Chapter 15

La Bugal-B'laan Tribal Association v. Ramos: The Constitutionality of the Mining Law

In the previous Chapter entitled "Invest in the Whole Country, Not Just in the Mining Industry," I discussed from the lay person's perspective the reasons for and the consequences of the Supreme Court's Decision upholding the constitutionality of the Mining Law. After all, the text of that chapter was taken from my speech delivered during the International Mining Summit a few weeks after the Decision had come out. In the present chapter, I shall summarize the comprehensive Court judgments more thoroughly, especially their strictly constitutional and legal aspects.

Factual Backdrop

On July 25, 1987, then President Corazon C. Aquino issued Executive Order (EO) No. 279, authorizing the secretary of the Department of Environment and Natural Resources (DENR) to "accept, consider and evaluate proposals from foreign-owned corporations or foreign investors for contracts or agreements involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, which, upon appropriate recommendation of the Secretary, the President may execute with the foreign proponent."

On March 3, 1995, then President Fidel V. Ramos approved Republic Act (RA) No. 7942 to "govern the exploration, development, utilization and processing of all mineral resources."[1] Its Implementing Rules and Regulations were embodied in DENR

Administrative Order (DAO) No. 96-40, s. 1996,[2] issued on December 20, 1996, by then DENR Secretary Victor O. Ramos.

On March 30, 1995, the President entered into a financial and technical assistance agreement (FTAA) with Western Mining Corporation Philippines, Inc. (WMCP) covering 99,387 hectares of land in South Cotabato, Sultan Kudarat, Davao del Sur and North Cotabato.

On January 10, 1997, counsels for petitioners sent a letter to the DENR secretary, demanding that the Department stop the implementation of RA 7942 and DAO No. 96-40. Subsequently, they filed before the Supreme Court a Petition for prohibition and mandamus, with a prayer for a temporary restraining order. They alleged that RA 7942 was unconstitutional, because it allowed fully foreign-owned corporations to explore, develop and exploit mineral resources in a manner contrary to Section 2 (paragraph 4) of Article XII of the Constitution. DENR DAO 96-40 allegedly allowed the taking of private property without a determination of public use and just compensation; the enjoyment of the nation's wealth by foreign citizens and fully foreign-owned corporations, contrary to the Constitution; priority to fully foreign-owned corporations in the exploration, development and utilization of mineral resources; and the inequitable sharing of wealth, contrary to Section 1 (paragraph 1) and Section 2 (paragraph 4) of Article XII of the Constitution. Petitioners also claimed that the FTAA between the President of the Republic of the Philippines and WMCP was illegal and unconstitutional.

WMCP subsequently filed before the Supreme Court a Manifestation, alleging that on January 23, 2001, WMC Resources International Pty., Ltd. (WMC),[3] had sold all its shares in

WMCP to Sagittarius Mines, Inc. ("Sagittarius"), a corporation organized under Philippine laws, at least 60 percent of the capital of which was owned by Filipinos and/or Filipino-owned corporations; and about 40 percent, by Indophil Resources NL, an Australian company. WMCP further claimed that, by the sale and transfer of shares, it had "ceased to be connected in any way with WMC." Consequently, in an Order dated December 18, 2001, the DENR secretary approved the transfer -- from WMCP to Sagittarius -- as well as the registration, of the subject FTAA.

The Original Decision

Of several grounds raised by petitioners, only the first and the last were delved into by the Supreme Court in its original Decision[4] promulgated on January 27, 2004.[5]

The Constitutional Provision Crucial to the Case

At the core of the case is the proper interpretation of Section 2 of Article XII of the Constitution, which reads as follows:

> "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."

The Substantive Issues

RA 7942 Provisions on Service Contracts Unconstitutional

Prior to tackling the substantive issues, the original Decision initially traced the historical evolution of the above provision -- from the Spanish regime, which espoused the Regalian doctrine; to the American Occupation, which featured the concession system; to the 1935 Constitution, which saw the nationalization of natural resources; to the Petroleum Act of 1949, which reverted to the concession system; and, finally, to Presidential Decree (PD) No. 87 and the 1973 Constitution, which allowed the service contract system. While insightful and informative, this historical presentation shall no longer be summarized here, for brevity's sake.

The original Decision dissected the earlier-quoted constitutional provision as follows:

1. The 1987 Constitution retained the Regalian doctrine, under which all lands of the public domain and all natural resources were deemed owned by the State.[6]

2. Like the 1935 and the 1973 Constitutions, the 1987 Constitution prohibited the alienation of natural resources, except agricultural lands.[7]

3. The third sentence of the first paragraph was new: "The exploration, development and utilization of natural resources shall be under the **full control and supervision of the State**." The constitutional policy of the State's "full control and supervision" over natural resources proceeded from the concept of *jura regalia*, as well as a recognition of the importance of the country's natural resources, not only for national economic development, but also for security and national defense.[8] Under this provision, the State assumed "a more dynamic role" in the exploration, development and utilization of natural resources.[9]

4. Conspicuously absent in Section 2 was the proviso in the 1935 and the 1973 Constitutions authorizing the State to grant licenses, concessions, or leases for the exploration, development or utilization of natural resources. By that omission, the exploitation of inalienable lands of the public domain through those modes was no longer allowed under the 1987 Constitution.[10]

Consonant with the State's "full supervision and control" over natural resources, Section 2 offered two options. *One*, the State may directly undertake those activities by itself; or, *two*, it may enter into co-production, joint venture, or production-sharing agreements with Filipino

citizens or entities at least 60 percent of whose capital was owned by the citizens.

A *third* option was found in the third paragraph of the same section: "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."

5. A *fourth* option, under the fourth and the fifth paragraphs of Section 2, allowed the participation of foreign-owned corporations in the exploration, development, and utilization of natural resources, subject to certain limitations or conditions:

First, only the President, on behalf of the State, may enter into these agreements, and only with corporations. By contrast, under the 1973 Constitution, a Filipino citizen, corporation or association may enter into a service contract with a "foreign person or entity."

Second, only *large-scale* exploration, development, and utilization was allowed. The term "large-scale usually referred to very capital-intensive activities."[11]

Third, the natural resources subject of the activities were restricted to minerals, petroleum and other mineral oils, the intent being to limit contracts to those areas where Filipino capital may not be sufficient.[12]

Fourth, they must be in accordance with the terms and conditions provided by law.

Fifth, they must be based on real contributions to the economic growth and general welfare of the country.

Sixth, the agreements must contain rudimentary stipulations for the promotion,

development and use of local scientific and technical resources.

Seventh, the President shall notify Congress of every financial or technical assistance agreement entered into within thirty days from its execution.

Finally, while the 1973 Constitution referred to "service contracts for financial, technical, management, or other forms of assistance," the 1987 Constitution provided for "agreements . . . involving either financial or technical assistance." The terms "service contracts" and "management or other forms of assistance," found in the earlier Constitution, were omitted.

In the original Decision, the Supreme Court held that, in accordance with the text of Section 2 of Article XII of the Constitution, FTAAs should be limited to **technical** *or* **financial** assistance only. They did not extend to the foreign-owned corporation's management and operation of the mining activity. Quoting at length various exchanges between members of the 1987 Constitutional Commission and the working group behind a UP Law draft, the Court held that foreign contractors' management or operation of mining activities -- the primary feature of service contracts under the 1973 Constitution -- was precisely the evil that the drafters of the 1987 Charter had sought to eradicate.

