not intend to fix an iron-clad rule on the 60 percent share, applicable to all situations at all times and in all circumstances.”

I respond to the arguments of the majority opinion.

1. DAO 99-56 as Basis for Government’s Share in FTAA

The main thrust of my separate opinion is that mineral agreements under RA 7942, whether FTAA under Section 81 or MPSAs under Section 80, do not allow the State to receive any share from the income of mining companies. The State can collect only taxes, duties and fees from mining companies.

The majority opinion, however, points to the phrase “among other things” in the second paragraph of Section 81 as the authority of the State to collect in FTAA a share in the mining income separate from taxes, duties and fees. The majority opinion can point to no other provision in RA 7942 allowing the State to collect any share. The majority opinion admits that limiting the State’s share in any mineral agreement to taxes, duties and fees is unconstitutional. Thus, the majority opinion’s case rises or falls on whether the phrase “among other things” allows the State to collect from FTAA contractors any income in addition to taxes, duties and fees.

In the case of MPSAs, the majority opinion cannot point to any provision in RA 7942 allowing the State to collect any share in MPSAs separate from taxes, duties and fees. The language of Section 80 is so crystal clear – “the total government share in a mineral production sharing agreement shall be the excise tax on mineral products” - that there is no dispute whatsoever about it. The majority opinion merely states that the constitutionality of Section 80 is not in issue in the present case. Section 81, the constitutionality of which the majority opinion admits is in issue here, is intertwined with Sections 39, 80, 84 and 112. Resolving the constitutionality of Section 81 necessarily involves a determination of the constitutionality of Sections 39, 80, 84 and 112.

The WMCP FTAA, the constitutionality of which is certainly in issue, is governed not only by Section 81 but also by Sections 39, 80 and 112. The reason is that the WMCP FTAA is a reversible contract that gives WMCP the absolute option at anytime to convert the FTAA into an MPSA. In short, the WMCP FTAA is like a single coin with two sides - one an FTAA and the other an MPSA.

a. The Integrated Intent, Plan and Structure of RA 7942

The clear intent of RA 7942 is to limit the State's share from mining operations to taxes, duties and fees, unless the State contributes equity in addition to the mineral resources. RA 7942 does not recognize the mere contribution of mineral resources as entitling the State to receive a share in the net mining revenues separate from taxes, duties and fees. Thus, Section 80 expressly states that the "total government share in a mineral production sharing agreement shall be the excise tax on mineral products." Section 84 reiterates this by stating that "with respect to mineral production sharing agreement, the excise tax on mineral products shall be the government share under said agreement." The only share of the State in an MPSA is the excise tax. Ironically, Sections 80 and 84 disallow the State from sharing in the production or income, even as the contract itself is called a mineral production sharing agreement.

In co-production and joint venture agreements, where the State contributes equity in addition to the mineral resources, the first paragraph of Section 81 expressly requires that "the share of the government x x x shall be negotiated by the Government and the contractor." However, in FTAA's where the State contributes only its mineral resources, the second paragraph of Section 81 states –

The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

All the items enumerated in the second paragraph of Section 81 as comprising the "Government share" refer to taxes, duties and fees. The phrase "all such other taxes, duties and fees as provided for under existing laws" makes this clear.

Section 112 places "all valid and existing mining" agreements "at the date of effectivity" of RA 7942 under the fiscal regime prescribed in Section 80. Section 112 expressly states that the "government share in mineral production sharing agreement x x x shall immediately govern and apply to a mining lessee or contractor." Section 112 provides:

Section 112. Non-impairment of Existing Mining/Quarrying Rights. — All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production-sharing agreements granted under Executive Order No. 279, at the date of effectivity of this Act, shall remain valid, shall not be impaired, and shall be recognized by the Government: Provided, That the provisions of Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the secretary, in writing, not to avail of said provisions: Provided, further, That no renewal of mining lease contracts shall be made after the expiration of its term: Provided, finally, That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations. (Italics supplied)

Thus, Section 112 requires "all" FTAA's and MPSA's, as of the date of effectivity of RA 7942, to pay only the excise tax - 2% on metallic and non-metallic minerals and 3% on petroleum[58] - instead of the stipulated mining income sharing, if any, in their respective FTAA's or MPSA's.

This means that Section 112 applies even to the Occidental-Shell FTAA, which was executed before the enactment of RA 7942. This reduces the State's share in the Malampaya gas extraction from 60% of net proceeds to 3% of the market price of the gas as provided in Section 80 of RA 7942 in relation to Section 151 of the National Internal Revenue Code. This is disastrous to the national economy because Malampaya under the original Occidental-Shell FTAA generates annually some US\$0.5 billion to the National Treasury.

Section 112 applies to all agreements executed "under Executive Order No. 279." The WMCP FTAA expressly states in its Section 1.1, "This Agreement is a Financial & Technical Assistance Agreement entered into pursuant to Executive Order No. 279." Thus, Section 112 applies to the WMCP FTAA.

Section 39 of RA 7942 grants the FTAA contractor the "option to convert" the FTAA into an MPSA "at any time during the term" of the FTAA if the contract areas are not economically viable for large-scale mining. Once the contractor reduces its foreign equity to not more than 40%, the Secretary "shall approve the conversion and execute the mineral production sharing agreement. Thus, Section 39 provides:

Section 39. Option to Convert into a Mineral Agreement. — The contractor has the option to convert the financial or technical assistance agreement to a mineral agreement at any time during the term of the agreement, if the economic viability of the contract area is found to be inadequate to justify large-scale mining operations, after proper notice to the Secretary as provided for under the implementing rules and regulations: Provided, That the mineral agreement shall only be for the remaining period of the original agreement.

In the case of a foreign contractor, it shall reduce its equity to forty percent (40%) in the corporation, partnership, association, or cooperative. Upon compliance with this requirement by the contractor, the Secretary shall approve the conversion and execute the mineral production-sharing agreement. (*Italics supplied*)

The only requirement in the second paragraph of Section 39 is that the FTAA contractor shall reduce its foreign equity to 40%. The second paragraph states, "Upon compliance with this requirement, the Secretary shall approve the conversion and execute the mineral production sharing agreement." The determination of the economic viability of the contract area for large-scale mining, which is left to the foreign contractor with "proper notice" only to the DENR Secretary, is not even made a condition for the conversion.

Under Section 3(aq) of RA 7942, the foreign contractor holds the exploration permit and conducts the physical exploration. The foreign contractor controls the release of the technical data on the mineral resources. The foreign contractor can easily justify the non-viability of the contract area for large-scale mining. The Philippine Government will have to depend on the foreign contractor for technical data on whether the contract area is viable for large-scale mining. Obviously, such a situation gives the foreign contractor actual control in determining whether the contract area is viable for large-scale mining.

The conversion from an FTAA into an MPSA is solely at the will of the foreign contractor because the contractor can choose at any time to sell 60% of its equity to a Philippine citizen. The price or consideration for the sale of the contractor's 60% equity does not go to the State but to the foreign stockholders of the contractor. Under Section 80 of RA 7942, once the FTAA is converted into an MPSA the only share of the State is the 2% excise tax on mineral products. Thus, under RA 7942 the FTAA contractor has the absolute option to pay the State only the 2% excise tax, despite any other stipulated consideration in the FTAA.

Clearly, Sections 3(aq), 39, 80, 81, 84 and 112 are tightly integrated under a single intent, plan and structure: unless the State contributes equity in addition to the mineral resources, the State shall receive only taxes, duties and fees. The State's contribution of mineral resources is not sufficient to entitle the State to receive any income from the mining operations separate from taxes, duties and fees.

b. The Meaning of the Phrase “Among Other Things”

As far as the State and the Filipino people are concerned, the most important part of an FTAA is the consideration: how much will the State receive from the exploitation of its non-renewable and exhaustible mineral resources?

Section 81 of RA 7942 does not require the foreign FTAA contractor to pay the State any share from the mining income apart from taxes, duties and fees. The second paragraph of Section 81, just like Section 80, only allows the State to collect taxes, duties and fees as the State’s share from the mining operations. The intent of RA 7942 is that the State cannot share in the income from mining operations, separate from taxes, duties and fees, based only on the mineral resources that the State contributes to the mining operations.

This is also the position of the Solicitor General – that the State’s share under Section 81 refers only to direct and indirect taxes. Thus, the Solicitor General agrees that Section 81 does not allow the State to collect any share from the mining income separate from taxes, duties and fees. The majority opinion agrees that Section 81 is unconstitutional if it does not require the foreign FTAA contractor to pay the State any share of the net mining income apart from taxes, duties and fees.

However, the majority opinion says that the phrase “among other things” in Section 81 is the authority to require the FTAA contractor to pay a consideration separate from taxes, duties and fees. The majority opinion cites the phrase “among other things” as the source of power of the DENR Secretary to adopt DAO 56-99[59] prescribing the formulae on the State’s share from mining operations separate from taxes, duties and fees.

In short, the majority opinion says that the phrase “among other things” is a delegation of legislative power to the DENR Secretary to adopt the formulae on the share of the State from mining operations. The issue now is whether the phrase “among other things” in the second paragraph of Section 81 is intended as a delegation of legislative power to the DENR Secretary. If so, the issue turns on whether it is a valid delegation of legislative power. I reproduce again the second paragraph of Section 81 for easy reference:

The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor’s corporate income tax, excise tax, special allowance, withholding tax due from the contractor’s foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws. (Italics supplied)

Section 81 of RA 7942 does not delegate any legislative power to the DENR Secretary to adopt the formulae in determining the share of the State. There is absolutely no language in the second paragraph of Section 81 granting the DENR Secretary any delegated legislative power. Thus, the DENR Secretary acted without authority or jurisdiction in issuing DAO 56-99 based on a supposed delegated power in the second paragraph of Section 81. This makes DAO 56-99 void.

Even assuming, for the sake of argument, that there is language in Section 81 delegating legislative power to the DENR Secretary to adopt the formulae in DAO 56-99, such delegation is void. Section 81 has no standards by which the delegated power shall be exercised. There is no specification on the minimum or maximum share that the State must receive from mining operations under FTAA’s. No parameters on the extent of the delegated power to the DENR Secretary are found in Section 81. Neither were such parameters ever discussed even remotely by Congress when it enacted RA 7942.

In sharp contrast, the first paragraph of the same Section 81, in prescribing the State’s share in co-production and joint venture agreements, expressly specifies the standards in determining the State’s share as follows: “(a) capital investment of the project, (b) risks involved, (c) contribution of the project to the economy, and (d) other

factors that will provide for a fair and equitable sharing between the Government and the contractor.” The reason for the absence of similar standards in the succeeding paragraph of Section 81 in determining the State’s share in FTAA’s is obvious - the State’s share in FTAA’s is limited solely to taxes, duties and fees. Thus, such standards are inapplicable and irrelevant.

The majority opinion now makes the formulae in DAO 56-99 the heart and soul of RA 7942 because the formulae supposedly determine the consideration of the FTAA. The consideration is the most important part of the FTAA as far as the State and Filipino people are concerned. The formulae in DAO 56-99 derive life solely from the phrase “among other things.” DAO 56-99 itself states that it is issued “[P]ursuant to Section 81 and other pertinent provisions of Republic Act No. 7942.” Without the phrase “among other things,” the majority opinion could not point to any other provision in RA 7942 to support the existence of the formulae in DAO 56-99.

Thus, the phrase “among other things” determines whether the FTAA has the third element of a valid contract – the commercial value or consideration that the State will receive. The majority opinion in effect says that Congress made the wealth and even the future prosperity of the nation to depend on the phrase “among other things.”

The DENR Secretary can change the formulae in DAO 56-99 any time even without the approval of the President or Congress. The DENR Secretary is the sole authority to determine the amount of consideration that the State shall receive in an FTAA. Section 5 of DAO 56-99 states:

x x x any amendment of an FTAA other than the provision on fiscal regime shall require the negotiation with the Negotiation Panel and the recommendation of the Secretary for approval of the President of the Republic of the Philippines. (Italics supplied)

Under Section 5, if the amendment in the FTAA involves non-fiscal matters, the amendment requires the approval of the President. However, if the amendment involves a change in the fiscal regime –referring to the consideration of the FTAA - the DENR Secretary has the final authority and approval of the President is not required. This makes the DENR Secretary more powerful than the President.

Section 5 of DAO 56-99 violates paragraphs 4 and 5 of Section 2, Article XII of the 1987 Constitution mandating that the President shall approve all FTAA’s and send copies of all approved FTAA’s to Congress. The consideration of the FTAA is the most important part of the FTAA as far as the State and the Filipino people are concerned. The DENR Secretary, in issuing DAO 56-99, has arrogated to himself the power to approve FTAA’s, a power vested by the Constitution solely in the President. By not even informing the President of changes in the fiscal regime and thus preventing such changes from reaching Congress, DAO 56-99 even seeks to hide changes in the fiscal regime from Congress. By its provisions alone, DAO 56-99 is clearly unconstitutional and void.

Section 5 of DAO 56-99 also states that “[A]ll FTAA’s approved prior to the effectivity of this Administrative Order shall remain valid and be recognized by the Government.” This means that the fiscal regime of an FTAA executed prior to the effectivity of DAO 56-99 “shall remain valid and be recognized.” If the earlier FTAA provides for a fiscal regime different from DAO 56-99, then the fiscal regime in the earlier FTAA shall prevail. In effect, DAO 56-99 exempts an FTAA approved prior to its effectivity from paying the State the share prescribed in the formulae under DAO 56-99 if the earlier FTAA provides for a different fiscal regime. Such is the case of the WMCP FTAA.

Based on the majority opinion’s position that the 1987 Constitution requires payment in addition to taxes, duties and fees, this makes DAO 56-99 unconstitutional and void. DAO 56-99 does not require prior FTAA’s to pay the State the share prescribed in the formulae under DAO 56-99 even if the consideration in the prior FTAA’s is limited only to taxes, duties and fees. DAO 56-99 recognizes such payment of taxes, duties and fees as a “valid”

consideration. Certainly, the DENR Secretary has no authority to exempt foreign FTAA contractors from a constitutional requirement. Not even Congress or the President can do so.

Ironically, DAO 56-99, the very authority the majority opinion cites to support its claim that the WMCP FTAA has a consideration, does not apply to the WMCP FTAA. By its own express terms, DAO 56-99 does not apply to FTAA's executed before the issuance of DAO 56-99, like the WMCP FTAA. The majority opinion's position has no leg to stand on since even DAO 56-99, assuming it is valid, cannot save the WMCP FTAA from want of consideration.

The formulae prescribed in DAO 56-99 are totally alien to the phrase "among other things." There is no relationship whatsoever between the phrase "among other things" and the highly esoteric formulae prescribed in DAO 56-99. No one in this Court can assure the Filipino people that the formulae in DAO 56-99 will guarantee the State 60%, or 30% or even 10% of the net proceeds from the mining operations. And yet the majority opinion trumpets DAO 56-99 as the savior of Section 81 from certain constitutional infirmity.

The majority opinion gives the stamp of approval and legitimacy on DAO 56-99. This assumes that the majority understand fully the formulae in DAO 56-99. Can the majority tell the Court and the Filipino people the minimum share that the State will receive under the formulae in DAO 56-99? The formulae in DAO 56-99 are fuzzy since they do not guarantee the minimum share of the State, unlike the clear and specific income sharing provisions in the Occidental-Shell FTAA or in the case of Consolidated Mines, Inc. v. Court of Tax Appeals.[60]

The Solicitor General asserts that the phrase "among other things" refers to indirect taxes, an interpretation that contradicts the DENR Secretary's interpretation under DAO 56-99. The Solicitor General is correct. The ejusdem generis rule of statutory interpretation applies squarely to the phrase "among other things."

In *Philippine Bank of Communications v. Court of Appeals*,[61] the Court held:

Under the rule of ejusdem generis, where a description of things of a particular class or kind is 'accompanied by words of a generic character, the generic words will usually be limited to things of a kindred nature with those particularly enumerated x x x.'

In *Grapilon v. Municipal Council of Cigara*,[62] the Court construed the general word "absence" in the phrase "absence, suspension or other temporary disability of the mayor" in Section 2195 of the Revised Administrative Code as "on the same level as 'suspension' and 'other forms of temporary disability'." The Court quoted with approval the following Opinion of the Secretary of Interior:

The phrase 'other temporary disability' found in section 2195 of the Code, follows the words 'absence' and 'suspension' and is used as a modifier of the two preceding words, under the principle of statutory construction known as ejusdem generis.

In *City of Manila v. Entote*,[63] the Court ruled that broad expressions such as "and all others" or "any others" or "other matters," when accompanied by an enumeration of items of the same kind or class, "are usually to be restricted to persons or things of the same kind or class with those specifically named" in the enumeration. Thus, the Court held:

In our jurisdiction, this Court in *Ollada vs. Court of Tax Appeals, et al.* applied the rule of "ejusdem generis" to construe the purview of a general phrase "other matters" appearing after an enumeration of specific cases decided by the Collector of Internal Revenue and appealable to the Court of Tax Appeals found in section 7, paragraph 1, of Republic Act No. 1125, and it held that in order that a matter may come under said general clause, it is necessary that it belongs to the same kind or class of cases therein specifically enumerated. (Italics supplied)

The four requisites of the ejusdem generis rule^[64] are present in the phrase “among other things” as appearing in Section 81 of RA 7942. First, the general phrase “among other things” is accompanied by an enumeration of specific items, namely, “the contractor’s corporate income tax, excise tax, special allowance, withholding tax due from the contractor’s foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.” Second, all the items enumerated are of the same kind or class - they are all taxes, duties and fees. Third, the enumeration of the specific items is not exhaustive because “all such other taxes, duties and fees” are included. Thus, the enumeration of specific items is merely illustrative. Fourth, there is no indication of legislative intent to give the general phrase “among other things” a broader meaning. On the contrary, the legislative intent of RA 7942 is to limit the State’s share from mining operations to taxes, duties and fees.

In short, the phrase “among other things” refers to taxes, duties and fees. The phrase “among other things” is even followed at the end of the sentence by the phrase “and all such other taxes, duties, and fees,” reinforcing even more the restriction of the phrase “among other things” to taxes, duties and fees. The function of the phrase “and such other taxes, duties and fees” is to clarify that the taxes enumerated are not exhaustive but merely illustrative.

c. Formulae in DAO 56-99 a Mere Creation of DENR

The majority opinion praises the DENR for “conceiving and developing” the formulae in DAO 56-99. Thus, the majority opinion states:

As can be seen from DAO 56-99, the agencies concerned did an admirable job of conceiving and developing not just one formula, but three different formulas for arriving at the additional government share. (Italics supplied)

Indeed, we credit the DENR for conceiving and developing on their own the formulae in DAO 56-99. The formulae are the creation of DENR, not of Congress.

The DENR conceived and developed the formulae to save Section 81 not only from constitutional infirmity, but also from blatantly depriving the State and Filipino people from any share in the income of mining companies. However, the DENR’s admittedly “admirable job” cannot amend Section 81 of RA 7942. The DENR has no legislative power to correct constitutional infirmities in RA 7942. The DENR does not also possess the constitutional power to prescribe the sharing of mining income between the State and mining companies, the act the DENR attempts to do in adopting DAO 56-99.

d. DAO 56-99 is an Exercise in Futility

Even assuming arguendo the majority opinion is correct that the phrase “among other things” constitutes sufficient legal basis to issue DAO 56-99, the FTAA contractor can still prevent the State from collecting any share of the mining income. By invoking Section 39 of RA 7942 giving the foreign FTAA contractor the option to convert the FTAA into an MPSA, the FTAA contractor can easily place itself outside the scope of DAO 56-99 which expressly applies only to FTAAAs.

Also, by invoking Section 112, the foreign contractor need not even convert its FTAA into a mineral production agreement to place its contract under Section 80 and outside of Section 81. Section 112 automatically and immediately places all FTAAAs under the fiscal regime applicable to MPSAs, forcing the State to collect only the 2% excise tax. Thus, DAO 56-99 is an exercise in futility. This now compels the Court to resolve the constitutionality of Sections 39 and 112 of RA 7942 in the present case.

e. Congress Prescribes the Terms and Conditions of FTAAAs.

In a last-ditch attempt to justify the constitutionality of DAO 56-99, the majority opinion now claims that the President has the prerogative to prescribe the terms and conditions of FTAAAs, including the fiscal regime of FTAAAs. The majority opinion states:

x x x It is the President who is constitutionally mandated to enter into FTAAAs with foreign corporations, and in doing so, it is within the President's prerogative to specify certain terms and conditions of the FTAAAs, for example, the fiscal regime of FTAAAs - i.e., the sharing of the net revenues between the contractor and the State. (Emphasis in the original; italics supplied)

The majority opinion is re-writing the 1987 Constitution and even RA 7942. Paragraph 4, Section 2, Article XII of the 1987 Constitution expressly provides:

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, x x x. (Italics supplied)

Clearly, the 1987 Constitution mandates that the President may enter into FTAAAs only “according to the general terms and conditions provided by law.” There is no doubt whatsoever that it is Congress that prescribes the terms and conditions of FTAAAs, not the President as the majority opinion claims. The 1987 Constitution mandates the President to comply with the terms and conditions prescribed by Congress for FTAAAs.

Indeed, RA 7942 stipulates the terms and conditions for FTAAAs. Section 35 of RA 7942 provides that the “following terms, conditions, and warranties shall be incorporated in the financial or technical assistance agreement to wit: x x x.” Section 38 of RA 7942 expressly limits an FTAA to a “term not exceeding twenty-five (25) years,” which is one of the issues in the present case.

The majority opinion claims that the President has the power to prescribe “the fiscal regime of FTAAAs – i.e., the sharing of the net mining revenues between the contractor and the State.” This claim of the majority opinion renders the entire Chapter XIV of RA 7942 an act of usurpation by Congress of Presidential power. Chapter XIV – entitled “Government Share” - prescribes the fiscal regimes of MPSAs and FTAAAs. The constitutionality of Sections 80 and 81 of Chapter XIV - whether the fiscal regimes prescribed in these sections of RA 7942 comply with the 1987 Constitution - is the threshold issue in this case.

The majority opinion seeks to uphold the constitutionality of Section 81 of RA 7942, an act of Congress prescribing the fiscal regime of FTAAAs. If it is the President who has the constitutional authority to prescribe the fiscal regime of FTAAAs, then Section 81 is unconstitutional for being a usurpation by Congress of a Presidential power. The majority opinion not only re-writes the 1987 Constitution, it also contradicts itself.

That is not all. By claiming that the President has the prerogative to prescribe the fiscal regime of FTAAAs, the majority opinion contradicts its basic theory that DAO 56-99 draws life from the phrase “among other things” in Section 81 of RA 7942. Apparently, the majority opinion is no longer confident of its position that DAO 56-99 draws life from the phrase “among other things.” The majority opinion now invokes a non-existent Presidential power that directly collides with the express constitutional power of Congress to prescribe the “general terms and conditions” of FTAAAs.

f. Sections 80 and 84 of RA 7942 are Void on their Face

Definitely, Section 80 of RA 7942 is constitutionally infirm even based on the reasoning of the majority opinion. The majority opinion agrees that the 1987 Constitution requires the mining contractor to pay the State “more than just the usual taxes, duties and fees.” Under Section 80, the excise tax – 2% for metallic and non-metallic minerals and 3% for petroleum - is the only and total share of the State from mining operations. Section 80

provides:

Section 80. Government Share in Mineral Production Sharing Agreement. — The total government share in a mineral production sharing agreement shall be the excise tax on mineral products as provided in Republic Act No. 7729, amending Section 151(a) of the National Internal Revenue Code, as amended. (Italics supplied)

Section 80 has no ifs or buts. Section 84 even reiterates Section 80 that “with respect to a mineral production sharing agreement, the excise tax on mineral products shall be the government share under said agreement.” There is no ejusdem generis phrase like “among other things” in Section 80 that the majority opinion can cling on to save it from constitutional infirmity. DAO 56-99, the magic wand of the majority opinion, expressly applies only to FTAAAs and not to MPSAs. By any legal yardstick, even by the arguments of the majority opinion, Sections 80 and 84 are void and unconstitutional.

g. Necessity of Resolving Constitutionality of Sections 39, 80 and 84

The majority opinion states that the constitutionality of Sections 80 and 84 of RA 7942 is not in issue in the present case. The majority opinion forgets that petitioners have assailed the constitutionality of RA 7942 and the WMCP FTAA for violation of Section 2, Article XII of the 1987 Constitution. Petitioner specifically assails the “inequitable sharing of wealth” in the WMCP FTAA, which petitioners assert is “contrary to Section 1, paragraph 1, and Section 2, paragraph 4, Article XII of the Constitution.”

Section 9.1 of the WMCP FTAA grants WMCP the absolute option, by mere notice to the DENR Secretary, to convert the FTAA into an MPSA under Section 80. The “sharing of wealth” in Section 80 is “inequitable” and “contrary to x x x Section 2, paragraph 4, Article XII of the Constitution” because the State will only collect the 2% excise tax in an MPSA. Such a pittance of a sharing will not make any “real contributions to the economic growth and general welfare of the country” as required in paragraph 4, Section 2, Article XII of the 1987 Constitution.

Section 39 of RA 7942 also grants foreign FTAA contractors the option, by mere notice to the DENR Secretary, to convert their FTAAAs into MPSAs under Section 80. Necessarily, the constitutionality of the WMCP FTAA must be resolved in conjunction with Section 80 of RA 7942.

The WMCP FTAA is like a coin with two sides, one side is an FTAA, and the other an MPSA. By mere notice to the DENR Secretary, WMCP can convert the contract from an FTAA to an MPSA, a copy of which, complete with all terms and conditions, is annexed to the WMCP FTAA.[65] The DENR Secretary has no option but to sign the annexed MPSA. There are only two conditions to WMCP’s exercise of this option: the reduction of foreign equity in WMCP to 40%, and notice to the DENR Secretary. The first condition is already fulfilled since all the equity of WMCP is now owned by a corporation 60% Filipino owned. The notice to the DENR Secretary is solely at the will of WMCP.

What this Court is staring at right now is a dual contract - an FTAA which, by mere notice to the DENR Secretary, immediately becomes an MPSA. The majority opinion agrees that the provisions of the WMCP FTAA, which grant a sham consideration to the State, are void. Since the majority opinion agrees that the WMCP FTAA has a sham consideration, the WMCP FTAA thus lacks the third element of a valid contract. The majority opinion should declare the WMCP FTAA void for want of consideration unless the majority opinion treats the contract as an MPSA under Section 80. Indeed, the only recourse of WMCP to save the validity of its contract is to convert it into an MPSA.

Thus, with the absence of consideration in the WMCP FTAA, what is actually before this Court is an MPSA. This squarely puts in issue whether an MPSA is constitutional if the only consideration or payment to the State is the

2% excise tax as provided in Section 80 of RA 7942.

The basic constitutional infirmity of the WMCP FTAA is the absence of a fair consideration to the State as owner of the mineral resources. Petitioners call this the “inequitable sharing of wealth.” The constitutionality of the consideration for the WMCP FTAA cannot be resolved without determining the validity of both Sections 80 and 81 of RA 7942 because the consideration for the WMCP FTAA is anchored on both Sections 80 and 81.

The majority opinion refuses to face the issue of whether the WMCP contract can validly rely on Section 80 for its consideration. If this issue is not resolved now, then the WMCP FTAA has no consideration. The majority opinion admits that the consideration in the WMCP FTAA granting the State 60% share in the mining revenues is a sham and thus void ab initio.

Strangely, the majority opinion claims that the share of the State in the mining revenues is not the principal consideration of the FTAA. The majority opinion claims that the principal consideration of the FTAA is the “development” of the minerals by the foreign contractor. The foreign contractor can bring equipment to the mine site, tunnel the mines, and construct underground rails to bring the minerals to the surface - in short develop the mines. What will the State and the Filipino people benefit from such activities unless they receive a share of the mining proceeds? After the minerals are exhausted, those equipment, tunnels and rails would be dilapidated and even obsolete. Besides, those equipment belong to the foreign contractor even after the expiration of the FTAA.

Plainly, even a businessman with limited experience will not agree that the principal consideration in an FTAA, as far as the State and Filipino people are concerned, is the development of the mines. It is obvious why the majority opinion will not accept that the principal consideration is the share of the State in the mining proceeds. Otherwise, the majority opinion will have to admit that the WMCP FTAA lacks the third element of a valid contract - the consideration. This will compel the majority opinion to admit that the WMCP FTAA is void ab initio.

The only way for the majority opinion to save the WMCP FTAA from nullity is to treat it as an MPSA and thus apply Section 80 of RA 7942. This puts in issue the constitutionality of Section 80. The majority opinion, however, refuses to treat the WMCP FTAA as an MPSA. Thus, the WMCP FTAA still lacks a valid consideration. However, the majority opinion insists that the WMCP FTAA is valid.

If the majority opinion puts the constitutionality of Section 80 in issue, the majority opinion will have to declare Section 80 unconstitutional. The majority opinion agrees that the 1987 Constitution requires the State to collect “more than the usual taxes, duties and fees.” Section 80 indisputably limits the State to collect only the excise tax and nothing more.

The equivocal stance of the majority opinion will not put an end to this litigation. Once WMCP converts its FTAA into an MPSA to avoid paying “more than the usual taxes, duties and fees,” petitioners will immediately question the validity of WMCP’s MPSA as well as the constitutionality of Section 80. The case will end up again in this Court on the same issue of whether there is a valid consideration for such MPSA, which necessarily involves a determination of the constitutionality of Section 80. Clearly, this Court has no recourse but to decide now the constitutionality of Section 80.

