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[G.R. No. 127882. January 27, 2004]

LA BUGAL-B'LAAN TRIBAL ASSOCIATION, INC., represented by its Chairman F'LONG MIGUEL M. LUMAYONG, WIGBERTO E. TAÑADA, PONCIANO BENNAGEN, JAIME TADEO, RENATO R. CONSTANTINO, JR., F'LONG AGUSTIN M. DABIE, ROBERTO P. AMLOY, RAQIM L. DABIE, SIMEON H. DOLOJO, IMELDA M. GANDON, LENY B. GUSANAN, MARCELO L. GUSANAN, QUINTOL A. LABUAYAN, LOMINGGES D. LAWAY, BENITA P. TACUAYAN, minors JOLY L. BUGOY, represented by his father UNDERO D. BUGOY, ROGER M. DADING, represented by his father ANTONIO L. DADING, ROMY M. LAGARO, represented by his father TOTING A. LAGARO, MIKENY JONG B. LUMAYONG, represented by his father MIGUEL M. LUMAYONG, RENE T. MIGUEL, represented by his mother EDITHA T. MIGUEL, ALDEMAR L. SAL, represented by his father DANNY M. SAL, DAISY RECARSE, represented by her mother LYDIA S. SANTOS, EDWARD M. EMUY, ALAN P. MAMPARAIR, MARIO L. MANGCAL, ALDEN S. TUSAN, AMPARO S. YAP, VIRGILIO CULAR, MARVIC M.V.F. LEONEN, JULIA REGINA CULAR, GIAN CARLO CULAR, VIRGILIO CULAR, JR., represented by their father VIRGILIO CULAR, PAUL ANTONIO P. VILLAMOR, represented by his parents JOSE VILLAMOR and ELIZABETH PUA-VILLAMOR, ANA GININA R. TALJA, represented by her father MARIO JOSE B. TALJA, SHARMAINE R. CUNANAN, represented by her father ALFREDO M. CUNANAN, ANTONIO JOSE A. VITUG III, represented by his mother ANNALIZA A. VITUG, LEAN D. NARVADEZ, represented by his father MANUEL E. NARVADEZ,

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JR., ROSERIO MARALAG LINGATING, represented by her father RIO OLIMPIO A. LINGATING, MARIO JOSE B. TALJA, DAVID E. DE VERA, MARIA MILAGROS L. SAN JOSE, SR., SUSAN O. BOLANIO, OND, LOLITA G. DEMONTEVERDE, BENJIE L. NEQUINTO,[1] ROSE LILIA S. ROMANO, ROBERTO S. VERZOLA, EDUARDO AURELIO C. REYES, LEAN LOUEL A. PERIA, represented by his father ELPIDIO V. PERIA,[2] GREEN FORUM PHILIPPINES, GREEN FORUM WESTERN VISAYAS, (GF-WV), ENVIRONMENTAL LEGAL ASSISTANCE CENTER (ELAC), PHILIPPINE KAISAHAN TUNGO SA KAUNLARAN NG KANAYUNAN AT REPORMANG PANSAKAHAN (KAISAHAN),[3] KAISAHAN TUNGO SA KAUNLARAN NG KANAYUNAN AT REPORMANG PANSAKAHAN (KAISAHAN), PARTNERSHIP FOR AGRARIAN REFORM and RURAL DEVELOPMENT SERVICES, INC. (PARRDS), PHILIPPINE PARTNERSHIP FOR THE DEVELOPMENT OF HUMAN RESOURCES IN THE RURAL AREAS, INC. (PHILDHRRA), WOMEN'S LEGAL BUREAU (WLB), CENTER FOR ALTERNATIVE DEVELOPMENT INITIATIVES, INC. (CADI), UPLAND DEVELOPMENT INSTITUTE (UDI), KINAIYAHAN FOUNDATION, INC., SENTRO NG ALTERNATIBONG LINGAP PANLIGAL (SALIGAN), LEGAL RIGHTS AND NATURAL RESOURCES CENTER, INC. (LRC), *petitioners, vs.* **VICTOR O.**

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[1] Appears as "Nequito" in the caption of the Petition by "Nequinto" in the body. (*Rollo*, p. 12.)

[2] As appears in the body of the Petition. (*Id.*, at 13.) The caption of the petition does not include Louel A. Peria as one of the petitioners but the name of his father Elpidio V. Peria appears therein.

[3] Appears as "Kaisahan Tungo sa Kaunlaran ng Kanayunan at Reporang Pansakahan (KAISAHAN)" in the caption of the Petition by "Philippine Kaisahan Tungo sa Kaunlaran ng Kanayunan at Reporang Pansakahan (KAISAHAN)" in the body. (*Id.*, at 14.)

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RAMOS, SECRETARY, DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (DENR), HORACIO RAMOS, DIRECTOR, MINES AND GEOSCIENCES BUREAU (MGB-DENR), RUBEN TORRES, EXECUTIVE SECRETARY, and WMC (PHILIPPINES), INC.,[4] *respondents.*

SYNOPSIS

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

As a background, the FTAA is for the exploration, development and commercial exploitation of the country's mineral deposits. At the time of execution of the subject FTAA in 1995, WMCP was owned by WMC Resources International Pty., Ltd. (WMC) — "a wholly owned subsidiary of Western Mining Corporation Holdings Limited, a publicly-listed major Australian mining and exploration company."

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

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[4] Erroneously designated in the Petition as "Western Mining Philippines Corporation." (*Id.*, at 212.) Subsequently, WMC (Philippines), Inc. was renamed "Tampakan Mineral Resources Corporation." (*Id.*, at 778.)

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interested in acquiring the shares in WMCP, appealed this Order of the DENR Secretary, but the Office of the President, and subsequently, the Court of Appeals (CA), upheld said Order.

On January 27, 2004, the Court *en banc* promulgated its Decision granting the Petition and declaring the unconstitutionality of certain provisions of RA 7942, DAO 96-40, as well as of the entire FTAA executed between the government and WMCP, mainly on the finding that FTAAs are service contracts prohibited by the 1987 Constitution. The Decision struck down the subject FTAA for being similar to service contracts, which, though permitted under the 1973 Constitution, were subsequently denounced for being antithetical to the principle of sovereignty over our natural resources, because they allowed foreign control over the exploitation of our natural resources, to the prejudice of the Filipino nation.

SYLLABUS

1. **REMEDIAL LAW; COURTS; MOOT CASE; CASE NOT RENDERED MOOT EITHER BY TRANSFER AND REGISTRATION OF THE FINANCIAL AND TECHNICAL ASSISTANCE AGREEMENT TO A FILIPINO-OWNED CORPORATION OR BY THE NON-ISSUANCE OF A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION.** — It bears stressing that this case has not been rendered moot either by the transfer and registration of the FTAA to a Filipino-owned corporation or by the non-issuance of a temporary restraining order or a preliminary injunction to stay the above-said July 23, 2002 decision of the Office of the President. The validity of the transfer remains in dispute and awaits final judicial determination. This assumes, of course, that such transfer cures the FTAA's alleged unconstitutionality, on which question judgment is reserved.

2. **CONSTITUTIONAL LAW; JUDICIARY; POWER OF JUDICIAL REVIEW.** — When an issue of constitutionality is raised, this Court can exercise its power of judicial review only if the following requisites are present: (1) The existence of an actual and appropriate case; (2) A personal and substantial

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interest of the party raising the constitutional question; (3) The exercise of judicial review is pleaded at the earliest opportunity; and (4) The constitutional question is the *lis mota* of the case.

3. **ID.; ID.; "JUDICIAL POWER", CONSTRUED; POWER OF JUDICIAL REVIEW LIMITED TO DETERMINATION OF ACTUAL CASES AND CONTROVERSIES.** — Section 1, Article VIII of the Constitution states that "(j)udicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable." The power of judicial review, therefore, is limited to the determination of actual cases and controversies. An actual case or controversy means an existing case or controversy that is appropriate or ripe for determination, not conjectural or anticipatory, lest the decision of the court would amount to an advisory opinion. The power does not extend to hypothetical questions since any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions unrelated to actualities.

4. **REMEDIAL LAW; COURTS; "*LOCUS STANDI*", CONSTRUED.** — "Legal standing" or *locus standi* has been defined as a personal and substantial interest in the case such that the party has sustained or will sustain direct injury as a result of the governmental act that is being challenged, alleging more than a generalized grievance. The gist of the question of standing is whether a party alleges "such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions." Unless a person is injuriously affected in any of his constitutional rights by the operation of statute or ordinance, he has no standing. Petitioners traverse a wide range of sectors. Among them are 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, members of said cooperative, as well as other residents of areas also affected by the mining activities of WMCP. These petitioners have standing to raise the constitutionality of the questioned FTAA as they allege a personal and substantial injury. They claim that they would suffer "irremediable displacement" as

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a result of the implementation of the FTAA allowing WMCP to conduct mining activities in their area of residence. They thus meet the appropriate case requirement as they assert an interest adverse to that of respondents who, on the other hand, insist on the FTAA's validity.

5. **ID.; ID.; ID.; PETITITONERS HAVE STANDING TO RAISE THE CONSTITUTIONALITY OF THE FINANCIAL AND TECHNICAL ASSISTANCE AGREEMENT AND TO ASSAIL THE VALIDITY OF EXECUTIVE ORDER NO. 279.** — In view of the alleged impending injury, petitioners also have standing to assail the validity of E.O. No. 279, by authority of which the FTAA was executed. Public respondents maintain that petitioners, being strangers to the FTAA, cannot sue either or both contracting parties to annul it. In other words, they contend that petitioners are not real parties in interest in an action for the annulment of contract.

6. **ID.; ID.; ID.;WHERE THE CASE INVOLVES CONSTITUTIONAL QUESTIONS, THE ISSUE IS NOT WHETHER PETITIONERS ARE REAL PARTIES IN INTEREST, BUT WHETHER THEY HAVE LEGAL STANDING TO INSTITUTE THE SPECIAL CIVIL ACTION OF *CERTIORARI* AND *MANDAMUS*.** — Public respondents' contention fails. The present action is not merely one for annulment of contract but for prohibition and *mandamus*. Petitioners allege that public respondents acted without or in excess of jurisdiction in implementing the FTAA, which they submit is unconstitutional. As the case involves constitutional questions, this Court is not concerned with whether petitioners are real parties in interest, but with whether they have legal standing.

7. **CONSTITUTIONAL LAW; JUDICIAL REVIEW; ALTHOUGH R.A. NO. 7942 AND DAO NO. 96-40 WERE NOT IN FORCE WHEN THE FINANCIAL AND TECHNICAL ASSISTANCE AGREEMENT WAS ENTERED INTO, THE QUESTION AS TO THEIR VALIDITY IS RIPE FOR ADJUDICATION.** — The challenge against the constitutionality of R.A. No. 7942 and DAO No. 96-40 likewise fulfills the requisites of justiciability. Although these laws were not in force when the subject FTAA was entered into, the question as to their validity is ripe for adjudication. It is undisputed that R.A. No. 7942 and DAO No. 96-40 contain provisions that are more favorable

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to WMCP, hence, these laws, to the extent that they are favorable to WMCP, govern the FTAA.