The constitutional provision allowing the President to enter into FTAAs with foreign-owned corporations is an exception to the rule that participation in the nation's natural resources is exclusive to Filipinos. Accordingly, such provision must be construed strictly.

The Court assumed "that the foreign contractor manages the mineral resources, just like the foreign contractor in a service contract," based on the definitions of exploration,[13]

development,[14] utilization,[15] mineral processing,[16] and mining operation;[17] as well as the provision that an FTAA contractor warrants that it "has or has access to all the financing, **managerial**, and technical expertise . . ."[18] provided under RA 7942. According to the original Decision, the latter proviso "suggests that an FTAA contractor is bound to provide some **management** assistance -- a form of assistance that has been eliminated and, therefore, proscribed by the present Charter."

The *ponencia* concluded that "[b]y allowing foreign contractors to manage or operate all the aspects of the mining operation, the above-cited provisions of RA 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." The Decision thus struck down the following provisions of the law:

> "(1) The proviso in Section 3(aq), which defines 'qualified person,' to wit:
>
> '*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.'
>
> "(2) Section 23, which specifies the rights and obligations of an exploration permittee, insofar as said section applies to a financial or technical assistance agreement,
>
> "(3) Section 33, which prescribes the eligibility of a contractor in a financial or technical assistance agreement;
>
> "(4) Section 35, which enumerates the terms and conditions for every financial or technical assistance agreement;
>
> "(5) Section 39, which allows the contractor in a financial and technical assistance agreement to convert the same into a mineral production-sharing agreement;
>
> "(6) Section 56, which authorizes the issuance of a mineral processing permit to a contractor in a financial and technical assistance agreement;
>
> "The following provisions of the same Act are likewise void as they are dependent on the foregoing provisions and cannot stand on their own:

"(1) Section 3(g), which defines the term 'contractor,' insofar as it applies to a financial or technical assistance agreement.

"Section 34, which prescribes the maximum contract area in a financial or technical assistance agreements;

"Section 36, which allows negotiations for financial or technical assistance agreements;

"Section 37, which prescribes the procedure for filing and evaluation of financial or technical assistance agreement proposals;

"Section 38, which limits the term of financial or technical assistance agreements;

"Section 40, which allows the assignment or transfer of financial or technical assistance agreements;

"Section 41, which allows the withdrawal of the contractor in an FTAA;

"The second and third paragraphs of Section 81, which provide for the Government's share in a financial and technical assistance agreement; and

"Section 90, which provides for incentives to contractors in FTAAs insofar as it applies to said contractors." [Quoted provisions of the law omitted.]

The WMCP FTAA Unconstitutional

For being a constitutionally prohibited service contract, the WMCP FTAA was also nullified by the Court. The following stipulations supposedly granted WMCP beneficial ownership of natural resources that properly belonged to the State and were intended for the benefit of its citizens:

1. Section 1.3, granting 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"

2. Provisions giving WMCP 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 utilised 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 x x x 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 x x x 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."[19]

3. Section 11, stating that the materials, equipment, plant and other installations placed in the Contract Area would remain the property of WMCP, which may remove those items within twelve months from the termination of the FTAA

4. Section 1.2, charging WMCP with the provision of "[all] financing, technology, management and personnel necessary for the Mining Operations"; and "all materials, labour, equipment and other installations that may be required for carrying on all Mining Operations"; and, in turn, allowing WMCP to make expansions, improvements and replacements of the mining facilities, as well as to add any new facilities it would consider necessary for the mining operations[20]

The Court, however, held that the President may enter into an agreement involving both technical *and* financial assistance with just one foreign corporation. It would supposedly be absurd to force the government to contract with two foreign corporations over the same mining area -- one corporation for financial assistance and the other for technical assistance -- even if one had the capability to provide both technical and financial assistance.

The original Decision disposed as follows:

> **"WHEREFORE**, the petition is *GRANTED*. The Court hereby declares unconstitutional and void:
>
> (1) The following provisions of Republic Act No. 7942:
> (a) The proviso in Section 3(aq),
> (b) Section 23,
> (c) Section 33 to 41,
> (d) Section 56,
> (e) The second and third paragraphs of Section 81, and
> (f) Section 90.
>
> (2) All provisions of Department of Environment and Natural Resources Administrative Order 96-40, s. 1996 which are not in conformity with this Decision, and
>
> (3) The Financial and Technical Assistance Agreement between the Government of the Republic of the Philippines and WMC Philippines, Inc."

The Separate Opinions

The Vitug Separate Opinion

Justice Jose C. Vitug[21] joined the majority in invalidating the following portions of RA 7942: (a) Section 3(aq), which considered a foreign-owned corporation qualified not only to enter into financial or technical assistance agreements, but also to obtain an exploration or mineral processing permit; b) Section 35(g), (l), (m), which stated the rights and obligations of

a foreign-owned corporation pursuant to its "mining operations"; and c) Section 56, which provided that foreign-owned or controlled corporations were eligible to be granted a mineral processing permit.

He dissented, however, insofar as the original Decision nullified the WMCP FTAA and held that the use of the terms "agreements x x x involving either technical or financial assistance" in the 1987 Constitution -- in lieu of "service contracts" found in the 1973 Charter -- reflected the intention of the framers to disallow service contracts with foreign entities for the exploration and exploitation of the country's natural resources.

Quoting exchanges among the constitutional commissioners, he concluded that the framers of the Charter had not intended to limit the contracts that the President may enter into to mere "agreements for financial and technical assistance." Instead, in order to uphold and strengthen the national policy of preserving and developing the country's natural resources exclusively for the Filipino people, they provided for safeguards to prevent the execution of service contracts of the old regime, but not of service contracts per se.

My Dissenting Opinion

I initially urged the Court to dismiss the Petition on the ground of mootness; a decision on the constitutionality issue should await a *live* case before the Court.

The nullity of the assailed FTAA was unarguably premised upon the contractor being a **foreign** corporation. All the shares of WMC in WMCP, however, had been sold to Sagittarius Mines, Inc., in which 60 percent of the equity was Filipino-owned. The assailed FTAA had

likewise been transferred from WMCP to Sagittarius. The conveyance of the FTAA to a Filipino corporation was like the sale of land to a foreigner who subsequently acquires Filipino citizenship, or who later resells the property to a Filipino citizen. The conveyance would be validated, as the property in question would no longer be owned by a disqualified vendee.[22]

There being no more justiciable controversy, the plea to nullify the Mining Law became a virtual petition for declaratory relief, over which the Supreme Court had no original jurisdiction.[23]

On the merits, I also urged dismissal of the Petition. The drafters' choice and use of the phrase "agreements x x x **involving** x x x technical or financial assistance" did not absolutely indicate the intent to exclude other modes of assistance. Rather, the phrase signified the possibility of the inclusion of other activities, provided they bore some *reasonable relationship to and compatibility with* financial or technical assistance.

The present Constitution **still recognizes and allows service contracts**, albeit *subject to several restrictions and modifications aimed at avoiding the pitfalls of the past,* as shown by excerpts from the deliberations of the Constitutional Commission (ConCom), in which the members discussed "technical or financial agreements" in the same breath as "service contracts" and used the terms interchangeably. It would appear from their lengthy discussions *when they were crafting and polishing the provisions dealing with financial and/or technical assistance agreements* that they *actually had in mind the* **Marcos-era service contracts** *that they were familiar with,* but which they duly modified and restricted so as to prevent abuses. *These provisions ultimately became the fourth and the fifth paragraphs of Section 2 of Article*

XII of the 1987 Constitution.