As the Solicitor General reported in his Compliance dated 20 October 2004, the DENR has signed five MPSAs with different parties.[66] These five MPSAs uniformly contain the following provision:

Share of the Government - The Government Share shall be the excise tax on mineral products at the time of removal and at the rate provided for in Republic Act No. 7729 amending Section 151(a) of the National Internal Revenue Code, as amended, as well as other taxes, duties, and fees levied by existing laws. (Italics supplied)

If the constitutionality of Section 80 is not resolved now, these five MPSAs, including the WMCP FTAA once converted into an MPSA, will remain in limbo. There will be no implementation of these MPSAs until the Court finally resolves this constitutional issue.

Even if evaded now, the constitutionality of Section 80 will certainly resurface, resulting in a repeat of this litigation, most probably even between the same parties. To avoid unnecessary delay, this Court must rule now on the constitutionality of Section 80 of RA 7942.

2. The Constitutional Term Limit Applies to FTAA's

Section 3.3 of the WMCP FTAA provides a fixed contract term of 50 years at the option of WMCP. Thus, Section 3.3 provides:

This Agreement shall be renewed by the Government for a further period of twenty-five (25) years under the same terms and conditions provided that the Contractor lodges a request for a renewal with the Government not less than sixty (60) days prior to the expiry of the initial term of this Agreement and provided that the Contractor is not in breach of any of the requirements of this Agreement. (Italics supplied)

This provision grants WMCP the absolute right to extend the first 25-year term of the FTAA to another 25-year term upon mere lodging of a request or notice to the Philippine Government. WMCP has the absolute right to extend the term of the FTAA to 50 years and all that the Government can do is to acquiesce to the wish of WMCP.

Section 3.3 of the WMCP FTAA is void because it violates Section 2, Article XII of the 1987 Constitution, the first paragraph of which provides:

All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant. (Italics supplied)

The majority opinion, however, makes the startling assertion that FTAA's are not covered by the term limit under Section 2, Article XII of the 1987 Constitution. The majority opinion states:

I believe that the constitutional term limits do not apply to FTAA's. The reason is that the above provision is found within paragraph 1 of Section 2 of Article XII, which refers to mineral agreements – co-production agreements, joint venture agreements and mineral production sharing agreements - which the government may enter into with Filipino citizens and corporations, at least 60 percent owned by Filipino citizens. (Italics supplied)

If the term limit does not apply to FTAA's because the term limit is found in the first paragraph of Section 2, then the other limitations in the same first paragraph of Section 2 do not also apply to FTAA's. These limitations are three: first, that the State owns the natural resources; second, except for agricultural lands, natural resources shall not be alienated; third, the State shall exercise full control and supervision in the exploitation of natural resources. Under the majority opinion's interpretation, these three limitations will no longer apply to FTAA's, leading to patently absurd results. The majority opinion will also contradict its own admission that even in FTAA's the State

must exercise full control and supervision in the exploitation of natural resources.

Section 2, Article XII of the 1987 Constitution is a consolidation of Sections 8 and 9, Article XIV of the 1973 Constitution, which state:

Section 8. All lands of public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, wildlife, and other natural resources of the Philippines belong to the State. With the exception of agricultural, industrial or commercial, residential, or resettlement lands of the public domain, natural resources shall not be alienated, and no license, concession, or lease for the exploration, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than development of water power, in which cases, beneficial use may be the measure and the limit of the grant.

Section 9. The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital which is owned by such citizens. The Batasang Pambansa, in the national interest, may allow such citizens, corporations or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management, or other forms of assistance are hereby recognized as such.

Section 9, Article XIV of the 1973 Constitution, a one-paragraph section, contained the provision reserving the exploration, development and utilization of natural resources to Philippine citizens or corporations 60% Filipino owned as well as the provision on FTAA's. The provision on the 25-year term limit was found in the preceding Section 8 of Article XIV. If the 25-year term limit under the 1973 Constitution did not apply to FTAA's, then it should not also have applied to non-FTAA mining contracts, an interpretation that is obviously wrong. Thus, the term limit in Section 8, Article XIV of the 1973 Constitution necessarily applied to both non-FTAA mining contracts and FTAA's in Section 9.

What the framers of the 1987 Constitution did was to consolidate Sections 8 and 9, Article XIV of the 1973 Constitution into one section, the present Section 2, Article XII of the 1987 Constitution. The consolidation necessitated re-arranging the sentences and paragraphs without any intention of destroying their unity and coherence. Certainly, the consolidation did not mean that the FTAA's are no longer subject to the 25-year term limit. If anything, the consolidation merely strengthened the need, following the rules of statutory construction, to read and interpret together all the paragraphs, and even the sentences, of Section 2, Article XII of the 1987 Constitution.

In his book *The 1987 Constitution of the Republic of the Philippines: A Commentary*, Father Joaquin G. Bernas, S.J., who was a leading member of the 1986 Constitutional Commission, discussed the limitations on the exploitation of natural resources. Father Bernas states:

4. Other limitations

Agreements for the exploitation of the natural resources can have a life of only twenty-five years. This twenty-five year limit dates back to the 1935 Constitution and is considered to be a "reasonable time to attract capital, local and foreign, and to enable them to recover their investment and make a profit. The twenty-five year limit on the exploitation of natural resources is not applicable to "water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power." In these cases, "beneficial use may be the measure and the limit of the grant." But in the case of water rights for water power, the twenty-five year limit is applicable."^[67] (Italics supplied)

The 1935, 1973 and 1987 Constitutions all limit the exploitation of natural resources to 25-year terms. They also

limit franchises for public utilities, leases of alienable lands of public domain, and water rights for power development to 25-year terms. If a different term is intended, the Constitution expressly says so as in water rights for uses other than power development. Under the 1973 and 1987 Constitutions, there is no separate term for FTAA's other than the 25-year term for the exploitation of natural resources.

The WMCP FTAA draws life from Executive Order No. 279 issued on 25 July 1987 by then President Corazon C. Aquino when she still exercised legislative powers. Section 1.1 of the WMCP FTAA expressly states, "This Agreement is a Financial & Technical Assistance Agreement entered into pursuant to Executive Order No. 279." Section 7 of Executive Order No. 279 provides:

Section 7. All provisions of Presidential Decree No. 463, as amended, other existing mining laws, and their implementing rules and regulations, or parts thereof, which are not inconsistent with the provisions of this Executive Order, shall continue in force and effect. (Italics supplied)

Section 40 of Presidential Decree No. 463 ("PD 463"), as amended by Presidential Decree No. 1385, provides:

Section 40. Issuance of Mining Lease Contracts - x x x After the mining claim has been verified as to its mineral contents and its actual location on the ground as determined through reports submitted to the Director, the Secretary shall approve and issue the corresponding mining lease contract, which shall be for a period not exceeding twenty-five (25) years, renewable upon the expiration thereof for another period not exceeding twenty-five (25) years under such terms and conditions as provided by law. (Italics supplied)

Thus, at the time of execution of the WMCP FTAA, statutory law limited the term of all mining contracts to 25-year terms. PD 463 merely implemented the mandate of the 1973 Constitution on the 25-year term limit, which is the same 25-year term limit in the 1987 Constitution. Under Section 7 of Executive Order No. 279, Section 40 of PD 463 limiting mining contracts to a 25-year term applies to the WMCP FTAA. Therefore, Section 3.3 of the WMCP FTAA providing for a 50-year term is void.

Then President Aquino also issued Executive Order No. 211 on 10 July 1987, a bare 17 days before issuing Executive Order No. 279. Section 3 of Executive Order No. 211 states:

Section 3. The processing, evaluation and approval of all mining applications, declarations of locations, operating agreements and service contracts as provided for in Section 2 above, shall be governed by Presidential Decree No. 463, as amended, other existing mining laws, and their implementing rules and regulations: Provided, However, that the privileges granted as well as the terms and conditions thereof shall be subject to any and all modifications or alterations which Congress may adopt pursuant to Section 2, Article XII of the 1987 Constitution. (Italics supplied)

Section 3 of Executive Order No. 211 applies to the WMCP FTAA which was executed on 22 March 1995, more than seven years after the issuance of Executive Order No. 211. Subsequently, Congress enacted RA 7942 to prescribe new terms and conditions for all mineral agreements. RA 7942 took effect on 9 April 1995.

RA 7942 governs the WMCP FTAA because Executive Order No. 211 expressly makes mining agreements like the WMCP FTAA subject to "any and all modifications or alterations which Congress may adopt pursuant to Section 2, Article XII of the 1987 Constitution." Section 38 of RA 7942 provides for a 25-year term limit specifically for FTAA's, thus:

Section 38. Term of Financial or Technical Assistance Agreement. — A financial or technical assistance agreement shall have a term not exceeding twenty-five (25) years to start from the execution thereof, renewable for not more than twenty-five (25) years under such terms and conditions as may be provided by law. (Italics supplied)

Thus, the 25-year term limit specifically for FTAA's in Section 38 of RA 7942 applies to the WMCP FTAA. Again, Section 3.3 of the WMCP FTAA providing for a 50-year term is void.

What is clear from the foregoing is that the 25-year statutory term limit on mining contracts is merely an implementation of the 25-year constitutional term limit, whether under the 1935, 1973 or 1987 Constitutions. The majority opinion's assertion that the 25-year term in the first paragraph of Section 2, Article XII of the 1987 Constitution does not apply to FTAA's is obviously wrong.

3. Section 112 of RA 7942 Applies to the WMCP FTAA

The majority opinion insists that Section 112 of RA 7942 does not apply to the WMCP FTAA. Section 112 provides:

Section 112. Non-impairment of Existing Mining/Quarrying Rights. — All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production-sharing agreements granted under Executive Order No. 279, at the date of effectivity of this Act, shall remain valid, shall not be impaired, and shall be recognized by the Government: Provided, That the provisions of Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the secretary, in writing, not to avail of said provisions: Provided, further, That no renewal of mining lease contracts shall be made after the expiration of its term: Provided, finally, That such leases, production-sharing agreements, financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations. (*Italics supplied*)

Section 112 "immediately" applies the fiscal regime under Section 80 on "mineral production sharing agreement" to "all valid and existing mining" contracts, including those "granted under Executive Order No. 279." If Section 112 applies to the WMCP FTAA, then the WMCP FTAA is subject only to the 2% excise tax under Section 80 as the "total share" of the Philippine Government.

The majority opinion states, "Whether Section 112 may properly apply to co-production or joint venture agreements, the fact of the matter is that it cannot be made to apply to FTAA's." This position of the majority opinion is understandable. If Section 112 applies to FTAA's, the majority opinion would have to rule on the constitutionality of Section 80 of RA 7942. The majority opinion already agrees that the 1987 Constitution requires the FTAA contractor to pay the State "more than the usual taxes, duties and fees." If Section 112 applies to FTAA's, the majority opinion would have no choice but declare unconstitutional Section 80.

Thus, the majority opinion insists that Section 112 "cannot be made to apply to FTAA's." This insistence of the majority opinion collides with the very clear and plain language of Section 112 of RA 7942 and Section 1.1 of the WMCP FTAA. This insistence of the majority opinion will lead to absurd results.

First, Section 112 of RA 7942 speaks of "all valid and existing mining" contracts. The phrase "all valid and existing mining" contracts means the entire or total mining contracts in existence "at the date of effectivity" of RA 7942 without exception. The word "all" negates any exception. This certainly includes the WMCP FTAA, unless the majority opinion concedes that the WMCP FTAA is not a mining contract, or if it is, that it is not a valid contract.

Second, the last proviso of Section 112 itself expressly states that "financial or technical assistance agreements shall comply with the applicable provisions of this Act and its implementing rules and regulations." There is no shadow of doubt whatsoever that Section 112, by its own plain, clear and indisputable language, commands that FTAA's shall comply with RA 7942. I truly cannot fathom how the majority opinion can assert that Section 112 cannot apply to FTAA's.

Third, Section 112 expressly refers to Chapters XIV and XVI of RA 7942. Chapter XIV refers to the “Government Share” and covers Sections 80, 81 and 82 of RA 7942. Section 81, as the majority opinion concedes, applies to FTAAs. Chapter XVI refers to “Incentives” and covers Section 90 to 94 of RA 7942. Section 90 states that the “contractors in mineral agreements, and financial technical and assistance agreements shall be entitled to the fiscal and non-fiscal incentives as provided under Executive Order No. 226 x x x.” Clearly, Section 112 applies to FTAAs.

Fourth, Section 1.1 of the WMCP FTAA expressly states, “This Agreement is a Financial & Technical Assistance Agreement entered into pursuant to Executive Order No. 279.” Section 112 states in unequivocal language that “all valid and existing” agreements “granted under Executive Order No. 279” are immediately placed under the fiscal regime of MPSAs. In short, mining agreements granted under Executive Order No. 279 are expressly among the agreements included in Section 112 and placed under the fiscal regime prescribed in Section 80. There is no doubt whatsoever that Section 112 applies to the WMCP FTAA which was “entered into pursuant to Executive Order No. 279.”

Fifth, Section 3 of Executive Order No. 211 expressly subjects all mining contracts executed by the Executive Department to the terms and conditions of new mining laws that Congress might enact in the future. Thus, Section 3 of Executive Order No. 211 states:

Section 3. The processing, evaluation and approval of all mining applications, declarations of locations, operating agreements and service contracts as provided for in Section 2 above, shall be governed by Presidential Decree No. 463, as amended, other existing mining laws, and their implementing rules and regulations: Provided, However, that the privileges granted as well as the terms and conditions thereof shall be subject to any and all modifications or alterations which Congress may adopt pursuant to Section 2, Article XII of the 1987 Constitution. (Italics supplied)

There is no dispute that Executive Order No. 211, issued prior to the execution of the WMCP FTAA, applies to the WMCP FTAA. There is also no dispute that RA 7942 took effect after the issuance of Executive Order No. 211 and after the execution of the WMCP FTAA. Therefore, Section 112 of RA 7942 applies specifically to the WMCP FTAA.

Indeed, it is plain to see why Section 112 of RA 7942 applies to FTAAs, like the WMCP FTAA, that were executed prior to the enactment of RA 7942. Section 112 is found in Chapter XX of RA 7942 on “Transitory and Miscellaneous Provisions.” The title of Section 112 refers to the “[N]on-impairment of Existing Mining Quarrying Rights.” RA 7942 is the general law governing all kinds of mineral agreements, including FTAAs. In fact, Chapter VI of RA 7942, covering nine sections, deals exclusively on FTAAs. The fiscal regime in FTAAs executed prior to the enactment of RA 7942 may differ from the fiscal regime prescribed in RA 7942. Hence, Section 112 provides the transitory provisions to resolve differences in the fiscal regimes, ostensibly to avoid impairment of contract obligations. Clearly, Section 112 applies to FTAAs.

There are no ifs or buts in Section 112. The plain, simple and clear language of Section 112 makes FTAAs, like the WMCP FTAA, subject to Section 112. We repeat the express words of Section 112 -

- (1) “All valid and existing mining lease contracts x x x mineral production-sharing agreements granted under Executive Order No. 279, at the date of effectivity of this Act x x x.”
- (2) the “x x x government share in mineral production- sharing agreement x x x shall immediately govern and apply to a mining lessee or contractor x x x.”
- (3) “financial or technical assistance agreements shall comply with the applicable provisions of this Act and its

implementing rules and regulations.”

With such clear and unequivocal language, how can the majority opinion blithely state that Section 112 “cannot be made to apply to FTAAAs”? It defies common sense, simple logic and plain English to assert that Section 112 does not apply to FTAAAs. It defies the fundamental rule of statutory construction as repeated again and again in jurisprudence:

Time and time again, it has been repeatedly declared by this Court that where the law speaks in clear and categorical language, there is no room for interpretation. There is only room for application.[68]

For nothing is better settled than that the first and fundamental duty of courts is to apply the law as they find it, not as they like it to be. Fidelity to such a task precludes construction or interpretation, unless application is impossible or inadequate without it.[69]

Where the law is clear and unambiguous, it must be taken to mean exactly what it says and the court has no choice but to see to it that its mandate is obeyed.[70]

If Section 112 of RA 7942 does not apply to FTAAAs as the majority opinion asserts, what will govern FTAAAs executed before the enactment of RA 7942, like the WMCP FTAA? Section 112 expressly addresses FTAAAs executed before the enactment of RA 7942, requiring these earlier FTAAAs to comply with the provisions of RA 7942 and its implementing rules. Executive Order No. 211, issued seven years before the execution of the WMCP FTAA, requires all FTAAAs subsequently executed to comply with the terms and conditions of any future mining law that Congress may enact. That law is RA 7942 which took effect after the execution of the WMCP FTAA.

The majority opinion allows the WMCP FTAA to become *sui generis*, an FTAA outside the scope of RA 7942 which expressly governs “all” mining agreements, whether MPSAs or FTAAAs. This means that the WMCP FTAA is not even governed by Section 81 of RA 7942 and its phrase “among other things,” which the majority opinion claims is the authority to subject the WMCP FTAA to the payment of consideration that is “more than the usual taxes, duties and fees.”

This makes the majority opinion’s position self-contradictory and inutile. The majority opinion claims that the WMCP FTAA is subject to the phrase “among other things” in Section 81. At the same time, the majority opinion asserts that Section 112, which requires earlier FTAAAs to comply with Section 81 and other provisions of RA 7942, does not apply to the WMCP FTAA. The majority opinion is caught in a web of self-contradictions.

This exemption by the majority opinion of the WMCP FTAA from Section 112 is judicial class legislation. Why is the WMCP FTAA so special that the majority opinion wants it exempted from Section 112 of RA 7942? Why are only “all” other FTAAAs subject to the terms and conditions of RA 7942 and not the WMCP FTAA?

4. Foreign Corporations and Contractors Cannot Hold Exploration Permits

The majority opinion states that “there is no prohibition at all against foreign or local corporations or contractors holding exploration permits.” This is another assertion of the majority opinion that directly collides with the plain language of the 1987 Constitution.

Section 2, Article XII of the 1987 Constitution expressly reserves to Philippine citizens and corporations 60% Filipino owned the “exploration, development and utilization of natural resources.” The majority opinion rationalizes its assertion in this manner:

Pursuant to Section 20 of RA 7942, an exploration permit merely grants to a qualified person the right to conduct exploration for minerals in specified areas. Such a permit does not amount to an authorization to extract and carry off the mineral resources that may be discovered. x x x. (Italics in original)

The issue is not whether an exploration permit allows a foreign contractor or corporation to extract mineral resources, for apparently by its language alone a mere exploration permit does not. There is no dispute that an exploration permit merely means authority to explore, not to extract. The issue is whether the issuance of an exploration permit to a foreign contractor violates the constitutional limitation that only Philippine citizens or corporations 60% Filipino owned can engage in the “exploration x x x of natural resources.”

The plain language of Section 2, Article XII of the 1987 Constitution clearly limits to Philippine citizens or to corporations 60% Filipino owned the right to engage in the “exploration x x x of natural resources.” To engage in “exploration” is simply to explore, not to develop, utilize or extract. To engage in exploration one must secure an exploration permit. The mere issuance of the exploration permit is the authority to engage in the exploration of natural resources.

This activity of exploration, which requires an exploration permit, is a reserved activity not allowed to foreign contractors or foreign corporations. Foreign contractors and foreign corporations cannot secure exploration permits because they cannot engage in the exploration of natural resources. If, as the majority opinion asserts, foreign contractors or foreign corporations can secure and hold exploration permits, then they can engage in the “exploration x x x of natural resources.” This violates Section 2, Article XII of the 1987 Constitution.

Consequently, Section 3(aq) of RA 7942, which provides that “a legally organized foreign-owned corporation shall be deemed a qualified person for purposes of granting an exploration permit,” is void and unconstitutional.

However, the State may directly undertake to explore, develop and utilize the natural resources. To do this the State may contract a foreign corporation to conduct the physical act of exploration in the State’s behalf, as in an FTAA. In such a case, the foreign FTAA contractor is merely an agent of the State which holds the right to explore. No exploration permit is given to the foreign contractor because it is the State that is directly undertaking the exploration, development and utilization of the natural resources.

The requirement reserving “exploration x x x of natural resources” to Philippine citizens or to corporations 60% Filipino owned is not a matter of constitutional whim. The State cannot allow foreign corporations, except as contractual agents under the full control and supervision of the State, to explore our natural resources because information derived from such exploration may have national security implications.

If a Chinese company from the People’s Republic of China is allowed to explore for oil and gas in the Spratlys, the technical information obtained by the Chinese company may only bolster the resolve of the Chinese Government to hold on to their occupied reefs in the Spratlys despite these reefs being within the Exclusive Economic Zone of the Philippines. Certainly, we cannot expect the Chinese company to disclose to the Philippine Government the important technical data obtained from such exploration.

In Africa, foreign mining companies who have explored the mineral resources of certain countries shift their support back and forth between government and rebel forces depending on who can give them better terms in exploiting the mineral resources. Technical data obtained from mineral exploration have triggered or fueled wars and rebellions in many countries. The right to explore mineral resources is not a trivial matter as the majority opinion would want us to believe.

Even if the foreign companies come from countries with no territorial dispute with the Philippines, can we expect them to disclose fully to the Philippine Government all the technical data they obtain on our mineral resources? These foreign companies know that the Philippine Government will use the very same data in negotiating from them a higher share of the mining revenues. Why will the foreign companies give to the Philippine Government technical data justifying a higher share for the Philippine Government and a lower share for the foreign

companies? The framers of the 1935, 1973 and 1986 Constitutions were acutely aware of this problem. That is why the 1987 Constitution not only reserves the “exploration x x x of natural resources” to Philippine citizens and to corporations 60% Filipino owned, it also now requires the State to exercise “full control and supervision” over the “exploration x xx of natural resources.”

5. The State is Entitled to 60% Share in the Net Mining Revenues

The majority opinion claims that the Constitution does not require that the State’s share in FTAA’s or other mineral agreements should be at least 60% of the net mining revenues. Thus, the majority opinion states that “the Charter did not intend to fix an iron-clad rule on the 60 percent share, applicable to all situations at all times and in all circumstances.”

The majority opinion makes this claim despite the express admission by intervenor CMP and respondent WMCP that the State, as owner of the natural resources, is entitled to 60% of the net mining revenues. The intervenor CMP admits that under an FTAA, the Philippine Government “stands in the place of the 60% Filipino owned company” and hence must retain 60% of the net income. Thus, intervenor CMP concedes that:

x x x In other words, in the FTAA situation, the Government stands in the place of the 60% Filipino-owned company, and the 100% foreign-owned contractor company takes all the risks of failure to find a commercially viable large-scale ore body or oil deposit, for which the contractor will get 40% of the financial benefits.[71] (Italics supplied)

As applied to the WMCP FTAA, intervenor CMP asserts that the “contractor’s stipulated share under the WMCP FTAA is limited to a maximum of 40% of the net production.”[72] Intervenor CMP further insists that “60% of its (contractor’s) net returns from mining, if any, will go to the Government under the WMCP FTAA.”[73]

Like intervenor CMP, respondent WMCP also maintains that under an FTAA, the State is “guaranteed” a 60% share of the foreign contractor’s Net Mining Revenues. Respondent WMCP admits that:

In other words, the State is guaranteed a sixty per centum (60%) share of the Mining Revenues, or 60% of the actual fruits of the endeavor. This is in line with the intent behind Section 2 of Article XII that the Filipino people, as represented by the State, benefit primarily from the exploration, development, and utilization of the Philippines’ natural resources.

Incidentally, this sharing ratio between the Philippine Government and the Contractor is also in accordance with the 60%-40% equity requirement for Filipino-owned corporations in Paragraph 1 of Section 2 of Article XII.[74] (Italics supplied)

In short, the entire mining industry, as represented by intervenor CMP, is willing to pay the State a share equivalent to 60% of the net mining revenues. Even the foreign contractor WMCP agrees to pay the State 60% of its net mining revenues, albeit dishonestly.

However, the majority opinion refuses to accept that the State is entitled to what the entire mining industry is willing to pay the State. Incredibly, the majority opinion claims that “there is no independent showing that the taking of at least 60 percent share in the after-tax income of a mining company operated by a foreign contractor is fair and reasonable under most if not all circumstances.” Despite the willingness of the entire mining industry to pay the State a 60% share without exception, the majority opinion insists that such sharing is not fair and reasonable to the mining industry “under most if not all circumstances.” What is the basis of the majority opinion in saying this when the entire mining industry already admits, concedes and accepts that the State is entitled, without exception, to 60% of the net mining revenues?

Oddly, the majority opinion cites only the personal experience of the ponente, who had previously “been engaged

in private business for many years.” The majority opinion even states, in insisting that the State should receive less than 60% share, that “[F]airness is a credo not only in law, but also in business.” The majority opinion cannot be more popish than the Pope. The majority opinion ponente’s business judgment cannot supplant the unanimous business judgment of the entire mining industry, as manifested by intervenor CMP before this Court. What is obvious is that it is not fair to deprive the Filipino people, many of whom live in hand to mouth existence, of what is legally their share of the national patrimony, in light of the willingness of the entire mining industry to pay the Filipino people their rightful share.

The majority opinion gives a “simplified illustration” to show that the State does not deserve a 60% share of the net proceeds from mining revenues. The majority opinion states:

x x x Let us base it on gross revenues of, say, P500. After deducting operating expenses, but prior to income tax, suppose a mining makes a taxable income of P100. A corporate income tax of 32 percent results in P32 of taxable income going to the government, leaving the mining firm with P68. Government then takes 60 percent thereof, equivalent to P40.80, leaving only P27.20 for the mining firm.

The majority opinion’s “simplified illustration” is indeed too simplified because it does not even consider the exploration, development and capital expenses. The majority opinion’s “simplified illustration” deducts from gross revenues only “operating expenses.” This is an egregious error that makes this “simplified illustration” misleading. Exploration, development and other capital expenses constitute a huge part of the deductions from gross revenues. In the early years of commercial production, the exploration, development and capital expenses, if not subject to a cap or limitation, can wipe out the gross revenues.

The majority opinion’s operating expenses are not even taken from mining industry rates. One can even zero out the taxable income by simply jacking up the operating expenses. A “simplified illustration” of an income statement of an operating mining company, omitting the deduction of amortized capital expenses, serves no purpose whatsoever. What is important is the return on the investment of the foreign contractor. The absolute amount that goes to the contractor may be smaller than what goes to the State. However, the amount that goes to the contractor may be a hundred times its investment. This can only be determined if the capital expenditures of the contractor are taken into account.

Under an FTAA, the State is directly undertaking the exploitation of mineral resources. The net proceeds are not subject to income tax since there is no separate taxable entity. The State is an entity but not a taxable corporate entity. The State does not pay income tax to itself, and even if it does, it is just a book entry since it is the payor and payee at the same time. Only the 40% share of the FTAA contractor is subject to the 32% corporate income tax. On this score alone, the majority opinion’s “simplified illustration” is wrong.

Intervenor CMP and respondent WMCP are correct in anchoring on Section 2, Article XII of the 1987 Constitution their admission that the State is entitled to 60% of the net mining revenues. Their common position is based on the Constitution, existing laws and industry practice.

First, the State owns the mineral resources. To the owner of the mineral resources belongs the income from any exploitation of the mineral resources. The owner may share its income with the contractor as compensation to the contractor, which is an agent of the owner. The industry practice is the owner receives an equal or larger share of the income as against the share of the contractor or agent.

In the Occidental-Shell FTAA covering Malampaya, where the contractor contributed all the capital and technology, the State receives 60% of the net proceeds. In addition, Occidental-Shell’s 40% share is subject to the 32% Philippine income tax. Occidental-Shell’s US\$2 billion investment^[75] in Malampaya is by far the single biggest foreign investment in the Philippines. The offshore Malampaya gas extraction is also by far more capital

intensive and riskier than land-based mineral extraction. Over the 20-year life of the natural gas reserves, the State will receive US\$8-10 billion[76] from its share in the Occidental-Shell FTAA.

In *Consolidated Mines, Inc. v. Court of Tax Appeals*,[77] a case decided under the 1973 Constitution, Consolidated Mines, the concessionaire of the mines, shared equally the net mining income with Benguet Consolidated Mines, the mining operator or contractor. Thus, as quoted in *Consolidated Mines*, the agreement between the concessionaire and operator stated:

X. After Benguet has been fully reimbursed for its expenditures, advances and disbursements as aforesaid the net profits from the operation shall be divided between Benguet and Consolidated share and share alike, it being understood however, that the net profits as the term is used in this agreement shall be computed by deducting from gross income all operating expenses and all disbursements of any nature whatsoever as may be made in order to carry out the terms of this agreement. (*Italics supplied*)

Incidentally, in *Consolidated Mines* the State did not receive any share in the net mining income because of the “license, concession or lease” system under the 1935 and 1973 Constitutions. The State and the Filipino people received only taxes, duties and fees.

Second, the State exercises “full control and supervision” over the exploitation of mineral resources. “Full control” as used in the Constitution means more than ordinary majority control. In corporate practice, ordinary control of a corporation means a simple majority control, or at least 50% plus one of the total voting stock. In contrast, full or total control means two-thirds of the voting stock, which enables the owner of the two-thirds equity to amend any provision in the charter of the corporation. However, since foreigners can own up to 40% of the equity of mining companies, “full control” cannot exceed the control corresponding to the State’s 60% equity. Thus, the State’s share in the net proceeds of mining companies should correspond to its 60% interest and control in mining companies.