8. **ID.; ID.; CONSTITUTIONAL QUESTIONS, EVEN IF NOT RAISED AT THE EARLIEST OPPORTUNITY, CAN STILL BE RAISED LATER; RATIONALE.** — Misconstruing the application of the third requisite for judicial review — that the exercise of the review is pleaded at the earliest opportunity — WMCP points out that the petition was filed only almost two years after the execution of the FTAA, hence, not raised at the earliest opportunity. The third requisite should not be taken to mean that the question of constitutionality must be raised immediately after the execution of the state action complained of. That the question of constitutionality has not been raised before is not a valid reason for refusing to allow it to be raised later. A contrary rule would mean that a law, otherwise unconstitutional, would lapse into constitutionality by the mere failure of the proper party to promptly file a case to challenge the same.

9. **REMEDIAL LAW; SPECIAL CIVIL ACTIONS; PROHIBITION; CONCEPT; APPROPRIATE REMEDY TO PREVENT FULFILLMENT OF OBLIGATIONS UNDER THE CONTRACT WHICH IS UNCONSTITUTIONAL AND VOID.** — Prohibition is a preventive remedy. It seeks a judgment ordering the defendant to desist from continuing with the commission of an act perceived to be illegal. The petition for prohibition at bar is thus an appropriate remedy. While the execution of the contract itself may be *fait accompli,* its implementation is not. Public respondents, in behalf of the Government, have obligations to fulfill under said contract. Petitioners seek to prevent them from fulfilling such obligations on the theory that the contract is unconstitutional and, therefore, void.

10. **COURTS; SUPREME COURT; HIERARCHY OF COURTS; NOT VIOLATED WITH FILING OF PETITION FOR PROHIBITION; EXCEPTIONAL AND COMPELLING CIRCUMSTANCES JUSTIFY DIRECT RESORT TO THE SUPREME COURT.** — The contention that the filing of this petition violated the rule on hierarchy of courts does not likewise lie. x x x The repercussions of the issues in this case on the Philippine mining industry, if not the national economy, as well as the novelty thereof, constitute exceptional and

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compelling circumstances to justify resort to this Court in the first instance. In all events, this Court has the discretion to take cognizance of a suit which does not satisfy the requirements of an actual case or legal standing when paramount public interest is involved. When the issues raised are of paramount importance to the public, this Court may brush aside technicalities of procedure.

11. **LAND TITLES AND DEEDS; PUBLIC LANDS; REGALIAN DOCTRINE, BASIS AND COVERAGE.** — The first sentence of Section 2 embodies the Regalian doctrine or *jura regalia*. Introduced by Spain into these Islands, this feudal concept is based on the State's power of *dominium*, which is the capacity of the State to own or acquire property. The Regalian doctrine extends not only to land but also to "all natural wealth that may be found in the bowels of the earth.

12. **ID.; ID.; ID.; DIFFERENCE BETWEEN THE REGALIAN DOCTRINE AND THE AMERICAN SYSTEM.** — The Regalian doctrine and the American system, therefore, differ in one essential respect. Under the Regalian theory, mineral rights are not included in a grant of land by the state; under the American doctrine, mineral rights are included in a grant of land by the government.

13. **ID.; ID.; CONCESSION SYSTEM, CONSTRUED.** — Section 21 [Phil. Bill of 1902] also made possible the concession (frequently styled "permit", "license" or "lease") system. This was the traditional regime imposed by the colonial administrators for the exploitation of natural resources in the extractive sector (petroleum, hard minerals, timber, *etc.*). Under the concession system, the concessionaire makes a direct equity investment for the purpose of exploiting a particular natural resource within a given area. Thus, the concession amounts to complete control by the concessionaire over the country's natural resource, for it is given exclusive and plenary rights to exploit a particular resource at the point of extraction. In consideration for the right to exploit a natural resource, the concessionaire either pays rent or royalty, which is a fixed percentage of the gross proceeds. Later statutory enactments by the legislative bodies set up in the Philippines adopted the contractual framework of the concession. For instance, Act No. 2932, approved on August 31, 1920, which provided for the exploration, location, and lease of lands containing

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petroleum and other mineral oils and gas in the Philippines, and Act No. 2719, approved on May 14, 1917, which provided for the leasing and development of coal lands in the Philippines, both utilized the concession system.

14. **CONSTITUTIONAL LAW; 1935 CONSTITUTION; ADOPTED THE REGALIAN DOCTRINE.** — The 1935 Constitution adopted the Regalian doctrine, declaring all natural resources of the Philippines, including mineral lands and minerals, to be property belonging to the State. As adopted in a republican system, the medieval concept of *jura regalia* is stripped of royal overtones and ownership of the land is vested in the State.

15. **ID.; PRESIDENTIAL DECREE NO. 87, THE OIL EXPLORATION AND DEVELOPMENT ACT OF 1972; SERVICE CONTRACTS, CONSTRUED.** — The promulgation on December 31, 1972 of Presidential Decree No. 87, otherwise known as the *OIL EXPLORATION AND DEVELOPMENT ACT OF 1972* signaled such a transformation. P.D. No. 87 permitted the government to explore for and produce indigenous petroleum through "service contracts." A functional definition of "service contracts" in the Philippines is provided as follows: A service contract is a contractual arrangement for engaging in the exploitation and development of petroleum, mineral, energy, land and other natural resources by which a government or its agency, or a private person granted a right or privilege by the government authorizes the other party (service contractor) to engage or participate in the exercise of such right or the enjoyment of the privilege, in that the latter provides financial or technical resources, undertakes the exploitation or production of a given resource, or directly manages the productive enterprise, operations of the exploration and exploitation of the resources or the disposition of marketing or resources.

16. **ID.; ID.; ID.; SERVICE CONTRACT WAS BASICALLY A CONCESSION REGIME.** — Ostensibly, the service contract system had certain advantages over the concession regime. It has been opined, though, that, in the Philippines, our concept of a service contract, at least in the petroleum industry, was basically a concession regime with a production-sharing element.

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17. **ID.; 1987 CONSTITUTION; ARTICLE XII, SECTION 2, RETAINED THE REGALIAN DOCTRINE; ALIENATION OF NATURAL RESOURCES, EXCEPT AGRICULTURAL LANDS, PROHIBITED.** — The 1987 Constitution retained the Regalian doctrine. The first sentence of Section 2, Article XII states: "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." Like the 1935 and 1973 Constitutions before it, the 1987 Constitution, in the second sentence of the same provision, prohibits the alienation of natural resources, except agricultural lands.

18. **ID.; ID.; PUBLIC LANDS; UTILIZATION OF INALIENABLE LANDS OF PUBLIC DOMAIN THROUGH LICENSE, CONCESSION OR LEASE, NO LONGER ALLOWED UNDER THE 1987 CONSTITUTION.** — Conspicuously absent in Section 2 is the provision in the 1935 and 1973 Constitutions authorizing the State to grant licenses, concessions, or leases for the exploration, exploitation, development, or utilization of natural resources. By such omission, the utilization of inalienable lands of public domain through "license, concession or lease" is no longer allowed under the 1987 Constitution.

19. **ID.; ID.; ID.; LIMITATIONS OR CONDITIONS TO AGREEMENTS REGARDING EXPLORATION, DEVELOPMENT AND UTILIZATION OF NATURAL RESOURCES BY FOREIGN-OWNED CORPORATIONS.** — Although Section 2 sanctions the participation of foreign-owned corporations in the exploration, development, and utilization of natural resources, it imposes certain limitations or conditions to agreements with such corporations. First, the *parties* to FTAAs. Only the President, in 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, the size of the activities: only *large-scale* exploration, development, and utilization is allowed. The term "large-scale usually refers to very capital-intensive activities." Third, the *natural resources subject of the activities* is restricted to *minerals, petroleum and other mineral oils*, the intent being to limit service

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contracts to those areas where Filipino capital may not be sufficient. Fourth, *consistency with the provisions of statute.* The agreements must be *in accordance with the terms and conditions provided by law*. Fifth, Section 2 prescribes certain standards for entering into such agreements. The agreements must be *based on real contributions to economic growth and general welfare of the country*. Sixth, the *agreements* must contain *rudimentary stipulations* for the *promotion of the development and use of local scientific and technical resources*. Seventh, the notification requirement. *The President shall notify Congress* of every financial or technical assistance agreement entered into within thirty days from its execution. Finally, the *scope* of the agreements. While the 1973 Constitution referred to "service contracts for financial, technical, management, or other forms of assistance" the 1987 Constitution provides for "agreements . . . involving *either financial or technical assistance.*" It bears noting that the phrases "service contracts" and "management or other forms of assistance" in the earlier constitution have been omitted.

20. ID.; ID.; ID.; DIFFERENT MODES BY WHICH THE STATE UNDERTAKES THE EXPLORATION, DEVELOPMENT AND UTILIZATION OF NATURAL RESOURCES. — The State, being the owner of the natural resources, is accorded the primary power and responsibility in the exploration, development and utilization thereof. As such, it may undertake these activities through four modes: (1) The State may directly undertake such activities. (2) The State may enter into co-production, joint venture or production-sharing agreements with Filipino citizens or qualified corporations. (3) Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens. (4) For the large-scale exploration, development and utilization of minerals, petroleum and other mineral oils, the President may enter into agreements with foreign-owned corporations involving technical or financial assistance.

21. ID.; ID.; FINANCIAL AND TECHNICAL ASSISTANCE AGREEMENT (FTAA), CONSTRUED. — The fourth mode involves "financial or technical assistance agreements." An FTAA is defined as "a contract involving financial or technical assistance for large-scale exploration, development, and utilization of natural resources." Any qualified person with

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technical and financial capability to undertake large-scale exploration, development, and utilization of natural resources in the Philippines may enter into such agreement directly with the Government through the DENR. For the purpose of granting an FTAA, a legally organized foreign-owned corporation (any corporation, partnership, association, or cooperative duly registered in accordance with law in which less than 50% of the capital is owned by Filipino citizens) is deemed a "qualified person." Other than the difference in contractors' qualifications, the principal distinction between mineral agreements and FTAAs is the maximum contract area to which a qualified person may hold or be granted. "Large-scale" under R.A. No. 7942 is determined by the size of the contract area, as opposed to the amount invested (US S50,000,000.00), which was the standard under E.O. 279.

22. **STATUTES; EXECUTIVE ORDER NO. 200; EFFECTIVITY; APPLIES ONLY WHEN A STATUTE DOES NOT PROVIDE FOR ITS OWN DATE OF EFFECTIVITY.** — It bears noting that there is nothing in E.O. No. 200 that prevents a law from taking effect on a date other than — even before — the 15-day period after its publication. Where a law provides for its own date of effectivity, such date prevails over that prescribed by E.O. No. 200. Indeed, this is the very essence of the phrase "unless it is otherwise provided" in Section 1 thereof. Section 1, E.O. No. 200, therefore, applies only when a statute does not provide for its own date of effectivity.

23. **ID.; ID.; PUBLICATION THEREOF IS MANDATORY.** — What is mandatory under E.O. No. 200, and what due process requires, as this Court held in *Tañada v. Tuvera*, is the publication of the law for without such notice and publication, there would be no basis for the application of the maxim *"ignorantia legis n[eminem] excusat."* It would be the height of injustice to punish or otherwise burden a citizen for the transgression of a law of which he had no notice whatsoever, not even a constructive one.