Tantamount to closing one's eyes to reality is the insistence that the term "agreements involving technical or financial assistance" refers only to *purely* technical or financial assistance to be rendered to the State by a foreign corporation (and must perforce exclude management and other forms of assistance). Nowadays, securing the kind of *financial assistance* required by large-scale explorations, which involve *hundreds of millions of dollars,* is not just a matter of signing a simple promissory note in favor of a lender. *Prudent lending practices necessitate a certain degree of involvement in the borrower's management process.*

Thus, I proposed the holding of an oral argument to include the subject of international lending practices and how they would impact on our constitutional restrictions, so that the Court would find out what kinds of FTAA provisions were realistic vis-à-vis international standards and our constitutional protection. ***If this Court closed its doors to those international realities and unilaterally set up its own concept of strict technical and financial assistance, then it might unwittingly make the country a virtual hermit -- an economic isolationist -- in the real world of finance.***

Finally, I believed that the ConCom did not mean to tie the hands of the President and restrict the latter only to agreements on rigid financial and technical assistance and *nothing else.* The commissioners fully realized that their work would have to withstand the test of time; that the Charter, though crafted with the wisdom born of past experiences and lessons painfully learned, would have *to be a living document that would answer the needs of the nation well into the future.* Thus, their unerring emphasis on flexibility and adaptability.[24]

The Subsequent Resolution
Reversing the Original Decision

Respondents filed separate Motions for Reconsideration, after which the Court en banc called the case for Oral Argument on the following issues:

1. Had the case been rendered moot by the sale of the WMC shares in WMCP to Sagittarius; and by the subsequent transfer from WMCP to Sagittarius, as well as the registration, of the FTAA?

2. Assuming that the case had 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 was the proper interpretation of the phrase "Agreements Involving Either Technical or Financial Assistance" contained in Section 2 (paragraph 4) of Article XII of the Constitution?

Non-Interference Policy

In reversing its original Decision, the Court[25] emphasized the doctrine that the judiciary should not inordinately interfere in the exercise of the presidential power of control granted by the Constitution. Specifically, Article XII authorized the Chief Executive to "enter into agreements with foreign owned corporations" over the exploration, development and utilization of our natural resources. 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." Only if grave abuse of discretion was committed in this regard by the President and/or Congress may the courts, in a *proper* case, exercise their residual duty under Article VIII.[26]

Thus, the Resolution I penned on behalf of the Court enunciated this all-embracing judicial policy:

> "The Constitution should be read in broad, life-giving strokes. It should not be used to strangulate 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."[27]

To recall, the original Decision declared certain provisions of RA 7942 and its implementing regulations unconstitutional. It also nullified the entire FTAA executed between the government and WMCP, mainly on the finding that FTAAs were similar to **service contracts that were allegedly prohibited by the 1987 Constitution**.

Case Rendered Moot
by the Transfer of the FTAA
to a Filipino Corporation

As I stated in my Dissenting Opinion on the original Decision, the crux of the issue of mootness was the fact that WMCP, *at the time it entered into the FTAA,* was wholly foreign-owned. It was no longer possible for the Court to declare the Agreement unconstitutional, inasmuch as 60 percent of the shares of WMCP (now Sagittarius) had been transferred to a Filipino-owned corporation, and the FTAA would henceforth be implemented by a Filipino

entity. The objective of the Constitution -- to keep the exploration, development and utilization of our natural resources in Filipino hands -- had been served. Nevertheless, petitioners asserted that a Filipino corporation was not allowed by the Constitution to enter into an FTAA with the government. Hence, the matter had to be ruled on.

A textual analysis of the first paragraph of Section 2[28] of Article XII did not support petitioners' argument. Nowhere in the provision was there any express limitation or restriction barring Filipino corporations from entering into FTAAs with the government.

Immediate Resolution of Constitutionality Issue Dictated by Public Interest

In view of the mootness of the case, the Petition should have been dismissed. The Supreme Court, however, recognized *"the exceptional character of the situation*[29] *and the paramount public interest involved, as well as the necessity to put an end to the uncertainties plaguing the mining industry and the affected communities as a result of doubts cast upon the constitutionality of the Mining Act, the subject and future FTAAs, and the need to avert a multiplicity of suits."* Paraphrasing *Gonzales v. Commission on Elections,*[30] it was evident that strong reasons of public policy demanded that the constitutionality issue be resolved then.

Proper Interpretation of Section 2 (Paragraph 4) of Article XII of the Constitution

The main issue in this case was whether paragraph 4 of Section 2 of Article XII of the

Constitution was contravened by RA 7942 and DAO 96-40, not whether it was violated by specific acts implementing the last two mentioned. For ease of reference and in consonance with *verba legis*, the Resolution stratified the entire provision as follows:

1. All natural resources are owned by the State and, except for agricultural lands, they cannot be alienated.
2. The exploration, development and utilization (EDU) of natural resources shall be under the full control and supervision of the State.
3. 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 was owned by them.
4. *Small-scale* utilization of natural resources may be allowed by law in favor of Filipino citizens.
5. For the *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."

The drafters' 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 from foreign corporations. The use of the word "involving" signifies the **possibility of the inclusion of other forms of assistance or activities** having to do with, related to, or compatible with

financial or technical assistance.[31]

Restricting foreign companies to the government only financial or technical assistance necessarily implies that the State itself is the one *directly* and *solely* undertaking the large-scale EDU of a mineral resource. After a reality check, however, one will have to admit the implausibility of the State's direct undertaking of a *large-scale* EDU of minerals, petroleum and other mineral oils. This endeavor entails not only humongous capital requirements -- which the government does not have -- but also the attendant risk of never finding and developing economically viable quantities of minerals, petroleum and other mineral oils.[32]

The drafters' inclusion of the clause "technical or financial assistance" recognized the fact that foreign business entities and multinational corporations were the ones with the resources and know-how to provide the technical and/or financial assistance required for a large-scale EDU of these resources. They necessarily gave implied assent to everything that the Agreements necessarily entailed, or that could reasonably be deemed necessary to make them tenable and effective. Among these conditions were management of 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 undertaking would remain firmly in the State.

Finally, there was not even any transitory provision that would confirm the theory that the omission of the term "service contract" from the 1987 Constitution signaled the demise of service contracts, many of which were then still in force and effect. On the contrary, pertinent portions of the deliberations of the members of the Constitutional Commission conclusively

showed that they had discussed "service contracts" in the same breath as "agreements involving either technical or financial assistance" and had used the terms interchangeably.[33]

The final version is that the service contracts may be entered into *only with respect to minerals, petroleum and other mineral oils,* subject to several safeguards.

Concept of "Control"

Though reversing its Decision of January 27, 2004, the Court nonetheless pointed out that "full control and supervision" could not be taken literally to mean that the State controlled and supervised *everything involved -- down to the minutest details* -- and made *all decisions* required, in the mining operations. This strained concept of control and supervision 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.

The concept of *control* under Section 2 of Article XII must be taken to mean less than dictatorial and all-encompassing control, but nevertheless sufficient for 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 the government to control the conduct of affairs of the enterprises and restrain activities deemed not desirable or beneficial.

As provided by RA 7942, certain government agencies are empowered to approve or

disapprove the various work programs and the corresponding minimum expenditure commitments for each of the exploration, development and utilization phases of the mining enterprise. The State may 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 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.