Third, Section 2, Article XII of the 1987 Constitution requires that the FTAA must make “real contributions to the economic growth and general welfare of the country.” As respondent WMCP aptly admits, “the intent behind Section 2 of Article XII (is) that the Filipino people, as represented by the State, (shall) benefit primarily from the exploration, development, and utilization of the Philippines’ natural resources.” For the Filipino people to benefit primarily from the exploitation of natural resources, and for FTAAAs to make real contributions to the national economy, the majority of the net proceeds from mining operations must accrue to the State.

Fourth, the 1987 Constitution ordains the State to “conserve and develop our patrimony.” The nation’s mineral resources are part of our national patrimony. The State can “conserve” our mineral resources only if the majority of the net proceeds from the exploitation of mineral resources accrue to the State.

In sum, only the majority opinion refuses to accept that the State has a right to receive at least 60% of the net proceeds from mining operations. The principal parties involved in this case do not object that the State shall receive such share. The entire mining industry and respondent WMCP admit that the State is entitled to a 60% share of the net proceeds. The State, represented by the Government, will certainly not object to such share.

More than anything else, the intent and language of the 1987 Constitution require that the State receive the bulk of the income from mining operations. Only Congress, through a law, may allow a share lesser than 60% if certain compelling conditions are present. Congress may authorize the President to make such determination subject to standards and limitations that Congress shall prescribe.

The majority opinion wants to give the President the absolute discretion to determine the State’s share from mining revenues. The President will be hard put accepting anything less than 60% of the net proceeds. If the

President accepts less than 60%, the President is open to a charge of entering into a manifestly and grossly disadvantageous contract to the Government because the entire mining industry, including WMCP, has already agreed to pay 60% of the net proceeds to the State. The only way to avoid this is for Congress to enact a law providing for the conditions when the State may receive less than 60% of the net proceeds.

Conclusion

Let us assume that one of the Justices of this Court is the owner of mineral resources – say gold reserves. A foreigner offers to extract the gold and pay for all development, capital and operating expenses. How much will the good Justice demand as his or her share of the gold extracted by the foreigner? If the Justice follows the Malampaya precedent, he or she will demand a 60% share of the net proceeds. If the Justice follows the manifestation of intervenor CMP and respondent WMCP before this Court, he or she will also demand a 60% share in the net proceeds. If the Justice follows the Consolidated Mines precedent, he or she will demand no less than 50% of the net proceeds. In either case, the 2% excise tax on the gold extracted is part of the operating expenses to be paid by the foreigner but deducted from the gross proceeds.

Now, under the Regalian doctrine the State, not the Justice, owns the gold reserves. How much should the State demand from the foreigner as the State's share of the gold that is extracted? If we follow Sections 39, 80, 81, 84 and 112 of RA 7942, the State will receive only 2% excise tax as its "total share" from the gold that is extracted.

Is this fair to the State and the Filipino people, many of whom live below the poverty line? Is this what the 1987 Constitution mandates when it says that (a) the State must conserve and develop the nation's patrimony, (b) the State owns all the natural resources, (c) the State must exercise full control and supervision over the exploitation of its natural resources, and (d) FTAA's must make real contributions to the national economy and the general welfare?

How this Court decides the present case will determine largely whether our country will remain poor, or whether we can progress as a nation. Based on NEDA's estimates, the total mineral wealth of the nation is P47 trillion, or US\$840 billion. This is 15 times more than our US\$56 billion foreign debt. Can this Court in conscience agree that the State will receive only 2% of the P47 trillion mineral wealth of the nation?

In *Miners Association*, this Court ruled that the 1987 Constitution has abandoned the old system of "license, concession or lease" and instead installed full State control and supervision over the exploitation of natural resources. No amount of dire warnings or media publicity should intimidate this Court into resurrecting the old and discredited system that has caused the denudation of almost all of the nation's virgin forests without any visible benefit to the Filipino people.

The framers of the 1987 Constitution have wisely instituted the new system to prevent a repeat of the denudation of our forestlands that did not even make any real contribution to the economic growth of the nation. This Court must do its solemn duty to uphold the intent and letter of the Constitution and, in the words of the Preamble of the 1987 Constitution, "conserve and develop our patrimony" for the benefit of the Filipino people.

This Court cannot trivialize the Filipino people's right to be the primary beneficiary of the nation's mineral resources by ruling that the phrase "among other things" is sufficient to insure that FTAA's will "make real contributions to the economic growth and general welfare of the country." This Court cannot tell the Filipino people that the phrase "among other things" is sufficient to "preserve and develop the national patrimony." This Court cannot tell the Filipino people that the phrase "among other things" means that they will receive the bulk of mining revenues.

This Court cannot tell the Filipino people that Congress deliberately used the phrase "among other things" to

guarantee that the Filipino people will receive their equitable share from mining revenues of foreign contractors. This Court cannot tell the Filipino people that with the phrase “among other things,” this Court has protected the national interest as mandated by the 1987 Constitution.

I therefore vote to deny the motions for reconsideration. I vote to declare unconstitutional Section 3(aq), Section 39, Section 80, the second paragraph of Section 81, the proviso in Section 84, and the first proviso in Section 112 of RA 7942 for violation of Section 2, Article XII of the 1987 Constitution. In issuing the rules to implement these void provisions of RA 7942, DENR Secretary Victor O. Ramos gravely abused his discretion amounting to lack or excess of jurisdiction.

I also vote to declare unconstitutional the present WMCP FTAA for violation of the same Section 2, Article XII of the 1987 Constitution. However, WMCP may negotiate with the Philippine Government for a new mineral agreement covering the same area consistent with this Decision.

[1] Philippine Mining Act of 1995.

[2] Rollo, pp. 23–24.

[3] Ibid., pp. 65-120. Then Executive Secretary Teofisto Guingona, Jr. signed the WMCP FTAA on behalf of then President Fidel V. Ramos upon recommendation of then DENR Secretary Angel C. Alcala.

[4] Section 2, Article XII of the 1987 Constitution provides in full: “All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation’s marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.”

[5] Chavez v. Public Estates Authority, 433 Phil. 506 (2002).

[6] The only limitation is that the State cannot alienate its natural resources except for agricultural lands. However, the State can exploit commercially its natural resources and sell the marketable products from such exploitation. See note 12.

[7] Article 441, Civil Code.

[8] Section 1, Article XIII of the 1935 Constitution; Section 8, Article XIV of the 1973 Constitution.

[9] *Miners Association of the Philippines v. Hon. Factoran, Jr., et al.*, 310 Phil. 113 (1995).

[10] Records of the Constitutional Commission, Vol. III, p. 260.

[11] See note 7.

[12] Hector de Leon, *PHILIPPINE CONSTITUTIONAL LAW*, Vol. 2, p. 804 (1999 Ed.).

[13] See note 9.

[14] Section 2, Article XII of the 1987 Constitution provides in part: “x x x With the exception of agricultural lands, all other natural resources shall not be alienated.”

[15] Chapter XIV covers Sections 80 to 82 of RA 7942.

[16] The five Mineral Production Sharing Agreements (Annexes A to F) attached to the 20 October 2004 Compliance of the Solicitor General uniformly contain the following provision:

Share of the Government - The Government Share shall be the excise tax on mineral products at the time of removal and at the rate provided for in Republic Act No. 7729 amending Section 151(a) of the National Internal Revenue Code, as amended, as well as other taxes, duties, and fees levied by existing laws. (Italics supplied)

Clearly, the State’s share is limited to taxes, duties and fees just like under the old system of “license, concession or lease.” See the (1) Mineral Production Sharing Agreement between the Republic of the Philippines and Ungay-Malobago Mines, Inc. and Rapu-Rapu Minerals, Inc. dated 12 September 2000; (2) Mineral Production Sharing Agreement between the Republic of the Philippines and Ungay-Malobago Mines, Inc. and TVI Resource Development (Phils.), Inc. dated 17 June 1998; (3) Mineral Production Sharing Agreement between the Republic of the Philippines and Base Metals Mineral Resources Corporation (BMMRC) dated 20 November 1997; (4) Mineral Production Sharing Agreement between the Republic of the Philippines and Philex Gold Philippines, Inc. dated 29 December 1999 (MPSA No. 148-99XIII); and (5) Mineral Production Sharing Agreement between the Republic of the Philippines and Philex Gold Philippines, Inc. dated 29 December 1999 (MPSA No. 149-99-XIII).

[17] Sections 144, 145 and 149, National Internal Revenue Code.

[18] *Commissioner of Internal Revenue v. Court of Appeals*, 312 Phil. 337 (1995).

[19] Memorandum dated 13 July 2004, p. 56.

[20] Section 26, RA 7942.

[21] Chapter XIV covers Sections 80 to 82 of RA 7942.

[22] *China Banking Corporation v. Court of Appeals*, G.R. Nos. 146749 & 147938, 10 June 2003, 403 SCRA 634; *City of Baguio v. De Leon*, 134 Phil. 912 (1968).

[23] The 1995 Implementing Rules and Regulations of RA 7942 attempt to limit the period to five years. Thus,

Section 236 of the Implementing Rules states that the “period of recovery which is reckoned from the date of commercial operation shall be for a period not exceeding five years or until the date of actual recovery, whichever comes first.” However, the succeeding sentence of Section 236 also states, “For clarification, the Government’s entitlement to its share shall commence after the FTAA contractor has fully recovered its pre-operating, exploration and development stage expenses, inclusive and the contractor’s obligations under Chapter XXVII (on Taxes and Fees) of the rules and regulations do not arise until this time.” What the first sentence limits the succeeding sentence cancels. The 1996 Revised Implementing Rules and Regulations of RA 7942 omit the clarificatory sentence.

[24] Section 94(a) of RA 7942 guarantees the foreign contractor the “right to repatriate the entire proceeds of the liquidation of the foreign investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation.” Section 94(b) guarantees the “right to remit earnings from the investment in the currency in which the foreign investment was originally made and at the exchange rate prevailing at the time of remittance.”

[25] Memorandum dated 13 July 2004, p. 65.

[26] Annex 8, Compliance of the Solicitor General dated 20 October 2004.

[27] Fifth Whereas Clause, Occidental-Shell FTAA.

[28] Section 1.1, Occidental-Shell FTAA.

[29] Sections 7.3 and 7.4, Occidental-Shell FTAA.

[30] Section 2.19, Occidental-Shell FTAA.

[31] Sections 12.1 and 15.2, Occidental-Shell FTAA; Paragraph 4, Annex B on Accounting Procedures.

[32] Section 7.2, Occidental-Shell FTAA.

[33] Section 6.1.i, Occidental-Shell FTAA.

[34] Sections 2.16 and 2.17, Occidental-Shell FTAA.

[35] Sections 2.24, 6.1.j, 6.3 and 8.1, Occidental-Shell FTAA.

[36] Under Section 12.1 of the Occidental-Shell FTAA, the three-man arbitral panel consists of the Philippine Government’s nominee, Occidental-Shell’s nominee, and a third member mutually chosen by the nominees of the Government and Occidental-Shell.

[37] Intervenor CMP’s Motion for Reconsideration dated 10 July 2004, p. 22.

[38] Ibid.

[39] Respondent WMCP’s Memorandum dated 15 July 2004, p. 42.

[40] Ibid.

[41] See note 3.

[42] The same provision appears in the FTAA between the Republic of the Philippines and ARIMCO Mining Corporation dated 20 June 1994. ARIMCO, a domestic corporation owned and controlled by an Australian mining company, does not need to pay the 60% share of the Philippine Government in the mining revenues if ARIMCO’s foreign parent company sells 60% of ARIMCO’s equity to a Philippine citizen or to a 60% Filipino

owned corporation. In such event, the share of the Philippine Government in the mining revenues is ZERO percent. ARIMCO will only pay the Philippine Government the 2% excise tax due on mineral products under a mineral production sharing agreement. See Annex 5, Compliance of Solicitor General dated 20 October 2004.

[43] Section 2.1 of the WMCP FTAA defines a “Qualified Entity” as an “entity that at the relevant time is qualified to enter into a mineral production sharing agreement with the Government under the laws restricting foreign ownership and equity in natural resource projects.”

[44] Motion for Reconsideration dated 14 July 2004, p. 22.

[45] Ibid., p. 20.

[46] Ibid., p. 12.

[47] Decision dated 27 January 2004.

[48] Memorandum dated 14 April 2004, p.12.

[49] Memorandum dated 15 July 2004, p. 42.

[50] Section 10.2 (l), WMCP FTAA.

[51] Article 441, Civil Code.

[52] Section 2.1 of the WMCP FTAA allows WMCP to recover pre-operating expenses over 10 years from the start of commercial production.

[53] Memorandum dated 13 July 2004, p. 65.

[54] Section 9, Article XII of the 1987 Constitution.

[55] Memorandum dated 13 July 2004, p. 60.

[56] Ibid., p. 59.

[57] Ibid., p. 65.

[58] Section 151, National Internal Revenue Code.

[59] DENR ADMINISTRATIVE ORDER NO. 56-99

SUBJECT: Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements Pursuant to Section 81 and other pertinent provisions of Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995 (the “Mining Act”), the following guidelines establishing the fiscal regime of Financial or Technical Assistance Agreements (FTAA) are hereby promulgated.

SECTION 1. Scope

This Administrative Order is promulgated to:

- a. Establish the fiscal regime for FTAAAs which the Government and the FTAA Contractors shall adopt for the large-scale exploration, development and commercial utilization of mineral resources in the country; and
- b. Provide for the formulation of a Pro Forma FTAA embodying the fiscal regime established herein and such other terms and conditions as provided in the Mining Act and the Implementing Rules and Regulations (IRR) of the Mining Act.

SECTION 2. Objectives

The objectives of this Administrative Order are:

- a. To achieve an equitable sharing among the Government, both National and Local, the FTAA Contractor and the concerned communities of the benefits derived from mineral resources to ensure sustainable mineral resources development; and
- b. To ensure a fair, equitable, competitive and stable investment regime for the large scale exploration, development and commercial utilization of minerals.

SECTION 3. Fiscal Regime of a Financial or Technical Assistance Agreement

The Financial or Technical Assistance Agreement which the Government and the FTAA Contractor shall enter into shall have a Fiscal Regime embodying the following provisions:

- a. General Principles. The Government Share derived from Mining Operations after the Date of Commencement of Commercial Production shall be determined in accordance with this Section.
- b. Occupation Fees. Prior to or upon registration of the FTAA and on the same date every year thereafter, the Contractor shall pay to the concerned Treasurer of the municipality(ies) or city(ies) the required Occupation Fee over the Contract Area at the rate provided for by existing laws, rules and regulations.
- c. Deductible Expenses. Allowable deductible expenses shall include all the expenses incurred by the Contractor directly, reasonably and necessarily related to the Mining Operations in the Contract Area in a Calendar Year during the Operating Phase. Allowable deductible expenses shall include the following:
 1. Mining, milling, transport and handling expenses together with smelting and refining costs other than smelting and refining costs paid to third parties;
 2. General and administrative expenses actually incurred by the Contractor in the Philippines;
 3. Consulting fees:
 - a) incurred within the Philippines for work related to the project
 - b) incurred outside the Philippines for work related to the project: Provided, That such fees are justifiable and subject to the approval of the Director.
 4. Environmental expenses of the Contractor including such expenses necessary to fully comply with its environmental obligations as stipulated in the environmental protection provision of the FTAA and in the IRR;
 5. Expenses for the development of host and neighboring communities and for the development of geoscience and mining technology as stipulated in the FTAA and in the IRR together with the training costs and expenses referred to in the FTAA;
 6. Royalty payments to Claimowners or surface land owners relating to the Contract Area during the Operating Phase;
 7. Continuing exploration and mine development expenses within the Contract Area after the pre-operating period;
 8. Interest expenses charged on loans or such other financing-related expenses incurred by the Contractor subject to the financing requirement in the FTAA, which shall not be more than the prevailing international rates charged for similar types of transactions at the time the financing was arranged, and where such loans are necessary for the

operations; and

9. Government taxes, duties and fees.

Ongoing Capital Expenditures shall be considered as capital expenses subject to Depreciation Charges.

“Ongoing Capital Expenditures” shall mean expenses for approved acquisitions of equipment and approved construction of buildings necessary for the Mining Operations as provided in its approved Mining Project Feasibility Study.

“Depreciation Charges” means the annual non-cash deduction from the Operating Income for the use of fixed assets that are subject to exhaustion, wear and tear and obsolescence during their employment in a Mining Operation. Its applicability and computation are regulated by existing taxation laws, the Mining Act and the IRR. Incentives relating to depreciation allowance shall be in accordance to the provisions of the Mining Act and the IRR.

“Operating Income” means the Gross Output less Deductible Expenses, while “Gross Output” has the meaning ascribed to it in the National Internal Revenue Code.

d. Payment of Government Taxes and Fees. The Contractor shall promptly pay all the taxes and fees required by the Government in carrying out the activities covered in the FTAA and in such amount, venue, procedure and time as stipulated by the particular law and implementing rules and regulations governing such taxes and fees subject to all rights of objection or review as provided for in relevant laws, rules and regulations. In case of non-collection as covered by Clause 3-g-1 of this Section, the Contractor shall follow the prevailing procedures for availment of such non-collection in accordance with pertinent laws, rules and regulations. Where prevailing orders, rules and regulations do not fully recognize and implement the provisions covered by Clause 3-g-1 of this Section, the Government shall exert its best efforts to ensure that all such orders, rules and regulations are revised or modified accordingly.

e. Recovery of Pre-Operating Expenses. Considering the high risk, high cost and long term nature of Mining Operations, the Contractor is given the opportunity to recover its Pre-Operating Expenses incurred during the pre-operating period, after which the Government shall receive its rightful share of the national patrimony. The Recovery Period, which refers to the period allowed to the Contractor to recover its Pre-Operating Expenses as provided in the Mining Act and the IRR, shall be for a maximum of five (5) years or at a date when the aggregate of the Net Cash Flows from the Mining Operations is equal to the aggregate of its Pre-operating Expenses, reckoned from the Date of Commencement of Commercial Production, whichever comes first. The basis for determining the Recovery Period shall be the actual Net Cash Flows from Mining Operations and actual Pre-Operating Expenses converted into its US dollar equivalent at the time the expenditure was incurred.

“Net Cash Flow” means the Gross Output less Deductible Expenses, Pre-Operating Expenses, Ongoing Capital Expenditures and Working Capital charges.

f. Recoverable Pre-Operating Expenses. Pre-Operating Expenses for recovery which shall be approved by the Secretary upon recommendation of the Director shall consist of actual expenses and capital expenditures relating to the following:

1. Acquisition, maintenance and administration of any mining or exploration tenements or agreements covered by the FTAA;
2. Exploration, evaluation, feasibility and environmental studies, production, mining, milling, processing and rehabilitation,

3. Stockpiling, handling, transport services, utilities and marketing of minerals and mineral products;
4. Development within the Contract Area relating to the Mining Operations;
5. All Government taxes and fees;
6. Payments made to local Governments and infrastructure contributions;
7. Payments to landowners, surface rights holders, Claimowners, including the Indigenous Cultural Communities, if any;
8. Expenses incurred in fulfilling the Contractor's obligations to contribute to national development and training of Philippine personnel;
9. Consulting fees incurred inside and outside the Philippines for work related directly to the Mining Operations;
10. The establishment and administration of field and regional offices including administrative overheads incurred within the Philippines which are properly allocatable to the Mining Operations and directly related to the performance of the Contractor's obligations and exercise of its rights under the FTAA;
11. Costs incurred in financial development, including interest loans payable within or outside the Philippines, subject to the financing requirements required in the FTAA and to a limit on debt-equity ratio of 5:1 for investments equivalent to 200 Million US Dollars or less, or for the first 200 Million US Dollars of investments in excess of 200 Million US Dollars, or 8:1 for that part of the investment which exceeds 200 Million US Dollars: Provided, That the interests shall not be more than the prevailing international rates charged for similar types of transaction at the time the financing was arranged;
12. All costs of constructing and developing the mine incurred before the Date of Commencement of Commercial Production, including capital and property as hereinafter defined irrespective as to their means of financing, subject to the limitations defined by Clause 3-f-11 hereof, and inclusive of the principal obligation and the interests arising from any Contractor's leasing, hiring, purchasing or similar financing arrangements including all payments made to Government both National and Local; and
13. General and administrative expenses actually incurred by the Contractor for the benefit of the Contract Area.

The foregoing recoverable Pre-Operating Expenses shall be subject to verification of its actual expenditure by an independent audit recognized by the Government and chargeable against the Contractor.

g. Government Share.

1. Basic Government Share. The following taxes, fees and other such charges shall constitute the Basic Government Share:
 - a) Excise tax on minerals;
 - b) Contractor's income tax;
 - c) Customs duties and fees on imported capital equipment;
 - d) Value added tax on the purchase of imported equipment, goods and services;
 - e) Withholding tax on interest payments on foreign loans;
 - f) Withholding tax on dividends to foreign stockholders;
 - g) Royalties due the Government on Mineral Reservations;

- h) Documentary stamps taxes,
- i) Capital gains tax;
- j) Local business tax;
- k) Real property tax,
- l) Community tax;
- m) Occupation fees;
- n) All other local Government taxes, fees and imposts as of the effective date of the FTAA;
- o) Special Allowance, as defined in the Mining Act; and
- p) Royalty payments to any Indigenous People(s)/Indigenous Cultural Community(ies).

From the Effective Date, the foregoing taxes, fees and other such charges constituting the Basic Government Share, if applicable, shall be paid by the Contractor: Provided, That above items (a) to (g) shall not be collected from the Contractor upon the date of approval of the Mining Project Feasibility Study up to the end of the Recovery Period. Any taxes, fees, royalties, allowances or other imposts, which should not be collected by the Government, but nevertheless paid by the Contractor and are not refunded by the Government before the end of the next taxable year, shall be included in the Government Share in the next taxable year. Any Value-Added Tax refunded or credited shall not form part of Government Share.

2. Additional Government Share. Prior to the commencement of Development and Construction Phase, the Contractor may select one of the formula for calculating the Additional Government Share set out below which the Contractor wishes to apply to all of its Mining Operations and notify the Government in writing of that selection. Upon the issuance of such notice, the formula so selected shall thereafter apply to all of the Contractor's Mining Operations.

a) Fifty-Fifty Sharing of the Cumulative Present Value of Cash Flows. The Government shall collect an Additional Government Share from the Contractor equivalent to an amount which when aggregated with the cumulative present value of Government Share during the previous Contract Years and the Basic Government Share for the current Contract Year is equivalent to a minimum of fifty percent (50%) of the Cumulative Present Value of Project Cash Flow before financing for the current Contract Year. as defined below.

Computation. The computation of the Additional Government Share shall commence immediately after the Recovery Period. If the computation covers a period of less than one year, the Additional Government Share corresponding to this period shall be computed pro-rata wherein the Additional Government Share during the year shall be multiplied by the fraction of the year after recovery. The Additional Government Share shall be computed as follows:

Project Cash Flow Before Financing and Tax ("CF") for a taxable year shall be calculated as follows:

$$CF = GO - DE + I - PE - OC$$

Cumulative Present Value of Project Cash Flow ("CP") shall be the sum of the present value of the cumulative present value of project cash flow during the previous year ($CP_{i-1} \times 1.10$) and the Project Cash Flow Before Financing and Tax for the current year ("CF"), and shall be calculated as follows:

$$CP = (CP_{i-1} \times 1.10)$$

Cumulative Present Value of Total Government Share Before Additional Government Share (“CGB”) shall be the sum of: the present value of the cumulative present value of the Total Government Share during the previous year (CGA i-J x 1.10), and the Basic Government Share for the current year (BGS), and shall be calculated as follows:

$$\text{CGB} = (\text{CGA } i-1 \times 1.10) + \text{BGS}$$

The Additional Government Share (“AGS”) shall be:

$$\text{If: } \text{CGB} > \text{CP} \times 0.5 \text{ then } \text{AGS} = 0$$

$$\text{If } \text{CGB} < \text{CP} \times 0.5 \text{ then } \text{AGS} = [\text{CP} \times 0.5] - \text{CGB}$$

Cumulative Present Value of Total Government Share (CGA):

$$\text{CGA} = \text{CGB} + \text{AGS}$$

where:

BGS = Basic Government Share shall have the meaning as described in Clause 3-g-1 hereof;

GO = Gross Output shall have the same meaning as defined in the National Internal Revenue Code;

DE = Deductible Expenses shall have the meaning as described in Clause 3-c hereof;

I = Interest payments on loans included in the Deductible Expenses shall be equivalent to those referred to in Clause 3-c-8 hereof;

PE = unrecovered Pre-Operating Expenses;

OC = On-going Capital Expenditures as defined in Clause 3-c hereof;

CPI-1 = cumulative present value of project cash flow during the previous year; and

CGA = cumulative present value of total Government Share during the previous year.

b) Profit Related Additional Government Share. The Government shall collect an Additional Government Share from the Contractor based on twenty-five percent (25%) of the additional profits once the arithmetic average of the ratio of Net Income After Tax To Gross Output as defined in the National Internal Revenue Code, for the current and previous taxable years is 0.40 or higher rounded off to the nearest two decimal places.

Computation. The computation of the Additional Government Share from additional profit shall commence immediately after the Recovery Period. If the computation covers a period of less than a year, the additional profit corresponding to this period shall be computed pro-rata wherein the total additional profit during the year shall be multiplied by the fraction of the year after recovery.

The additional profit shall be derived from the following formula.:

If the computed average ratio as derived from above is less than 0.40:

$$\text{Additional Profit} = 0$$

If the computed average ratio is 0.40 or higher:

$$[\text{NIAT} - (0.40 \times \text{GO})]$$

$$\text{Additional Profit} = \text{-----}$$

(1-ITR)

The Additional Government Share from the additional profit is computed using the following formula:

Additional Government Share

From Additional Profit = 25% x Additional Profit

where:

NIAT = Net Income After Tax for the particular taxable year under consideration.

GO = Gross Output from operations during the same taxable year.

ITR = Income Tax Rate applied by the Bureau of Internal Revenue in computing the income tax of the Contractor during the taxable year.

c) Additional Share Based from the Cumulative Net Mining Revenue. The Additional Government Share for a given taxable year shall be calculated as follows:

(i) Fifty percent (50%) of cumulative Net Mining Revenue from the end of the Recovery Period to the end of that taxable year;

LESS

(ii) Cumulative Basic Government Share for that period as calculated under Clause 3-g-1 hereof;

AND LESS (if applicable)

(iii) Cumulative Additional Government Share in respect of the period commencing at the end of the Recovery Period and expiring at the end of the taxable year immediately preceding the taxable year in question.

“Net Mining Revenue” means the Gross Output from Mining Operations during a Calendar year less Deductible Expenses, plus Government taxes, duties and fees included as part of Deductible Expenses.

3. Failure to Notify. If the Contractor does not notify the Government within the time contemplated by Clause 3-g-2 of the formula for calculating the Additional Government Share which the Contractor wishes to apply to all of its Mining Operations, the Government shall select and inform the Contractor which option will apply to the latter.

4. Filing and Payment of Additional Government Share. Payment of the Additional Government Share shall commence after the Recovery Period. The Additional Government Share shall be computed, filed and paid to the MGB within fifteen (15) days after the filing and payment of the final income tax return during the taxable year to the Bureau of Internal Revenue. Late filing and payment of the Additional Government Share shall be subject to the same penalties applicable to late filing of income tax returns. The Contractor shall furnish the Director a copy of its income tax return not later than fifteen (15) days after the date of filing.

A record of all transactions relating to the computation of the Additional Government Share shall be maintained by the Contractor and shall be made available to the Secretary or his/her authorized representative for audit.

h. Sales and Exportation — The Contractor shall endeavor to dispose of the minerals and by-products produced in the Contract Area at the highest commercially achievable market price and lowest commercially achievable commissions and related fees in the circumstances then prevailing and to negotiate for sales terms and conditions compatible with world market conditions. The Contractor may enter into long term sales and marketing contracts

or foreign exchange and commodity hedging contracts which the Government acknowledges to be acceptable notwithstanding that the sale price of minerals may from time to time be lower, or that the terms and conditions of sales are less favorable, than those available elsewhere.

The Government shall be informed by the Contractor when it enters into a marketing agreement with both foreign and local buyers. The Contractor shall provide the Government a copy of the final marketing agreement entered into with buyers subject to the confidentiality clause of the FTAA.

The Government shall be entitled to check and inspect all sales and exportation of minerals and/or mineral products including the terms and conditions of all sales commitments.

Sales commitments with affiliates, if any, shall be made only at prices based on or equivalent to arm's length sales and in accordance with such terms and conditions at which such agreement would be made if the parties had not been affiliated, with due allowance for normal selling discounts or commissions. Such discounts or commissions allowed the affiliates must be no greater than the prevailing rate so that such discounts or commissions will not reduce the net proceeds of sales to the Contractor below those which it would have received if the parties had not been affiliated. The Contractor shall, subject to confidentiality clause of the FTAA, submit to the Government evidence of the correctness of the figures used in computing the prices discounts and commissions, and a copy of the sales contract.