24. **ID.; ID.; EFFECTIVITY; WHILE THE EFFECTIVITY OF EXECUTIVE ORDER NO. 279 DOES NOT REQUIRE PUBLICATION, IT IS NOT A GROUND FOR ITS INVALIDATION; EXECUTIVE ORDER NO. 200 WHICH PROVIDES FOR PUBLICATION HAS SUPPLETORY APPLICATION.** — While the effectivity clause of E.O. No.

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279 does not require its publication, it is not a ground for its invalidation since the Constitution, being "the fundamental, paramount and supreme law of the nation," is deemed written in the law. Hence, the due process clause, which, so Tañada held, mandates the publication of statutes, is read into Section 8 of E.O. No. 279. Additionally, Section 1 of E.O. No. 200 which provides for publication "either in the Official Gazette or in a newspaper of general circulation in the Philippines," finds suppletory application. It is significant to note that E.O. No. 279 was actually published in the Official Gazette on August 3, 1987.

25. **ID.; ID.; ID.; EXECUTIVE ORDER NO. 279 BECAME EFFECTIVE IMMEDIATELY UPON ITS PUBLICATION IN THE OFFICIAL GAZETTE ON AUGUST 3, 1987 AND A VALIDLY ENACTED STATUTE.** — From a reading then of Section 8 of E.O. No. 279, Section 1 of E.O. No. 200, and *Tañada v. Tuvera*, this Court holds that E.O. No. 279 became effective *immediately* upon its publication in the Official Gazette on August 3, 1987. That such effectivity took place after the convening of the first Congress is irrelevant. At the time President Aquino issued E.O. No. 279 on July 25, 1987, she was still validly exercising legislative powers under the Provisional Constitution. Article XVIII (Transitory Provisions) of the 1987 Constitution explicitly states: Sec. 6. The incumbent President shall continue to exercise legislative powers until the first Congress is convened. The convening of the first Congress merely precluded the exercise of legislative powers by President Aquino; it did not prevent the effectivity of laws she had previously enacted. *There can be no question, therefore, that E.O. No. 279 is an effective, and a validly enacted, statute.*

26. **STATUTORY CONSTRUCTION; CONSTITUTIONS; IN THE INTERPRETATION OF CONSTITUTIONS, THE INSTRUMENT MUST BE SO CONSTRUED AS TO GIVE EFFECT TO THE INTENTION OF THE PEOPLE WHO ADOPTED IT.** — Petitioners' submission is well-taken. It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people who adopted it. This intention is to be sought in the constitution itself, and the apparent meaning of the words is to be taken as expressing it, except in cases where that assumption would

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lead to absurdity, ambiguity, or contradiction. What the Constitution says according to the text of the provision, therefore, compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say. Accordingly, following the literal text of the Constitution, assistance accorded by foreign-owned corporations in the large-scale exploration, development, and utilization of petroleum, minerals and mineral oils should be limited to "technical" or "financial" assistance only.

27. CONSTITUTIONAL LAW; 1987 CONSTITUTION; ALLOWS ONLY TECHNICAL OR FINANCIAL ASSISTANCE; NO LONGER "MANAGEMENT OR OTHER FORMS OF ASSISTANCE." — As priorly pointed out, the phrase "management or other forms of assistance" in the 1973 Constitution was deleted in the 1987 Constitution, which allows only "technical or financial assistance." *Casus omisus pro omisso habendus est.* A person, object or thing omitted from an enumeration must be held to have been omitted intentionally. As will be shown later, the management or operation of mining activities by foreign contractors, which is the primary feature of service contracts, was precisely the evil that the drafters of the 1987 Constitution sought to eradicate.

28. ID.; ID.; PHRASE "SERVICE CONTRACTS", DELETED IN THE 1987 CONSTITUTION; NOT SYNONYM0US TO TECHNICAL OR FINANCIAL ASSISTANCE AGREEMENTS. — As earlier noted, the phrase "service contracts" has been deleted in the 1987 Constitution's Article on National Economy and Patrimony. If the CONCOM intended to retain the concept of service contracts under the 1973 Constitution, it could have simply adopted the old terminology ("service contracts") instead of employing new and unfamiliar terms ("agreements . . . involving either technical or financial assistance"). Such a difference between the language of a provision in a revised constitution and that of a similar provision in the preceding constitution is viewed as indicative of a difference in purpose. If, as respondents suggest, the concept of "technical or financial assistance" agreements is identical to that of "service contracts," the CONCOM would not have bothered to fit the same dog with a new collar. To uphold respondents' theory would reduce the first to a mere euphemism for the second and render the change in phraseology

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meaningless. An examination of the reason behind the change confirms that technical or financial assistance agreements are not synonymous to service contracts. As the following question of Commissioner Quexada and Commissioner Villegas' answer shows, the drafters intended to do away with service contracts which were used to circumvent the capitalization (60%-40%) requirement.

29. **ID.; ID.; CONSTITUTIONAL PROVISION ALLOWING THE PRESIDENT TO ENTER INTO FINANCIAL OR TECHNICAL ASSISTANCE AGREEMENTS WITH FOREIGN-OWNED CORPORATIONS IS AN EXCEPTION TO THE RULE THAT PARTICIPATION IN THE NATION'S NATURAL RESOURCES IS RESERVED EXCLUSIVELY TO FILIPINOS.** — In any case, 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 reserved exclusively to Filipinos. Accordingly, such provision must be construed strictly against their enjoyment by non-Filipinos. As Commissioner Villegas emphasized, the provision is "very restrictive." Commissioner Nolledo also remarked that "entering into service contracts is an exception to the rule on protection of natural resources for the interest of the nation and, therefore, being an exception, it should be subject, whenever possible, to stringent rules." Indeed, exceptions should be strictly but reasonably construed; they extend only so far as their language fairly warrants and all doubts should be resolved in favor of the general provision rather than the exception.

30. **ID.; ID.; R.A. NO. 7942 WHICH AUTHORIZES SERVICE CONTRACTS IS INVALID; WHILE THE STATUTE EMPLOYS THE PHRASE "FINANCIAL AND TECHNICAL AGREEMENTS" IN ACCORDANCE WITH THE 1987 CONSTITUTION, THESE AGREEMENTS ARE ACTUALLY SERVICE CONTRACTS THAT GRANT BENEFICIAL OWNERSHIP TO FOREIGN CONTRACTORS CONTRARY TO THE FUNDAMENTAL LAW.** — With the foregoing discussion in mind, this Court finds that R.A. No. 7942 is invalid insofar as said Act authorizes service contracts. Although the statute employs the phrase "financial and technical agreements" in accordance with the 1987 Constitution, it actually treats these agreements as service contracts that grant beneficial

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ownership to foreign contractors contrary to the fundamental law.

31. **ID.; ID.; ID.; R.A. 7942 PERMITS A CIRCUMVENTION OF THE CONSTITUTIONALLY ORDAINED 60%-40% CAPITALIZATION REQUIREMENT FOR CORPORATIONS OR ASSOCIATIONS ENGAGED IN THE EXPLOITATION, DEVELOPMENT AND UTILIZATION OF THE NATURAL RESOURCES.** — By allowing foreign contractors to manage or operate all the aspects of the mining operation, the above-cited provisions of R.A. No. 7942 have in effect conveyed beneficial ownership over the nation's mineral resources to these contractors, leaving the State with nothing but bare title thereto. Moreover, the same provisions, whether by design or inadvertence, permit a circumvention of the constitutionally ordained 60%-40% capitalization requirement for corporations or associations engaged in the exploitation, development and utilization of Philippine natural resources.

32. **STATUTORY CONSTRUCTION; WHEN SOME PARTS OF A STATUTE ARE UNCONSTITUTIONAL, ALL THE PROVISIONS WHICH ARE DEPENDENT, CONDITIONAL OR CONNECTED, MUST FALL WITH THEM.**— When the parts of the statute are so mutually dependent and connected as conditions, considerations, inducements, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them.

33. **CONSTITUTIONAL LAW; 1987 CONSTITUTION; SERVICE CONTRACTS; THE FINANCIAL AND TECHNICAL ASSISTANCE AGREEMENT OF WESTERN MINING PHILIPPINES, INC., IS A SERVICE CONTRACT; CASE AT BAR.** — There can be little doubt that the WMCP FTAA itself is a service contract. Section 1.3 of the WMCP FTAA grants WMCP "the exclusive right to explore, exploit, utilise[,] process and dispose of all mineral products and by-products thereof that may be produced from the Contract Area."

34. **ID.; ID.; CONTRACTUAL STIPULATIONS WHICH GRANT FOREIGN CORPORATION BENEFICIAL OWNERSHIP**

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OVER NATURAL RESOURCES THAT PROPERLY BELONG TO THE STATE AND ARE INTENDED FOR THE BENEFIT OF ITS CITIZENS ARE ABHORRENT TO THE 1987 CONSTITUTION. — Pursuant to Section 1.2 of the FTAA, WMCP shall provide "[all] financing, technology, management and personnel necessary for the Mining Operations." The mining company binds itself to "perform all Mining Operations . . . providing all necessary services, technology and financing in connection therewith," and to "furnish all materials, labour, equipment and other installations that may be required for carrying on all Mining Operations." WMCP may make expansions, improvements and replacements of the mining facilities and may add such new facilities as it considers necessary for the mining operations. These contractual stipulations, taken together, grant WMCP beneficial ownership over natural resources that properly belong to the State and are intended for the benefit of its citizens. These stipulations are abhorrent to the 1987 Constitution. They are precisely the vices that the fundamental law seeks to avoid, the evils that it aims to suppress. Consequently, the contract from which they spring must be struck down.

35. **ID.; ID.; INVALIDATION OF THE FINANCIAL AND TECHNICAL ASSISTANCE AGREEMENT DOES NOT CONSTITUTE BREACH OF THE TREATY ON THE PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE PHILIPPINE AND AUSTRALIAN GOVERNMENTS.** — The invalidation of the subject FTAA, it is argued, would constitute a breach of said treaty which, in turn, would amount to a violation of Section 3, Article II of the Constitution adopting the generally accepted principles of international law as part of the law of the land. One of these generally accepted principles is *pacta sunt servanda*, which requires the performance in good faith of treaty obligations. Even assuming *arguendo* that WMCP is correct in its interpretation of the treaty and its assertion that "the Philippines could not . . . deprive an Australian investor (like [WMCP]) of fair and equitable treatment by invalidating [WMCP's] FTAA without likewise nullifying the service contracts entered into before the enactment of RA 7942 . . .," the annulment of the FTAA would not constitute a breach of the treaty invoked. For this decision herein invalidating the subject FTAA forms part of the legal system of the Philippines. The equal protection

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clause guarantees that such decision shall apply to all contracts belonging to the same class, hence, upholding rather than violating, the "fair and equitable treatment" stipulation in said treaty.

36. **STATUTORY CONSTRUCTION; WORDS "EITHER/OR" SHOULD NOT BE LITERALLY INTERPRETED AS IT WOULD RESULT IN ABSURD OR UNREASONABLE CONSEQUENCES.** — One other matter requires clarification. Petitioners contend that, consistent with the provisions of Section 2, Article XII of the Constitution, the President may enter into agreements involving "*either* technical or financial assistance" only. The agreement in question, however, is a technical *and* financial assistance agreement. Petitioners' contention does not lie. To adhere to the literal language of the Constitution would lead to absurd consequences. Surely, the framers of the 1987 Charter did not contemplate such an absurd result from their use of "either/or." A constitution is not to be interpreted as demanding the impossible or the impracticable; and unreasonable or absurd consequences, if possible, should be avoided. Courts are not to give words a meaning that would lead to absurd or unreasonable consequences and a literal interpretation is to be rejected if it would be unjust or lead to absurd results. That is a strong argument against its adoption. Accordingly, petitioners' interpretation must be rejected.