Foreigners Allowed to Hold Exploration Permits

The Court also upheld the constitutionality of Section 3(aq) of RA 7942, which would allow a foreign contractor to apply for and hold an *exploration permit*. The permit would merely grant to a qualified person the right to *conduct exploration* of all minerals in specified areas.[34] It *would not amount to an authorization to extract and carry off the mineral resources discovered.*

The permit grantee may apply for a mineral production sharing agreement (MPSA), a joint venture agreement (JVA), a co-production agreement (CPA), or an FTAA over the permit area, if the grantee meets the necessary qualifications and the terms and conditions of the agreement. The contractor will be in a position to extract minerals and earn revenues only when the mineral agreement or FTAA is granted.

A perusal of the WMCP FTAA also reveals a slew of stipulations[35] providing for State control and supervision. For instance, concerned government officials are informed beforehand of the contractor's proposed exploration activities and expenditures for each succeeding two-year period, with the right to approve or disapprove those activities and expenditures or to require changes or adjustments if deemed necessary. The power of the government, exercised through the DENR secretary, should not be taken lightly, considering that it *has absolutely no contribution to the exploration expenditures or work activities.*

In sum, the 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.**

Beneficial Ownership of Mineral Resources

One of the main reasons certain provisions of RA 7942 were previously struck down was the finding, mentioned in the Decision, that beneficial ownership of the mineral resources had been conveyed to the contractor.

An assiduous examination of the WMCP FTAA, however, uncovers no indication that it confers upon WMCP the ownership -- beneficial or otherwise -- of the mining property to be developed, the minerals to be produced, or the proceeds of their sale. Similarly, neither RA 7942 nor DAO 99-56[36] can be said to convey beneficial ownership of any mineral resource or

product to any foreign FTAA contractor.

On the contrary, DAO 99-56 aims to ensure an equitable sharing of 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. Specifically, the government's expectation is, *inter alia,* the taxes and fees normally paid by a mining enterprise. On the other hand, the government grants the FTAA contractor certain fiscal and non-fiscal incentives to help support the latter's cash flow during the most critical phase (cost recovery) and to make the Philippines competitive with other mineral-producing countries. After the contractor shall have recovered its initial investment, it will pay the basic share of the government, plus an additional share based on the options and formulas set forth in DAO 99-56.

The **basic government share**[37] is comprised of direct taxes, fees and royalties, as well as other payments made by the contractor during the term of the FTAA.

The **additional government share** may be an amount that will (a) result in a 50-50 sharing of the cumulative present value of the *cash flows of the enterprise*; (b) be equivalent to 25 percent of the *additional or excess profits of the enterprise*, reckoned against a benchmark return on investments; or (c) result in a 50-50 sharing of the cumulative *net mining revenue,* from the end of the recovery period up to the taxable year in question. In computing the additional share, the contractor is required to select one of three options it will apply to all of its mining operations.

Unconstitutional Provisions of the WMCP FTAA

Section 7.7 apparently gives the government a 60 percent share in the net mining revenues of WMCP from the commencement of commercial production. Section 7.9, however, deprives the government of a part or all of that share, should the WMCP's foreign shareholders who originally owned 100 percent of the equity sell 60 percent or more of the corporation's outstanding capital stock to a Filipino citizen or corporation.

Evidently, what Section 7.7 grants to the State is taken away in the next breath by Section 7.9 *without any offsetting compensation.* Thus, for the exploitation of its mineral resources, the State has in reality no vested right to receive any income from the FTAA. Such an outcome is completely unacceptable.

Since it was very much separable[38] from Section 7.7 and the rest of the WMCP FTAA, Section 7.9 was deleted (or nullified) without requiring the invalidation of the Agreement. The deletion preserved for the government its due share of the benefits.

Section 7.8(e)[39] of the FTAA was likewise declared invalid and without effect for being grossly disadvantageous and prejudicial to the government and contrary to public policy. The offending provision constituted *unjust enrichment* on the part of the contractor *at the expense of the government*, which was effectively being made to pay twice for the same item.

The FTAA More Advantageous Than Other Agreements

On the subject of beneficial interest, the Court additionally remarked that the FTAA was a more advantageous proposition for the government as compared with other agreements permitted by the Constitution. In a CPA, the government *shall provide inputs to the mining operations other than the mineral resource itself.*[40] In a JVA, a JV company is organized by the government and the contractor, with both parties having equity shares; yet, the contractor is granted the exclusive right to conduct mining operations and to extract minerals found in the area.[41] 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*; the contractor provides the necessary financing, technology, management and manpower.

In other words, in two of the three types of agreement under consideration, the *government has to ante up some risk capital for the enterprise*. This fact notwithstanding, management and control of the mining operations in all three arrangements are *in the hands of the contractor*, with the government being mainly a silent partner. These three types of agreement apply to any natural resource, without limitation and regardless of the size or magnitude of the project or operations.

In contrast, and pursuant to paragraph 4 of Section 2 of Article XII, the FTAA is limited to large-scale projects and only those 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. Correlatively, the foreign stakeholder bears up to 100 percent of the risk of loss if the project fails.

Finally, in response to the urging of the petitioners that the Court should consider whether

mining as an industry and economic activity deserved to be accorded priority, preference and government support -- as against agriculture and other activities in which Filipinos and the Philippines might have an "economic advantage" -- the Court said:

> "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*."[42]

Refutation of the Morales Dissent

In her Dissent, Justice Morales explained that the use of the disjunctive *either-or* in the phrase "agreements involving **either** technical **or** financial assistance*"* denoted restriction and limitation. As Justice Antonio T. Carpio himself pointed out during the Oral Argument, however, a restrictive and literal construction would mean that if both technical and financial assistance were required for a project, the government would have to deal with at least two different foreign contractors. Though very much qualified to provide *both* kinds of assistance, a foreign contractor would be prohibited from providing one kind as soon as it shall have agreed to provide the other. But what laudable objective or purpose could possibly be served by this strict and restrictive literal interpretation?

Citing *Oposa v. Factoran Jr.,*[43] Justice Morales further claimed that a service contract was *not a contract or property right that would merit protection by the due process clause of the Constitution,* but merely a license or privilege that may be validly revoked, rescinded or withdrawn by executive action whenever dictated by public interest or public welfare.

I replied that *Oposa* had cited *Tan v. Director of Forestry*[44] and *Ysmael v. Deputy Executive Secretary,*[45] even if both dealt specifically with **timber licenses only**. A grantee of a timber license, permit or license agreement would get to cut the timber already growing on the surface. In a logging concession, the investment of the licensee was not as substantial as that of a large-scale mining contractor. In contrast, the latter would have sunk a great deal of money (tens of millions of dollars) into the ground, so to speak, for exploration activities; the development of the mine site and infrastructure; and the actual excavation and extraction of minerals, including the extensive tunneling work to reach the ore body. Cancellation of the mining contract would utterly deprive the contractor of its investments.

One would be adopting a well-nigh confiscatory stance if one were to say that an FTAA is like a mere timber license or permit, which involves no contract or property right that would merit protection by the due process clause of the Constitution and may therefore be revoked or cancelled. At the very least, to say so would be downright dismissive of the property rights of business persons and corporate entities that have investments, operations and expenditures contributing to the general welfare of the people, the coffers of government, and the strength of the economy.

Refutation of the Carpio Dissent

Justice Antonio T. Carpio, on the other hand, assails the authority of the DENR secretary to issue DAO 99-56 and to prescribe the formulas for the State's share from the mining operations. But, undoubtedly, it is the President who is constitutionally mandated **to enter into**

FTAAs with foreign corporations. It is within the President's prerogative **to specify certain terms and conditions** of the FTAAs, such as the apportionment of the net mining revenues between the contractor and the State.