The Contractor undertakes that any mining, processing or treatment of Ore by the Contractor shall be conducted in accordance with such generally accepted international standards as are economically and technically feasible, and in accordance with such standards the Contractor undertakes to use all reasonable efforts to optimize the mining recovery of Ore from proven reserves and metallurgical recovery of minerals from the Ore: Provided, That it is economically and technically feasible to do so.

For purposes of this Clause 3-h, an affiliate of an affiliated company means:

- a) any company in which the Contractor holds fifty percent (50%) or more of the shares;
- b) any company which holds fifty percent (50%) or more of the Contractor's shares;
- c) any company affiliated by the same definition in (a) or (b) to an affiliated company of the Contractor is itself considered an affiliated company for purposes of the FTAA;
- d) any company which, directly or indirectly, is controlled by or controls, or is under common control by the Contractor;
- e) any shareholder or group of shareholders of the Contractor or of an affiliated company; or
- f) any individual or group of individuals in the employment of the Contractor or of any affiliated company.

Control means the power exercisable, directly or indirectly, to direct or cause the direction of the management and policies of a company exercised by any other company and shall include the right to exercise control or power to acquire control directly or indirectly, over the company's affairs and the power to acquire not less than fifty percent (50%) of the share capital or voting power of the Contractor. For this purpose, a creditor who lends, directly or indirectly, to the contractor, unless he has lent money to the Contractor in the ordinary course of money-lending business, may be deemed to be a Person with power to acquire not less than fifty percent (50%) of the share capital or voting power of the Contractor if the amount of the total of its loan is not less than fifty percent (50%) of the total loan capital of the company.

If a person ("x") would not be an affiliate of an affiliated company ("y") on the basis of the above definition but

would be an affiliate if each reference in that definition to “fifty percent (50%)” was read as a reference to “forty percent (40%)” and the Government has reasonable grounds for believing that “x” otherwise controls “y” or “x” is otherwise controlled by “y,” then, upon the Contractor being notified in writing by the Government of that belief and the grounds therefore, “x” and “y” shall be deemed to be affiliates unless the Contractor is able to produce reasonable evidence to the contrary.

i. Price or Cost Transfers. The Contractor commits itself not to engage in transactions involving price or cost transfers in the sale of minerals or mineral products and in the purchase of input goods and services resulting either in the illegitimate loss or reduction of Government Share or illegitimate increase in Contractor’s share. If the Contractor engages affiliates or an affiliated company in the sale of its mineral products or in providing goods, services, loans or other forms of financing hereunder, it shall do so on terms no less than would be the case with unrelated persons in arms-length transactions.

SECTION 4. Pro Forma FTAA Contract

The fiscal regime provided herein, and the terms and conditions provided in the Mining Act and IRR shall be embodied in a Pro Forma FTAA Contract to be prepared by the Department of Environment and Natural Resources. The Pro Forma FTAA Contract shall also incorporate such other provisions as the DENR may formulate as a result of consultations or negotiations conducted for that purpose with concerned entities.

The Pro Forma FTAA Contract shall be used by the DENR, the Negotiating Panel and the mining applicant for negotiation of the terms and conditions of the FTAA: Provided, That the terms and conditions provided in the Pro Forma FTAA Contract shall be incorporated in each and every FTAA.

SECTION 5. Status of Existing FTAA

All FTAA approved prior to the effectivity of this Administrative Order shall remain valid and be recognized by the Government: Provided, That should a Contractor desire to amend its FTAA, it shall do so by filing a Letter of Intent (LOI) to the Secretary thru the Director. Provided, further, That if the Contractor desires to amend the fiscal regime of its FTAA, it may do so by seeking for the amendment of its FTAA’s whole fiscal regime by adopting the fiscal regime provided hereof: Provided, finally, That any amendment of an FTAA other than the provision on fiscal regime shall require the negotiation with the Negotiating Panel and the recommendation of the Secretary for approval of the President of the Republic of the Philippines.

SECTION 6. Repealing Clause

All orders and circulars or parts thereof inconsistent with or contrary to the provisions of this Order are hereby repealed, amended or modified accordingly.

SECTION 7. Effectivity

This Order shall take effect fifteen (15) days upon its complete publication in newspaper of general circulation and fifteen (15) days after registration with the Office of the National Administrative Register.

(SGD.) ANTONIO H. CERILLES
Secretary

[60] G.R. Nos. L-18843 & 18844, 29 August 1974; *supra*, note 77.

[61] 323 Phil. 297 (1996).

[62] 112 Phil. 24 (1961).

[63] 156 Phil. 498 (1974).

[64] Ruben E. Agpalo, STATUTORY CONSTRUCTION, p. 217 (1998 Ed.), citing Commissioner of Customs v. Court of Appeals, G.R. No. 33471, 31 January 1972, 43 SCRA 192; Asturias Sugar Central, Inc. v. Commissioner of Customs, G.R. No. 19337, 30 September 1969, 29 SCRA 617; People v. Kottinger, 45 Phil. 352 (1923).

[65] Section IX of the WMCP FTAA, entitled “Option to Convert into MPSA,” provides:

9.1

The Contractor may, at any time, give notice to the Secretary of its intention to convert this Agreement either in whole or in part into one or more Mineral Production Sharing Agreements in the form of the Agreement annexed hereto in Annexure B (“the MPSA”) over such part or parts of the Contract Area as are specified in the notice.

[66] The five Mineral Production Sharing Agreements (Annexes A to F) attached to the 20 October 2004 Compliance of the Solicitor General are: (1) Mineral Production Sharing Agreement between the Republic of the Philippines and Ungay-Malobago Mines, Inc. and Rapu-Rapu Minerals, Inc. dated 12 September 2000; (2) Mineral Production Sharing Agreement between the Republic of the Philippines and Ungay-Malobago Mines, Inc. and TVI Resource Development (Phils.), Inc. dated 17 June 1998; (3) Mineral Production Sharing Agreement between the Republic of the Philippines and Base Metals Mineral Resources Corporation (BMMRC) dated 20 November 1997; (4) Mineral Production Sharing Agreement between the Republic of the Philippines and Philex Gold Philippines, Inc. dated 29 December 1999 (MPSA No. 148-99XIII); and (5) Mineral Production Sharing Agreement between the Republic of the Philippines and Philex Gold Philippines, Inc. dated 29 December 1999 (MPSA No. 149-99-XIII).

[67] p. 1140, 2003 Edition.

[68] Cebu Portland Cement Company v. Municipality of Naga, Cebu, et al., 133 Phil. 695 (1968).

[69] Resins, Inc. v. Auditor General, 134 Phil. 697 (1968).

[70] Luzon Surety Co., Inc. v. De Garcia, et al., 140 Phil. 509 (1969); Quijano, et al. v. Development Bank of the Phils., et al., 146 Phil. 283 (1970); Chartered Bank Employees Association v. Ople, No. L-44717, 28 August 1985, 138 SCRA 273.

[71] Motion for Reconsideration dated 14 July 2004, p. 22.

[72] Ibid., p. 20.

[73] Ibid., p. 12.

[74] Memorandum dated 15 July 2004, p. 42.

[75] www.malampaya.com

[76] Ibid.

[77] 157 Phil. 608 (1974).

DISSENTING OPINION

CARPIO MORALES, J.:

Regrettably, a majority of the members of this Court has voted to reverse its January 27, 2004 Decision in *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*[1] by which it declared certain provisions[2] of the Mining Act of 1995[3] on Financial or Technical Assistance Agreements (FTAAs), the related provisions of Department of Environment and Natural Resources Administrative Order 96-40 (DAO No. 96-40), and the March 22, 1995 Financial and Technical Assistance Agreement (FTAA) executed between the Government of the Republic of the Philippines and WMC Philippines, Inc. (WMCP) in violation of Section 2, Article XII of the Constitution.

Because I find that: (1) the “agreements ... involving either technical or financial assistance” contemplated by the fourth paragraph of Section 2, Article XII of the 1987 Constitution are distinct and dissimilar from the “service contracts” under the 1973 Constitution; and (2) these certain provisions of the Mining Act, its implementing rules, and the WMCP FTAA unconstitutionally convey beneficial ownership and control over Philippine mineral and petroleum resources to foreign contractors, I most respectfully dissent.

Antecedents

By motion, private respondent WMCP seeks a reconsideration of this Court’s Decision, it arguing essentially that FTAAs are the same as service contracts which were sanctioned under the 1973 Constitution.

By Resolution of June 22, 2004, this Court, upon motion,[4] impleaded Philippine Chamber of Mines (PCM), as respondent-in-intervention. Intervenor PCM argues that the “agreements” referred to in paragraph 4 of Section 2, Article XII of the Constitution were intended to involve or include the “service contracts” provided for in the 1973 Constitution.

The parties were, on June 29, 2004, heard on oral arguments during which two major issues were tackled: first, the proper interpretation of the phrase “agreements... involving either technical or financial assistance” in Section 2, Article XII of the Constitution, and second, mootness.

Thereafter, the parties submitted their respective memoranda, as required by Resolution of this Court. However, despite the verbal request of Associate Justice Artemio V. Panganiban during the oral arguments,[5] intervenor PCM failed to submit along with its memorandum any documents to establish international mining practices, particularly in developing countries.

Issues for Resolution

The majority opinion holds that the resolution of the Motions for Reconsideration in this case should be confined to the issues taken up during the oral arguments on June 29, 2004. These were: (1) the proper interpretation of the phrase “agreements... involving either technical or financial assistance” in Section 2, Article XII of the Constitution, and (2) mootness.

It further holds that the issue of whether the Mining Act and the WMCP FTAA are manifestly disadvantageous to the government could not be passed upon because the same was supposedly not raised in the original petition.

These rulings, while well intentioned, cannot be accepted.

First, there is no rule of procedure, whether in Rule 52 or elsewhere, which restricts the resolution of a case to the issues taken up in the oral arguments. The reason is obvious. The issues for resolution in any given case are determined by the conflicting arguments of the parties as set forth in their pleadings. On the other hand, the matters to be taken up in an oral argument may be limited, by order of the court, to only such points as the court

may deem necessary. Thus, Section 1 of Rule 49 provides:

Section 1. When allowed. – At its own instance or upon motion of a party, the court may hear the parties in oral argument on the merits of a case, or on any material incident in connection therewith.

The oral argument shall be limited to such matters as the court may specify in its order or resolution. (*Italics supplied*)

A narrow delimitation of matters to be taken up during oral argument is a matter of practical necessity since often not all the relevant issues can be thoroughly discussed without unduly imposing on the time of the Court. However, unlike a pre-trial order,[6] the delimitation does not control or limit the issues to be resolved. These issues may be subject matter of the parties' memoranda, as in this case.

Second, as noted in the Decision,[7] the issue of whether the Mining Act and the WMCP FTAA afford the State a just share in the proceeds of its natural resources was in fact raised by the petitioners, viz:

Petitioners claim that the DENR Secretary acted without or in excess of jurisdiction:

I

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows fully foreign owned corporations to explore, develop, utilize and exploit mineral resources in a manner contrary to Section 2, paragraph 4, Article XII of the Constitution;

II

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows the taking of private property without the determination of public use and for just compensation;

III

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it violates Sec. 1, Art. III of the Constitution;

IV

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows enjoyment by foreign citizens as well as fully foreign owned corporations of the nation's marine wealth contrary to Section 2, paragraph 2 of Article XII of the Constitution;

V

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows priority to foreign and fully foreign owned corporations in the exploration, development and utilization of mineral resources contrary to Article XII of the Constitution;

VI

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows the inequitable sharing of wealth contrary to Sections [sic] 1, paragraph 1, and Section 2, paragraph 4[,] [Article XII] of the Constitution;

VII

x x x in recommending approval of and implementing the Financial and Technical Assistance Agreement between the President of the Republic of the Philippines and Western Mining Corporation Philippines Inc. because the same is illegal and unconstitutional.[8] (Emphasis and italics supplied)

Indeed, this Court expressly passed upon this issue in the Decision when it held that:

With the foregoing discussion in mind, this Court finds that R.A. No. 7942 is invalid insofar as said Act authorizes service contracts. Although the statute employs the phrase “financial and technical agreements” in accordance with the 1987 Constitution, it actually treats these agreements as service contracts that grant beneficial ownership to foreign contractors contrary to the fundamental law.[9] (Emphasis and italics supplied)

Moreover, the issue of whether the State is deprived of its just share in the proceeds from mining was touched upon by the parties in their memoranda. Thus, respondent WMCP argues that:

Section 10.2 (a) of the COLUMBIO FTAA does not prohibit the State from partaking of the fruits of the exploration. In fact, Section 7.7 of the COLUMBIO FTAA provides:

“7.7 Government Share

From the Commencement of Commercial Production, the Contractor shall pay a government share of sixty per centum (60%) of Net Mining Revenues, calculated in accordance with the following provisions (the “Government Share”). The Contractor shall be entitled to retain the balance of all revenues from the Mining Operations.”

In other words, the State is guaranteed a sixty per centum (60%) share of the Net Mining Revenues, or 60% of the actual fruits of the endeavor. This is in line with the intent behind Section 2 of Article XII that the Filipino people, as represented by the State, benefit primarily from the exploration, development, and utilization of the Philippines’ natural resources.[10] (Emphasis and italics supplied)

while the petitioners, for their part, claim:

For instance, government share is computed on the basis of net mining revenue. Net mining revenue is gross mining revenue less, among others, deductible expenses. Some of the allowable deductions from the base amount to be used to compute government share are suspicious. The WMCP FTAA contract, for instance, allows expenditures for development “outside the Contract Area,” consulting fees for work done “outside the Philippines,” and the “establishment and administration of field offices including administrative overheads incurred within and outside the Philippines.”

x x x

One mischief inherent in past service contracts was the practice of transfer pricing. UNCTAD defines this as the “pricing of transfers of goods, services and other assets within a TNC network.” If government does not control the exploration, development and utilization of natural resources, then the intra-transnational corporation pricing of expenditures may not become transparent.[11] (Italics supplied; footnotes omitted)

In fine, the majority opinion skirts an issue raised in the original Petition for Prohibition and Mandamus, passed upon in its Decision of January 27, 2004 and argued by the parties in the present Motion for Reconsideration.

Instead, I find that the myriad arguments raised by the parties may be grouped according to two broad categories: first, the arguments pertaining to the constitutionality of FTAA provisions of the Mining Act; and second, those pertaining to the validity of the WMCP FTAA. Within these categories, the following issues are submitted for resolution: (1) whether in invalidating certain provisions of the Mining Act a non-justiciable political question is passed upon; (2) whether the FTAA's contemplated in Section 2, Article XII of the 1987 Constitution are identical to, or inclusive of, the “service contracts” provided for in the 1973 Constitution; (3) whether the declaration of the

unconstitutionality of certain provisions of the Mining Act should be reconsidered; (4) whether the question of validity of the WMCP FTAA was rendered moot before the promulgation of the Decision; and (5) whether the decision to declare the WMCP FTAA unconstitutional and void should be reconsidered.

Following the foregoing framework of analysis, I now proceed to resolve the issues raised in the motion for reconsideration.

I

Constitutionality of the Philippine Mining Act of 1995

The issues presented constitute justiciable questions.

Contrary to the posture of respondent WMCP, this Court did not tread on a political question in rendering its Decision of January 27, 2004.

The Constitution delineates the parameters of the powers of the legislative, the executive and the judiciary.[12] Whether the first and second great departments of government exceeded those parameters is the function of the third.[13] Thus, the Constitution defines judicial power to include “the duty... to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”[14]

Judicial power does not extend to political questions, which are concerned with issues dependent upon the wisdom, not the legality, of a particular measure.[15] The reason is that, under our system of government, policy issues are within the domain of the political branches of government and of the people themselves as the repository of all state power.[16] In short, the judiciary does not settle policy issues.[17]

The distinction between a truly political question and an ostensible one lies in the answer to the question of whether there are constitutionally imposed limits on powers or functions conferred upon political bodies.[18] If there are constitutionally imposed limits, then the issue is justiciable, and a court is duty-bound to examine whether the branch or instrumentality of the government properly acted within those limits.[19]

Respondent WMCP argues that the “exploration, development, and utilization of natural resources are matters of policy, in other words, political matters or questions,” over which this Court has no jurisdiction.

Respondent is mistaken. The questions involved in this case are not political. The provisions of paragraph 4, Section 2 of Article XII of the Constitution, including the phrase “agreements... involving either technical or financial assistance,” incorporate limitations[20] on the scope of such agreements or FTAAAs. Consequently, they constitute limitations on the powers of the legislative to determine their terms, as well as the powers of the Executive to enter into them. In its Decision, this Court found that, by enacting the objectionable portions of the Mining Act and in entering into the subject FTAA, the Congress and the President went beyond the constitutionally delimited scope of such agreements and thereby transgressed the boundaries of their constitutional powers.

The “agreements” contemplated in paragraph 4, Section 2, Article XII of the Constitution are distinct and dissimilar from the old “service contracts.”

The majority and respondents share a common thesis: that the fourth paragraph of Sec. 2, Article XII contemplates not only financial or technical assistance but, just like the service contracts which were allowed under the 1973 Constitution, management assistance as well.

The constitutional provision in dispute reads:

Art. XII

National Economy and Patrimony

x x x

Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish workers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution. (Emphasis and italics supplied)

Its counterpart provision in Article XIV of the 1973 Constitution authorized "service contracts" as follows:

Sec. 9. The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens, or to corporations or associations at least sixty per centum of which is owned by such citizens. The Batasang Pambansa, in the national interest, may allow such citizens, corporations or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any person or entity for the exploration, development, exploration, or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management, or other forms of assistance are hereby recognized as such. (Emphasis and italics supplied)

Respondent WMCP contends that the fourth paragraph of Section 2 is an exception to the rule that participation in the country's natural resources is reserved to Filipinos.[21] It hastens to add, however, that the word "may" therein is permissive not restrictive;[22] and that consistent with the provision's permissive nature, the word "involving" therein should be construed to mean "to include," such that the assistance by foreign corporations should not be confined to technical or financial, but also to management forms.[23] And it notes that the

Constitution used “involving” instead of such restrictive terms as “solely,” “only,” or “limited to.”[24]

To the Office of the Solicitor General (OSG), the intent behind the fourth paragraph is to prevent the practice under the 1973 Constitution of allowing foreigners to circumvent the capitalization requirement,[25] as well as to address the absence of a governing law that led to the abuse of service contracts.[26] The phrase “technical or financial” is merely for emphasis, the OSG adds, that it is descriptive, not definitive, of the forms of assistance that the State needs and which foreign corporations may provide in the large-scale exploration, development and utilization of the specified resources.[27] Furthermore, the OSG contends that the denomination of the subject FTAA as a “financial and technical assistance agreement” is a misnomer and should more properly be called “agreements for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils.”[28] It argues that the President has broad discretion to enter into any agreement, regardless of the scope of assistance, with foreign corporations.[29] Driving its point, the OSG poses: If the framers of the Constitution intended to limit the service of foreign corporations to “passive assistance,” such as simple loan agreements, why confine them to large-scale ventures?[30] Why does the Constitution require that such agreements be based on real contributions to economic growth and general welfare of the country?[31] Why the condition in the last paragraph of Section 2 that the President report to Congress?[32] Finally, the OSG asserts that these requirements would be superfluous if the assistance to be rendered were merely technical or financial.[33] And that it would make more sense if the phrase “agreements... involving technical or financial assistance” were construed to mean the same concept as the service contracts under the 1973 Constitution.

The OSG’s contentions are complemented by intervenor PCM which maintains that the FTAA “is an agreement for [the] rendition of a whole range of services of an integrated and comprehensive character, ranging from discovery through development and utilization and production of minerals or petroleum by the foreign-owned corporation.”[34] In fine, intervenor posits that the change in phraseology in the 1987 Constitution does not relate to the substance of the agreement,[35] otherwise, the State itself would be compelled to conduct the exploration, development and utilization of natural resources, ventures that it is ill-equipped to undertake.[36]

Primary Concepts in Article XII of the Constitution

Before passing upon the foregoing arguments and for better clarity, it may be helpful to first examine the concepts of (a) “beneficial ownership,” (b) “full control and supervision,” and (c) “real contributions to the economic growth and general welfare of the country” which are at the heart of Section 2, Article XII of the Constitution.

Beneficial Ownership

Beneficial ownership, as the plain meaning of the words implies, refers to the right to the gains, rewards and advantages generated by the property.[37]

The concept is not new, but in fact is well entrenched in the law of trusts.[38] Thus, while the trustee holds the legal title to or ownership of the property entrusted to him, he is nevertheless not the beneficial owner. Rather, he holds and administers the property for the benefit of another, called the beneficiary or the cestui que trust. Hence, the profits realized from the administration and management of the property by the trustee, who is the “naked owner,” less any lawful fees due to the latter, accrue to the cestui que trust, who is the “beneficial” or “equitable” owner.[39]

The foregoing concepts are directly applicable to the statement in Section 2, Article XII of the Constitution that “[a]ll lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State.”

The words “owned” and “State” should both be understood on two levels. “Owned” or “ownership” refers to

both the legal title to and the beneficial ownership of the natural resources. Similarly, “State” should be understood as denoting both the body politic making up the Republic of the Philippines, i.e., the Filipino people, as well as the Government which represents them and acts on their behalf.

Thus, the phrase “natural resources are owned by the State” simultaneously vests the legal title to the nation’s natural resources in the Government, and the beneficial ownership of these resources in the sovereign Filipino people, from whom all governmental authority emanates.[40]

On this point, petitioners and respondent WMCP appear to be in rare agreement. Thus, petitioners, in their Memorandum state:

xxx With respect to exploration, development and utilization of mineral resources, the State should not merely be concerned about passing laws. It is expected that it holds these natural resources covered in Article XII, Section 2 in dominium and in trust for the Filipino people.[41] (Emphasis and italics supplied; underscoring in the original)

Respondent WMCP is even more emphatic:

The Regalian Doctrine, as embodied under the Constitution, is a recognition that sovereignty resides in the Filipino people, and the prime duty of government or the State is to serve and protect the people. Thus, the ownership of natural resources by the State under Section 2, Article XII of the Constitution is actually a beneficial trust in favor of the Filipino people.

Stated differently, it is the Filipino people who own the nation’s natural resources, and the State is merely the guardian-in-trust thereof.[42] (Emphasis and italics supplied; underscoring in the original; citations omitted)

Clearly, in the exploration, development and utilization of the nation’s natural resources, the Government is in a position analogous to a trustee, holding title to and managing these resources for the benefit of the Filipino people, including future generations.[43] As the trustee of the sovereign, the Government has a fiduciary duty to ensure that the gains, rewards and advantages generated by the Philippines’ natural resources accrue to the benefit of the Filipino people. Corollary to this, the Government cannot, without violating its sacred trust, enter into any agreement or arrangement which effectively deprives the Filipino people of their beneficial ownership of these resources – e.g., when it enters into an agreement whereby the vast majority of the resources, or the profit generated from the resources, is bargained away in favor of a foreign entity.

Full Control and Supervision

In the context of its role as trustee, the Government’s “full control and supervision” over the exploration, development and utilization of the nation’s natural resources, in its most basic and fundamental sense, is accomplished by maintaining a position whereby it can carry out its fiduciary duty to protect the beneficial interest of its cestui que trust in these resources.

Significantly, Section 2, Article XII of the Constitution provides that the Government may undertake the exploration, development and utilization of these resources by itself or together with a third party.[44] In the first case, where no third party is involved, the Government’s “full control and supervision” over the resources is easily achieved. In the second case, where the third party may naturally be expected to seek participation in the operation of the venture and ask for compensation in proportion to its contribution(s), the Government must still maintain a position vis-à-vis its third party partner whereby it can adequately protect the interest of the Filipino people, who are the beneficial owners of the resources.

By way of concrete example, the Government may enter into a joint venture agreement[45] with a third party to explore, develop or utilize certain natural resources through a jointly owned corporation, wherein the government

has the controlling interest. Under this arrangement, the Government would clearly be in a position to protect the interest of the beneficial owners of the natural resources.

In the alternative, as suggested by the OSG,[46] the Government may be allowed one or more directors (holding nominal shares) on the governing board and executive committee(s) of the private corporation contracted to undertake mining activities in behalf of the government. Depending on the by-laws of the private corporation, strategic representation of the Government in its governing board and executive committee(s) may afford sufficient protection to the interest of the people.

However, Section 2, Article XII of the Constitution does not limit the options available to the Government, when dealing with prospective mining partners, to joint ventures or representation in the contractor's board of directors. To be sure, the provision states that the Government may enter into "co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations," or, for large scale exploration, development and utilization, "agreements with foreign-owned corporations involving either technical or financial assistance." But whatever form the agreement entered into by the Government and its third party partner(s) may take, the same must contain, as an absolute minimum, provisions that ensure that the Government can effectively perform its fiduciary duty to safeguard the beneficial interest of the Filipino people in their natural resources, as mandated by the Constitution.

Real Contributions to the Economy and the General Welfare of the Country

Section 2, Article XII likewise requires that "agreements ... involving financial or technical assistance" be "based on real contributions to the economic growth and general welfare of the country." This provision articulates the value which the Constitution places on natural resources, and recognizes their potential benefits. It likewise acknowledges the fact that the impact of mining operations is not confined to the economy but, perhaps to a greater extent, affects Philippine society as a whole as well.

"Minerals, petroleum and other mineral oils," are part of the non-renewable wealth of the Filipino people. By pursuing large scale exploration, development and utilization of these resources, the State would be allowing the consumption or exhaustion of these resources, and thus deprive future Filipino generations the enjoyment thereof. Mining – especially large-scale mining – often results in the displacement of local residents. Its negative effects on the environment are well-documented.[47]

Thus, for benefits from the exploration, development and utilization of these resources to be real, they must yield profits over and above 1) the capital and operating costs incurred, 2) the resulting damage to the environment, and 3) the social costs to the people who are immediately and adversely affected thereby.

Moreover, the State must ensure that the real benefits from the utilization of these resources are sufficient to offset the corresponding loss of these resources to future generations. Real benefits are intergenerational benefits because the motherland's natural resources are the birthright not only of the present generation of Filipinos but of future generations as well.[48]

The requirement of real benefit is applicable even when the exploration, development and utilization are being undertaken directly by the Government or with the aid of Filipinos or Filipino corporations. But it takes on greater significance when a foreign entity is involved. In the latter instance, the foreign entity would naturally expect to be compensated for its assistance. In that event, it is inescapable that a foreigner would be benefiting from an activity (i.e. mining) which also results in numerous, serious and long term harmful consequences to the

environment and to Philippine society.

Moreover, as recognized by the 1935 Constitutional Convention, foreign involvement in the exploitation of Philippine natural resources has serious implications on national security. As recounted by delegate Jose Aruego:

The nationalization of the natural resources was also intended as an instrument of national defense. The Convention felt that to permit foreigners to own or control the natural resources would be to weaken the national defense. It would be making possible the gradual extension of foreign influence into our politics, thereby increasing the possibility of foreign control. xxx

Not only these. The nationalization of the natural resources, it was believed, would prevent making the Philippines a source of international conflicts with the consequent danger to its internal security and independence. For unless the natural resources were nationalized, with the nationals of foreign countries having the opportunity to own or control them, conflicts of interest among them might arise inviting danger to the safety and independence of the nation.[49] (Italics supplied)

Significantly, and contrary to the posture of the OSG, it is immaterial whether the foreign involvement takes the form of “active” participation in the mining concern or “passive” assistance such as a foreign mining loan or the licensing of mining technology. Whether the foreign involvement is passive or active, the fact remains that the foreigner will expect to be compensated and, as a necessary consequence, a fraction of the gains, rewards and advantages generated by Philippine natural resources will be diverted to foreign hands even as the long term pernicious “side effects” of the mining activity will be borne solely by the Filipino people.

Under such circumstances, the Executive, in determining whether or not to avail of the assistance of a foreign corporation in the large scale exploration, development and utilization of Philippine natural resources, must carefully weigh the costs and benefits if it is to faithfully discharge its fiduciary duty to protect the beneficial interest of the Filipino people in these resources.

These same considerations likewise explain why the last paragraph of Section 2 mandates that the President “notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.” The Constitution requires that the Legislative branch, which is perceived to be more broadly representative of the people and therefore more immediately sensitive to their concerns, be given a timely opportunity to scrutinize and evaluate the Executive’s decision.

With these concepts in mind, I now turn to what I believe to be the proper interpretation of “agreements... involving either technical or financial assistance” in paragraph 4 of Section 2, Article XII of the Constitution.

Construction of paragraph 4,
Section 2, Article XII of the
Constitution

The suggestion that the avoidance of the term “service contracts” in the fourth paragraph is to prevent the circumvention, prevalent under the 1973 Constitution, of the 60-40 capital requirement does not persuade, it being too narrow an interpretation of that provision. If that were the only purpose in the change of phraseology, this Court reiterates, there would have been no need to replace the term “service contracts” with “agreements... involving either technical or financial assistance.”

The loophole in the 1973 Constitution that sanctioned dummyism is easily plugged by the provision in the present Constitution that the President, not Congress or the Batasan Pambansa (under the 1973 Constitution), may enter into either technical or financial agreements with foreign corporations. The framers then could have easily employed the more traditional term “service contracts” in designating the agreements contemplated, and thus

obviated confusion, especially since the term was employed by the legal system then prevailing^[50] and had a settled acceptance.