VITUG, *J., separate opinion*:

1. **CONSTITUTIONAL LAW; SERVICE CONTRACTS; DECLARATIONS OF CONCOM COMMISSIONERS DO NOT MEAN THAT THE GOVERNMENT MAY NO LONGER ENTER INTO SERVICE CONTRACTS WITH FOREIGN ENTITIES; FRAMERS OF CHARTER DID NOT INTEND TO LIMIT THE CONTRACTS WHICH THE PRESIDENT MAY ENTER INTO, TO MERE "AGREEMENTS FOR FINANCIAL AND TECHNICAL ASSISTANCE."** — The majority would cite the emphatic statements of Commissioners Villegas and Davide that the country's natural resources are exclusively reserved for Filipino citizens and that, according to Commissioner Villegas, "the deletion of the phrase 'service contracts' (is the) first attempt to avoid some of the abuses in the past regime in the use of

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service contracts to go around the 60-40 arrangement." These declarations do not necessarily mean that the Government may no longer enter into service contracts with foreign entities. In order to uphold and strengthen the national policy of preserving and developing the country's natural resources exclusively for the Filipino people, the present Constitution indeed has provided for safeguards to prevent the execution of service contracts of the old regime, but not of service contracts *per se*. It could not have been the object of the framers of the Charter to limit the contracts which the President may enter into, to mere "agreements for financial and technical assistance." One would take it that the usual terms and conditions recognized and stipulated in agreements of such nature have been contemplated. Basically, the financier and the owner of know-how would understandably satisfy itself with the proper implementation and the profitability of the project. It would be abnormal for the financier and owner of the know-how not to assure itself that all the activities needed to bring the project into fruition are properly implemented, attended to, and carried out. Needless to say, no foreign investor would readily lend financial or technical assistance without the proper incentives, including fair returns, therefor.

2. **ID.; CONTRACTS; THE FUNDAMENTAL LAW IS DEEMED WRITTEN IN EVERY CONTRACT; THE PROVISIONS OF THE FOREIGN AND TECHNICAL ASSISTANCE AGREEMENT ENTERED INTO BY THE GOVERNMENT AND THE FOREIGN CORPORATION MUST BE READ IN CONFORMITY WITH ARTICLE XII, SECTION 2, 1987 CONSTITUTION.** — The fundamental law is deemed written in every contract. The FTAA entered into by the government and WMCP recognizes this vital principle. The assailed contract or its provisions must then be read in conformity with abovementioned constitutional mandate. Hence, Section 10.2 (a) of the FTAA, for instance, which states that "the Contractor shall have the exclusive right to explore for, exploit, utilize, process, market, export and dispose of all minerals and products and by-products thereof that may be derived or produced from the Contract Area and to otherwise conduct Mining Operations in the Contract Area in accordance with the terms and conditions hereof," must be taken to mean that the foregoing rights are to be exercised by WMCP for and in behalf of the State and that WMCP, as the Contractor, would be bound to carry out

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the terms and conditions of the agreement acting for and in behalf of the State. In exchange for the financial and technical assistance, inclusive of its services, the Contractor enjoys an exclusivity of the contract and a corresponding compensation therefor.

PANGANIBAN, *J., separate opinion*:

1. **CONSTITUTIONAL LAW; JUDICIARY; POWER OF JUDICIAL REVIEW; SUPREME COURT DOES NOT DECIDE CONSTITUTIONAL ISSUES UNLESS THEY ARE THE VERY *LIS MOTA* OF THE CASE.**— Furthermore, there being no more justiciable controversy, the plea to nullify the Mining Law has become a virtual petition for declaratory relief, over which the Supreme Court has no original jurisdiction. At bottom, I rely on the well-settled doctrine that this Court does not decide constitutional issues, unless they are the very *lis mota* of the case.

2. **CONSTITUTIONAL LAW; ARTICLE XII, SEC. 2, 1987 CONSTITUTION; USE OF THE PHRASE "AGREEMENTS XXX INVOLVING XXX TECHNICAL OR FINANCIAL ASSISTANCE" DOES NOT INDICATE THE INTENT TO EXCLUDE OTHER MODES OF ASSISTANCE BUT INCLUDES OTHER ACTIVITIES.** — *First*, the drafters' choice of words — their use of the phrase "agreements x x x involving x x x technical or financial assistance" — does not absolutely indicate the intent to exclude other modes of assistance. Rather, the phrase signifies the possibility of the inclusion of other activities, provided they bear some *reasonable relationship to and compatibility with* financial or technical assistance.

3. **ID.; ID.; SERVICE CONTRACTS; RECOGNIZED AND ALLOWED UNDER THE PRESENT CONSTITUTION SUBJECT TO SEVERAL RESTRICTIONS AND MODIFICATIONS AIMED AT AVOIDING PITFALLS OF THE PAST.** — *Second,* I believe the foregoing position is supported by the fact that our present Constitution *still recognizes and allows service contracts* (and has not rendered them taboo), albeit *subject to several restrictions and modifications aimed at avoiding the pitfalls of the past.* Some excerpts from the deliberations of the Constitutional

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Commission (Concom), showed that its members discussed "technical or financial agreements" in the same breath as "service contracts" and used the terms interchangeably.

4. ID.; ID.; ID.; TECHNICAL AND FINANCIAL ASSISTANCE AGREEMENTS WERE UNDERSTOOD BY THE DELEGATES TO INCLUDE SERVICE CONTRACTS DULY MODIFIED TO PREVENT ABUSES. — *In any event, it would appear that the members of the Concom 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), *when they were crafting and polishing the provisions dealing with financial and/or technical assistance agreements. These provisions ultimately became the fourth and the fifth paragraphs of Section 2 of Article XII of the 1987 Constitution.* Put differently, "technical and financial assistance agreements" were understood by the delegates to include service contracts *duly modified to prevent abuses*.

5. ID.; ID.; ID.; CONCOM DRAFTERS REFER TO SERVICE CONTRACTS THAT MIGHT BE GIVEN TO FOREIGN-OWNED CORPORATIONS AS EXCEPTIONS TO THE GENERAL PRINCIPLE OF FILIPINO CONTROL OF THE ECONOMY. — I respectfully submit that the statements of Commissioner Jose Nolledo, quoted above, are especially pertinent, since they refer specifically to service contracts in favor of aliens. From his perspective, it is clear to me that *the Concom discussions in their entirety* had to do with service contracts that might be given to foreign-owned corporations as exceptions to the general principle of Filipino control of the economy.

6. ID.; ID.; AGREEMENTS INVOLVING TECHNICAL OR FINANCIAL ASSISTANCE INCLUDE MANAGEMENT AND OTHER FORMS OF ASSISTANCE. — Likewise, *technical assistance*, particularly in certain industries like mining and oil exploration, would likely be from the industry's leading players. It may involve the training of personnel and some form of supervision and oversight with respect to the correct and proper implementation of the technical assistance. The purpose is to ensure that the technical assistance rendered will not go to waste, and that the lender's business reputation

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and successful track record in the industry will be adequately safeguarded. Thus the technical assistance arrangements often necessarily include interface with the management process itself.

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The Solicitor General for public respondent.
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D E C I S I O N

CARPIO MORALES, *J.*:

The present petition for *mandamus* and prohibition assails the constitutionality of Republic Act No. 7942,[5] otherwise known as the PHILIPPINE MINING ACT OF 1995, along with the Implementing Rules and Regulations issued pursuant thereto, Department of Environment and Natural Resources (DENR) Administrative Order 96-40, and of the Financial and Technical Assistance Agreement (FTAA) entered into on March 30, 1995 by the Republic of the Philippines and WMC (Philippines), Inc. (WMCP), a corporation organized under Philippine laws.

On July 25, 1987, then President Corazon C. Aquino issued Executive Order (E.O.) No. 279[6] authorizing the DENR Secretary to

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[5] An Act Instituting A New System of Mineral Resources Exploration, Development, Utilization and Conservation.

[6] Authorizing the Secretary of Environment and Natural Resources to Negotiate and Conclude Joint Venture, Co-Production, or Production-Sharing Agreements for the Exploration, Development and Utilization of Mineral Resources, and Prescribing the Guidelines for such Agreements and those Agreements involving Technical or Financial Assistance by Foreign-Owned Corporations for Large-Scale Exploration, Development and Utilization of Minerals.

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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. In entering into such proposals, the President shall consider the real contributions to the economic growth and general welfare of the country that will be realized, as well as the development and use of local scientific and technical resources that will be promoted by the proposed contract or agreement. Until Congress shall determine otherwise, large-scale mining, for purpose of this Section, shall mean those proposals for contracts or agreements for mineral resources exploration, development, and utilization involving a committed capital in a single mining unit project of at least Fifty Million Dollars in United States currency (US $50,000,000.00).[7]

On March 3, 1995, then President Fidel V. Ramos approved R.A. No. 7942 to "govern the exploration, development, utilization and processing of all mineral resources."[8] R.A. No. 7942 defines the modes of mineral agreements for mining operations,[9] outlines the procedure for their filing and approval,[10] assignment/transfer[11] and withdrawal,[12] and fixes their terms.[13] Similar provisions govern financial or technical assistance agreements.[14]

The law prescribes the qualifications of contractors[15] and grants them certain rights, including timber,[16] water[17] and

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[7] Exec. Order No. 279 (1987). Sec. 4.

[8] Rep. Act No. 7942 (1995). Sec. 15.

[9] *Id.*. Sec. 26 (a)-(c).

[10] *Id.*. Sec. 29.

[11] *Id.*. Sec. 30.

[12] *Id.*. Sec. 31.

[13] *Id.*. Sec. 32.

[14] *Id.*. Ch. VI.

[15] *Id.*. Secs. 27 and 33 in relation to Sec. 3 (aq).

[16] *Id.*. Sec. 72.

[17] *Id.*. Sec. 73.

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easement[18] rights, and the right to possess explosives.[19] Surface owners, occupants, or concessionaires are forbidden from preventing holders of mining rights from entering private lands and concession areas.[20] A procedure for the settlement of conflicts is likewise provided for.[21]

The Act restricts the conditions for exploration,[22] quarry[23] and other[24] permits. It regulates the transport, sale and processing of minerals,[25] and promotes the development of mining communities, science and mining technology,[26] and safety and environmental protection.[27]

The government's share in the agreements is spelled out and allocated,[28] taxes and fees are imposed,[29] incentives granted.[30] Aside from penalizing certain acts,[31] the law likewise specifies grounds for the cancellation, revocation and termination of agreements and permits.[32]

On April 9, 1995, 30 days following its publication on March 10, 1995 in *Malaya* and *Manila Times*, two newspapers of general circulation, R.A. No. 7942 took effect.[33]

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[18] *Id.*, Sec. 75.

[19] *Id.*, Sec. 74.

[20] *Id.*, Sec. 76.