Being the Chief Executive's alter ego with respect to the control and supervision of the mining industry, the DENR secretary is necessarily clothed with the requisite authority and power to draw up guidelines applicable to FTAAs in general, as well as to specify therein the terms of the sharing of benefits from mining.

Epilogue

In closing, let me quote significant parts of the Epilogue of the Resolution:

> "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 FTAAs, particularly when it comes to the government share of financial benefits from FTAAs.* 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.
>
> x x x x x x x x x
>
> "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.
>
> x x x x x x x x x

"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 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."[46]

The Dissenting Opinions

The Carpio Dissent

Justice Antonio T. Carpio argued that Sections 3(aq), 39, 80, 81 (second paragraph), 84 (proviso) and 112 (first proviso) of RA 7942 had violated Section 2 of Article XII of the 1987 Constitution. In his view, these provisions of the law **waived the constitutional ownership rights of the State over mineral resources** and also **abdicated its constitutional duty to fully control and supervise the exploitation of mineral resources.**

The framers of the 1987 Constitution sought to avoid the adverse effects of the "license, concession or lease" system of exploitation under the 1935 and the 1973 Constitutions by using a different phraseology -- "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 State as owner of the natural resources must receive income from their exploitation. **The payment of taxes, fees and charges derived from its taxing or police power 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. Even if it enters into an FTAA with **foreign-owned corporations** for the large-scale exploitation of minerals, petroleum and other mineral oils, it must retain its fair share of the income from the exploitation. To ensure this outcome, it must exercise full control and supervision over the activity.

Hence, **all exploration permits and similar authorizations are in the name of the Philippine government,** which then authorizes the contractor to act on its behalf. 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, but subject to the State's control and supervision.[47]

Under the WMCP FTAA, however, the contractor has the exclusive right to exploit, utilize and process the mineral resources to the exclusion of third parties and even the Philippine government. The contractor also has the exclusive right to dispose of the minerals recovered through the mining operations.

The DENR secretary has actually no authority to disapprove the foreign contractor's

work program.[48] **The Philippine government is in fact compelled to agree to any request by the foreign contractor to amend the FTAA** to satisfy the conditions of WMCP's creditors.[49]

The WMCP FTAA also violates its constitutional term limits, which should be "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."[50] An FTAA binds the Philippine government to an ironclad 50-year term at the sole option of the contractor.[51]

The Morales Dissent

Madame Justice Conchita Carpio Morales, who penned the original Decision in this case, maintains that (1) the "agreements . . . involving either technical or financial assistance" contemplated by the fourth paragraph of Section 2 of Article XII of the 1987 Constitution are distinct and dissimilar from the "service contracts" under the 1973 Constitution; and (2) certain provisions of the Mining Act, its implementing rules and the WMCP FTAA unconstitutionally convey to foreign contractors beneficial ownership and control over Philippine mineral and petroleum resources.[52]

She submits further that in the exploration, development and utilization of the nation's natural resources, the government is in a position analogous to that of a trustee holding title to and managing those resources for the benefit of the Filipino people, including future generations.[53] As the trustee of the sovereign, the government has a fiduciary duty to ensure that the gains, rewards and advantages generated by the natural resources of the Philippines

accrue to the benefit of the Filipino people.

Moreover, the State must ensure that FTAAs are "based on real contributions to the **economic growth** and **general welfare** of the country."[54] These contributions must be *sufficient to offset the corresponding loss of resources to future generations*. **Real benefits** are intergenerational, because the motherland's natural resources are the birthright of both present and future Filipino generations.[55]

In opting to exercise the prerogative to enter into FTAAs, the President must ensure that the agreements conform to the restrictions laid down by Section 2, including the scope of the assistance that must be limited to financial or technical forms. The use of the term "involving" in the fourth paragraph of Section 2 indicates exclusivity. In addition, "either" in the same paragraph is clearly used as a conjunction joining 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. Moreover, the 1987 Constitution deleted not only the term "management" from the 1973 Constitution, but also the catch-all phrase "or other forms of assistance," thus reinforcing the exclusivity of "either technical or financial assistance."

With respect to the consequences of the deletion or omission from the 1987 Constitution of the term "service contracts," which was in the 1973 Constitution, Justice Morales invokes the following Latin guides on statutory construction: first, *casus omisus pro omisso habendus est;* [56] second, *expressio unius est exclusion alterius;*[57] and third, *expressium facit cessare*

tacitum.[58]

Nonetheless, foreign-owned corporations are not precluded from a **limited** participation in the management of the exploration, development and utilization of natural resources, so long as their participation is ***incidental*** **to the financial or technical assistance** they are rendering. The scope of an FTAA should not be broadened to include "managerial assistance." Adequate protection is not provided by the mere fact that the Act requires the submission of work programs and minimum expenditure commitments to the government. These requirements were also in the old concession and service contract[59] systems, but did not serve to place full control and supervision of the country's natural resources in the hands of the government.

Moreover, the foreign contractor's limited participation in management **should not effectively grant foreign-owned corporations beneficial ownership** of the natural resources. *Conspicuously absent from the Mining Act, however, 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.*

In fact, *the law grants the lion's share of the proceeds from the mining operation to the foreign corporation.* Under Section 81, **the government does not receive any share in those proceeds.** Even more galling is the provision that its share (composed of taxes and fees only) shall not be collected until after the foreign corporation will have "fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive."

The taxes and fees that make up the government's "basic share" cannot be considered as

a return on the resources mined corresponding to the beneficial ownership of the Filipino people. More important, "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."[60]

By selling 60 percent of its equity to a Filipino corporation, 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 percent, while maintaining a 40 percent beneficial interest in them. Worse, if the Filipino corporation acquiring the foreign contractor's stake is 60 percent Filipino-owned and 40 percent foreign-owned, then *the total beneficial interest of foreigners in the mineral output of the mining concern would constitute a majority of 64 percent,* while that of Filipinos would at most amount to 36 percent -- 34 percent for the Filipino stockholders of the 60-40 Filipino corporation and 2 percent for the government (in trust for the Filipino people).

Furthermore, if the grant of an exploration permit does not contemplate the entry into an agreement between the State and the applicant foreign corporation, as the majority admits, then the grant is not sanctioned by Section 2 (paragraph 4) of Article XII of the Constitution. This provision mentions only "agreements . . . involving either financial or technical assistance." Because it does not fall within the exception embodied here, "*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.*"

Moreover, "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." 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 ownership or **legal title** of the land in the hands of Filipinos. This purpose is not identical or even analogous to that of Section 2 of Article XII of the Constitution, which is to reserve to the Filipino people the **beneficial ownership** of their natural resources -- the right to the gains, rewards and advantages generated by their natural resources.

The very fact that WMC sold its 100 percent interest in WMCP to a Filipino company for US$10 million leads to very serious questions concerning the validity of the WMCP FTAA:

> "First, if a Filipino corporation is capable of undertaking the terms of the FTAA, why was an agreement with a foreign owned corporation been entered into in the first place? Second, does not the fact that, as alleged by petitioners and admitted by respondent WMCP, Sagittarius, WMCP's putative new owner, is capitalized at less than half the purchase price 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, why did WMC sell 100% of its shares in WMCP for only US$10,000,000.00? Finally, considering that, as emphasized by WMCP, '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?" (citations omitted)

The Tinga Concurrence

In the main, Justice Dante O. Tinga concurred in the majority Resolution. The points he

raised can be summed up as follows.