The other proffered *raison d'être* of the fourth paragraph, i.e. to address the absence of a governing law that led to the abuse of service contracts, is equally unpersuasive. In truth, there were a host of laws governing service contracts pertaining to various natural resources, as this Court noted when it traced the history of Section 2, Article XII in its Decision.^[51]

Respondent WMCP nevertheless correctly states that the fourth paragraph establishes an exception to the rule limiting the exploration, development and utilization of the nation's natural resources to Filipinos. As an exception, however, it is illogical to deduce that the provision should be interpreted liberally, not restrictively. It bears repeating that the provision, being an exception, should be strictly construed against foreign participation.

In any case, the constitutional provision allowing the President to enter into FTAAAs with foreign-owned corporations is an exception to the rule that participation in the nation's natural resources is reserved exclusively to Filipinos. Accordingly, such provision must be construed strictly against their enjoyment by non-Filipinos. As Commissioner Villegas emphasized, the provision is "very restrictive." Commissioner Nollado also remarked that "entering into service contracts is an exception to the rule on protection of natural resources for the interest of the nation and, therefore, being an exception, it should be subject, whenever possible, to stringent rules." Indeed, exceptions should be strictly but reasonably construed; they extend only so far as their language fairly warrants and all doubts should be resolved in favor of the general provision rather than the exception.^[52] (Emphasis and italics supplied; citations omitted).

That the fourth paragraph employs the word "may" does not make it non-restrictive. Indeed, "may" does make the provision permissive, but only as opposed to mandatory,^[53] and operates to confer discretion upon a party.^[54] Thus, as used in the fourth paragraph, "may" provides the President with the option to enter into FTAAAs. It is, however, not incumbent upon the President to do so for, as owner of the natural resources, the "State [itself] may directly undertake such activities."^[55] If the President opts to exercise the prerogative to enter into FTAAAs, the agreement must conform to the restrictions laid down by Section 2, including the scope of the assistance, which must be limited to financial or technical forms.

"May" in the fourth paragraph, therefore, should be understood in the same sense as it is used in the first paragraph, that is, that the State "may enter into... agreements with Filipino citizens, or corporations or association at least sixty per centum of whose capital is owned by such citizens."

The majority, however, opines that the "agreements involving either technical or financial assistance" referred to in paragraph 4 of Section 2 of Article XII of the 1987 Constitution are indeed service contracts. In support of this conclusion, the majority maintains that the use of the phrase "agreements... involving either technical or financial assistance" does not indicate the intent to exclude other modes of assistance because the use of the word "involving" signifies the possibility of the inclusion of other forms of assistance or activities. And it proffers that the word "involving" has three connotations that can be differentiated as follows: (1) the sense of concerning, having to do with, or affecting; (2) entailing, requiring, implying or necessitating; (3) including, containing or comprising. None of these three connotations, it is contended, convey a sense of exclusivity. Thus, it concludes that had the framers intended to exclude other forms of assistance, they would have simply said "agreements for technical or financial assistance" as opposed to "agreements including technical or financial assistance."

To interpret the term "involving" in the fourth paragraph to mean "including," as the majority contends, would run counter to the restrictive spirit of the provision. Notably, the 1987 Constitution uses "involving" not "including." As admitted in the majority opinion, the word "involve" may also mean concerning, having to do

with or affecting. Following the majority opinion's own methodology of substitution, "agreements... involving either technical or financial assistance" means "agreements...concerning either technical or financial assistance." And the word "concerning" according to Webster's Third New International Dictionary means "regarding", "respecting" or "about." To reiterate, these terms indicate exclusivity. More tellingly, the 1987 Constitution not only deleted the term "management" in the 1973 Constitution, but also the catch-all phrase "or other forms of assistance,"[56] thus reinforcing the exclusivity of "either technical or financial assistance."

That the fourth paragraph does not employ the terms "solely," "only," or "limited to" to qualify "either technical or financial assistance" does not detract from the provision's restrictive nature. Moreover, the majority opinion's illustration conveniently omits "either... or." As Senior Associate Justice Reynato S. Puno pointed out during the oral arguments, the use of the disjunctive "either... or" denotes restriction.[57]

According to the Penguin Dictionary, the word "either" may be used as (1) an adjective or (2) a pronoun or (3) a conjunction or (4) an adverb. As an adjective, the word "either" means (1) any one of two; one or the other; or (2) one and the other; each. As a pronoun, the word "either" means the one or the other. As a conjunction, the word "either" is used before two or more sentence elements of the same class or function joined usually by "or" to indicate what immediately follows is the first of two or more alternatives. Lastly, as an adverb, "either" is used for emphasis after a negative or implied negation (i.e. for that matter or likewise). The traditional rule holds that "either" should be used only to refer to one of two items and that "any" is required when more than two items are involved.[58] However, modern English usage has relaxed this rule when "either" is used as a conjunction.[59] Thus, the word "either" may indicate the choice between two or more possibilities.

"Either" in paragraph 4, section 2, Article XII, is clearly used as a conjunction, joining two (and only two) concepts – financial and technical. The use of the word "either" clearly limits the President to only two possibilities, financial and technical assistance. Other forms of assistance are plainly not allowed, since only the words "financial and technical" follow the word "either."

In accordance with the intent of the provision, "agreements... involving either technical or financial" is deemed restrictive and not just descriptive. It is a condition, a limitation, not a mere description.

The OSG's suggestion that the President may enter into "any" agreement, the scope of which may go beyond technical or financial assistance, with a foreign-owned corporation, does not impress. The first paragraph of Section 2 limits contracts with Filipino citizens or corporations to co-production, joint venture or production-sharing agreements. To subscribe to the OSG's theory would allow foreign-owned corporations participation in the country's natural resources equal to, perhaps even greater than, that of Filipino citizens or corporations.

The OSG cites the Separate Opinion of Justice Jose C. Vitug, now retired, who proposed that, on the premise that the State itself may undertake the exploration, development and utilization of natural resources, a foreign-owned corporation may engage in such activities in behalf of the State:

The Constitution has not prohibited the State from itself exploring, developing, or utilizing the country's natural resources, and, for this purpose, it may, I submit, enter into the necessary agreements with individuals or entities in the pursuit of a feasible operation.

The fundamental law is deemed written in every contract. The FTAA entered into by the government and WMCP recognizes this vital principle. Thus, two of the agreement's clauses provide:

"WHEREAS, the 1987 Constitution of the Republic of the Philippines provides in Article XII, Section 2 that all lands of the public domain, waters, minerals, coal, petroleum, and other natural resources are owned by the State, and that the exploration, development and utilization of natural resources shall be under the full control

and supervision of the State; and

“WHEREAS, the Constitution further provides that the Government may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large scale exploration, development and utilization of minerals.”

The assailed contract or its provisions must then be read in conformity with abovementioned constitutional mandate. Hence, Section 10.2(a) of the FTAA, for instance, which states that “the Contractor shall have the exclusive right to explore for, exploit, utilize, process, market, export and dispose of all minerals and products and by-products thereof that may be derived or produced from the Contract Area and to otherwise conduct Mining Operations in the Contract Area in accordance with the terms and conditions hereof,” must be taken to mean that the foregoing rights are to be exercised by WMCP for and in behalf of the State and that WMCP, as the Contractor, would be bound to carry out the terms and conditions of the agreement acting for and in behalf of the State. In exchange for the financial and technical assistance, inclusive of its services, the Contractor enjoys an exclusivity of the contract and a corresponding compensation therefor.[60] (*Italics supplied*).

This proposition must be rejected since it sanctions the circumvention, if not outright violation, of the fourth paragraph by allowing foreign corporations to render more than technical or financial assistance on the pretext that it is an agent of the State. Quando aliquid prohibetur ex directo, prohibetur et per obliquum. What is prohibited directly is prohibited indirectly.[61] Further, the proposition lends itself to mischievous consequences. If followed to its logical conclusion, nothing would stop the State from engaging the services of a foreign corporation to undertake in its behalf the exploration, development and utilization of all other natural resources, not just “minerals, petroleum and mineral oils,” even on a small scale, not just “large-scale.”

The present Constitution restricts foreign involvement to large-scale activities because the idea is to limit the participation of foreign corporations only to areas where they are needed.

MS. QUESADA. Going back to Section 3, the section suggests that:

The exploration, development, and utilization of natural resources ... may be directly undertaken by the State, or it may enter into co-production, joint venture or production-sharing agreement with ... corporations or associations at least sixty percent of whose voting stock or controlling interest is owned by such citizens.

Lines 25 to 30 on the other hand, suggest that in the large-scale exploration, development and utilization of natural resources, the President with the concurrence of Congress may enter into agreements with foreign-owned corporations even for technical or financial assistance.

I wonder if this first part of Section 3 contradicts the second part. I am raising this point for fear that foreign investors will use their enormous capital resources to facilitate the actual exploitation or exploration, development and effective disposition of our natural resources to the detriment of Filipino investors. I am not saying that we should not consider borrowing money from foreign sources. What I refer to is that foreign interest should be allowed to participate only to the extent that they lend us money and give us technical assistance with the appropriate government permit. In this way, we can insure the enjoyment of our natural resources by our people.

MR. VILLEGAS. Actually, the second provision about the President does not permit foreign investors to participate. It is only technical or financial assistance – they do not own anything – but on conditions that have to be determined by law with the concurrence of Congress. So, it is very restrictive.

If the Commissioner will remember, this removes the possibility for service contracts which we said yesterday were avenues used in the previous regime to go around the 60-40 requirement.[62] (*Emphasis and italics supplied*)

The intent is to allow Filipinos to benefit from Filipino resources.

MR. DAVIDE. May I be allowed to explain the proposal?

MR. MAAMBONG. Subject to the three-minute rule, Madam President.

MR. DAVIDE. It will not take me three minutes.

The Commission had just approved the Preamble. In the Preamble we clearly stated there that the Filipino people are sovereign and that one of the objectives for the creation or establishment of a government is to conserve and develop the national patrimony. The implication is that the national patrimony or our natural resources are exclusively reserved for the Filipino people. No alien must be allowed to enjoy, exploit and develop our natural resources. As a matter of fact, that principle proceeds from the fact that our natural resources are gifts from God to the Filipino people and it would be a breach of that special blessing from God if we will allow aliens to exploit our natural resources.

I voted in favor of the Jamir proposal because it is not really exploitation that we granted to the alien corporations but only for them to render financial or technical assistance. It is not for them to enjoy our natural resources. Madam President, our natural resources are depleting; our population is increasing by leaps and bounds. Fifty years from now, if we will allow these aliens to exploit our natural resources, there will be no more natural resources for the next generations of Filipinos. It may last long if we will begin now. Since 1935 the aliens have been allowed to enjoy to a certain extent the exploitation of our natural resources, and we became victims of foreign dominance and control. The aliens are interested in coming to the Philippines because they would like to enjoy the bounty of nature exclusively intended for the Filipinos by God.

And so I appeal to all, for the sake of the future generations, that if we have to pray in the Preamble “to preserve and develop the national patrimony for the sovereign Filipino people and for the generations to come,” we must at this time decide once and for all that our natural resources must be reserved only to Filipino citizens.

Thank you.[63] (Emphasis and italics supplied)

The intent loses all significance if foreign-owned corporations are likewise allowed to participate even in small or medium-scale ventures.

Thus, in keeping with the clear intent and rationale of the Constitution, financial or technical assistance by foreign corporations are allowable only where there is no Filipino or Filipino-owned corporation (including corporations at least 60% of the capital of which are owned by Filipinos) which can provide the same or similar assistance.

To reiterate, the over-arching letter and intent of the Constitution is to reserve the exploration, development and utilization of natural resources to Filipinos.

The justification for foreign involvement in the exploration, development and utilization of natural resources was that Filipino nationals or corporations may not possess the necessary capital, technical knowledge or technology to mount a large scale undertaking. In the words of the “Draft of the 1986 U.P. Law Constitution Project” (U.P. Law Draft) which was taken into consideration during the deliberation of the CONCOM:[64]

Under the proposed provision, only technical assistance or financial assistance agreements may be entered into, and only for large-scale activities. These are contract forms which recognize and assert our sovereignty and ownership over natural resources since the foreign entity is just a pure contractor and not a beneficial owner of our economic resources. The proposal recognizes the need for capital and technology to develop our natural resources without sacrificing our sovereignty and control over such resources[65] x x x (Emphasis and italics supplied)

Thus, the contention that Section 2, Article XII allows for any agreement for assistance by a foreign corporation “so long as such assistance requires specialized knowledge or skills, and are related to the exploration, development and utilization of mineral resources” is erroneous.[66]

Where a foreign corporation does not offer financial or technological assistance beyond the capabilities of its Philippine counterparts, an FTAA with such a corporation would be highly questionable. Similarly, where the scope of the undertaking does not qualify as “large scale,” an FTAA with a foreign corporation is equally suspect.

“Agreements” in Section 2, Article XII do not include “service contracts.”

This Court’s ruling in the Decision under reconsideration that the agreements involving either technical or financial assistance contemplated by the 1987 Constitution are different and dissimilar from the service contracts under the 1973 Constitution must thus be affirmed. That there is this difference, as noted in the Decision, is gathered from the change in phraseology.[67] There was no need to employ strongly prohibitory language, like that found in the Bill of Rights.[68] For the framers to expressly prohibit “management and other forms of assistance” would be redundant inasmuch as the elimination of such phrase serves the same purpose. The deletion is simply too significant to ignore and speaks just as profoundly – it is an outright rejection.

It bears noting that the fourth paragraph does not employ the same language adopted in the first paragraph, which specifically denominates the agreements that the State may enter into with Filipinos or Filipino-owned corporations. The fourth paragraph does not state “The President may also enter into co-production, joint venture, or production-sharing agreements with foreign-owned corporations for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils....” On the other hand, the fourth paragraph cannot be construed as a grant of boundless discretion to the President to enter into any agreement regardless of the scope of assistance because it would result in a bias against Filipino citizens and corporations.

On this point, the following observations from the U.P. Law Draft on the odious and objectionable features of service contracts bear restating:

5. The last paragraph is a modification of the service contract provision found in Section 9, Article XIV of the 1973 Constitution as amended. This 1973 provision shattered the framework of nationalism in our fundamental law (see Magallona, “Nationalism and its Subversion in the Constitution”). Through the service contract, the 1973 Constitution had legitimized that which was prohibited under the 1935 constitution—the exploitation of the country’s natural resources by foreign nationals. Through the service contract, acts prohibited by the Anti-Dummy Law were recognized as legitimate arrangements. Service contracts lodge exclusive management and control of the enterprise to the service contractor, not unlike the old concession regime where the concessionaire had complete control over the country’s natural resources, having been given exclusive and plenary rights to exploit a particular resource and, in effect, having been assured of ownership of that resource at the point of extraction (see Agabin, “Service Contracts: Old Wine in New Bottles”). Service contracts, hence, are antithetical to the principle of sovereignty over our natural resources, as well as the constitutional provision on nationalization or Filipinization of the exploitation of our natural resources.[69] (Italics supplied)

Furthermore, Professor Pacifico A. Agabin, a member of the working group of the U.P. Law Constitution Project and now counsel for intervenor PCM, stated in his position paper:

Recognizing the service contract for what it is, we have to expunge it from the Constitution and reaffirm ownership over our natural resources. That is the only way we can exercise effective control over our natural resources.

This should not mean complete isolation of the country's natural resources from foreign investment. Other contract forms which are less derogatory to our sovereignty and control over natural resources – like technical assistance agreements, financial assistance [agreements], co-production agreements, joint ventures, production-sharing [agreements] – could still be utilized and adopted without violating constitutional provisions. In other words, we can adopt contract forms which recognize and assert our sovereignty and ownership over natural resources, and where the entity is just a pure contractor instead of the beneficial owner of our economic resources.[70] (Emphasis & italics supplied),

indicating that the proposed financial or technical assistance agreements are contract forms different from the 1973 Constitution service contracts.

Thus the phrase “agreements with foreign-owned corporations involving either technical or financial assistance” in Section 2, Article XII of the Constitution must be interpreted as restricting foreign involvement in the exploration, development and utilization of natural resources to large scale undertakings requiring foreign financial or technical assistance and not, as alleged by respondents, inclusive of any possible agreement under the sun.

The majority however argues that the deletion or omission from the 1987 Constitution of the term “service contracts” found in the 1973 Constitution does not sufficiently prove the drafters’ intent to exclude foreigners from management since such intent cannot be definitively and conclusively established. This argument overlooks three basic principles of statutory construction.

First, *casus omisus pro omisso habendus est*.^[71] As recently as 2001 in *Commission on Audit of the Province of Cebu v. Province of Cebu*,^[72] this Court held that a person, object or thing omitted from an enumeration must be held to have been omitted intentionally.^[73] That there is a difference between technical or financial assistance contemplated by the 1987 Constitution and the service contracts under the 1973 Constitution is gathered from the omission of the phrase “management or other forms of assistance.”

As earlier noted, the phrase “service contracts” has been deleted in the 1987 Constitution’s Article on National Economy and Patrimony. If the CONCOM intended to retain the concept of service contracts under the 1973 Constitution, it would have simply adopted the old terminology (“service contracts”) instead of employing new and unfamiliar terms (“agreements...involving either technical or financial assistance.”) Such a difference between the language of a provision in a revised constitution and that of a similar provision in the preceding constitution is viewed as indicative of a difference in purpose. If, as respondents suggest, the concept of “technical or financial assistance” agreements is identical to that of “service contracts,” the CONCOM would not have bothered to fit the same dog with a new collar. To uphold respondents’ theory would reduce the first to a mere euphemism for the second render the change in phraseology meaningless.^[74] (Emphasis and italics supplied; citation omitted)

Second, *expressio unius est exclusion alterius*.^[75] The express mention of one person, thing, act, or consequence excludes all others.^[76]

Third and lastly, *expressum facit cessare tacitum*.^[77] What is expressed puts an end to that which is implied.^[78] Since the constitutional provision, by its terms, is expressly limited to financial or technical agreements, it may not, by interpretation or construction, be extended to other forms of assistance.

These three principles of statutory construction, derived from the well-settled principle of *verba legis*, proceed from the premise that the Constitutional Commission would not have made specific enumerations in the provision if it had the intention not to restrict its meaning and confine its terms to those expressly mentioned. And this Court

may not, in the guise of interpretation, enlarge the scope of a constitutional provision and include therein situations not provided nor intended by the framers. To do so would be to do violence to the very language of the Constitution, the same Constitution which this Court has sworn to uphold.

The majority counters, however, that service contracts were not de-constitutionalized since the deliberations of the members of the Constitutional Commission conclusively show that they discussed agreements involving either technical or financial assistance in the same breath as service contracts and used the terms interchangeably. This argument merely echoes that of private respondent WMCP which had already been addressed in this Court's Decision of January 27, 2004, (the Decision) viz:

While certain commissioners may have mentioned the term "service contracts" during the CONCOM deliberations, they may not have been necessarily referring to the concept of service contracts under the 1973 Constitution. As noted earlier "service contracts" is a term that assumes different meanings to different people. The commissioners may have been using the term loosely, and not in its technical and legal sense, to refer, in general, to agreements concerning natural resources entered into by the Government with foreign corporations. These loose statements do not necessarily translate to the adoption of the 1973 Constitution provision allowing service contracts.

It is true that, as shown in the earlier quoted portions of the proceedings in [the] CONCOM, in response to Sr. Tan's question, Commissioner Villegas commented that, other than congressional notification, the only difference between "future" and "past" "service contracts" is the requirement of a general law as there were no laws previously authorizing the same.[79] However, such remark is far outweighed by his more categorical statement in his exchange with Commissioner Quesada that the draft article "does not permit foreign investors to participate" in the nation's natural resources – which was exactly what service contracts did – except to provide "technical or financial assistance."

In the case of the other commissioners, Commissioner Nollado himself clarified in his work that the present charter prohibits service contracts. Commissioner Gascon was not totally averse to foreign participation, but favored stricter restrictions in the form of majority congressional concurrence. On the other hand, Commissioners Garcia and Tadeo may have veered to the extreme side of the spectrum and their objections may be interpreted as votes against any foreign participation in our natural resources whatsoever.[80] (Emphasis and italics supplied; citations omitted)

In fact, the opinion of Commissioner Nollado in his textbook which is cited in this Court's January 27, 2004 Decision should leave no doubt as to the intention of the framers to eliminate service contracts altogether.

Are service contracts allowed under the new Constitution? No. Under the new Constitution, foreign investors (fully alien-owned) can NOT participate in Filipino enterprises except to provide: (1) Technical Assistance for highly technical enterprises; and (2) Financial Assistance for large-scale enterprises.

The intention of this provision, as well as other provisions on foreign investments, is to prevent the practice (prevalent in the Marcos government) of skirting the 60/40 equation using the cover of service contracts.[81]

Next, the majority opinion asserts that if the framers had meant to ban service contracts altogether, they would have provided for the termination or pre-termination of the existing service contracts.

There was no need for a constitutional provision to govern the termination or pre-termination of existing service contracts since the intention of the framers was to apply the rule banning service contracts prospectively.

MR. DAVIDE. Under the proposal, I notice that except for the lands of the public domain, all other natural resources cannot be alienated and in respect to lands of the public domain, private corporations with the required ownership by Filipino citizens can only lease the same. Necessarily, insofar as other natural resources

are concerned, it would only be the State which can exploit, develop, explore and utilize the same. However, the State may enter into a joint venture, coproduction (sic) or production-sharing. Is that not correct?

MR. VILLEGAS. Yes.

MR. DAVIDE. Consequently, henceforth upon the approval of this Constitution, no timber or forest concessions, permits or authorization can be exclusively granted to any citizen of the Philippines nor to any corporation qualified to acquire lands of the public domain?

MR. VILLEGAS. Would Commissioner Monsod like to comment on that? I think his answer is “yes.”

MR. DAVIDE. So, what will happen now to licenses or concessions earlier granted by the Philippine government to private corporations or to Filipino citizens? Would they be deemed repealed?

MR. VILLEGAS. This is not applied retroactively. They will be respected.

MR. DAVIDE. In effect, they will be deemed repealed?

MR. VILLEGAS. No.[82] (Emphasis and italics supplied)

Besides, a service contract is only a license or privilege, not a contract or property right which merits protection by the due process clause of the Constitution. Thus in the landmark case of *Oposa v. Factoran, Jr.*,^[83] this Court held:

x x x Needless to say, all licenses may thus be revoked or rescinded by executive action. It is not a contract, property or a property right protected by the due process clause of the Constitution. In *Tan vs. Director of Forestry*, this Court held:

“x x x A timber license is an instrument by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. A timber license is not a contract within the purview of the due process clause; it is only a license or privilege, which can be validly withdrawn whenever dictated by public interest or public welfare as in this case.

‘A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right; nor is it taxation’ Thus, this Court held that the granting of license does not create irrevocable rights, neither is it property or property rights.”

We reiterated this pronouncement in *Felipe Ysmal, Jr. & Co, Inc. vs. Deputy Executive Secretary*:

“x x x Timber licenses, permits and license agreements are the principal instruments by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. And it can hardly be gainsaid that they merely evidence a privilege granted by the State to qualified entities, and do not vest in the latter a permanent or irrevocable right to the particular concession area and the forest products therein. They may be validly amended, modified, replaced or rescinded by the Chief Executive when national interests so require. Thus, they are not deemed contracts within the purview of the due process clause.”

Since timber licenses are not contracts, the non-impairment clause which reads:

“SEC 10. No law impairing, the obligation of contracts shall be passed.”

cannot be invoked.

In the second place, even if it is to be assumed that the same are contracts, the instant case does not involve a law or even an executive issuance declaring the cancellation or modification of existing timber licenses. Hence, the non-impairment clause cannot as yet be invoked. Nevertheless, granting further that a law has actually been

passed mandating cancellations or modifications, the same cannot still be stigmatized as a violation of the non-impairment clause. This is because by its very nature and purpose, such a law could have only been passed in the exercise of the police power of the state for the purpose of advancing the right of the people to a balanced and healthful ecology, promoting their health and enhancing the general welfare. In *Abe vs. Foster Wheeler Corp.*, this Court stated:

“The freedom of contract, under our system of government, is not meant to be absolute. The same is understood to be subject to reasonable legislative regulation aimed at the promotion of public health, moral, safety and welfare. In other words, the constitutional guaranty of non-impairment of obligations of contract is limited by the exercise of the police power of the State, in the interest of public health, safety, moral and general welfare.”

The reason for this is emphatically set forth in *Nebia vs. New York* quoted in *Philippine American Life Insurance Co. vs. Auditor General*, to wit:

“Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.”

In short, the non-impairment clause must yield to the police power of the state.[84] (Emphasis and italics supplied; citations omitted)

The majority however argues that *Oposa* is not applicable since the investment in a logging concession is not as substantial an investment as that of a large scale mining contractor. Such a contention is patently absurd. Taken to its logical conclusion, the majority would have this Court exempt firms in highly capital intensive industries from the exercise of police power simply to protect their investment. That would mean that the legislature would, for example, be powerless to revoke or amend legislative franchises of public utilities, such as power and telecommunications firms, which no doubt require huge sums of capital.

The majority opinion then proffers that the framers of the Constitution were pragmatic enough to know that foreign entities would not enter into such agreements without requiring arrangements for the protection of their investments, gains, and benefits or other forms of conditionalities. It goes on to argue that “by specifying such ‘agreements involving assistance,’ the framers of the Constitution necessarily gave implied assent to everything that these agreements necessarily entailed; or that could reasonably be deemed necessary to make them tenable and effective, including management authority with respect to the day-to-day operations of the enterprise and measures for the protection of the interests of the foreign corporation.”

The deliberations of the Constitutional Commission, however, do not support the immediately foregoing contentions.

MR. TINGSON. Within the purview of what the Gentleman is saying, would he welcome friendly foreigners to lend us their technical expertise in helping develop our country?

MR. GARCIA. Part 2 of this proposal, Filipino control of the economy, in fact, says that the entry of foreign capital, technology and business enterprises into the national economy shall be effectively regulated to ensure the protection of the interest of our people.

In other words, we welcome them but on our own terms. This is very similar to our position on loans. We welcome loans as long as they are paid on our own terms, on our ability to pay, not on their terms. For example,

the case of Peru is instructive. They decided first to develop and grow, and were willing to pay only 10 percent of their foreign exchange earnings. That, I think, is a very commendable position given the economic situation of a country such as Peru. The Philippines is a similar case, especially when we realize that the foreign debt was made by a government that was bankrupt in its desire to serve the people.

MR. MONSOD. Mr. Vice-President, I think we have to make a distinction that it is not really realistic to say that we will borrow on our own terms. Maybe we can say that we inherited unjust loans, and we would like to repay these on terms that are not prejudicial to our own growth. But the general statement that we should only borrow on our own terms is a bit unrealistic.

MR. GARCIA. Excuse me. The point I am trying to make is that we do not have to borrow. If we have to borrow, it must be on our terms. In other words, banks do not lend out of the goodness of their hearts. Banks lend to make a profit.

MR. TINGSON. Mr. Vice-President, I think the trouble in our country is that we have forgotten the scriptural injunction that the borrower becomes a slave to the lender. That is the trouble with our country; we have borrowed and borrowed but we forget that we become slaves to those who lend us.[85] (Emphasis and italics supplied)

By public respondent's information, "[t]he potential mining wealth in the Philippines is estimated at \$840 billion or P47 trillion or 10 times our annual GDP, and 15 times our total foreign debt of \$56 billion. Globally, the Philippines ranks third in gold, fourth in copper, fifth in nickel and sixth in chromite." [86] With such high concentration of valuable minerals coupled with the Filipino people's willingness to protect and preserve ownership of their natural resources at the expense of retarding or postponing the exploration, development, and utilization of these resources, the Philippines clearly has the superior bargaining position and should be able to dictate its terms. No foreign entity should be able to bully the Philippines and intimidate the Government into conceding to certain conditions incompatible with the Constitution.

Extent of foreign corporation's
participation in the management of
an FTAA

Foreign-owned corporations, however, are not precluded from a limited participation in the management of the exploration, development and utilization of natural resources.

Some degree of participation by the contractor in management, to assure the proper application of its investment and/or to facilitate the technical assistance and transfer of technology may be unavoidable and not necessarily undesirable. Thus, there is merit in respondent WMCP's contention, to which even petitioners conceded during the oral arguments, that a foreign-owned corporation is not prevented from having limited participation in the management assistance or participation so long as it is incidental to the financial or technical assistance being rendered:

JUSTICE PANGANIBAN:

Alright. Going back to verba legis, you say that the FTAA's are limited to financial or technical assistance only.

ATTY. LEONEN:

Either financial or technical assistance, yes your Honor.

ATTY. LEONEN:

Full management, your Honor.

JUSTICE PANGANIBAN:

Full management is excluded.

ATTY. LEONEN:

Yes your Honor.

JUSTICE PANGANIBAN:

But incidental management to protect the financial or technical assistance should be allowed.

ATTY. LEONEN:

If a mining company would get the technical expertise to bring in drilling rig your Honor, and that is the sole contract, then we cannot imagine a situation were it is not the technicians that we will do the actual drilling your Honor, but for the entire contract area your Honor as it is now in the FTAA then I think that would be different.

JUSTICE PANGANIBAN:

Yes I agree. In other words, the words financial or technical may include parts of management, isn't it? Its reasonable in other words if I may re state it, it's reasonable to expect that entities, foreign entities who don't know anything about this country, well that is an exaggeration, who know not too much about this country, would not just extend money, period. They would want to have a say a little bit of say management and sometimes even in auditing of the company, isn't it reasonable to expect.