[21] *Id.*, Ch. XIII.

[22] *Id.*, Secs. 20-22.

[23] *Id.*, Secs. 43, 45.

[24] *Id.*, Secs. 46-49, 51-52.

[25] *Id.*, Ch. IX.

[26] *Id.*, Ch. X.

[27] *Id.*, Ch. XI.

[28] *Id.*, Ch. XIV.

[29] *Id.*, Ch. XV.

[30] *Id.*, Ch. XVI.

[31] *Id.*, Ch. XIX.

[32] *Id.*, Ch. XVII.

[33] Section 116, R.A. No. 7942 provides that the Act "shall take effect thirty (30) days following its complete publication in two (2) newspapers of general circulation in the Philippines."

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Shortly *before the effectivity of R.A. No. 7942*, however, or on March 30, 1995, the President entered into an FTAA with WMCP covering 99,387 hectares of land in South Cotabato, Sultan Kudarat, Davao del Sur and North Cotabato.[34]

On August 15, 1995, then DENR Secretary Victor O. Ramos issued DENR Administrative Order (DAO) No. 95-23, s. 1995, otherwise known as the Implementing Rules and Regulations of R.A. No. 7942. This was later repealed by DAO No. 96-40, s. 1996 which was adopted on December 20, 1996.

On January 10, 1997, counsels for petitioners sent a letter to the DENR Secretary demanding that the DENR stop the implementation of R.A. No. 7942 and DAO No. 96-40,[35] giving the DENR fifteen days from receipt[36] to act thereon. The DENR, however, has yet to respond or act on petitioners' letter.[37]

Petitioners thus filed the present petition for prohibition and *mandamus*, with a prayer for a temporary restraining order. They allege that at the time of the filing of the petition, 100 FTAA applications had already been filed, covering an area of 8.4 million hectares,[38] 64 of which applications are by fully foreign-owned corporations covering a total of 5.8 million hectares, and at least one by a fully foreign-owned mining company over offshore areas.[39]

Petitioners claim that the DENR Secretary acted without or in excess of jurisdiction:

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x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being

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[34] WMCP FTAA, Sec. 4.1.

[35] *Rollo*, p. 22.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.* The number has since risen to 129 applications when the petitioners filed their Reply. (*Rollo*, p. 363.)

[39] *Id.*, at 22.

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unconstitutional in that it allows fully foreign owned corporations to explore, develop, utilize and exploit mineral resources in a manner contrary to Section 2, paragraph 4, Article XII of the Constitution;

II

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows the taking of private property without the determination of public use and for just compensation;

III

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it violates Sec. 1, Art. III of the Constitution;

IV

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows enjoyment by foreign citizens as well as fully foreign owned corporations of the nation's marine wealth contrary to Section 2, paragraph 2 of Article XII of the Constitution;

V

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows priority to foreign and fully foreign owned corporations in the exploration, development and utilization of mineral resources contrary to Article XII of the Constitution;

VI

x x x in signing and promulgating DENR Administrative Order No. 96-40 implementing Republic Act No. 7942, the latter being unconstitutional in that it allows the inequitable sharing of wealth contrary to Sections [*sic*] 1, paragraph 1, and Section 2, paragraph 4[,] [Article XII] of the Constitution;

VII

x x x in recommending approval of and implementing the Financial and Technical Assistance Agreement between the President of

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the Republic of the Philippines and Western Mining Corporation Philippines Inc. because the same is illegal and unconstitutional.[40]

They pray that the Court issue an order:

(a) Permanently enjoining respondents from acting on any application for Financial or Technical Assistance Agreements;

(b) Declaring the Philippine Mining Act of 1995 or Republic Act No. 7942 as unconstitutional and null and void;

(c) Declaring the Implementing Rules and Regulations of the Philippine Mining Act contained in DENR Administrative Order No. 96-40 and all other similar administrative issuances as unconstitutional and null and void; and

(d) Cancelling the Financial and Technical Assistance Agreement issued to Western Mining Philippines, Inc. as unconstitutional, illegal and null and void.[41]

Impleaded as public respondents are Ruben Torres, the then Executive Secretary, Victor O. Ramos, the then DENR Secretary, and Horacio Ramos, Director of the Mines and Geosciences Bureau of the DENR. Also impleaded is private respondent WMCP, which entered into the assailed FTAA with the Philippine Government. *WMCP is owned by WMC Resources International Pty., Ltd. (WMC), "a wholly owned subsidiary of Western Mining Corporation Holdings Limited, a publicly listed major Australian* ***mining and exploration company.***"[42] By WMCP's information, "it is a 100% owned subsidiary of WMC LIMITED."[43]

Respondents, aside from meeting petitioners' contentions, argue that the requisites for judicial inquiry have not been met and that the petition does not comply with the criteria for prohibition and *mandamus*. Additionally, respondent WMCP argues that there has been a violation of the rule on hierarchy of courts.

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[40] *Id.*, at 23-24.

[41] *Id.*, at 52-53. Emphasis and italics supplied.

[42] WMCP FTAA, p. 2.

[43] *Rollo*, p. 220.

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After petitioners filed their reply, this Court granted due course to the petition. The parties have since filed their respective memoranda.

WMCP subsequently filed a Manifestation dated September 25, 2002 alleging that on January 23, 2001 WMC sold all its shares in WMCP to Sagittarius Mines, Inc. (Sagittarius), a corporation organized under Philippine laws.[44] WMCP was subsequently renamed "Tampakan Mineral Resources Corporation."[45] WMCP claims that at least 60% of the equity of Sagittarius is owned by Filipinos and/or Filipino-owned corporations while about 40% is owned by Indophil Resources NL, an Australian company.[46] It further claims that by such sale and transfer of shares, "WMCP has ceased to be connected in any way with WMC."[47]

By virtue of such sale and transfer, the DENR Secretary, by Order of December 18, 2001,[48] approved the transfer and registration of the subject FTAA from WMCP to Sagittarius. Said Order, however, was appealed by Lepanto Consolidated Mining Co. (Lepanto) to the Office of the President which upheld it by Decision of July 23, 2002.[49] Its motion for reconsideration having been denied by the Office of the President by Resolution of November 12, 2002,[50] Lepanto filed a petition for review[51] before the Court of Appeals. Incidentally, two other petitions for review related to the approval of the transfer and registration of the FTAA to Sagittarius were recently resolved by this Court.[52]

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[44] *Id.*, at 754.

[45] *Vide* Note 4.

[46] *Rollo*, p. 754.

[47] *Id.*, at 755.

[48] *Id.*, at 761-763.

[49] *Id.*, at 764-776.

[50] *Id.*, at 782-786.

[51] Docketed as C.A.-G.R. No. 74161.

[52] G.R. No. 153885, entitled *Lepanto Consolidated Mining Company v. WMC Resources International Pty. Ltd., et al.*, decided September 24, 2003 and G.R. No. 156214, entitled *Lepanto Mining Company v. WMC Resources International Pty. Ltd., WMC (Philippines), Inc., Southcot Mining Corporation, Tampakan Mining Corporation and Sagittarius Mines, Inc.*, decided September 23, 2003.

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It bears stressing that this case has not been rendered moot either by the transfer and registration of the FTAA to a Filipino-owned corporation or by the non-issuance of a temporary restraining order or a preliminary injunction to stay the above-said July 23, 2002 decision of the Office of the President.[53] The validity of the transfer remains in dispute and awaits final judicial determination. This assumes, of course, that such transfer cures the FTAA's alleged unconstitutionality, on which question judgment is reserved.

WMCP also points out that the original claimowners of the major mineralized areas included in the WMCP FTAA, namely, Sagittarius, Tampakan Mining Corporation, and Southcot Mining Corporation, are all Filipino-owned corporations,[54] each of which was a holder of an approved Mineral Production Sharing Agreement awarded in 1994, albeit their respective mineral claims were subsumed in the WMCP FTAA;[55] and that these three companies are the same companies that consolidated their interests in Sagittarius to whom WMC sold its 100% equity in WMCP.[56] WMCP concludes that in the event that the FTAA is invalidated, the MPSAs of the three corporations would be revived and the mineral claims would revert to their original claimants.[57]

These circumstances, while informative, are hardly significant in the resolution of this case, it involving the validity of the FTAA, not the possible consequences of its invalidation.

Of the above-enumerated seven grounds cited by petitioners, as will be shown later, only the first and the last need be delved

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[53] Section 12, Rule 43 of the Rules of Court, invoked by private respondent, states, "The appeal shall not stay the award, judgment, final order or resolution sought to be reviewed unless the Court of Appeals shall direct otherwise upon such terms as it may deem just."

[54] WMCP's Reply (dated May 6, 2003) to Petitioners' Comment (to the Manifestation and Supplemental Manifestation), p. 3.

[55] *Ibid.*

[56] *Ibid.*

[57] WMCP's Reply (dated May 6, 2003) to Petitioners' Comment (to the Manifestation and Supplemental Manifestation), p. 4.

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into; in the latter, the discussion shall dwell only insofar as it questions the effectivity of E.O. No. 279 by virtue of which order the questioned FTAA was forged.

I

Before going into the substantive issues, the procedural questions posed by respondents shall first be tackled.

REQUISITES FOR JUDICIAL REVIEW

When an issue of constitutionality is raised, this Court can exercise its power of judicial review only if the following requisites are present:

(1) The existence of an actual and appropriate case;

(2) A personal and substantial interest of the party raising the constitutional question;

(3) The exercise of judicial review is pleaded at the earliest opportunity; and

(4) The constitutional question is the *lis mota* of the case.[58]

Respondents claim that the first three requisites are not present.

Section 1, Article VIII of the Constitution states that "(j)udicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable." The power of judicial review, therefore, is limited to the determination of actual cases and controversies.[59]

An actual case or controversy means an existing case or controversy that is appropriate or ripe for determination, not conjectural or anticipatory,[60] lest the decision of the court would amount to an advisory opinion.[61] The power does not extend

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[58] *Philippine Constitution Association v. Enriquez*, 235 SCRA 506 (1994); *National Economic Protectionism Association v. Ongpin*, 171 SCRA 657 (1989); *Dumlao v. COMELEC*, 95 SCRA 392 (1980).

[59] *Dumlao v. COMELEC, supra.*

[60] *Board of Optometry v. Colet*, 260 SCRA 88 (1996).

[61] *Dumlao v. COMELEC, supra.*

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to hypothetical questions[62] since any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions unrelated to actualities.[63]

"Legal standing" or *locus standi* has been defined as a personal and substantial interest in the case such that the party has sustained or will sustain direct injury as a result of the governmental act that is being challenged,[64] alleging more than a generalized grievance.[65] The gist of the question of standing is whether a party alleges "such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions."[66] Unless a person is injuriously affected in any of his constitutional rights by the operation of statute or ordinance, he has no standing.[67]

Petitioners traverse a wide range of sectors. Among them are 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, members of said cooperative,[68] as well as other residents of areas also affected by the mining activities of WMCP.[69] These petitioners have standing to raise the

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[62] *Subic Bay Metropolitan Authority v. Commission on Elections*, 262 SCRA 492 (1996).

[63] *Angara v. Electoral Commission*, 63 Phil. 139 (1936).

[64] *Integrated Bar of the Philippines v. Zamora*, 338 SCRA 81, 100 (2000); *Dumlao v. COMELEC, supra; People v. Vera*, 65 Phil. 56 (1937).