There are two fundamental restrictions on the power of the Executive to contract with foreign corporations regarding the exploration, development and utilization of our natural resources. *One,* the State shall retain legal ownership of all natural resources; and, *two,* it shall have full control and supervision over the exploitation of natural resources. These key postulates predicate the following constitutional restrictions on the power of the President to enter into agreements with foreign corporations.

First, the natural resources that may be the subject of the agreement are limited to minerals, petroleum, and other mineral oils. *Second*, agreements with foreign-owned corporations may be entered into only for the large-scale EDU of minerals, petroleum, and other mineral oils. *Third*, only the President may enter into these agreements. *Fourth*, the agreements must be in accord with the general terms and conditions provided by law. *Fifth*, the decision to enter into the agreements must be based on their "real contributions to the economic growth and general welfare of the country."

The authority of the executive branch to contract, which is a right emanating from its traditional functions, is connected with its power to determine economic policy. **Hence, the proper approach to the interpretation of Section 2 of Article XII is to tilt it in favor of asserting a right rather than limiting a privilege.**

While the 1987 Constitution does not use the term "service contracts," it contemplates a broader expanse of agreements. The test should be whether the law and the contract take away

the State's full control and supervision over the EDU, and thus negate or defeat the State's ownership, of the country's mineral resources.

Section 2 should be accorded a liberal interpretation, so as to recognize this fundamental prerogative of the President. The word "full" should not be construed as implying that the control or supervision may not at all be yielded or delegated. Instead, "full" should be interpreted to mean the encompassing scope of the concerns of the State relating to the extractive enterprises in which it may interfere or over which it may impose its will.

The question as to who should exercise management is best left to the parties to the agreement: the President and the foreign corporation. E**ven if the State cedes management to a different entity, such as the foreign corporation, it has the duty to ensure that the actual exercise of managerial power does not contravene our laws and public policy.**

The WMCP FTAA is replete with judicially enforceable stipulations, delineating the State's control. State control and supervision is exercised not only through the FTAA, but also through statutes and executive or administrative issuances. The Mining Act itself is an expression of State control and supervision.[61]

The Nazario Concurrence

Concurring with the Resolution, Justice Minita Chico-Nazario further reinforced the notion that "full control and supervision" does not mean that foreign stockholders cannot be

legally elected as members of the board of a corporation, 40 percent of whose capital is foreign-owned. Disapproved in fact was the amendment proposed by then Commissioner Davide, now Chief Justice, providing that the governing and managing bodies of those corporations shall be vested exclusively in citizens of the Philippines.

In contrast, a provision[62] in regard to educational institutions and substantially similar to the proposed Davide amendment was approved. It was NOT the intention of the framers of the Constitution for the governing boards of domestic corporations with non-Filipino members to be deprived of the right to control and administer the corporation when it engages in the exploration, development and utilization of natural resources through co-production, joint venture or production-sharing with the State.

Similarly, there is no justification for holding that foreign corporations who invest considerably large amounts of money -- under agreements involving either technical or financial assistance for the large-scale EDU of minerals, petroleum and other mineral oils -- should be prohibited from managing the business. Indeed, to say that the Constitution requires the State to have full and total control and supervision of the activities, when undertaken on a large scale under agreements with foreign corporations investing huge amounts of money, is to divorce oneself from reality. As long as the foreign assistance results in real contributions to the economic growth of our country and enhances the general welfare of our people, the development of our mineral resources by and through foreign corporations who have FTAAs with the government is not unconstitutional.

The question of whether the FTAA will, in fact, redound to the general welfare of the

public involves a judgment call by our policymakers, who are answerable to our people during the appropriate electoral exercises and are not subject to judicial pronouncements based on grave abuse of discretion.

Resolution of the Second Motion for Reconsideration

Petitioners filed a Motion for Reconsideration, praying for the reversal of the Court's December 1, 2004 Resolution. The Court denied the Motion with finality, because the issues raised were a mere rehash of the arguments and positions already raised and discussed extensively in the assailed Resolution; as well as in the Dissenting, Separate and Concurring Opinions -- consisting altogether of several hundred pages.

The Carpio Dissent

In addition to the views enunciated in his earlier Dissenting Opinion, Justice Carpio wrote a new Dissent pointing out alleged flaws in DAO 99-56.

He contended that DAO 99-56 provided three formulas for determining the State's share in the mining revenues of foreign contractors. They will have the **sole option**[63] to choose which formula to use. Under **Option B**,[64] four conditions must concur before the State can receive any share from the mining revenues of the foreign contractor:

> ***"First,*** **the foreign contractor's net income after tax must exceed 40% of its gross output or sales.** ***Second*****, this extraordinary high-income ratio must average more than 40% of gross output over two consecutive years.** ***Third*****, the State's share shall come only from the excess of such 40% of gross output.** ***Fourth*****, the State's share is only 25% of the excess of such 40% of gross output."** [Emphasis in the original.]

The first two conditions are impossible to achieve, while the last two are grossly unfair to the State. A 40 percent after-tax net income on gross sales in two consecutive years is **highly extraordinary** in the business world and is unheard of in the mining industry. Over the last nine years, the highest ratio resulting from the application of Option B was 0.27 in 1997; and the second highest, 0.23 in 1995.

If the profit-sharing formula in Option B is applied to mining companies operating in the Philippines in the last nine years, the State will receive **no share whatsoever** in the mining profits of the foreign contractor. Similarly, no mining company operating in **other countries** has achieved the trigger level in Option B. The average ratio over the nine-year period of WMC Resources Ltd., the Australian mining company that used to own Respondent WMCP, was **only 0.10;** and its highest two-year average ratio, **only 0.19 in 1999 and 2000**.[65]

In its official publication, *A Response to the Issues Raised against Mining*,[66] the Mines and Geosciences Bureau (MGB) of the DENR **publicly admitted** that the State was entitled to a share, only if the foreign contractor's profits were **extraordinarily high**. The extraordinarily high trigger level of 0.40 was impossible to achieve, however, based on the historical performance of mining companies in the Philippines and abroad. The *raison d'être* of DAO 99-56 betrayed a callous intent to deprive the State and the Filipino people of their fair and rightful share in the mineral wealth of the nation.

The requirement of **two consecutive years** of extraordinary profitability makes it even harder for the State to receive any share, given the **historical volatility of metal prices**. Gold

and copper[67] prices swing up and down, often preventing metal prices from remaining **extraordinarily high** for two consecutive years.

Even assuming *arguendo* that the first two conditions happen, the third and the fourth conditions still limit the State's share to **25 percent of the profits in excess of the 0.40 trigger level.** In other words, for every 4 percent additional profits in excess of that trigger level, the State receives only a 1 percent share of the contractor's **excess** mining profits.

By imposing impossible conditions, DAO 99-56 gives all the mining revenues to the foreign contractor. This imposition is grossly and manifestly disadvantageous to the State and the Filipino people. DAO 99-56 implements the intent of the Mining Act: to limit the State's share in mining operations to taxes, duties and fees only. It actually reverts our mining system to the old system of "license, concession or lease" under the 1935 and the 1973 Constitutions, which have been abolished by the 1987 Constitution.