ATTY. LEONEN:

I would qualify my answer your Honor with management of what your Honor. It means if it's for development and utilization of the minerals.

JUSTICE PANGANIBAN:

No.

ATTY. LEONEN:

Yes your Honor, but if it's management of sub-contracted activity like a symposium then that would be all right your Honor. Mining companies do symposiums also.

JUSTICE PANGANIBAN:

Management to protect their own investments, whether it be technical or financial.

ATTY. LEONEN:

Their investment, your Honor, which cannot be the entire mining operation from my perspective, your Honor.

JUSTICE PANGANIBAN:

Yes I agree because there is the Constitutional provision of control and supervision, full control and supervision to the State.

ATTY. LEONEN:

And Filipino corporations your Honor.

JUSTICE PANGANIBAN:

Or even Filipino corporation, the full control and supervision is still with the State.

ATTY. LEONEN:

Yes your Honor.

JUSTICE PANGANIBAN:

Even with Filipino citizens being the contractors, full control and supervision is still with the State.

ATTY. LEONEN:

Yes, your Honor.

JUSTICE PANGANIBAN:

In all these contract full control and supervision is with the State.

ATTY. LEONEN:

Yes your Honor and we can only hope that the State is responsive to the people we represent.

x x x

JUSTICE PANGANIBAN:

Yes, yes. Can it also not be said reading that the Constitution that the safeguards on contracts with foreigners was left by the Constitutional Commission or by Constitution itself to Congress to craft out.

ATTY. LEONEN:

I can accept your Honor that there was a province of power that was given to Congress, but it was delimited by the fact, that they removed the word management and other arrangement and put the words either financial and technical.

JUSTICE PANGANIBAN:

Yes but you just admitted earlier that these two words would also include some form of management or other things to protect the investment or the technology being put by the foreign company.

ATTY. LEONEN:

Yes your Honor for so long as it's not the entire.

JUSTICE PANGANIBAN:

Yes, yes provided the State does not lose control and supervision, isn't it?

ATTY. LEONEN:

Yes your Honor.[87] (Emphasis and italics supplied)

Thus, the degree of the foreign corporation's participation in the management of the mining concern is co-extensive with and strictly limited to the degree of financial or technical assistance extended. The scope of the assistance defines the limits of the participation in management.

However, to whatever extent the foreign corporation's incidental participation in the management of the mining concern may be, full control and supervision, sufficient to protect the interest of the Filipino people, over all

aspects of mining operations must be retained by the Government. While this does not necessarily mean that the Government must assume the role of a back seat driver, actively second guessing every decision made by the foreign corporation, it does mean that sufficient safeguards must be incorporated into the FTAA to insure that the people's beneficial interest in their natural resources are protected at all times.

Moreover, the foreign contractor's limited participation in management, as the Court held in its Decision, should not effectively grant foreign-owned corporations beneficial ownership over the natural resources.

The opinion, submitted by the OSG, of Bernardo M. Villegas, who was a Member of the Constitutional Commission and Chair of its Committee on National Economy and Patrimony, is not inconsistent with the foregoing conclusion. Commissioner Villegas opined:

The phrase "service contracts" contained in the 1973 Constitution was deleted in the 1987 Constitution because there was the general perception among the Concom members that it was used during the Marcos regime as an instrument to circumvent the 60-40 limit in favor of Filipino ownership. There was also the impression that the inclusion of the word "management" in the description of the service contract concept in the 1973 Constitution was tantamount to ownership by the foreign partner.

The majority of the Concom members, however, recognized the vital need of the Philippine economy for foreign capital and technology in the exploitation of natural resources to benefit Filipinos, especially the poor in the countryside where the mining sites are located. For this reason, the majority voted for "agreements involving financial or technical assistance" or FTAA.

I maintain that the majority who voted Yes to this FTAA provision realized that an FTAA involved more than borrowing money and/or buying technology from foreigners. If an FTAA involved only a loan and/or purchase of technology, there would not have been a need for a constitutional provision because existing laws in the Philippines more than adequately regulate these transactions.

It can be deducted from the various comments of both those who voted Yes and No to the FTAA provision that an FTAA also involves the participation in management of the foreign partner. What was then assumed in 1986 is now even clearer in the way business organizations have evolved in the last decade or so under the modern concept of good governance. There are numerous stakeholders in a business other than the stockholders or equity owners who participate actively in the management of a business enterprise. Not only do creditors and suppliers demand representation in boards of directors. There are also other so-called independent directors who actively participate in management.

In summary, the word "management" was deleted from the description of the FTAA because some CONCOM delegates identified management with beneficial ownership. In order not to prolong the debate, those in favor of the FTAA provision agreed not to include the word management. But from what has been discussed above, it was clear in the minds of those who voted YES that the FTAA included more than just a loan and/or purchase of technology from foreigners but necessarily allowed the active participation of the foreign partners in the management of the enterprise engaged in the exploitation of natural resources.[88] (*Italics supplied*).

Under no circumstances should the execution of an FTAA be tantamount to the grant of a roving commission whereby a foreign contractor is given blanket and unfettered discretion to do whatever it deems necessary – denude watersheds, divert sources of water, drive communities from their homes – in pursuit of its pecuniary goals.

Nor should the scope of an FTAA be broadened to include "managerial assistance." As discussed extensively in the Decision,[89] "managerial assistance" – a euphemism by which full control and beneficial ownership of natural resources were vested in foreigners – is part and parcel of the martial law era "service contracts" and the old "concession regime" which the 1987 Constitution has consigned to the dust bin of history.

The elimination of the phrase “service contracts” effectuates another purpose. Intervenor PCM agrees that the Constitution tries to veer away from the old concession system,[90] which vested foreign-owned corporations control and beneficial ownership over Philippine natural resources. Hence, the 1987 Constitution also deleted the provision in the 1935 and 1973 Constitutions authorizing the State to grant licenses, concessions, or leases for the exploration, exploitation, development, or utilization of natural resources.[91]

Prof. Agabin had no flattering words for the concession system, which he described in his position paper as follows:

Under the concession system, the concessionaire makes a direct equity investment for the purpose of exploiting a particular natural resource within a given area. Thus, the concession amounts to a complete control by the concessionaire over the country’s natural resource, for it is given exclusive and plenary rights to exploit a particular resource and is in effect assured ownership of that resource at the point of extraction. In consideration for the right to exploit a natural resource, the concessionaire either pays rent or royalty which is a fixed percentage of the gross proceeds. But looking beyond the legal significance of the concession regime, we can see that there are functional implications which give the concessionaire great economic power arising from its exclusive equity holding. This includes, first, appropriation of the returns of the undertaking, subject to a modest royalty; second, exclusive management of the project; third, control of production of the natural resource, such as volume of production, expansion, research and development; and fourth, exclusive responsibility for downstream operations, like processing, marketing, and distribution. In short, even if nominally, the state is the sovereign and owner of the natural resource being exploited, it has been shorn of all elements of control over such natural resource because of the exclusive nature of the contractual regime of the concession. The concession system, investing as it does ownership of natural resources, constitutes a consistent inconsistency with the principle embodied in our Constitution that natural resources belong to the State and shall not be alienated, not to mention the fact that the concession was the bedrock of the colonial system in the exploitation of natural resources.[92] (Emphasis in the original)

Vestiges of the concession system endured in the service contract regime, including the vesting on the contractor of the management of the enterprise, as well as the control of production and other matters, such as expansion and development. [93] Also, while title to the resource discovered was nominally in the name of the government, the contractor had almost unfettered control over its disposition and sale.[94]

The salutary intent of the 1987 Constitution notwithstanding, these stubborn features of the concession system persist in the Mining Act of 1995. The statute allows a foreign-owned corporation to carry out mining operations,[95] which includes the conduct of exploration,[96] development[97] and utilization[98] of the resources.[99] The same law grants foreign contractors auxiliary mining rights, i.e., timber rights,[100] water rights,[101] the right to possess explosives,[102] easement rights,[103] and entry into private lands and concession areas.[104] These are the very same rights granted under the old concession and service contract systems.

The majority opinion proposes two alternative standards of Government control over FTAA operations. Thus, in the opening paragraphs it states:

Full control is not anathema to day-to-day management by the contractor, provided that the State retains the power to direct overall strategy; and to set aside, reverse, or modify plans and actions of the contractor. The idea of full control is similar to that which is exercised by the board of directors of a private corporation x x x (Emphasis and italics supplied)

However, the majority opinion subsequently substantially reduces the scope of its definition of “control” in this wise:

The concept of control adopted in Section 2 of Article XII must be taken to mean less than dictatorial, all-encompassing control; but nevertheless sufficient to give the State the power to direct, restrain, regulate and govern the affairs of the extractive enterprises. Control by the State may be on a macro level, through the establishment of policies, guidelines, regulations, industry standards and similar measures that would enable the government to control the conduct of affairs in various enterprises and restrain activities deemed not desirable or beneficial. (Emphasis and italics supplied; citations omitted; underscoring in the original)

This second definition is apparently analogous to regulatory control which the Government is automatically presumed to exercise over all business activities by virtue of the Police Power. This definition of the “full control and supervision” mandated by Section 2, Article XII of the Constitution strikes a discordant and unconvincing chord as it gives no effect to the mandated “full” character of the State’s control but merely places it at par with any other business activity or industry regulated by the Government.

But even under this second and more limited concept of regulatory control, the provisions of the Mining Act pertaining to FTAA’s do not pass the test of constitutionality.

To be sure, the majority opinion cites a litany of documents, plans, reports and records which the foreign FTAA contractor is obliged to submit or make available under the Mining Act and DAO 96-40. However, the mere fact that the Act requires the submission of work programs and minimum expenditure commitments^[105] does not provide adequate protection. These were also required under the old concession^[106] and service contract^[107] systems, but did not serve to place full control and supervision of the country’s natural resources in the hands of the Government.

Conspicuously absent from the Mining Act are effective means by which the Government can protect the beneficial interest of the Filipino people in the exploration, development and utilization of their resources. It appears from the provisions of the Mining Act that the Government, once it has determined that a foreign corporation is eligible for an FTAA and enters into such an agreement, has very little say in the corporation’s actual operations.

Thus, when pressed to identify the mechanism by which the Government can administratively compel compliance with the foregoing requirements as well as the other terms and conditions of the Mining Act, DAO 96-40 and DAO 99-56, the majority can only point to the cancellation of the agreement(s) and/or the incentives concerned under Section 95 to 99 of the Mining Act:^[108]

CHAPTER XVII

Ground for Cancellation, Revocation, and Termination

SECTION 95. Late or Non-filing of Requirements. — Failure of the permittee or contractor to comply with any of the requirements provided in this Act or in its implementing rules and regulations, without a valid reason, shall be sufficient ground for the suspension of any permit or agreement provided under this Act.

SECTION 96. Violation of the Terms and Conditions of Permit or Agreements. — Violation of the terms and conditions of the permits or agreements shall be a sufficient ground for cancellation of the same.

SECTION 97. Non-payment of Taxes and Fees. — Failure to pay taxes and fees due the Government for two (2) consecutive years shall cause the cancellation of the exploration permit, mineral agreement, financial or technical assistance agreement and other agreements and the re-opening of the area subject thereof to new applicants.

SECTION 98. Suspension or Cancellation of Tax Incentives and Credits. — Failure to abide by the terms and conditions of tax incentives and credits shall cause the suspension or cancellation of said incentives and credits.

SECTION 99. Falsehood or Omission of Facts in the Statement — All statements made in the exploration permit, mining agreement and financial or technical assistance agreement shall be considered as conditions and essential parts thereof and any falsehood in said statements or omission of facts therein which may alter, change or affect substantially the facts set forth in said statements may cause the revocation and termination of the exploration permit, mining agreement and financial or technical assistance agreement.

An examination of the foregoing fails to impress. For instance, how does cancellation of the FTAA under Section 97 for nonpayment of taxes and fees (comprising the “basic share” of the government) for two consecutive years facilitate the collection of the unpaid taxes and fees? How does it preserve and protect the beneficial interest of the Filipino people? For that matter, how does the DENR administratively compel compliance with the anti-pollution and other requirements?[109] If minerals are found to have been sold overseas at less than the most advantageous market prices, how does the DENR obtain satisfaction from the offending foreign FTAA contractor for the difference?

In sum, the enforcement provisions of the Mining Act and its Implementing Rules are scarcely effective, and, worse, perceptibly less than the analogous provisions of other Government Regulatory Agencies.

For instance, the Bangko Sentral Ng Pilipinas, the Central Monetary Authority mandated by the Constitution to exercise supervision (but not full control and supervision) over banks,[110] is empowered to (1) appoint a conservator with such powers as shall be deemed necessary to take charge of the assets, liabilities and management of a bank or quasi-bank;[111] (2) under certain well defined conditions, summarily and without need for prior hearing forbid a bank from doing business in the Philippines and appoint the Philippine Deposit Insurance Corporation as receiver;[112] and (3) impose a number of administrative sanctions such as (a) fines not to exceed P30,000 per day for each violation, (b) suspension of a bank’s rediscounting privileges, (c) suspension of lending or foreign exchange operations or authority to accept new deposits or make new investments, (d) suspension of interbank clearing privileges, and (e) revocation of quasi-banking license.[113]

Similarly, to give effect to the Constitutional mandate to afford full protection to labor,[114] the Labor Code[115] grants the Secretary of Labor the power to (1) issue compliance orders to give effect to the labor standards provisions of the Code;[116] and (2) enjoin an intended or impending strike or lockout by assuming jurisdiction over a labor dispute in an industry determined to be indispensable to the national interest.[117]

Under the Tax Code, the Commissioner of Internal Revenue has the power to (1) temporarily suspend the business operations of a taxpayer found to have committed certain specified violations;[118] (2) order the constructive distraint of the property of a taxpayer;[119] and (3) impose the summary remedies of distraint of personal property and or levy on real property for nonpayment of taxes.[120]

In comparison, the Mining Act and its Implementing Rules conspicuously fail to provide the DENR with anything remotely analogous to the foregoing regulatory and enforcement powers of other government agencies.

In fine, the provisions of the Mining Act and its Implementing Rules give scarcely more than lip service to the constitutional mandate for the State to exercise full control and supervision over the exploration, development and utilization of Philippine Natural Resources. Evaluated as a whole and in comparison with other government agencies, the provisions of the Mining Act and its Implementing Rules fail to meet even the reduced standard of effective regulatory control over mining operations. In effect, they abdicate control over mining operations in favor of the foreign FTAA contractor. For this reason, the provisions of the Mining Act, insofar as they pertain to FTAA contracts, must be declared unconstitutional and void.

The majority opinion vigorously asserts that it is the Chief Executive who exercises the power of control on

behalf of the State.

This only begs the question. How does President effectively enforce the terms and conditions of an FTAA? What specific powers are subsumed within the constitutionally mandated “power of control?” On these particular matters the majority opinion, like the Mining Act, is silent.

Provisions of the Mining Act
pertaining to FTAA's void for
conveying beneficial ownership
of Philippine mineral resources to
foreign contractors

An examination of the Mining Act reveals that the law grants the lion's share of the proceeds of the mining operation to the foreign corporation. Thus the second and third paragraphs of Section 81 of the law provide:

SECTION 81. Government Share in Other Mineral Agreements. — x x x

The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive. (*Italics supplied*)

Under the foregoing provisions, the Government does not receive a share in the proceeds of the mining operation. All it receives are taxes and fees from the foreign corporation, just as in the old concession^[121] and service contract^[122] regimes. The collection of taxes and fees cannot be considered a return on the resources mined corresponding to beneficial ownership of the Filipino people. Taxes are collected under the State's power to generate funds to finance the needs of the citizenry and to advance the common weal.^[123] They are not a return on investment or property. Similarly, fees are imposed under the police power primarily for purposes of regulation.^[124] Again, they do not correspond to a return on investment or property.

Even more galling is the stipulation in the above-quoted third paragraph that the Government's share (composed only of taxes and fees) shall not be collected until after the foreign corporation has “fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.” In one breath this provision virtually guarantees the foreigner a return on his investment while simultaneously leaving the Government's (and People's) share to chance.

It is, therefore, clearly evident that the foregoing provisions of the Mining Act effectively transfer the beneficial ownership over the resources covered by the agreement to a foreigner, in contravention of the letter and spirit of the Constitution.

Consequently, the assailed Decision inescapably concluded that:

The underlying assumption in all these provisions is that the foreign contractor manages the mineral resources, just like the foreign contractor in a service contract.^[125]

The Mining Act gives the foreign-owned corporation virtually complete control, not mere “incidental” participation in management, over the entire operations.

The law is thus at its core a retention of the concession system. It still grants beneficial ownership of the natural

resources to the foreign contractor and does little to affirm the State's ownership over them, and its supervision and control over their exploration, development and utilization.

While agreeing that the Constitution vests the beneficial ownership of Philippine minerals with the Filipino people, entitling them to gains, rewards and advantages generated by these minerals, the majority opinion nevertheless maintains that the Mining Act, as implemented by DENR Administrative Order 99-56[126] (DAO 99-56), is constitutional as, so it claims, it does not "convey beneficial ownership of any mineral resource or product to any foreign FTAA contractor." The majority opinion adds that the State's share, as expounded by DAO 99-56, amounts to "real contributions to the economic growth and general welfare of the country," at the same time allowing the contractor to recover "a reasonable return on its investments in the project."

Under DAO 99-56, the "government's share" in an FTAA is divided into (1) a "basic government share" composed of a number of taxes and fees[127] and (2) an "additional government share"[128] computed according to one of three possible methods – (a) a 50-50 sharing in the cumulative present value of cash flows,[129] (b) a profit related additional government share[130] or (c) an additional share based on the cumulative net mining revenue[131] – at the option of the contractor.

Thus, the majority opinion claims that the total government share, equal to the sum of the "basic government share" and the "additional government share," will achieve "a fifty-fifty sharing – between the government and the contractor – of net benefits from mining."

This claim is misleading and meaningless for two reasons:

First, as priorly discussed, the taxes and fees which make up the government's "basic share" cannot be considered a return on the resources mined corresponding to the beneficial ownership of the Filipino people. Again, they do not correspond to a return on investment or property.

Second, and more importantly, the provisions of the Mining Act effectively allow the foreign contractor TO CIRCUMVENT ALL THE PROVISIONS OF DAO 99-56, INCLUDING ITS INTENDED "50-50 SHARING" of the net benefits from mining, AND REDUCE GOVERNMENT'S TOTAL SHARE TO AS LOW AS TWO PERCENT (2%) OF THE VALUE OF THE MINERALS MINED.

The foreign contractor can do this because Section 39 of the Mining Act allows it to convert its FTAA into a Mineral Production-Sharing Agreement (MPSA) by the simple expedient of reducing its equity in the corporation undertaking the FTAA to 40%:

SECTION 39. Option to Convert into a Mineral Agreement. — The contractor has the option to convert the financial or technical assistance agreement to a mineral agreement at any time during the term of the agreement, if the economic viability of the contract area is found to be inadequate to justify large-scale mining operations, after proper notice to the Secretary as provided for under the implementing rules and regulations: Provided, That the mineral agreement shall only be for the remaining period of the original agreement.

In the case of a foreign contractor, it shall reduce its equity to forty percent (40%) in the corporation, partnership, association, or cooperative. Upon compliance with this requirement by the contractor, the Secretary shall approve the conversion and execute the mineral production-sharing agreement. (Emphasis and italics supplied)

And under Section 80 of the Mining Act, in connection with Section 151(a) of the National Internal Revenue Code[132] (Tax Code), the TOTAL GOVERNMENT SHARE in an MPSA is ONLY TWO PERCENT (2%) OF THE VALUE OF THE MINERALS. Section 80 of the Mining Act provides:

SECTION 80. Government Share in Mineral Production Sharing Agreement. — The total government share in a

mineral production sharing agreement shall be the excise tax on mineral products as provided in Republic Act No. 7729, amending Section 151(a) of the National Internal Revenue Code, as amended. (Italics supplied)

While Section 151(a) of the Tax Code reads:

Sec. 151. Mineral Products. — (a) Rates of Tax. — There shall be levied, assessed and collected on mineral, mineral products and quarry resources, excise tax as follows:

(1) On coal and coke, a tax of ten pesos (P10.00) per metric ton.

(2) On non-metallic minerals and quarry resources, a tax of two percent (2%) based on the actual market value of the annual gross output thereof at the time of removal, in the case of those locally extracted or produced; or the value used by the Bureau of Customs in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation.

(3) On all metallic minerals, a tax based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; or the value used by the Bureau of Customs in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation, in accordance with the following schedule:

(a) Copper and other metallic minerals:

(i) On the first three (3) years upon the effectivity of this Act, one percent (1%);

(ii) On the fourth and fifth year, one and a half percent (1 1/2%); and

(iii) On the sixth year and thereafter, two percent (2%)

(b) Gold and chromite, two percent (2%)

(4) On indigenous petroleum, a tax of fifteen percent (15%) of the fair international market price thereof, on the first taxable sale, such tax to be paid by the buyer or purchaser within 15 days from the date of actual or constructive delivery to the said buyer or purchaser. The phrase 'first taxable sale, barter, exchange or similar transaction' means the transfer of indigenous petroleum in its original state to a first taxable transferee. The fair international market price shall be determined in consultation with an appropriate government agency.

For the purpose of this subsection, 'indigenous petroleum' shall include locally extracted mineral oil, hydrocarbon gas, bitumen, crude asphalt, mineral gas and all other similar or naturally associated substances with the exception of coal, peat, bituminous shale and/or stratified mineral deposits. (Italics supplied)

By taking advantage of the foregoing provisions and selling 60% of its equity to a Filipino corporation (such as any of the members of respondent-in-intervention Philippine Chamber of Mines) a foreign contractor can easily reduce the total government's share (held in trust for the benefit of the Filipino People) in the minerals mined to a paltry 2% while maintaining a 40% beneficial interest in the same.

What is more, if the Filipino corporation acquiring the foreign contractor's stake is itself 60% Filipino-owned and 40% foreign-owned (a "60-40" Filipino corporation such as Sagittarius Mines, the putative purchaser of WMC's 100% equity in WMCP), then the total beneficial interest of foreigners in the mineral output of the mining concern would constitute a majority of 64%^[133] while the beneficial ownership of Filipinos would, at most,^[134] amount to 36% – 34% for the Filipino stockholders of the 60-40 Filipino corporation and 2% for the Government (in trust for the Filipino People).

The foregoing scheme, provided for in the Mining Act itself, is no different and indeed is VIRTUALLY IDENTICAL TO THAT EMBODIED IN SECTION 7.9 OF THE WMCP FTAA WHICH THE MAJORITY OPINION ITSELF FOUND TO BE "without a doubt GROSSLY DISADVANTAGEOUS TO THE

GOVERNMENT, DETRIMENTAL TO THE INTERESTS OF THE FILIPINO PEOPLE, AND VIOLATIVE OF PUBLIC POLICY:”

x x x While Section 7.7 gives the government a 60 percent share in the net mining revenues of WMCP from the commencement of commercial production; Section 7.9 deprives the government of part or all of the said 60 percent. Under the latter provision, should WMCP’s foreign shareholders – who originally owned 100 percent of the equity – sell 60 percent or more of its outstanding capital stock to a Filipino citizen or corporation, the State loses its right to receive its 60 percent share in net mining revenues under Section 7.7.

Section 7.9 provides

The percentage of Net Mining Revenues payable to the Government pursuant to Clause 7.7 shall be reduced by 1percent of Net Mining Revenues for every 1 percent ownership interest in the Contractor (i.e., WMCP) held by a Qualified Entity.

Evidently, what Section 7.7 grants to the State is taken away in the next breath by Section 7.9 without any offsetting compensation to the State. Thus, in reality, the State has no vested right to receive any income from the FTAA for the exploration of its mineral resources. Worse, it would seem that what is given to the State in Section 7.7 is by mere tolerance of WMCP’s foreign stockholders, who can at any time cut off the government’s entire 60 percent share. They can do so by simply selling 60 percent of WMCP’s outstanding stock to a Philippine citizen or corporation. Moreover, the proceeds of such sale will of course accrue to the foreign stockholders of WMCP, not to the State.

The sale of 60 percent of WMCP’s outstanding equity to a corporation that is 60 percent Filipino-owned and 40 percent foreign-owned will still trigger the operation of Section 7.9. Effectively, the State will lose its right to receive all 60 percent of the net mining revenues of WMCP; and foreign stockholders will own beneficially up to 64 percent of WMCP, consisting of the remaining 40percent foreign equity therein, plus the 24 percent pro-rata share in the buyer-corporation.

x x x

At bottom, Section 7.9 has the effect of depriving the State of its 60 percent share in the net mining revenues of WMCP without any offset or compensation whatsoever. It is possible that the inclusion of the offending provision was initially prompted by the desire to provide some form of incentive for the principal foreign stockholder in WMCP to eventually reduce its equity position and ultimately divest itself thereof in favor of Filipino citizens and corporations. However, as finally structured, Section 7.9 has the deleterious effect of depriving government of the entire 60 percent share in WMCP’s net mining revenues, without any form of compensation whatsoever. Such an outcome is completely unacceptable.

The whole point of developing the nation’s natural resources is to benefit the Filipino people, future generations included. And the State as sovereign and custodian of the nation’s natural wealth is mandated to protect, conserve, preserve and develop that part of the national patrimony for their benefit. Hence, the Charter lays great emphasis on “real contributions to the economic growth and general welfare of the country” [Footnote 75 of the Dissent omitted] as essential guiding principles to be kept in mind when negotiating the terms and conditions of FTAAAs.

x x x

Section 7.9 of the WMCP FTAA effectively gives away the State’s share of net mining revenues (provided for in Section 7.7) without anything in exchange. Moreover, this outcome constitutes unjust enrichment on the part of local and foreign stockholders of WMCP. By their mere divestment of up to 60 percent equity in WMCP in favor of Filipino citizens and/or corporations, the local and foreign stockholders get a windfall. Their share in the net

mining revenues of WMCP is automatically increased, without their having to pay the government anything for it. In short, the provision in question is without a doubt grossly disadvantageous to the government, detrimental to the interests of the Filipino people, and violative of public policy. (Emphasis supplied; italics and italics in the original; footnotes omitted)

The foregoing disquisition is directly applicable to the provisions of the Mining Act. By selling 60% of its outstanding equity to a 60% Filipino-owned and 40% foreign-owned corporation, the foreign contractor can readily convert its FTAA into an MPSA. Effectively, the State's share in the net benefits from mining will be automatically and drastically reduced from the theoretical 50% anticipated under DAO 99-56 to merely 2%. What is given to the State by Section 81 and DAO 99-56 is all but eliminated by Sections 39 and 80. At the same time, foreign stockholders will beneficially own up to 64% of the mining concern, consisting of the remaining 40% foreign equity therein plus the 24% pro-rata share in the buyer-corporation.

It is possible that, like Section 7.9 of the WMCP FTAA, Section 39 of the Mining Act was intended to provide some form of incentive for the foreign FTAA contractor to eventually reduce its equity position and ultimately divest itself thereof in favor of Filipino citizens and corporations. However, the net effect is to allow the Filipino people to be robbed of their just share in Philippine mineral resources. Such an outcome is completely unacceptable and cannot be sanctioned by this Court.

By this simple conversion, which may be availed of at any time, the local and foreign stockholders will obtain a windfall at the expense of the Government, which is the trustee of the Filipino people. The share of these stockholders in the net mining revenues from Philippine resources will be automatically increased without their having to pay the government anything in exchange.

On this basis alone, and despite whatever other differences of opinion might exist, the majority must concede that the provisions of the Mining Act are grossly disadvantageous to the government, detrimental to the interests of the Filipino people, and violative of Section 2, Article XII of the Constitution.

En passant, it is significant to note that Section 39 of the Mining Act allows an FTAA holder to covert its agreement to an MPSA "at any time during the term of the agreement."

As any reasonable person with a modicum of business experience can readily determine, the optimal time for the foreign contractor to convert its FTAA into an MPSA is after the completion of the exploration phase and just before undertaking the development, construction and utilization phase. This is because under Section 56 (a) of DAO 40-96, the requirement for a minimum investment of Fifty Million U.S. Dollars (US\$ 50,000,000.00)[135] is only applicable during the development, construction and utilization phase and NOT during the exploration phase where the foreign contractor need only comply with the stipulated minimum ground expenditures:

SECTION 56. Terms and Conditions of an FTAA. — The following terms, conditions and warranties shall be incorporated in the FTAA, namely:

a. A firm commitment, in the form of a sworn statement during the existence of the Agreement, that the Contractor shall comply with minimum ground expenditures during the exploration and pre-feasibility periods as follows:

Year US \$/Hectare

1 2

2 2

3 8

4 8

5 18

6 23

and a minimum investment of Fifty Million US Dollars (\$50,000,000.00) or its Philippine Peso equivalent in the case of Filipino Contractor for infrastructure and development in the contract area. If a Temporary/Special Exploration Permit has been issued prior to the approval of an FTAA, the exploration expenditures incurred shall form part of the expenditures during the first year of the exploration period of the FTAA.

In the event that the Contractor exceeds the minimum expenditure requirement in any one (1) year, the amount in excess may be carried forward and deducted from the minimum expenditure required in the subsequent year. In case the minimum ground expenditure commitment for a given year is not met for justifiable reasons as determined by the Bureau/concerned Regional Office, the unexpended amount may be spent on the subsequent year(s) of the exploration period. (*Italics supplied*)

By converting its FTAA to an MPSA just before undertaking development, construction and utilization activities, a foreign contractor further maximizes its profits by avoiding its obligation to make a minimum investment of US\$ 50,000,000.00. Assuming an exploration term of 6 years, it will have paid out only a little over US\$ 2.4 million^[136] in minimum ground expenditures.