[65] *Dumlao v. COMELEC, supra.*

[66] *Integrated Bar of the Philippines v. Zamora, supra.*

[67] *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila*, 21 SCRA 449 (1967).

[68] Petitioners Roberto P. Amloy, Raqim L. Dabie, Simeon H. Dolojo, Imelda Gandon, Leny B. Gusanan, Marcelo L. Gusanan, Quintol A. Labuayan, Lomingges Laway, and Benita P. Tacuayan.

[69] Petitioners Flong Agutin M. Dabie, Mario L. Mangcal, Alden S. Tusan, Sr., Susuan O. Bolanio, OND, Lolita G. Demonteverde, Benjie L. Nequinto, Rose Lilia S. Romano and Amparo S. Yap.

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constitutionality of the questioned FTAA as they allege a personal and substantial injury. They claim that they would suffer "irremediable displacement"[70] as a result of the implementation of the FTAA allowing WMCP to conduct mining activities in their area of residence. They thus meet the appropriate case requirement as they assert an interest adverse to that of respondents who, on the other hand, insist on the FTAA's validity.

In view of the alleged impending injury, petitioners also have standing to assail the validity of *E.O. No. 279*, by authority of which the FTAA was executed.

Public respondents maintain that petitioners, being strangers to the FTAA, cannot sue either or both contracting parties to annul it.[71] In other words, they contend that petitioners are not real parties in interest in an action for the annulment of contract.

Public respondents' contention fails. The present action is not merely one for annulment of contract but for prohibition and *mandamus*. Petitioners allege that public respondents acted without or in excess of jurisdiction in implementing the FTAA, which they submit is unconstitutional. As the case involves constitutional questions, this Court is not concerned with whether petitioners are real parties in interest, but with whether they have legal standing. As held in *Kilosbayan v. Morato*:[72]

> x x x "It is important to note . . . that standing because of its constitutional and public policy underpinnings, is very different from questions relating to whether a particular plaintiff is the real party in interest or has capacity to sue. Although all three requirements are directed towards ensuring that only certain parties can maintain an action, standing restrictions require a partial consideration of the merits, as well as broader policy concerns relating to the proper role of the judiciary in certain areas.["] (FRIEDENTHAL, KANE AND MILLER, *CIVIL PROCEDURE* 328 [1985])

Standing is a special concern in constitutional law because in some cases suits are brought not by parties who have been personally

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[70] *Rollo*, p. 6.

[71] *Id.* at 337, citing *Malabanan v. Gaw Ching*, 181 SCRA 84 (1990).

[72] 246 SCRA 540 (1995).

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injured by the operation of a law or by official action taken, but by concerned citizens, taxpayers or voters who actually sue in the public interest. Hence, the question in standing is whether such parties have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." (*Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 633 [1962].)

As earlier stated, petitioners meet this requirement.

The challenge against the constitutionality of *R.A. No. 7942 and DAO No. 96-40* likewise fulfills the requisites of justiciability. Although these laws were not in force when the subject FTAA was entered into, the question as to their validity is ripe for adjudication.

The WMCP FTAA provides:

> 14.3 *Future Legislation*
>
> Any term and condition more favourable to Financial & Technical Assistance Agreement contractors resulting from repeal or amendment of any existing law or regulation or from the enactment of a law, regulation or administrative order shall be considered a part of this Agreement.

It is undisputed that R.A. No. 7942 and DAO No. 96-40 contain provisions that are more favorable to WMCP, hence, these laws, to the extent that they are favorable to WMCP, govern the FTAA.

In addition, R.A. No. 7942 explicitly makes certain provisions apply to pre-existing agreements.

> SEC. 112. *Non-impairment of Existing Mining/Quarrying Rights.* — x x x That the provisions of Chapter XIV on government share in mineral production-sharing agreement and of Chapter XVI on incentives of this Act shall immediately govern and apply to a mining lessee or contractor unless the mining lessee or contractor indicates his intention to the secretary in writing not to avail of said provisions x x x *Provided, finally*, That such leases, production-sharing agreements, financial or technical assistance agreements

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shall comply with the applicable provisions of this Act and its implementing rules and regulations.

As there is no suggestion that WMCP has indicated its intention not to avail of the provisions of Chapter XVI of R.A. No. 7942, it can safely be presumed that they apply to the WMCP FTAA.

Misconstruing the application of the third requisite for judicial review — that the exercise of the review is pleaded at the earliest opportunity — WMCP points out that the petition was filed only almost two years after the execution of the FTAA, hence, not raised at the earliest opportunity.

The third requisite should not be taken to mean that the question of constitutionality must be raised immediately after the execution of the state action complained of. That the question of constitutionality has not been raised before is not a valid reason for refusing to allow it to be raised later.[73] A contrary rule would mean that a law, otherwise unconstitutional, would lapse into constitutionality by the mere failure of the proper party to promptly file a case to challenge the same.

PROPRIETY OF PROHIBITION AND MANDAMUS

Before the effectivity in July 1997 of the Revised Rules of Civil Procedure, Section 2 of Rule 65 read:

SEC. 2. *Petition for prohibition.* — When the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, are without or in excess of its or his jurisdiction, or with grave abuse of discretion, and there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court alleging the facts with certainty and praying that judgment be rendered commanding the defendant to desist from further proceeding in the action or matter specified therein.

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[73] *People v. Vera, supra.*

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Prohibition is a preventive remedy.[74] It seeks a judgment ordering the defendant to desist from continuing with the commission of an act perceived to be illegal.[75]

The petition for prohibition at bar is thus an appropriate remedy. While the execution of the contract itself may be *fait accompli,* its implementation is not. Public respondents, in behalf of the Government, have obligations to fulfill under said contract. Petitioners seek to prevent them from fulfilling such obligations on the theory that the contract is unconstitutional and, therefore, void.

The propriety of a petition for prohibition, being upheld, discussion of the propriety of the *mandamus* aspect of the petition is rendered unnecessary.

HIERARCHY OF COURTS

The contention that the filing of this petition violated the rule on hierarchy of courts does not likewise lie. The rule has been explained thus:

> Between two courts of concurrent original jurisdiction, it is the lower court that should initially pass upon the issues of a case. That way, as a particular case goes through the hierarchy of courts, it is shorn of all but the important legal issues or those of first impression, which are the proper subject of attention to the appellate court. This is a procedural rule borne of experience and adopted to improve the administration of justice.
>
> This Court has consistently enjoined litigants to respect the hierarchy of courts. Although this Court has concurrent jurisdiction with the Regional Trial Courts and the Court of Appeals to issue writs of *certiorari*, prohibition, *mandamus*, *quo warranto, habeas corpus* and injunction, such concurrence does not give a party unrestricted freedom of choice of court forum. The resort to this Court's primary jurisdiction to issue said writs shall be allowed only where the redress desired cannot be obtained in the appropriate courts *or where exceptional and compelling circumstances justify such invocation.* We held in *People v. Cuaresma* that:

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[74] *Militante v. Court of Appeals*, 330 SCRA 318 (2000).

[75] *Ibid.*

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> A becoming regard for judicial hierarchy most certainly indicates that petitions for the issuance of extraordinary writs against first level ("inferior") courts should be filed with the Regional Trial Court, and those against the latter, with the Court of Appeals. *A direct invocation of the Supreme Court's original jurisdiction to issue these writs should be allowed only where there are special and important reasons therefor,* clearly and specifically set out in the petition. This is established policy. It is a policy necessary to prevent inordinate demands upon the Court's time and attention which are better devoted to those matters within its exclusive jurisdiction, and to prevent further over-crowding of the Court's docket x x x[76] [Italics supplied.]

The repercussions of the issues in this case on the Philippine mining industry, if not the national economy, as well as the novelty thereof, constitute exceptional and compelling circumstances to justify resort to this Court in the first instance.

In all events, this Court has the discretion to take cognizance of a suit which does not satisfy the requirements of an actual case or legal standing when paramount public interest is involved.[77] When the issues raised are of paramount importance to the public, this Court may brush aside technicalities of procedure.[78]

II

Petitioners contend that E.O. No. 279 did not take effect because its supposed date of effectivity came after President Aquino had already lost her legislative powers under the Provisional Constitution.

And they likewise claim that the WMCP FTAA, which was entered into pursuant to E.O. No. 279, violates Section 2, Article XII of the Constitution because, among other reasons:

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[76] *Cruz v. Secretary of Environment and Natural Resources*, 347 SCRA 128 (2000), Kapunan, *J.*, Separate Opinion. [Italics supplied.]

[77] *Joya v. Presidential Commission on Good Government*, 225 SCRA 568 (1993).

[78] *Integrated Bar of the Philippines v. Zamora, supra.*

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(1) It allows foreign-owned companies to extend more than mere financial or technical assistance to the State in the exploitation, development, and utilization of minerals, petroleum, and other mineral oils, and even permits foreign owned companies to "*operate and manage mining activities*."

(2) It allows foreign-owned companies to extend both technical and financial assistance, instead of "*either* technical *or* financial assistance."

To appreciate the import of these issues, a visit to the history of the pertinent constitutional provision, the concepts contained therein, and the laws enacted pursuant thereto, is in order.

Section 2, Article XII reads in full:

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

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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 SPANISH REGIME AND THE REGALIAN DOCTRINE

The first sentence of Section 2 embodies the Regalian doctrine or *jura regalia*. Introduced by Spain into these Islands, this feudal concept is based on the State's power of *dominium*, which is the capacity of the State to own or acquire property.[79]

In its broad sense, the term "*jura regalia*" refers to royal rights, or those rights which the King has by virtue of his prerogatives. In Spanish law, it refers to a right which the sovereign has over anything in which a subject has a right of property or *propriedad*. These were rights enjoyed during feudal times by the king as the sovereign.

The theory of the feudal system was that title to all lands was originally held by the King, and while the use of lands was granted out to others who were permitted to hold them under certain conditions, the King theoretically retained the title. By fiction of law, the King was regarded as the original proprietor of all lands, and the true and only source of title, and from him all lands were held. The theory of *jura regalia* was therefore nothing more than a natural fruit of conquest.[80]

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[79] J. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 1009* (1996).

[80] *Cruz v. Secretary of Environment and Natural Resources, supra*, Kapunan, *J.*, Separate Opinion.

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The Philippines having passed to Spain by virtue of discovery and conquest,[81] earlier Spanish decrees declared that "all lands were held from the Crown."[82]

The Regalian doctrine extends not only to land but also to "all natural wealth that may be found in the bowels of the earth."[83] Spain, in particular, recognized the unique value of natural resources, viewing them, especially minerals, as an abundant source of revenue to finance its wars against other nations.[84] Mining laws during the Spanish regime reflected this perspective.[85]

[81] *Id.*, Puno, *J.*, Separate Opinion, and Panganiban, *J.*, Separate Opinion.