Moreover, Section 81 grants the foreign contractor the right to **recover fully** all its pre-operating, exploration and development expenses -- with no time limit. During the recovery period, it does not pay any tax, duty or fee to the government. It is also exempt from corporate income tax and *even withholding tax on dividend or interest payments to its stockholders.*

It will take the foreign contractor some **six years**[68] to recover fully all its pre-operating, exploration and development expenses. If the usual three-year pre-operating period is counted, **the government cannot collect any tax, duty or fee from the foreign contractor and its stockholders for a total period of nine years from the signing of the FTAA**.

The 1987 Constitution vests in Congress the power to prescribe the "general terms and conditions" of FTAAs. The most important term or condition is their fiscal regime, which must clearly lay down the share of the State in the mining revenues of the foreign contractor. In the Mining Act, Congress prescribed a fiscal regime that was constitutionally deficient for both the FTAAs and the MPSAs, because it **limited** the share of the State to the usual taxes, duties and fees. The Act did not require FTAA or MPSA contractors to pay the State any share from their mining revenues.

In issuing DAO 99-56, the DENR secretary usurped the power of Congress to prescribe the terms and conditions of FTAAs. DAO 99-56 purports to "**establish the fiscal regime of FTAAs**" despite the absence of guidelines or standards from Congress. It is void because the DENR secretary has clearly no power to prescribe the fiscal regime of FTAAs, particularly the government's non-tax share from mining revenues.

The President cannot save the Mining Act from constitutional infirmity by requiring FTAA contractors to pay the State a share from their mining revenues. Neither can this Court elevate DAO 99-56 to the status of a law to plug a fatal constitutional hole in the Mining Act.

The Morales Dissent

In addition to the points set forth by Justice Morales in her previous Dissenting Opinion, the following were underscored in the new one she filed.

Economic considerations "are inappropriate and inapplicable to the determination of the constitutionality of the Mining Act. x x x [J]udicial decision making should not be influenced by a desired economic outcome, but should be the product of the application of established neutral legal principles to the facts and the law of the case. If, in deciding a question of constitutionality, a judicial decision should reflect a particular economic perspective, it should only be that adopted by the Constitution itself."

Certainty, predictability and stability in the law are the major objectives of the legal system, and judicial decisions serve the important purpose of providing stability to the law and to the society governed by that law. These desired objectives can be achieved only if courts render decisions based on legal principles.

This Court should not heed the apprehension of some foreign businessmen that the original Decision in this case might hamper the government's efforts to resuscitate the mining industry and ultimately result in "the possible loss of billions of dollars of investments and exports and tens of thousands of jobs . . . ."[69] It should not be unwittingly swayed by peripheral and irrelevant economic arguments, in its well-intentioned desire to encourage economic recovery and prop up the floundering mining industry. Otherwise, the stability of our jurisprudence would be undermined; and the administration of justice, constantly subjected to speculation.

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[1] RA 7942, §15. RA 7942 defines the modes of agreements for mining operations (§26(a)-(c)); outlines the procedure for their filing and approval (§29), assignment/transfer (§30), and withdrawal (§31); and fixes their terms (§32). Similar provisions govern financial or technical assistance agreements (Ch. VI),

among others.

[2] This Order repealed DAO No. 95-23, s. 1995, issued on August 15, 1995.

[3] WMCP was originally owned by WMC, "a wholly owned subsidiary of Western Mining Corporation Holdings Limited, a publicly listed major Australian mining and exploration company." WMCP FTAA, p. 2.

[4] 421 SCRA 148, January 27, 2004. Penned by Justice Conchita Carpio Morales, the Decision was promulgated by a vote of 8-5-1. Those who concurred were Chief Justice Davide; and Justices Puno, Quisumbing, Carpio, Corona, Callejo, and Tinga. Justices Santiago, Gutierrez and Martinez joined the Dissent of Justice Panganiban; while Justice Vitug wrote a separate Dissent. Justice Azcuna took no part.

[5] With respect to the procedural questions, the Supreme Court upheld the legal standing of Petitioners La Bugal B'laan Tribal Association, Inc., a farmers' and indigenous people's cooperative organized under Philippine laws representing a community actually affected by the mining activities of WMCP, its members, as well as other residents of areas also affected by its mining activities -- those who claim that they would suffer "irremediable displacement" as a result of the implementation of the FTAA allowing WMCP to conduct mining activities in their area of residence. The Court said that it was not concerned with whether petitioners were real parties in interest, as the case involved constitutional questions.

The challenge against the constitutionality of RA 7942 and DAO 96-40 likewise fulfilled the requisites of "justiciability." Although these issuances were not in force when the subject FTAA was entered into, the question as to their validity was still ripe for adjudication.

The Court also held that the Petition for Prohibition was an "appropriate remedy." While the execution of the Contract itself may have been *fait accompli,* its implementation was not. Public respondents, on behalf of the government, had obligations to fulfill under the Contract. Petitioners sought to prevent them from fulfilling the obligations arising from it, on the theory that the FTAA was unconstitutional and, therefore, void.

The contention that the filing of the Petition violated the rule on hierarchy of courts was brushed aside. The repercussions of the issues on the Philippine mining industry, if not the national economy -- as well as their novelty -- constituted exceptional and compelling reasons to justify the resort to the Supreme Court at the first instance.

[6] 1st sentence of the first paragraph of Section 2, Art. XII.

[7] 2nd sentence of the first paragraph of Section 2, Article XII.

[8] *Miners Association of the Philippines, Inc. v. Factoran, Jr.,* 240 SCRA 100 (1995).

[9] Ibid.

[10] Ibid.

[11] III Records of the Constitutional Commission, p. 255.

[12] Id., at pp. 355-356.

[13] "[M]eans the searching or prospecting for mineral resources by geological, geochemical or geophysical surveys, remote sensing, test pitting, trending, drilling, shaft sinking, tunneling or any other means for the purpose of determining the existence, extent, quantity and quality thereof and the feasibility of mining them for profit." §3(q), RA 7942.

[14] "[M]eans the work undertaken to explore and prepare an ore body or a mineral deposit for mining, including the construction of necessary infrastructure and related facilities." §3(j), id.

[15] "[M]eans the extraction or disposition of minerals." §3(az), id.

[16] "[M]eans the milling, beneficiation or upgrading of ores or minerals and rocks or by similar means to convert the same into marketable products." §3(y), id.

[17] Means mining activities involving exploration, feasibility, development, utilization, and processing. §3(af), id.

[18][Id., §35(e).

[19] WMCP, §10.2.

[20] Id., §6.4.

[21] Retired on July 15, 2004.

[22] *Chavez v. Public Estates Authority,* 433 Phil. 506, July 9, 2002; 403 SCRA 1, May 6, 2003; and 415 SCRA 403, November 11, 2003.

[23] *United Residents of Dominican Hill, Inc. v. Commission on the Settlement of Land Problems,* 353 SCRA 782, March 7, 2001; other citations omitted.

[24] Commissioner Joaquin Bernas stressed that he had voted in favor of the Article, "because it is flexible enough to allow future legislators to correct whatever mistakes we may have made." Commissioner Felicitas Aquino further noted that "unlike the other articles of this Constitution, this article whether we like it or not would have to yield to flexibility and elasticity which inheres in the interpretation of this provision. Why? Precisely because the forces of economics are dynamic and are perpetually in motion."

[25] I had the honor of writing the Resolution, promulgated on December 1, 2004, reversing the original Decision by a vote of 10-4-1. Joining me were Chief Justice Davide; and Justices Puno ("in the result"), Quisumbing, Gutierrez, Martinez, Corona, Tinga (with a Concurring Opinion), Nazario (with a Concurring Opinion) and Garcia. The main Dissent was written by Justice Carpio, joined by Justices Santiago and Callejo. Justice Morales submitted a separate Dissent. Justice Azcuna took no part.