Clearly, under the terms and provisions of the Mining Act, even the promised influx of tens of millions of dollars in direct foreign investments is merely hypothetical and ultimately illusory.

Grant of Exploration Permits to Foreign Corporations is Unconstitutional

The majority is also convinced that Section 3(aq) of the Mining Act, defining foreign corporations as a qualified entity for the purposes of granting exploration permits, is “not unconstitutional.”

The questioned provision reads:

SECTION 3. Definition of Terms. — As used in and for purposes of this Act, the following terms, whether in singular or plural, shall mean:

x x x

(aq) "Qualified person" means any citizen of the Philippines with capacity to contract, or a corporation, partnership, association, or cooperative organized or authorized for the purpose of engaging in mining, with technical and financial capability to undertake mineral resources development and duly registered in accordance with law at least sixty per centum (60%) of the capital of which is owned by citizens of the Philippines: Provided, That a legally organized foreign-owned corporation shall be deemed a qualified person for purposes of granting an exploration permit, financial or technical assistance agreement or mineral processing permit. (*Italics supplied*)

In support of its contention that the above-quoted provision does not offend against the Constitution, the majority opinion states that: (1) “there is no prohibition at all against foreign or local corporations or contractors holding exploration permits;” and (2) an “exploration permit serves a practical and legitimate purpose in that it protects the interests and preserves the rights of the exploration permit grantee x x x during the period of time that it is spending heavily on exploration works, without yet being able to earn revenues x x x.”

The majority opinion also characterizes an exploration permit as “an authorization for the grantee to spend its

funds on exploration programs that are pre-approved by the government.” And it comments that “[t]he State risks nothing and loses nothing by granting these permits” to foreign firms.

These contentions fail for two obvious reasons.

First, setting aside for the moment all disagreements pertaining to the construction of Section 2, Article XII of the Constitution, the following, at the very least, may be said to have been conclusively determined by this Court: (1) the only constitutionally sanctioned method by which a foreign entity may participate in the natural resources of the Philippines is by virtue of paragraph 4 of Section 2, Article XII of the Constitution; (2) said provision requires that an agreement be entered into (3) between the President and the foreign corporation (4) for the large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils (5) according to the general terms and conditions provided by law, (6) based on real contributions to the economic growth and general welfare of the country; (7) such agreements will promote the development and use of local scientific and technical resources; and (8) the President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

However, by the majority opinion’s express admission, the grant of an exploration permit does not even contemplate the entry into an agreement between the State and the applicant foreign corporation since “prior to the issuance of such FTAA or mineral agreement, the exploration permit grantee (or prospective contractor) cannot yet be deemed to have entered into any contract or agreement with the State.”

Consequently, the grant of an exploration permit – which is not an agreement – cannot possibly be construed as being favorably sanctioned by paragraph 4 of Section 2, Article XII of the Constitution which refers to “agreements ... involving either financial or technical assistance.” Not falling within the exception embodied in paragraph 4 of Section 2, Article XII of the Constitution, the grant of such a permit to a foreign corporation is prohibited and the proviso providing for such grant in Section 3 (aq) of the Mining Act is void for being unconstitutional.

Second, given the foregoing discussion on the circumvention of the State’s share in an FTAA, it is clearly evident that to allow the grant of exploration permits to foreign corporations is to allow the whole-sale circumvention of the entire system of FTAA’s mandated by the Constitution.

For Chapter IV of the Mining Act on Exploration Permits grants to the permit holder, including foreign corporations, the principal rights conferred on an FTAA contractor during the exploration phase, including (1) the right to enter, occupy and explore the permit area under Section 23,[137] and (2) the exclusive right to an MPSA or other mineral agreements or FTAA’s upon the filing of a Declaration of Mining Project Feasibility under Sections 23 and 24;[138] but requires none of the obligations of an FTAA – not even the obligation under Section 56 of DAO 40-96 to pay the minimum ground expenditures during the exploration and feasibility period.[139]

Thus, all that a foreign mining company need do to further maximize its profits and further reduce the Government’s revenue from mining operations is to apply for an exploration permit and content itself with the “smaller” permit area of 400 meridional blocks onshore (which itself is not small considering that it is equivalent to 32,400 hectares or 324,000,000 square meters).[140] It is not obligated to pay any minimum ground expenditures during the exploration period.

Should it discover minerals in commercial quantities, it can circumvent the Fiscal Regime in DAO 99-56 by divesting 60% of its equity in favor of a Philippine corporation and opting to enter into an MPSA. By doing so it automatically reduces the Government’s TOTAL SHARE to merely 2% of value of the minerals mined by operation of Section 81.

And if the Philippine corporation to which it divested its 60% foreign equity is itself a 60-40 Philippine Corporation, then the beneficial interest of foreigners in the minerals mined would be a minimum of 64%.

In light of the foregoing, Section 3 (aq), in so far as it allows the granting of exploration permits to foreign corporations, is patently unconstitutional, hence, null and void.

II

Invalidity of the WMCP FTAA

Sale of foreign interest in WMCP to a Filipino corporation did not render the case moot and academic.

Respondent WMCP, now renamed Tampakan Mineral Resources Corporation, submits that the case has been rendered moot since “[e]xcept for the nominal shares of directors, 100% of TMRC’s share are now owned by Sagittarius Mines, which is a Filipino-owned corporation. More than 60% of the equity of Sagittarius is owned by Filipinos or Filipino-owned corporations.”[141] This Court initially reserved judgment on this issue.[142]

Petitioner invokes by analogy the rule that where land is invalidly transferred to an alien who subsequently becomes a Filipino citizen or transfers it to one, the infirmity in the original transaction is considered cured and the title of the transferee is rendered valid, citing *Halili v. Court of Appeals*. [143] The rationale for this rule is that if the ban on aliens from acquiring lands is to preserve the nation’s lands for future generations of Filipinos, that aim or purpose would not be thwarted but achieved by making lawful the acquisition of real estate by Filipino citizens.[144]

Respondent WMCP’s analogy is fallacious. Whether the legal title to the corporate vehicle holding the FTAA has been transferred from a foreigner to a Filipino is irrelevant. What is relevant is whether a foreigner has improperly and illegally obtained an FTAA and has therefore benefited from the exploration, development or utilization of Philippine natural resources in a manner contrary to the provisions of the Constitution.

As above-stated the doctrine enunciated in *Halili* is based on the premise that the purpose of the Constitution in prohibiting alien ownership of agricultural land is to retain the ownership or legal title of the land in the hands of Filipinos. This purpose is not identical or even analogous to that in Section 2, Article XII of the Constitution. As priorly discussed, the primary purpose of the provisions on National Patrimony is to preserve to the Filipino people the beneficial ownership of their natural resources – i.e. the right to the gains, rewards and advantages generated by their natural resources. Except under the terms of Section 2, Article XII, foreigners are prohibited from involving themselves in the exploration, development or utilization of these resources, much less from profiting from them.

Divestment by a foreigner of an illegally acquired right to mine Philippine resources does not alter the illegal character of the right being divested or sold. Indeed, such divestment or sale is obviously a method by which the foreigner may derive pecuniary benefit from his unlawful act since he receives payment for his illegally acquired interest in the country’s natural resources.

To rule otherwise would be to condone, even to invite, foreign entities to obtain Philippine mining interests in violation of the Constitution with the assurance that they can escape liability and at the same time make a tidy sum by later selling these interests to Filipinos. This is nothing less than allowing foreign speculation in Philippine natural resources. Worse, there is the very real possibility that these foreign entities may intentionally inflate the value of their illegally-acquired mineral rights to the detriment of their Filipino purchasers as the past

Bre-X scandal^[145] and recent Shell oil reserve controversy^[146] vividly illustrate.

To allow a foreigner to profit from illegally obtained mining rights or FTAA subverts and circumvents the letter and intent of Article XII of the Constitution. It facilitates rather than prevents the rape and plunder of the nation's natural resources by unscrupulous neo-colonial entities. It thwarts, rather than achieves, the purpose of the fundamental law.

As applied to the facts of this case, respondent WMCP, in essence, claims that now that the operation and management of the WMCP FTAA is in the hands of a Filipino company, no serious question as to the FTAA's validity need arise.

On the contrary, this very fact – that WMC has sold its 100% interest in WMCP to a Filipino company for US\$10,000,000.00 – directly leads to some very serious questions concerning the WMCP FTAA and its validity. First, if a Filipino corporation is capable of undertaking the terms of the FTAA, why was an agreement with a foreign owned corporation entered into in the first place? Second, does not the fact that, as alleged by petitioners^[147] and admitted by respondent WMCP,^[148] Sagittarius, WMCP's putative new owner, is capitalized at less than half the purchase price^[149] of WMC's shares in WMCP, a strong indication that Sagittarius is merely acting as the dummy of WMC? Third, if indeed WMCP has, to date, spent US\$40,000,000.00 in the implementation of the FTAA, as it claims,^[150] why did WMC sell 100% of its shares in WMCP for only US\$10,000,000.00? Finally, considering that, as emphasized by WMCP,^[151] "payment of the purchase price by Sagittarius to WMC will come only after the commencement of commercial production," hasn't WMC effectively acquired a beneficial interest in any minerals mined in the FTAA area to the extent of US\$10,000,000.00? If so, is the acquisition of such a beneficial interest by a foreign corporation permitted under our Constitution?

Succinctly put, the question remains: What is the validity of the FTAA by which WMC, a fully foreign owned corporation, has acquired a more than half billion peso^[152] interest in Philippine mineral resources located in a contract area of 99,387 (alleged to have later been reduced to 30,000)^[153] hectares of land spread across the four provinces of South Cotabato, Sultan Kudarat, Davao del Sur and North Cotabato?

Clearly then, the issues of this case have not been rendered moot by the sale of WMC's 100% interest in WMCP to a Filipino corporation, whether the latter be Sagittarius or Lepanto. If the FTAA is held to be valid under the Constitution, then the sale is valid and, more importantly, WMC's US\$10,000,000.00 interest in Philippine mineral deposit, arising as it did from the sale and its prior 100% ownership of WMCP, is likewise valid. However, if the FTAA is held to be invalid, then neither WMC's interest nor the sale which gave rise to said interest is valid for no foreigner may profit from the natural resources of the Republic of the Philippines in a manner contrary to the terms of the Philippine Constitution. If held unconstitutional, the WMCP FTAA is void ab initio for being contrary to the fundamental law and no rights may arise from it, either in favor of WMC or its Filipino transferee.

Evidently, the transfer of the shares in WMCP from WMC Resources International Pty. Ltd. (WMC), a foreign-owned corporation, to a Filipino-owned one, whether Sagittarius or Lepanto, now presently engaged in a dispute over said shares,^[154] did not "cure" the FTAA nor moot the petition at bar. On the contrary, it is the Decision in this case that rendered those pending cases moot for the invalidation of the FTAA leaves Sagittarius and Lepanto with nothing to dispute.

Terms of the WMCP FTAA are
contrary to the Constitution and
render said FTAA null and void.

The WMCP FTAA is clearly contrary to the agreements provided for in Section 2, Article XII of the Constitution. In the Decision under reconsideration, this Court observed:

Section 1.3 of the WMCP FTAA grants WMCP “the exclusive right to explore, exploit, utilise[,] process and dispose of all Minerals products and by-products thereof that may be produced from the Contract Area.” The FTAA also imbues WMCP with the following rights:

(b) to extract and carry away any Mineral samples from the Contract area for the purpose of conducting tests and studies in respect thereof;

(c) to determine the mining and treatment processes to be utilized during the Development/Operating Period and the project facilities to be constructed during the Development and Construction Period;

(d) have the right of possession of the Contract Area, with full right of ingress and egress and the right to occupy the same, subject to the provisions of Presidential Decree No. 512 (if applicable) and not be prevented from entry into private lands by surface owners and/or occupants thereof when prospecting, exploring and exploiting for minerals therein;

x x x

(f) to construct roadways, mining, drainage, power generation and transmission facilities and all other types of works on the Contract Area;

(g) to erect, install or place any type of improvements, supplies, machinery and other equipment relating to the Mining Operations and to use, sell or otherwise dispose of, modify, remove or diminish any and all parts thereof;

(h) enjoy, subject to pertinent laws, rules and regulations and the rights of third Parties, easement rights and the use of timber, sand, clay, stone, water and other natural resources in the Contract Area without cost for the purposes of the Mining Operations;

x x x

(l) have the right to mortgage, charge or encumber all or part of its interest and obligations under this Agreement, the plant, equipment and infrastructure and the Minerals produced from the Mining Operations;

x x x.

All materials, equipment, plant and other installations erected or placed on the Contract Area remain the property of WMCP, which has the right to deal with and remove such items within twelve months from the termination of the FTAA.

Pursuant to Section 1.2 of the FTAA, WMCP shall provide “[all] financing, technology, management and personnel necessary for the Mining Operations.” The mining company binds itself to “perform all Mining Operations . . . providing all necessary services, technology and financing in connection therewith,” and to “furnish all materials, labour, equipment and other installations that may be required for carrying on all Mining Operations.” WMCP may make expansions, improvements and replacements of the mining facilities and may add such new facilities as it considers necessary for the mining operations.

These contractual stipulations, taken together, grant WMCP beneficial ownership over natural resources that properly belong to the State and are intended for the benefit of its citizens. These stipulations are abhorrent to the 1987 Constitution. They are precisely the vices that the fundamental law seeks to avoid, the evils that it aims to suppress. Consequently, the contract from which they spring must be struck down.[155] (Citations omitted)

Indeed, save for the fact that the contract covers a larger area, the subject FTAA is actually a mineral production sharing agreement. Respondent WMCP admitted as much in its Memorandum.[156] The first paragraph of Section 2, Article XII of the Constitution, however, allows this type of agreement only with Filipino citizens or corporations.

That the subject FTAA is void for having an unlawful cause bears reaffirmation. In onerous contracts the cause is understood to be, for each contracting party, the prestation or promise of a thing or service by the other.[157] On the part of WMCP, a foreign-owned corporation, the cause was to extend not only technical or financial assistance but management assistance as well. The management prerogatives contemplated by the FTAA are not merely incidental to the two other forms of assistance, but virtually grant WMCP full control over its mining operations. Thus, in Section 8.3[158] of the FTAA, in case of a dispute between the DENR and WMCP, it is WMCP's decision which will prevail.

The questioned FTAA also grants beneficial ownership over Philippine natural resources to WMCP, which is prohibited from entering into such contracts not only by the fourth paragraph of Section 2, Article XII of the Constitution, but also by the first paragraph, the FTAA practically being a production-sharing agreement reserved to Filipinos.

Contracts whose cause is contrary to law or public policy are inexistent and void from the beginning.[159] They produce no effect whatsoever.[160] They cannot be ratified,[161] and so cannot the WMCP FTAA.

The terms of the WMCP FTAA effectively give away the Beneficial Ownership of Philippine minerals

As previously observed, the majority opinion finds Section 7.9. of the WMCP FTAA to be “grossly disadvantageous to the government, detrimental to the interests of the Filipino people, and violative of public policy” since it “effectively gives away the State's share of net mining revenues (provided for in Section 7.7) without anything in exchange.”

It likewise finds Section 7.8(e) of the WMCP FTAA to be invalid. Said provision states:

7.8 The Government Share shall be deemed to include all of the following sums:

x x x

(e)

an amount equivalent to whatever benefits that may be extended in the future by the Government to the Contractor or to financial or technical assistance agreement contractors in general. (*Italics supplied*)

And in its own estimation:

Section 7.8(e) is out of place in the FTAA. This provision does not make any sense why, for instance, money spent by the government for the benefit of the contractor in building roads leading to the mine site should still be deductible from the State's share in net mining revenues. Allowing this deduction results in benefiting the contractor twice over. To do so would constitute unjust enrichment on the part of the contractor at the expense of the government, since the latter is effectively being made to pay twice for the same item. For being grossly disadvantageous and prejudicial to the government and contrary to public policy, Section 7.8(e) is undoubtedly invalid and must be declared to be without effect. xxx (*Emphasis supplied; citations omitted; italics in the original*)

The foregoing estimation notwithstanding, the majority opinion declines to invalidate the WMCP FTAA on the theory that Section 7.9 and 7.8 are separable from the rest of the agreement, which may supposedly be given effect without the offending provisions.

As previously discussed, the same deleterious results are easily achieved by the foreign contractor's conversion of its FTAA into an MPSA under the provisions of the Mining Act. Hence, merely striking out Sections 7.9 and 7.8(e) of the WMCP FTAA will not suffice; the provisions pertaining to FTAA's in the Mining Act must be stricken out for being unconstitutional as well.

Moreover, Section 7.8 (e) and 7.9 are not the only provisions of the WMCP FTAA which convey beneficial ownership of mineral resources to a foreign corporation.

Under Section 10.2 (l) of the WMCP FTAA, the foreign FTAA contractor shall have the right to mortgage and encumber, not only its rights and interests in the FTAA, but the very minerals themselves:

10.2 Rights of Contractor

The Government agrees that the Contractor shall:-

x x x

(l)

have the right to mortgage, charge or encumber all or part of its interest and obligations under this Agreement, the plant, equipment and infrastructure and the Minerals produced from the Mining Operations; (*Italics supplied*)

Although respondents did not proffer their own explanation, the majority opinion theorizes that the foregoing provision is necessitated by the conditions that may be imposed by creditor-banks on the FTAA contractor:

xxx I believe that this provision may have to do with the conditions imposed by the creditor-banks of the then foreign contractor WMCP to secure the lendings made to the latter. Ordinarily, banks lend not only on the security of mortgages on fixed assets, but also on encumbrances of goods produced that can easily be sold and converted into cash that can be applied to the repayment of loans. Banks even lend on the security of accounts receivable that are collectible within 90 days. (*Citations omitted; italics in the original*)

It, however, overlooks the provision of Art. 2085 of the Civil Code which enumerates the essential requisites of a contract of mortgage:

Art. 2085. The following requisites are essential to the contracts of pledge and mortgage:

- (1) That they be constituted to secure the fulfillment of a principal obligation;
- (2) That the pledgor or mortgagor be the absolute owner of the thing pledged or mortgaged;
- (3) That the persons constituting the pledge or mortgage have the free disposal of their property, and in the absence thereof, that they be legally authorized for the purpose.

Third persons who are not parties to the principal obligation may secure the latter by pledging or mortgaging their own property. (*Emphasis and italics supplied*)

From the foregoing provision of law, it is abundantly clear that only the absolute owner of the minerals has the right to mortgage the same, and under Section 2, Article XII of the Constitution the absolute owner of the minerals is none other than the State. While the foreign FTAA contractor may have an interest in the proceeds of the minerals, it does not acquire ownership over the minerals themselves.

Put differently, the act of mortgaging the minerals is an act of ownership, which, under the Constitution, is reserved solely to the State. In purporting to grant such power to a foreign FTAA contractor, Section 10.2 (l) of the WMCP FTAA clearly runs afoul of the Constitution.

Moreover, it bears noting that to encumber natural resources of the State to secure a foreign FTAA contractor's obligations is anomalous since Section 1.2 of the WMCP FTAA provides that "[a]ll financing, technology, management and personnel necessary for the Mining Operations shall be provided by the Contractor."

Indeed, even the provisions of the Mining Act, irredeemably flawed though they may be, require that the FTAA contractor have the financial capability to undertake the large-scale exploration, development and utilization of mineral resources in the Philippines;^[162] and, specifically, that the contractor warrant that it has or has access to all the financing required to promptly and effectively carry out the objectives of the FTAA.^[163]

Under Section 10.2 (e) of the WMCP FTAA, the foreign FTAA Contractor has the power to require the Government to acquire surface rights in its behalf at such price and terms acceptable to it:

10.2 Rights of Contractor

The Government agrees that the Contractor shall:-

x x x

(e)

have the right to require the Government at the Contractor's own cost, to purchase or acquire surface areas for and on behalf of the Contractor at such price and terms as may be acceptable to the Contractor. At the termination of this Agreement such areas shall be sold by public auction or tender and the Contractor shall be entitled to reimbursement of the costs of acquisition and maintenance, adjusted for inflation, from the proceeds of sale; (*Italics supplied*)

Petitioners, in their Memorandum, point out that pursuant to the foregoing, the foreign FTAA contractor may compel the Government to exercise its power of eminent domain to acquire the title to the land under which the minerals are located for and in its behalf.

The majority opinion, however, readily accepts the explanation proffered by respondent WMCP, thus:

Section 10.2 (e) sets forth the mechanism whereby the foreign-owned contractor, disqualified to own land, identifies to the government the specific surface areas within the FTAA contract area to be acquired for the mine infrastructure. The government then acquires ownership of the surface land areas on behalf of the contractor, in order to enable the latter to proceed to fully implement the FTAA.

The contractor, of course, shoulders the purchase price of the land. Hence, the provision allows it, after the termination of the FTAA to be reimbursed from proceeds of the sale of the surface areas, which the government will dispose of through public bidding.

And it concludes that "the provision does not call for the exercise of the power of eminent domain" and the determination of just compensation.

The foregoing arguments are specious.

First, the provision in question clearly contemplates a situation where the surface area is not already owned by the Government – i.e. when the land over which the minerals are located is owned by some private person.

Second, the logical solution in that situation is not, as asserted by respondent WMCP, to have the Government purchase or acquire the land, but for the foreign FTAA contractor to negotiate a lease over the property with the

private owner.

Third, it is plain that the foreign FTAA contractor would only avail of Section 10.2 (e) if, for some reason or another, it is unable to lease the land in question at the price it is willing to pay. In that situation, it would have the power under Section 10.2 (e) to compel the State, as the only entity which can legally compel the landowner to involuntarily part with his property, to acquire the land at a price dictated by the foreign FTAA contractor.

Clearly, the State's power of eminent domain is very much related to the practical workings of Section 10.2 (e) of the WMCP FTAA. It is the very instrument by which the contractor assures itself that it can obtain the "surface right" to the property at a price of its own choosing. Moreover, under Section 60 of DAO 40-96, the contractor may, after final relinquishment, hold up to 5,000 hectares of land in this manner.

More. While the foreign FTAA contractor advances the purchase price for the property, in reality it acquires the "surface right" for free since under the same provision of the WMCP FTAA it is entitled to reimbursement of the costs of acquisition and maintenance, adjusted for inflation. And as if the foregoing were not enough, when read together with Section 3.3,[164] the foreign FTAA contractor would have the right to hold the "surface area" for a maximum of 50 years, at its option.

In sum, by virtue of Sections 10.2 (e) and 3.3. of the WMCP FTAA, the foreign FTAA contractor is given the power to hold inalienable mineral land of up to 5,000 hectares, with the assistance of the State's power of eminent domain, free of charge, for a period of up to 50 years in contravention of Section 3, Article XII of the Constitution:

Section 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural lands of the public domain may be further classified by law according to the uses which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. Private corporations or associations may not hold such alienable lands of the public domain except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than twelve hectares thereof by purchase, homestead, or grant.

Taking into account the requirements of conservation, ecology, and development, and subject to the requirements of agrarian reform, the Congress shall determine, by law, the size of lands of the public domain which may be acquired, developed, held, or leased and the conditions therefor. (*Italics supplied*)

Taken together, the foregoing provisions of the WMCP FTAA amount to a conveyance to a foreign corporation of the beneficial ownership of both the minerals and the surface rights to the same in contravention of the clear provisions of the Constitution.

The majority opinion posits that "[t]he acquisition by the State of land for the contractor is just to enable the contractor to establish its mine site, build its facilities, establish a tailings pond, set up its machinery and equipment, and dig mine shafts and tunnels, etc." It thus concludes that "5,000 hectares is way too much for the needs of a mining operator."

Evidently, the majority opinion does not take into account open pit mining. Open pit or opencut mining, as differentiated from methods that require tunneling into the earth, is a method of extracting minerals by their removal from an open pit or borrow;[165] it is a mine working in which excavation is performed from the surface.[166] It entails a surface mining operation in which blocks of earth are dug from the surface to extract the ore contained in them. During the mining process, the surface of the land is excavated forming a deeper and deeper pit until the end of mining operations.[167] It is used extensively in mining metal ores, copper, gold, iron, aluminum[168] – the very minerals which the Philippines is believed to possess in vast quantities; and is

considered the most cost-effective mining method.[169]

Furthermore, considering that FTAAAs deal with large scale exploration, development and utilization of mineral resources and that the original contract area of the WMCP FTAA was 99,387 hectares, an open pit mining operation covering a total of 5,000 hectares is not outside the realm of possibility.

In any event, regardless of what the majority opinion considers “way too much” (or too little), it is undisputed that under Section 60 of DAO 40-96, which is among the enactments under review, the contractor may, after final relinquishment, hold up to 5,000 hectares of land. And, under Section 3.3. of the WMCP FTAA, it may do so for a term of 25 years automatically renewable for another 25 years, at the option of the contractor.

The majority opinion also argues that, although entitled to reimbursement of its acquisition cost at the end of the contract term, the FTAA contractor does not acquire its surface rights for free since “the contractor will have been cash-out for the entire duration of the term of the contract – 25 to 50 years, depending,” thereby foregoing any interest income he might have earned. This is the “opportunity cost” of the contractor’s decision to use its money to acquire the surface rights instead of leaving it in the bank.

The majority opinion does not consider the fact that “opportunity cost” is more theoretical rather than actual and, for that reason, is not an allowable deduction from gross income in an income statement. In layman’s terms it is equivalent to “the value of the chickens that might have been hatched if only the cook had not scrambled the eggs.” Neither does it consider the fact that the contractor’s foregone interest income does not find its way to the pockets of either the previous land owner (in this case, the Bugal B’Laans) or the State.

But even if the contractor does incur some opportunity cost in holding the surface rights for 35 to 50 years. The fact remains that, under the terms of the WMCP FTAA, the contractor is given the power to hold inalienable mineral land of up to 5,000 hectares, with the assistance of the State’s power of eminent domain for a period of up to 50 years in contravention of Section 3, Article XII of the Constitution.

Clearly, Section 3 and 10.2 (e) of the WMCP FTAA in conjunction with Section 60 of DAO 40-96, amount to a conveyance to a foreign corporation of the beneficial ownership of both the minerals and the surface rights over the same, in contravention of the clear provisions of the Constitution.

The terms of the WMCP FTAA abdicate all control over the mining operation in favor of the foreign FTAA contractor

The majority opinion’s defense of the constitutionality of Section 8.1, 8.2, 8.3 of the WMCP FTAA is similarly unpersuasive. These Sections provide:

8.1

The Secretary shall be deemed to have approved any Work Programme or Budget or variation thereof submitted by the Contractor unless within sixty (60) days after submission by the Contractor the Secretary gives notice declining such approval or proposing a revision of certain features and specifying its reasons therefore (“the Rejection Notice”).

8.2

If the Secretary gives a Rejection Notice the Parties shall promptly meet and endeavour to agree on amendments to the Work Programme or budget. If the Secretary and the Contractor fail to agree on the proposed revision within 30 days from delivery of the Rejection Notice then the Work Programme or Budget

or variation thereof proposed by the Contractor shall be deemed approved so as not to unnecessarily delay the performance of this Agreement.

Even measured against the majority opinion's standards of control – i.e. either (1) the power to set aside, reverse, or modify plans and actions of the contractor; or (2) regulatory control – the foregoing provisions cannot pass muster. This is because, by virtue of the foregoing provisions, the foreign FTAA contractor has unfettered discretion to countermand the orders of its putative regulator, the DENR.

Contrary to the majority's assertions, the foregoing provisions do not provide merely temporary or stop-gap solutions. The determination of the FTAA contractor permanently reverses the "Rejection Notice" of the DENR since, by the majority opinion's own admission, there is no available remedy for the DENR under the agreement except to seek the cancellation of the same.

Indeed, the justification for the foregoing provisions is revealing:

xxx First, avoidance of long delays in these situations will undoubtedly redound to the benefit of the State as well as to the contractor. Second, who is to say that the work program or budget proposed by the contractor and deemed approved under Clause 8.3 would not be the better or more reasonable or more effective alternative? The contractor, being the "insider," as it were, may be said to be in a better position than the State – an outsider looking in – to determine what work program or budget would be appropriate, more effective, or more suitable under the circumstances. (Emphasis and italics supplied)

Both reasons tacitly rely on the unstated assumption that the interest of the foreign FTAA contractor and that of the Government are identical. They are not.

Private businesses, including large foreign-owned corporations brimming with capital and technical expertise, are primarily concerned with maximizing the pecuniary returns to their owners or shareholders. To this extent, they can be relied upon to pursue the most efficient courses of action which maximize their profits at the lowest possible cost.

The Government, on the other hand, is mandated to concern itself with more than just narrow self-interest. With respect to the nation's natural wealth, as the majority opinion points out, the Government is mandated to preserve, protect and even maximize the beneficial interest of the Filipino people in their natural resources. Moreover, it is directed to ensure that the large-scale exploration, development and utilization of these resources results in real contributions to the economic growth and general welfare of the nation. To achieve these broader goals, the Constitution mandates that the State exercise full control and supervision over the exploration, development and utilization of the country's natural resources.