[82] *Cariño v. Insular Government*, 212 US 449, 53 L.Ed. 595 (1909). For instance, Law 14, Title 12, Book 4 of the *Recopilacion de Leyes de las Indias* proclaimed:

We having acquired full sovereignty over the Indies, and all lands, territories, and possessions not heretofore ceded away by our royal predecessors, or by us, or in our name, still pertaining to the royal crown and patrimony, it is our will that all lands which are held without proper and true deeds of grant be restored to us according as they belong to us, in order that after reserving before all what to us or to our viceroys, audiencias, and governors may seem necessary for public squares, ways, pastures, and commons in those places which are peopled, taking into consideration not only their present condition, but also their future and their probable increase, and after distributing to the natives what may be necessary for tillage and pasturage, confirming them in what they now have and giving them more if necessary, all the rest of said lands may remain free and unencumbered for us to dispose of as we may wish.

[83] *Republic v. Court of Appeals*, 160 SCRA 228 (1988). It has been noted, however, that "the prohibition in the [1935] Constitution against alienation by the state of mineral lands and minerals is not properly a part of the Regalian doctrine but a separate national policy designed to conserve our mineral resources and prevent the state from being deprived of such minerals as are essential to national defense." (A. NOBLEJAS, *PHILIPPINE LAW ON NATURAL RESOURCES* 126-127 [1959 ED.], citing V. FRANCISCO, *THE NEW MINING LAW.*)

[84] *Cruz v. Secretary of Environment and Natural Resources, supra*, Kapunan, *J.*, Separate Opinion, citing A. NOBLEJAS, *PHILIPPINE LAW ON NATURAL RESOURCES 6* (1961). Noblejas continues:

Thus, they asserted their right of ownership over mines and minerals or precious metals, golds, and silver as distinct from the right of ownership of the land in which the minerals were found. Thus, when on a piece of land mining was more valuable than agriculture, the sovereign retained ownership of mines although the land has been alienated to private ownership. Gradually, the right to the ownership of minerals was extended to base metals. If the sovereign did not exploit the minerals, they grant or sell it as a right separate from the land. (*Id.*, at 6.)

[85] In the unpublished case of *Lawrence v. Garduño* (L-10942, quoted in V. FRANCISCO, *PHILIPPINE LAW ON NATURAL RESOURCES* 14-15 [1956]), this Court observed:

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THE AMERICAN OCCUPATION AND THE CONCESSION REGIME

By the *Treaty of Paris of December 10, 1898*, Spain ceded "the archipelago known as the Philippine Islands" to the United States. The Philippines was hence governed by means of organic acts that were in the nature of charters serving as a Constitution of the occupied territory from 1900 to 1935.[86] Among the principal

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The principle underlying Spanish legislation on mines is that these are subject to the eminent domain of the state. The Spanish law of July 7, 1867, amended by the law of March 4, 1868, in article 2 says: "The ownership of the substances enumerated in the preceding article (among them those of inflammable nature), belong[s] to the state, and they cannot be disposed of without the government authority."

The first Spanish mining law promulgated for these Islands (Decree of Superior Civil Government of January 28, 1964), in its Article I, says: "The supreme ownership of mines throughout the kingdom belong[s] to the crown and to the king. They shall not be exploited except by persons who obtained special grant from this superior government and by those who may secure it thereafter, subject to this regulation."

Article 2 of the royal decree on ownership of mines in the Philippine Islands, dated May 14, 1867, which was the law in force at the time of the cession of these Islands to the Government of the United States, says: "The ownership of the substances enumerated in the preceding article (among them those of inflammable nature) belongs to the state, and they cannot be disposed of without an authorization issued by the Superior Civil Governor."

Furthermore, all those laws contained provisions regulating the manner of prospecting, locating and exploring mines in private property by persons other than the owner of the land as well as the granting of concessions, which goes to show that private land did not include, without express grant, the mines that might be found therein.

Analogous provisions are found in the Civil Code of Spain determining the ownership of mines. In its Article 339 (Article 420, New Civil Code) enumerating properties of public ownership, the mines are included until specially granted to private individuals. In its Article 350 (Art. 437, New Civil Code) declaring that the proprietor of any parcel of land is the owner of its surface and of everything under it, an exception is made as far as mining laws are concerned. Then in speaking of minerals, the Code in its Articles 426 and 427 (Art. 519, New Civil Code) provides rules governing the digging of pits by third persons on private-owned lands for the purpose of prospecting for minerals.

[86] *Atok Big-Wedge Mining Co. v. Intermediate Appellate Court*, 261 SCRA 528 (1996).

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organic acts of the Philippines was the Act of Congress of July 1, 1902, more commonly known as the *Philippine Bill of 1902*, through which the United States Congress assumed the administration of the Philippine Islands.[87] Section 20 of said Bill reserved the disposition of mineral lands of the public domain from sale. Section 21 thereof allowed the free and open exploration, occupation and purchase of mineral deposits not only to citizens of the Philippine Islands but to those of the United States as well:

> Sec. 21. That all valuable mineral deposits in public lands in the Philippine Islands, both surveyed and unsurveyed, are hereby declared to be free and open to exploration, occupation and purchase, and the land on which they are found, to occupation and purchase, by citizens of the United States or of said Islands: *Provided*, That when on any lands in said Islands entered and occupied as agricultural lands under the provisions of this Act, but not patented, mineral deposits have been found, the working of such mineral deposits is forbidden until the person, association, or corporation who or which has entered and is occupying such lands shall have paid to the Government of said Islands such additional sum or sums as will make the total amount paid for the mineral claim or claims in which said deposits are located equal to the amount charged by the Government for the same as mineral claims.

Unlike Spain, the United States considered natural resources as a source of wealth for its nationals and saw fit to allow both Filipino and American citizens to explore and exploit minerals in public lands, and to grant patents to private mineral lands.[88] A person who acquired ownership over a parcel of private mineral land pursuant to the laws then prevailing could exclude other persons, even the State, from exploiting minerals within his property.[89] Thus, earlier jurisprudence[90] held that:

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[87] *Ibid.*

[88] *Cruz v. Secretary of Environment and Natural Resources, supra*, Kapunan, J., Separate Opinion.

[89] *Ibid.*

[90] *McDaniel v. Apacible and Cuisia*, 42 Phil. 749 (1922).

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A valid and subsisting location of mineral land, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the present and exclusive possession of the lands located, and this exclusive right of possession and enjoyment continues during the entire life of the location. x x x

x x x x x x x x x.

The discovery of minerals in the ground by one who has a valid mineral location, perfect his claim and his location, not only against third persons *but also against the Government*. x x x [Italics in the original.]

The Regalian doctrine and the American system, therefore, differ in one essential respect. Under the Regalian theory, mineral rights are not included in a grant of land by the state; under the American doctrine, mineral rights are included in a grant of land by the government.[91]

Section 21 also made possible the concession (frequently styled "permit", "license" or "lease")[92] system.[93] This was the traditional regime imposed by the colonial administrators for the exploitation of natural resources in the extractive sector (petroleum, hard minerals, timber, *etc.*).[94]

Under the concession system, the concessionaire makes a direct equity investment for the purpose of exploiting a particular natural resource within a given area.[95] Thus, the concession amounts to complete control by the concessionaire over the country's natural resource, for it is given exclusive and plenary rights to exploit a particular resource at the point

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[91] NOBLEJAS, *supra*, at 5.

[92] V. M. A. Dimagiba, *Service Contract Concepts in Energy*, 57 PHIL. L. J. 307, 313 (1982).

[93] P. A. Agabin, *Service Contracts: Old Wine in New Bottles?*, in *II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT 3*.

[94] *Id.*, at 2-3.

[95] *Id.*, at 3.

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of extraction[96] In consideration for the right to exploit a natural resource, the concessionaire either pays rent or royalty, which is a fixed percentage of the gross proceeds.[97]

Later statutory enactments by the legislative bodies set up in the Philippines adopted the contractual framework of the concession.[98] For instance, Act No. 2932,[99] approved on August 31, 1920, which provided for the exploration, location, and lease of lands containing petroleum and other mineral oils and gas in the Philippines, and Act No. 2719,[100] approved on May 14, 1917, which provided for the leasing and development of coal lands in the Philippines, both utilized the concession system.[101]

THE 1935 CONSTITUTION AND THE NATIONALIZATION OF NATURAL RESOURCES

By the Act of United States Congress of March 24, 1934, popularly known as the *Tydings-McDuffie Law*, the People of the Philippine Islands were authorized to adopt a constitution.[102] On July 30, 1934, the Constitutional Convention met for the purpose of drafting a constitution, and the Constitution subsequently drafted was approved by the Convention on February 8, 1935.[103] The Constitution was submitted to the President of the United States on March 18, 1935.[104] On March 23, 1935, the President of the United States certified that the Constitution conformed substantially with the provisions of the

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[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.*

[99] An Act to Provide for the Exploration, Location and Lease of Lands Containing Petroleum and other Mineral Oils and Gas in the Philippine Islands.

[100] An Act to Provide for the Leasing and Development of Coal Lands in the Philippine Islands.

[101] Agabin, *supra*, at 3.

[102] *People v. Linsangan*, 62 Phil. 646 (1935).

[103] *Ibid.*

[104] *Ibid.*

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Act of Congress approved on March 24, 1934.[105] On May 14, 1935, the Constitution was ratified by the Filipino people.[106]

The 1935 Constitution adopted the Regalian doctrine, declaring all natural resources of the Philippines, including mineral lands and minerals, to be property belonging to the State.[107] As adopted in a republican system, the medieval concept of *jura regalia* is stripped of royal overtones and ownership of the land is vested in the State.[108]

Section 1, Article XIII, on Conservation and Utilization of Natural Resources, of the 1935 Constitution provided:

SECTION 1. All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines, or to corporations or associations at least sixty *per centum* of the capital of which is owned by such citizens, subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution. Natural resources, with the exception of public agricultural land, shall not be alienated, and no license, concession, or lease for the exploitation, development, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases beneficial use may be the measure and limit of the grant.

The nationalization and conservation of the natural resources of the country was one of the fixed and dominating objectives of the 1935 Constitutional Convention.[109] One delegate relates:

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[105] *Ibid.*

[106] *Ibid.*

[107] *Atok Big-Wedge Mining Co. v. Intermediate Appellate Court, supra.*

[108] BERNAS, S.J., *supra*, at 1009-1010, citing *Lee Hong Hok v. David*, 48 SCRA 372 (1972).

[109] II J. ARUEGO, *THE FRAMING OF THE PHILIPPINE CONSTITUTION* 592 (1949).

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There was an overwhelming sentiment in the Convention in favor of the principle of state ownership of natural resources and the adoption of the Regalian doctrine. State ownership of natural resources was seen as a necessary starting point to secure recognition of the state's power to control their disposition, exploitation, development, or utilization. The delegates of the Constitutional Convention very well knew that the concept of State ownership of land and natural resources was introduced by the Spaniards, however, they were not certain whether it was continued and applied by the Americans. To remove all doubts, the Convention approved the provision in the Constitution affirming the Regalian doctrine.

The adoption of the principle of state ownership of the natural resources and of the Regalian doctrine was considered to be a necessary starting point for the plan of nationalizing and conserving the natural resources of the country. For with the establishment of the principle of state ownership of the natural resources, it would not be hard to secure the recognition of the power of the State to control their disposition, exploitation, development or utilization.[110]

The nationalization of the natural resources was intended (1) to insure their conservation for Filipino posterity; (2) to serve as an instrument of national defense, helping prevent the extension to the country of foreign control through peaceful economic penetration; and (3) to avoid making the Philippines a source of international conflicts with the consequent danger to its internal security and independence.[111]

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[110] *Id.*, at 600-601.