[26] "SEC. 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and 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."

[27] Resolution dated December 1, 2004, p. 3, per Panganiban, *J.*

[28] "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."

[29] "x x x 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 applied for. x x x. [W]*e must concede that there exists the distinct possibility that one or more of the future FTAAs 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."

[30] 137 Phil. 471, 489, April 18, 1969, per Fernando, *J.* (later *CJ*); citing *People v. Vera,* 65 Phil. 56, 94, November 16, 1937, per Laurel, *J.*

[31] If the real intention of the drafters was to confine foreign corporations to financial or technical assistance only, their language should have been so **unmistakably restrictive and stringent** as to leave no doubt about their true intent. But nowhere in the said 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. Besides, there has never been any constitutional or statutory provision that reserved to Filipino citizens or corporations the rendition of financial or technical assistance to companies engaged in mining or the development of any other natural resource. Hence, paragraph 4 is not to be understood as one limited only to foreign loans (or other forms

of financial support) and to technical assistance.

[32] 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 minuscule 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.

[33] Based on a careful reading of the ConCom deliberations, the matters established were as follows:

- In their discussion 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, service contracts with foreign corporations as contractors would be permitted, 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, reserving or limiting to Filipino citizens and corporations the EDU 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 safeguards that would be considered adequate and reasonable. Some of them, having "radical" leanings, wanted to ban service contracts altogether, for 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 concerning their individual opinions and philosophies. They supported or attacked the provisions with fervor.
- In the final voting, the Article on the National Economy and Patrimony -- including paragraph 4 allowing service contracts with foreign corporations -- was resoundingly approved by a vote of 32 to 7, with 2 abstentions.

[34] §20 of RA 7942.

[35] Among the stipulations are the following:

"2. The contractor's work program, activities and budgets must be approved by/on behalf of the State (Clause 2.1).
3. The DENR secretary has the power to extend the exploration period (Clause 3.2-a).
4. Approval by the State is necessary for incorporating lands into the FTAA contract area (Clause 4.3-c).
5. 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).
6. The contractor is obliged to relinquish periodically parts of the contract area not needed for exploration and development (Clause 4.6).
7. A Declaration of Mining Feasibility must be submitted for approval by the State (Clause 4.6-b).
8. The contractor is obligated to report to the State its exploration activities (Clause 4.9).
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).
10. The contractor is required to obtain State approval for its proposed expenditures for exploration activities (Clause 5.2).

x x x x x x x x x

17. Any expansions, modifications, improvements and replacements of mining facilities shall be subject to the approval of the secretary (Clause 6.4).
18. The State has control with respect to the amount of funds that the contractor may borrow within the Philippines (Clause 7.2).
19. The State has supervisory power with respect to technical, financial and marketing issues (Clause 10.1-a).
20. 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).
21. The State has the right to terminate the FTAA for the contractor's unremedied substantial breach thereof (Clause 13.2);
22. 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)."

[36] Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements.

[37] Payments to the National Government:

- Excise tax on minerals - 2 percent of the gross output of mining operations
- Contractor's income tax - maximum of 32 percent of taxable income for corporations
- Customs duties and fees on imported capital equipment - the rate 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 depending 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 depending 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

[38] 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."

[39] "7.8 The Government Share shall be deemed to include all of the following sums:

> "(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;"

[40] §3[h] in relation to §26[b] of RA 7942.

[41] §26[c] of RA 7942.

[42] Resolution, p. 97.

[43] 224 SCRA 792 (1993).

[44] 125 SCRA 302, (1983).

[45] 190 SCRA 673 (1990).

[46] Resolution, pp. 118-120.

[47] Justice Carpio cites as a valid FTAA one that meets the essential constitutional requirements the Service Contract dated December 11, 1990, between the Philippine Government as the first party; and Occidental Philippines, Inc. and Shell Exploration B.V. as the second party. The contract covers the

offshore exploitation of petroleum in Northwest Palawan. The following provisions allegedly ensure that the State would receive a fair share of the income from the petroleum operations and also exercise control and supervision over the exploitation of the petroleum:

> "a. There is express recognition that **the "conduct of Petroleum Operations shall be under the full control and supervision of the Office of Energy Affairs,"** 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';**
>
> "b. **The State receives 60% of the net proceeds from the petroleum operations, while the foreign contractor receives the remaining 40%;**
>
> "c. 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) within 60 days from completion of the audit, and if there is no amicable settlement, the dispute goes to arbitration;**
>
> "d. 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;
>
> "e. 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;
>
> "f. The petroleum output is sold at posted or market prices;
>
> "g. 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." (Emphasis supplied)

[48] §8.3 of the WMCP FTAA.

[49] §10.4(i), id.

[50] §2, Article XII of the 1987 Constitution.

[51] §3.3, WMCP FTAA.

[52] Beneficial ownership refers to the right to the gains, rewards and advantages generated by the property. *Vide* Black's Law Dictionary 156 (6th ed., 1991).

"Owned" or "ownership" refers to both the legal title to and the beneficial ownership of the natural resources. "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 that 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.

[53] *Oposa v. Factoran Jr.,* supra.

[54] For benefits from the EDU 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 adversely affected thereby.

[55] Vide *Oposa v. Factoran Jr.,* supra.

[56] A case omitted is to be held as intentionally omitted. Black's Law Dictionary 219 (6th ed., 1991). A person, object or thing omitted from an enumeration must be held to have been omitted *intentionally*.

[57] The express mention of one person, thing, act, or consequence excludes all others. Vide *Canet v. Decena,* GR No. 155344, January 20, 2004; other citations omitted.

[58] That which is expressed makes that which is implied cease. Black's Law Dictionary 581 (6th ed., 1991).

[59] *Vide* Pres. Decree No. 87, §8(c), (e), (f).

[60] "SEC. 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."

[61] Justice Tinga adds that, in his view, the constitutional directive for the State to maintain full control and supervision over the EDU of the country's mineral resources will be best served by the creation of a public corporation for the purpose, accountable to the State for all actions on its behalf. The public corporation can principally undertake mining activities and contract with foreign entities for financial and/or technical assistance if necessary. The power to determine the course of the project or the major policies it involves belongs to the public corporation as the agent of the State, not to the foreign contractor.

[62] "§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."

[63] §3(g)(2) of DAO 99-56 provides: "*Additional Government Share.* Prior 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." [Emphasis supplied]

[64] This Option stipulates that the State's share shall consist of "twenty-five percent (25%) of the additional profits once the arithmetic average of the ratio" of the after-tax net income to gross output for "the current and previous taxable years is 0.40 or higher."

[65] WMC Resources Ltd. is the number one nickel producer in Australia, while Rio Tuba Nickel Mining Corporation is the number one nickel producer in the Philippines.

[66] www.mgb.gov.ph/response/miningissues.htm.

[67] Gold and copper are two of the three principal mineral exports of the country, in addition to nickel.

[68] Assuming a depreciation period of 15 years, the annual depreciation will be roughly 1/15 or 6.7% of the initial investment, assuming all investments are in depreciable assets with only negligible working capital. Thus, the recovery period would be about 100(10.5+6.7) or 5.8 or some 6 years.

[69] *Vide* www.manilatimes.net/national/2004/feb/05/yehey/business/20040205bus10.html.