However, taking the majority opinion's reasoning to its logical conclusion, the business "insider's opinion" would always be superior to the Government's administrative or regulatory determination with respect to mining operations. Consequently, it is the foreign contractor's opinion that should always prevail. Ultimately, this means that, at least for the majority, foreign private business interests outweigh those of the State – at least with respect to the conduct of mining operations.

Indeed, in what other industry can the person regulated permanently overrule the administrative determinations of the regulatory agency?

To any reasonable mind, the absence of an effective means to enforce even administrative determinations over an FTAA contractor, except to terminate the contract itself, falls far too short of the concept of "full control and supervision" as to cause the offending FTAA to fall outside the ambit of Section 2, Article XII of the Constitution.

Verily, viewed in its entirety, the WMCP FTAA cannot withstand a rigid constitutional scrutiny since, by its provisions, it conveys both the beneficial ownership of Philippine minerals and control over their exploration, development and utilization to a foreign corporation. Being contrary to both the letter and intent of Section 2, Article XII of the Constitution, the WMCP FTAA must be declared void and of no effect whatsoever.

A Final Note

For over 350 years, the natural resources of this nation have been under the control and domination of foreign powers – whether political or corporate. Philippine mineral wealth, viciously wrenched from the bosom of the motherland, has enriched foreign shores while the Filipino people, to whom such wealth justly belongs, have remained impoverished and unrecompensed.

Time and time again the Filipino people have sought an end to this intolerable situation. From 1935 they have struggled to assert their legal control and ownership over their patrimony only to have their efforts repeatedly subverted – first, by the parity amendment to the 1935 Constitution and subsequently by the service contract provision in the 1973 Constitution.

It is not surprising that an industry, overly dependent on foreign support and now in decline, should implore this Court to reverse itself if only to perpetuate its otherwise economically unsustainable conduct. It is even understandable, however regrettable, that a government, strapped for cash and in the midst of a self-proclaimed fiscal crisis, would be inclined to turn a blind eye to the consequences of unconstitutional legislation in the hope, however false or empty, of obtaining fabulous amounts of hard currency.

But these considerations should not outweigh the Constitution.

As always, the one overriding consideration of this Court should be the will of the sovereign Filipino people as embodied in their Constitution. The Constitution which gives life to and empowers this Court. The same Constitution to which the members of this Court have sworn their unshakable loyalty and their unwavering fidelity.

Now, the unmistakable letter and intent of the 1987 Constitution notwithstanding, the majority of this Court has chosen to reverse its earlier Decision which, to me, would once again open the doors to foreign control and ownership of Philippine natural resources. The task of reclaiming Filipino control over Philippine natural resources now belongs to another generation.

ACCORDINGLY, I vote to deny respondents' Motions for Reconsideration.

[1] 421 SCRA 148 (2004).

[2] Section 3 (aq); Section 23; Sections 33-41; Section 56; Section 81, pars. 2-3; and Section 90.

[3] Rep. Act No. 7942 (1995).

[4] In its Motion for Intervention, intervenor PCM alleged that the Court's January 27, 2004 Decision in this case would adversely affect the ability of domestic mining companies to contract with their foreign counterparts with regard to mining operations beyond the resources of the local companies. (Rollo, at 2096.)

[5] Transcript of Stenographic Notes, June 29, 2004 (TSN) at 129.

[6] Rules of Court, Rule 18, sec. 7.

[7] *La Buga-B'Laan Tribal Association, Inc. v. Ramos*, 421 SCRA 148 (2004).

- [8] Id. at 173-174.
- [9] Id. at 234.
- [10] Memorandum (In support of WMCP's Motion and Supplemental Motion for Reconsideration) at 42-43.
- [11] Final Memorandum for the Petitioners at 9.
- [12] *Angara v. Electoral Commission*, 63 Phil. 139, 156-158 (1936).
- [13] *Bengson v. Senate Blue Ribbon Committee*, 203 SCRA 767, 775-776 (1991).
- [14] CONST., art. VIII, sec. 1.
- [15] *Tañada v. Cuenco*, 103 Phil. 1051, 1067 (1957).
- [16] *Valmonte v. Belmonte, Jr.*, 170 SCRA 256, 268 (1989).
- [17] Ibid.
- [18] *Francisco, Jr. v. House of Representatives*, 415 SCRA 44, 143-151 (2003).
- [19] Ibid.
- [20] Vide: *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*, supra at 207-208.
- [21] Memorandum for WMCP at 37.
- [22] Id. at 38.
- [23] Id. at 39.
- [24] Ibid.
- [25] Memorandum for Public Respondents at 34.
- [26] Id. at 37.
- [27] Id. at 21.
- [28] Id. at 22.
- [29] Rollo at 1373-1374.
- [30] Memorandum for Public Respondents at 24.
- [31] Ibid.
- [32] Id. at 25.
- [33] Id. at 23.
- [34] Memorandum for Intervenor at 7.
- [35] Statement for Intervenor at 1.
- [36] Memorandum for Intervenor at 9.
- [37] Vide: *Black's Law Dictionary* 156 (6th ed., 1991).
- [38] Article 1440 of the Civil Code provides:

Art. 1440. A person who establishes a trust is called a trustor; one in whom confidence is reposed as regards property for the benefit of another person is known as the trustee; and the person for whose benefit the trust has been created is referred to as the beneficiary.

Justice Jose C. Vitug (ret.) describes a trust relationship as follows:

A trust is a juridical relationship that exists between one person having the equitable title or beneficial enjoyment of property, real or personal, and another having the legal title thereto. The person who establishes the trust is the trustor (or grantor); one in whom confidence is reposed as regards property for the benefit of another person is known as the trustee (fiduciary), and the person for whose benefit the trust has been created is referred to as the beneficiary (cestui que trust). The Code has adopted the principles of the general law of trusts, insofar as they are not in conflict with its provisions, the Code of Commerce, the Rules of Court and special laws. [III J.C. VITUG CIVIL LAW 175 (2003); citations omitted]

[39] Vide: Black's Law Dictionary 156 (6th ed., 1991).

[40] CONST. art. II, sec. 1.

[41] Memorandum for Petitioners at 11.

[42] Memorandum for WMCP at 59.

[43] Oposa v. Factoran, Jr., 224 SCRA 792, 803 (1993).

[44] Vide: Miners Association of the Philippines, Inc. v. Factoran, Jr., 240 SCRA 100, 106 (1995).

[45] Vide: Rep. Act No. 7942 (1995), sec. 26 (c).

[46] Memorandum for Public Respondents at 49.

[47] For instance an article written by Patricia Thompson describes the 1996 Marcopper environmental disaster:

Between 2.4 and 4 million tons of tailings solids escaped from an open pit impoundment at Marcopper's copper mine on the island of Marinduque in the Philippines on March 24, 1996, when a concrete drainage plug gave way. The sediment-laden water flowed into the Boac River system at rates of 5 to 10 cubic meters per second. Although "independent studies by the United Nations and the Philippine Department of Science and Technology have concluded that the escaped material is not toxic," the increased sediment load in the Boac River led to substantial salt and freshwater kills. An impact assessment estimated that ten years would elapse before freshwater fish would be viable in the river again and predicted a seventy percent reduction in the "salt water fish catch from the mouth of the Boac River," however, there are some indications that this initial estimate may be too high. Although the Boac River itself is not a drinking water source, the release threatened potable water supplies along the banks of the river and necessitated airdrops of food and medical supplies. [P. Thompson, II. Mining Criminal Sanctions Sought in Philippine Mine Tailings Spill, 1996 Colo. J. Int'l Envt'l. l. & Pol'y 54 (1996).]

[48] Vide: Oposa v. Factoran, Jr., *supra*.

[49] II J. Aruego, The Framing of the Philippine Constitution 605-606 (1949); vide: La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 192, note 111.

[50] Vide: Pres. Decree No. 87 (Amending Presidential Decree No. 8 issued on October 2, 1972, and Promulgating an Amended Act to Promote the Discovery and Production of Indigenous Petroleum and Appropriate Funds therefor), Pres. Decree No. 151 (Allowing Citizens of the Philippines or Corporations or Associations at least Sixty Per Centum of the Capital of which is Owned by such Citizens to Enter into Service

Contracts with Foreign Persons, Corporations for the Exploration, Development, Exploitation or Utilization of Lands of the Public Domain, amending for the purpose certain provisions of Commonwealth Act No. 141), Pres. Decree No. 463 (Providing for A Modernized System of Administration and Disposition of Mineral Lands and to Promote and Encourage the Development and Exploitation thereof), and Pres. Decree No. 1442 (An Act to Promote the Exploration and Development of Geothermal Resources).

[51] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 199-205 & 233, note 252.

[52] *Id.* at 234.

[53] Caltex (Philippines), Inc. v. Court of Appeals, 212 SCRA 448, 463 (1992).

[54] Capati v. Ocampo, 113 SCRA 794, 796 (1982).

[55] CONST., art. XII, sec. 2, first par.

[56] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 208 & 218-222.

[57] TSN at 37-40.

[58] <http://dictionary.reference.com/search?q=either>

[59] *Ibid.*

[60] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 252-253.

[61] Laurel v. Civil Service Commission, 203 SCRA 195, 209 (1991).

[62] III Record of the Constitutional Commission 316-317.

[63] *Id.* at 358-359.

[64] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 224.

[65] I DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT, ARTICLE XV at 12 -13.

[66] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 217-218.

[67] *Id.* at 208 & 218-222.

[68] Vide: Section 1 ("No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied of the equal protection of the laws."); Section 4 ("No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."); Section 5 ("No law shall be made respecting an establishment of religion, or prohibiting the exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.")

[69] I DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT, ARTICLE XV at 11-12.

[70] P. A. Agabin, Service Contracts: Old Wines in New Bottles?, II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT 16, cited in La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 229.

[71] A case omitted is to be held as intentionally omitted. [Black's Law Dictionary 219 (6th ed., 1991)]

[72] 371 SCRA 196 (2001).

[73] *Id.* at 205.

[74] *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*, *supra* at 220.

[75] The expression of one thing is the exclusion of another. [Black's Law Dictionary 581 (6th ed., 1991)]

[76] *Vide*: *Canet v. Decena*, G.R. No. 155344, January 20, 2004; *Commissioner of Internal Revenue v. Michel J. Lhuiller Pawnshop, Inc.*, 406 SCRA 178, 186 (2003); *National Power Corporation v. City of Cabanatuan*, 401 SCRA 259, 280 (2003); *Malinias v. Commission on Elections*, 390 SCRA 480, 491 (2002); *Integrated Bar of the Philippines v. Zamora*, 338 SCRA 81, 109 (2000); *People v. Mamac*, 332 SCRA 547, 556 (2000); *Mathay, Jr. v. Court of Appeals*, 320 SCRA 703, 711 (1999); *Miranda v. Abaya*, 311 SCRA 617, 624 (1999); *City Government of San Pablo, Laguna v. Reyes*, 305 SCRA 353, 361 (1999); *Centeno v. Villalon-Pornillos*, 236 SCRA 197, 203 (1994); *Phil. American Life Insurance Company v. Ansaldo*, 234 SCRA 509, 515 (1994); *Commissioner of Customs v. Court of Tax Appeals*, 224 SCRA 665, 669-670 (1993); *Ledesma v. Court of Appeals*, 211 SCRA 753, 760 (1992); *Montoya v. Escayo*, 171 SCRA 442, 448 (1989); *Singapore Airlines Local Employees Association v. NLRC*, 130 SCRA 472, 479 (1984); *Vera v. Fernandez*, 89 SCRA 199, 203 (1979); *Central Barrio v. City Treasurer of Davao*, 23 SCRA 6, 9 (1968); *Catuiza v. People*, 13 SCRA 538, 542 (1965); *Ursal v. Court of Tax Appeals*, 101 Phil. 209, 212 (1957); *Vega v. Mun. Board of the City of Iloilo*, 94 Phil. 949, 953 (1954); *Sotto v. Commission on Elections*, 76 Phil. 516, 530 (1946).

[77] That which is expressed makes that which is implied to cease. [Black's Law Dictionary 581 (6th ed., 1991)]

[78] *Vide*: *Canet v. Decena*, G.R. No. 155344, January 20, 2004; *Malinias v. Commission on Election* 390 SCRA 480, 491 (2002); *National Electrification Administration v. Commission on Audit*, 377 SCRA 223, 232 (2002); *Espiritu v. Cipriano*, 55 SCRA 533, 538 (1974).

[79] Comm. Villegas' response that there was no requirement in the 1973 Constitution for a law to govern service contracts and that, in fact, there were then no such laws is inaccurate. The 1973 Charter required similar legislative approval, although it did not specify the form it should take: "The Batasang Pambansa, in the national interest, may allow such citizens ... to enter into service contracts ..." As previously noted in this Court's Decision of January 27, 2004, however, laws authorizing service contracts were actually enacted by presidential decree [i.e. Presidential Decree No. 87 (Amending Presidential Decree No. 8 issued on October 2, 1972, and Promulgating an Amended Act to Promote the Discovery and Production of Indigenous Petroleum and Appropriate Funds therefore), Pres. Decree No. 151 (Allowing Citizens of the Philippines or Corporations or Associations at least Sixty Per Centum of the Capital of which is Owned by such Citizens to Enter into Service Contracts with Foreign Persons, Corporations for the Exploration, Development, Exploitation or Utilization of Lands of the Public Domain, amending for the purpose certain provisions of Commonwealth Act No. 141), Pres. Decree No. 463 (Providing for a Modernized System of Administration and Disposition of Mineral Lands and to Promote and Encourage the Development and Exploitation thereof), and Pres. Decree No. 1442 (An Act to Promote the Exploration and Development of Geothermal Resources)]

[80] *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*, *supra* at 233-234.

[81] *Id.* at 224.

[82] III Record of the Constitutional Commission 260.

[83] 224 SCRA 792 (1993).

[84] Id. at 811-813.

[85] III Record of the Constitutional Commission 319.

[86] Rollo at 2779.

[87] TSN at 181-186.

[88] Memorandum for Public Respondents, Annex 1.

[89] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 227-234.

[90] Statement for Intervenor, p. 2.

[91] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 206; *vide*: Miners Association of the Philippines v. Factoran, 240 SCRA 100, 104 (1995).

[92] P. A. Agabin, Service Contracts: Old Wines in New Bottles?, II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT 3-4.

[93] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 227-228 citing Agabin, *supra*, at 15-16.

[94] *Ibid*.

[95] Rep. Act No. 7942 (1995), secs. 35 (g), sec. 3 (af).

[96] Id., sec. 3 (q).

[97] Id., sec. 3 (j).

[98] Id., sec. 3 (az).

[99] Id., sec. 33.

[100] Id., sec. 72.

[101] Id., sec. 73.

[102] Id., sec. 74.

[103] Id., sec. 75.

[104] Id., sec. 76.

[105] Id., sec. 35 (h).

[106] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 195.

[107] *Vide*: Pres. Decree No. 87, sec. 8 (c), (e) and (f).

[108] The DENR Secretary is also empowered to charge fines for late or non-submission of reports under Section 111 of the Mining Act, but the majority opinion either overlooked this provision or considered it too insubstantial to be able to compel enforcement of the law and its implementing rules.

[109] Section 108 provides a criminal penalty for violation of the terms and conditions of an environmental compliance certificate, but this remedy is judicial and not administrative. In any event, what is the likelihood of a Philippine court acquiring criminal jurisdiction over the person of the foreign corporate officers of the foreign

FTAA contractor who may be responsible for such violations?

[110] CONST., art. XII, sec. 20.

[111] Rep. Act. No. 7653 (1993), sec. 29.

[112] Id. sec. 30

[113] Id. sec. 37.

[114] CONST. art. XIII, sec. 3.

[115] Pres. Decree No. 442 as amended.

[116] Id. art. 128 (b).

[117] Id. art. 263 (g).

[118] Rep. Act No. 8424 (1997), sec. 115.

[119] Id. sec. 206.

[120] Id. sec. 207.

[121] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 196.

[122] Vide: Pres. Decree No. 87, sec. 8 (k) and sec. 9 (e).

[123] National Power Corporation v. Province of Albay, 186 SCRA 198, 207 (1990).

[124] Progressive Development Corporation v. Quezon City, 172 SCRA 629, 635 (1989).

[125] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 236.

[126] Guidelines Establishing the Fiscal Regime of financial or Technical Assistance Agreements.

[127] Section 3 (g) (1) of DAO 99-56 provides:

Section 3. Fiscal Regime of a Financial or Technical Assistance Agreement

x x x

g. Government Share.

1. Basic Government Share. The following taxes, fees and other such charges shall constitute the Basic Government Share:

- a) Excise tax on minerals;
- b) Contractor's income tax;
- c) Customs duties and fees on imported capital equipment;
- d) Value added tax on the purchase of imported equipment, goods and services;
- e) Withholding tax on interest payments on foreign loans;
- f) Withholding tax on dividends to foreign stockholders;
- g) Royalties due the Government on Mineral Reservations;

- h) Documentary stamps taxes;
- i) Capital gains tax;
- j) Local business tax;
- k) Real property tax;
- l) Community tax;
- m) Occupation fees;
- n) All other local Government taxes, fees and imposts as of the effective date of the FTAA;
- o) Special Allowance, as defined in the Mining Act; and
- p) Royalty payments to any Indigenous People(s)/Indigenous Cultural Community (ies).

From the Effective Date, the foregoing taxes, fees and other such charges constituting the Basic Government Share, if applicable, shall be paid by the Contractor: Provided, That above items (a) to (g) shall not be collected from the Contractor upon the date of approval of the Mining Project Feasibility Study up to the end of the Recovery Period. Any taxes, fees, royalties, allowances or other imposts, which should not be collected by the Government, but nevertheless paid by the Contractor and are not refunded by the Government before the end of the next taxable year, shall be included in the Government Share in the next taxable year. Any Value-Added Tax refunded or credited shall not form part of Government Share.

[128] Section 3 (g) (2) of DAO 99-56 provides:

2. Additional Government Share. Prior to the commencement of Development and Construction Phase, the Contractor may select one of the formula for calculating the Additional Government Share set out below which the Contractor wishes to apply to all of its Mining Operations and notify the Government in writing of that selection. Upon the issuance of such notice, the formula so selected shall thereafter apply to all of the Contractor's Mining Operations.

x x x

[129] Section 3 (g) (2) (1) of DAO 99-56 provides:

a) Fifty-Fifty Sharing of the Cumulative Present Value of Cash Flows. The Government shall collect an Additional Government Share from the Contractor equivalent to an amount which when aggregated with the cumulative present value of Government Share during the previous Contract Years and the Basic Government Share for the current Contract Year is equivalent to a minimum of fifty percent (50%) of the Cumulative Present Value of Project Cash Flow before financing for the current Contract Year, as defined below.

Computation. The computation of the Additional Government Share shall commence immediately after the Recovery Period. If the computation covers a period of less than one year, the Additional Government Share corresponding to this period shall be computed pro-rata wherein the Additional Government Share during the year shall be multiplied by the fraction of the year after recovery. The Additional Government Share shall be computed as follows:

Project Cash Flow Before Financing and Tax ("CF") for a taxable year shall be calculated as follows:

$$CF = GO - DE + I - PE - OC$$

Cumulative Present Value of Project Cash Flow ("CP") shall be the sum of the present value of the cumulative present value of project cash flow during the previous year ($CP_{i-1} \times 1.10$) and the Project Cash Flow Before Financing and Tax for the current year ("CF"), and shall be calculated as follows:

$$CP = (CP_{i-1} \times 1.10) + CF$$

Cumulative Present Value of Total Government Share Before Additional Government Share ("CGB") shall be the sum of: the present value of the cumulative present value of the Total Government Share during the previous year ($CGA_{i-1} \times 1.10$), and the Basic Government Share for the current year (BGS), and shall be calculated as follows:

$$CGB = (CGA_{i-1} \times 1.10) + BGS$$

The Additional Government Share ("AGS") shall be:

If: $CGB > CP \times 0.5$ then $AGS = 0$

If: $CGB < CP \times 0.5$ then $AGS = [CP \times 0.5] - CGB$

Cumulative Present Value of Total Government Share (CGA):

$$CGA = CGB + AGS$$

where:

BGS = Basic Government Share shall have the meaning as described in Clause 3-g-1 hereof;

GO = Gross Output shall have the same meaning as defined in the National Internal Revenue Code;

DE = Deductible Expenses shall have the meaning as described in Clause 3-c hereof;

I = Interest payments on loans included in the Deductible Expenses shall be equivalent to those referred to in Clause 3-c-8 hereof;

PE = unrecovered Pre-Operating Expenses;

OC = On-going Capital Expenditures as defined in Clause 3-c hereof;

CP_{i-1} = cumulative present value of project cash flow during the previous year; and

CGA_{i-1} = cumulative present value of total Government Share during the previous year.

[130] Section 3 (g) (2) of DAO 99-56 provides:

b) Profit Related Additional Government Share. The Government shall collect an Additional Government Share from the Contractor based on twenty-five percent (25%) of the additional profits once the arithmetic average of the ratio of Net Income After Tax To Gross Output as defined in the National Internal Revenue Code, for the current and previous taxable years is 0.40 or higher rounded off to the nearest two decimal places.

Computation. The computation of the Additional Government Share from additional profit shall commence immediately after the Recovery Period. If the computation covers a period of less than a year, the additional profit corresponding to this period shall be computed pro-rata wherein the total additional profit during the year shall be multiplied by the fraction of the year after recovery.

The additional profit shall be derived from the following formula:

If the computed average ratio as derived from above is less than 0.40:

Additional Profit = 0

If the computed average ratio is 0.40 or higher:

[NIAT-(0.40 x GO)]

Additional Profit = -----

(1 - ITR)

The Additional Government Share from the additional profit is computed using the following formula:

Additional Government Share

From Additional Profit = 25% x Additional Profit

where:

NIAT = Net Income After Tax for the particular taxable year under consideration.

GO = Gross Output from operations during the same taxable year.

ITR = Income Tax Rate applied by the Bureau of Internal Revenue in computing the income tax of the Contractor during the taxable year.

[131] Section 3 (g) (2) (3) of DAO 99-56 provides:

c) Additional Share Based from the Cumulative Net Mining Revenue. The Additional Government Share for a given taxable year shall be calculated as follows:

(i) Fifty percent (50%) of cumulative Net Mining Revenue from the end of the Recovery Period to the end of that taxable year;

LESS

(ii) Cumulative Basic Government Share for that period as calculated under Clause 3-g-1 hereof;

AND LESS (if applicable)

(iii) Cumulative Additional Government Share in respect of the period commencing at the end of the Recovery Period and expiring at the end of the taxable year immediately preceding the taxable year in question.

“Net Mining Revenue” means the Gross Output from Mining Operations during a Calendar year less Deductible Expenses, plus Government taxes, duties and fees included as part of Deductible Expenses.

[132] Republic Act No. 8424 as amended.

[133] The 40% equity of the foreign stockholders in a 60-40 Filipino corporation would translate to a 24% (40% x 60%) beneficial interest in the corporation undertaking the MPSA.

[134] Of course, the 60% Filipino equity in a 60-40 Filipino corporation could also be held by another 60-40 Filipino corporation or corporations, further diluting actual Filipino beneficial interest and increasing foreign beneficial interest.

[135] As noted in the Decision (La Bugal-B'Laan Tribal Association, Inc., supra at 212-213), unlike E.O. 279,

the Mining Act does not define “large-scale” in terms of capital expenditure although this was evidently the way it was understood by the 1986 Constitutional Commission. (vide: III RECORDS OF THE CONSTITUTIONAL COMMISSION 255).

In fact, the Mining Act does not categorically define “large-scale” at all. However, a comparison of the maximum areas for exploration in Section 22 for Exploration Permits (400 meridional blocks onshore for corporations), Section 28 for Mineral Agreements (200 meridional blocks for corporations) and Section 34 for FTAAAs (1,000 meridional blocks for corporations) indicates that “large-scale” under the Mining Act refers to the size of the contract area.

It is only Section 56 of DAO 40-96 that any reference to the US\$50,000,000.00 minimum capital investment prescribed by E.O. 279 is made.

[136] Applying the formula in Section 56 (a) of DAO 40-96 and assuming: (1) the foreign FTAA contractor began with the maximum contract area of 1,000 meridional blocks onshore, (2) an exploration period of 6 years and (3) compliance with Section 60 of DAO 40-96 on relinquishment of areas covered by FTAA.

The figure for an exploration period of 10 years is US\$ 4.8 million. The figure for a 20-year exploration period is US\$ 7.7 million.

One meridional block is equivalent to 81 hectares. (Website of the Philippine Mines and Geosciences Bureau www.mgb.gov.ph/eprimer.htm)

[137] SECTION 23. Rights and Obligations of the Permittee. — An exploration permit shall grant to the permittee, his heirs or successors-in-interest, the right to enter, occupy and explore the area: Provided, That if private or other parties are affected, the permittee shall first discuss with the said parties the extent, necessity, and manner of his entry, occupation and exploration and in case of disagreement, a panel of arbitrators shall resolve the conflict or disagreement.

The permittee shall undertake an exploration work on the area as specified by its permit based on an approved work program.

Any expenditure in excess of the yearly budget of the approved work program may be carried forward and credited to the succeeding years covering the duration of the permit. The Secretary, through the Director, shall promulgate rules and regulations governing the terms and conditions of the permit.

The permittee may apply for a mineral production sharing agreement, joint venture agreement, co-production agreement or financial or technical assistance agreement over the permit area, which application shall be granted if the permittee meets the necessary qualifications and the terms and conditions of any such agreement: Provided, That the exploration period covered by the exploration permit shall be included as part of the exploration period of the mineral agreement or financial or technical assistance agreement. (*Italics supplied*)

[138] SECTION 24. Declaration of Mining Project Feasibility. — A holder of an exploration permit who determines the commercial viability of a project covering a mining area may, within the term of the permit, file with the Bureau a declaration of mining project feasibility accompanied by a work program for development. The approval of the mining project feasibility and compliance with other requirements provided in this Act shall entitle the holder to an exclusive right to a mineral production sharing agreement or other mineral agreements or financial or technical assistance agreement. (*Italics supplied*)

[139] Sections 17-30 of DAO 40-96 on exploration permits contains absolutely no minimum requirement for ground expenditures, much less the minimum required investment of US\$ 50,000,000.00 for development,

infrastructure and utilization.

[140] Vide: note 20.

[141] Memorandum for WMCP, p. 2.

[142] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 176.

[143] 287 SCRA 465, 474 (1998). The Constitution prohibits non-Filipinos from acquiring or holding title to private lands or to lands of the public domain, except only by way of legal succession.

[144] *Id.* at 475.

[145] In 1997 Bre-X, a large Canadian mining firm, was found to have inflated the prospective amount of gold deposits in its Busang, Indonesia mining operation by "salting" and tampering with gold samples taken from the site. After news of the gold salting scam had broken out, Bre-X's share price fell by almost 90%. [W. Symonds & M. Shari, 'After Bre-X, Gold's Glow is Gone' Available at <http://www.businessweek.com/1997/15/b352267.htm>]

[146] In January, 2004, 20% of Royal Dutch/Shell's reserves of oil and gas were reclassified from "proven" to merely "probable" or other even less certain categories. As a result, Shell's share prices fell by 7% ['Shell shock' Available at http://www.economist.co.uk/business/PrinterFriendly.cfm?Story_ID=2354469]

[147] Memorandum for Petitioners at 14.

[148] Memorandum for WMCP at 67.

[149] US\$ 4,000,000.00 or approximately P224,000,000.00.

[150] Memorandum for WMCP at 16.

[151] *Id.* at 67.

[152] At the prevailing rate of exchange, the US\$10,000,000.00 selling price of WMC's shares in WMCP is worth approximately P560,000,000.00.

[153] TSN at 155-156; Memorandum for WMCP at 60-61.

[154] La Bugal-B'Laan Tribal Association, Inc. v. Ramos, *supra* at 176.

[155] *Id.* at 243-245.

[156] Memorandum for WMCP at 5.

[157] CIVIL CODE, art. 1350.

[158] Section 8.3 provides:

If the Secretary gives a Rejection Notice the Parties shall promptly meet and endeavour to agree on amendments to the Work Programme or budget. If the Secretary and the Contractor fail to agree on the proposed revision within 30 days from delivery of the Rejection Notice then the Work Programme or Budget or variation thereof proposed by the Contractor shall be deemed approved, so as not to unnecessarily delay the performance of this Agreement. (*Italics supplied; Rollo, p. 92-93.*)

[159] CIVIL CODE, art. 1409 (1).

[160] *Id.* art. 1352.

[161] Id. art. 1409.

[162] R.A. No. 7942, sec. 33.

[163] Id., sec. 35 (e).

[164] 3.3. This Agreement shall be renewed by the Government for a further period of twenty-five (25) years under the same terms and conditions provided that the Contractor lodges a request for renewal with the Government not less than sixty (60) days prior to the expiry of the initial terms of this Agreement and provided that the Contractor is not in breach of any of the requirements of this Agreement.

[165] http://en.wikipedia.org/wiki/Open-pit_mining htm.

[166] Webster's Third New International Dictionary 1579 (1976).

[167] <http://riot.ieor.berkeley.edu/riot/Applications/OPM/OPMDetails.html>.

[168] http://www.mine-engineer.com/mining/open_pit.htm; http://en.wikipedia.org/wiki/Open-pit_mining htm.

[169] http://www.mcq.org/roc/en/exploitation/exploitation_2_1_2.html.

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