[111] *Id.*, at 604. Delegate Aruego expounds:

At the time of the framing of the Philippine Constitution, Filipino capital had been known to be rather shy. Filipinos hesitated as a general rule to invest a considerable sum of their capital for the development, exploitation, and utilization of the natural resources of the country. They had not as yet been so used to corporate enterprises as the peoples of the West. This general apathy, the delegates knew, would mean the retardation of the development of the natural resources, unless foreign capital would be encouraged to come in and help in that development. They knew that the nationalization of the natural resources would certainly not encourage the investment of foreign capital into them. But there was a general feeling in the Convention that it was better to have such development retarded or even postponed altogether until such time when the Filipinos would be ready and willing to undertake it

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The same Section 1, Article XIII also adopted the concession system, expressly permitting the State to grant licenses, concessions, or leases for the exploitation, development, or utilization of any of the natural resources. Grants, however, were limited to Filipinos or entities at least 60% of the capital of which is owned by Filipinos.

The swell of nationalism that suffused the 1935 Constitution was radically diluted when on November 1946, the Parity Amendment, which came in the form of an "Ordinance Appended to the Constitution," was ratified in a plebiscite.[112] The Amendment extended, from July 4, 1946 to July 3, 1974, the right to utilize and exploit our natural resources to citizens of the United States and business enterprises owned or controlled, directly or indirectly, by citizens of the United States:[113]

Notwithstanding the provision of Section one, Article Thirteen, and Section eight, Article Fourteen, of the foregoing Constitution, during the effectivity of the Executive Agreement entered into by the President of the Philippines with the President of the United States

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rather than permit the natural resources to be placed under the ownership or control of foreigners in order that they might be immediately developed, with the Filipinos of the future serving not as owners but at most as tenants or workers under foreign masters. By all means, the delegates believed, the natural resources should be conserved for Filipino posterity.

The nationalization of natural resources was also intended as an instrument of national defense. The Convention felt that to permit foreigner to own or control the natural resources would be to weaken the national defense. It would be making possible the gradual extension of foreign influence into our politics, thereby increasing the possibility of foreign control. x x x

Not only these. The nationalization of the natural resources, it was believed, would prevent making the Philippines a source of international conflicts with the consequent danger to its internal security and independence. For unless the natural resources were nationalized, with the nationals of foreign countries having the opportunity to own or control them, conflicts of interest among them might arise inviting danger to the safety and independence of the nation. (*Id.*, at 605-606.)

[112] *Palting v. San Jose Petroleum Inc.*, 18 SCRA 924 (1966); *Republic v. Quasha*, 46 SCRA 160 (1972).

[113] *Atok Big-Wedge Mining Co. v. Intermediate Appellate Court, supra.*

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on the fourth of July, nineteen hundred and forty-six, pursuant to the provisions of Commonwealth Act Numbered Seven hundred and thirty-three, but in no case to extend beyond the third of July, nineteen hundred and seventy-four, the disposition, exploitation, development, and utilization of all agricultural, timber, and mineral lands of the public domain, waters, minerals, coals, petroleum, and other mineral oils, all forces and sources of potential energy, and other natural resources of the Philippines, and the operation of public utilities, shall, if open to any person, be open to citizens of the United States and to all forms of business enterprise owned or controlled, directly or indirectly, by citizens of the United States in the same manner as to, and under the same conditions imposed upon, citizens of the Philippines or corporations or associations owned or controlled by citizens of the Philippines.

The Parity Amendment was subsequently modified by the 1954 Revised Trade Agreement, also known as the Laurel-Langley Agreement, embodied in Republic Act No. 1355.[114]

[114] Article VI thereof provided:

1. The disposition, exploitation, development and utilization of all agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces and of sources of potential energy, and other natural resources of either Party, and the operation of public utilities, shall, if open to any person, be open to citizens of the other Party and to all forms of business enterprise owned or controlled directly or indirectly, by citizens of such other Party in the same manner as to and under the same conditions imposed upon citizens or corporations or associations owned or controlled by citizens of the Party granting the right.

2. The rights provided for in Paragraph 1 may be exercised x x x in the case of citizens of the United States, with respect to natural resources in the public domain in the Philippines, only through the medium of a corporation organized under the laws of the Philippines and at least 60% of the capital stock of which is owned and controlled by citizens of the United States. x x x

3. The United States of America reserves the rights of the several States of the United States to limit the extent to which citizens or corporations or associations owned or controlled by citizens of the Philippines may engage in the activities specified in this article. The Republic of the Philippines reserves the power to deny and of the rights specified in this Article to citizens of the United States who are citizens of States, or to corporations or associations at least 60% of whose capital stock or capital is owned or controlled by citizens of States, which deny like rights to citizens of the Philippines, or to corporations or associations which are owned or controlled by citizens of the Philippines x x x

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THE PETROLEUM ACT OF 1949 AND THE CONCESSION SYSTEM

In the meantime, Republic Act No. 387,[115] also known as the Petroleum Act of 1949, was approved on June 18, 1949.

The Petroleum Act of 1949 employed the concession system for the exploitation of the nation's petroleum resources. Among the kinds of concessions it sanctioned were exploration and exploitation concessions, which respectively granted to the 115 concessionaire the exclusive right to explore for[116] or develop[117] petroleum within specified areas.

Concessions may be granted only to duly qualified persons[118] who have sufficient finances, organization, resources, technical competence, and skills necessary to conduct the operations to be undertaken.[119]

Nevertheless, the Government reserved the right to undertake such work itself.[120] This proceeded from the theory that all natural deposits or occurrences of petroleum or natural gas in

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[115] An Act to Promote the Exploration, Development, Exploitation, and Utilization of the Petroleum Resources of the Philippines; to Encourage the Conservation of such Petroleum Resources; to Authorize the Secretary of Agriculture and Natural Resources to Create an Administration Unit and a Technical Board in the Bureau of Mines; to Appropriate Funds therefor; and for other purposes.

[116] Rep. Act No. 387 (1949), as amended, Art. 10 (b).

[117] *Id.*, Art. 10 (c).

[118] *Id.*, Art. 5.

[119] *Id.*, Art. 31. The same provision recognized the rights of American citizens under the Parity Amendment:

During the effectivity and subject to the provisions of the ordinance appended to the Constitution of the Philippines, citizens of the United States and all forms of business enterprises owned and controlled, directly or indirectly, by citizens of the United States shall enjoy the same rights and obligations under the provisions of this Act in the same manner as to, and under the same conditions imposed upon, citizens of the Philippines or corporations or associations owned or controlled by citizens of the Philippines.

[120] *Id.*, Art. 10.

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public and/or private lands in the Philippines belong to the State.[121] Exploration and exploitation concessions did not confer upon the concessionaire ownership over the petroleum lands and petroleum deposits.[122] However, they did grant concessionaires the right to explore, develop, exploit, and utilize them for the period and under the conditions determined by the law.[123]

Concessions were granted at the complete risk of the concessionaire; the Government did not guarantee the existence of petroleum or undertake, in any case, title warranty.[124]

Concessionaires were required to submit information as maybe required by the Secretary of Agriculture and Natural Resources, including reports of geological and geophysical examinations, as well as production reports.[125] Exploration[126] and exploitation[127] concessionaires were also required to submit work programs.

Exploitation concessionaires, in particular, were obliged to pay an annual exploitation tax,[128] the object of which is to induce the concessionaire to actually produce petroleum, and not simply to sit on the concession without developing or exploiting it.[129] These concessionaires were also bound to pay the Government royalty, which was not less than 12½% of the petroleum produced and saved, less that consumed in the operations of the concessionaire.[130] Under Article 66, R.A. No. 387, the exploitation

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[121] *Id.*, Art. 3.

[122] *Id.*, Art. 9.

[123] *Ibid.*

[124] Rep. Act No. 387 (1949), as amended, Art. 8.

[125] *Id.*, Art. 25.

[126] *Id.*, Art. 47.

[127] *Id.*, Art. 60.

[128] *Id.*, Art. 64. Article 49, R.A. No. 387 originally imposed an annual exploration tax on exploration concessionaires but this provision was repealed by Section 1, R.A. No. 4304.

[129] FRANCISCO, *supra*, at 103.

[130] Rep. Act No. 387 (1949), as amended, Art. 65.

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tax may be credited against the royalties so that if the concessionaire shall be actually producing enough oil, it would not actually be paying the exploitation tax.[131]

Failure to pay the annual exploitation tax for two consecutive years,[132] or the royalty due to the Government within one year from the date it becomes due,[133] constituted grounds for the cancellation of the concession. In case of delay in the payment of the taxes or royalty imposed by the law or by the concession, a surcharge of 1% per month is exacted until the same are paid.[134]

As a rule, title rights to all equipment and structures that the concessionaire placed on the land belong to the exploration or exploitation concessionaire.[135] Upon termination of such concession, the concessionaire had a right to remove the same.[136]

The Secretary of Agriculture and Natural Resources was tasked with carrying out the provisions of the law, through the Director of Mines, who acted under the Secretary's immediate supervision and control.[137] The Act granted the Secretary the authority to inspect any operation of the concessionaire and to examine all the books and accounts pertaining to operations or conditions related to payment of taxes and royalties.[138]

The same law authorized the Secretary to create an Administration Unit and a Technical Board.[139] The Administration Unit was charged, *inter alia*, with the enforcement of the provisions of the law.[140] The Technical Board had, among other

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131 FRANCISCO, *Supra*, at 103.

132 Rep. Act No. 387 (1949), as amended, Art. 90 (b) 3.

133 *Id.*, Art. 90 (b) 4.

134 *Id.*, Art. 93-A.

135 *Id.*, Art. 93.

136 *Ibid.*

137 Rep. Act No. 387 (1949), as amended, Art. 94.

138 *Id.*, Art. 106.

139 *Id.*, Art. 95.

140 *Ibid.*

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functions, the duty to check on the performance of concessionaires and to determine whether the obligations imposed by the Act and its implementing regulations were being complied with.[141]

Victorio Mario A. Dimagiba, Chief Legal Officer of the Bureau of Energy Development, analyzed the benefits and drawbacks of the concession system insofar as it applied to the petroleum industry:

Advantages of Concession. Whether it emphasizes income tax or royalty, the most positive aspect of the concession system is that the State's financial involvement is virtually risk free and administration is simple and comparatively low in cost. Furthermore, if there is a competitive allocation of the resource leading to substantial bonuses and/or greater royalty coupled with a relatively high level of taxation, revenue accruing to the State under the concession system may compare favorably with other financial arrangements.

Disadvantages of Concession. There are, however, major negative aspects to this system. Because the Government's role in the traditional concession is passive, it is at a distinct disadvantage in managing and developing policy for the nation's petroleum resource. This is true for several reasons. First, even though most concession agreements contain covenants requiring diligence in operations and production, this establishes only an indirect and passive control of the host country in resource development. Second, and more importantly, the fact that the host country does not directly participate in resource management decisions inhibits its ability to train and employ its nationals in petroleum development. This factor could delay or prevent the country from effectively engaging in the development of its resources. Lastly, a direct role in management is usually necessary in order to obtain a knowledge of the international petroleum industry which is important to an appreciation of the host country's resources in relation to those of other countries.[142]

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[141] Rep. Act No. 387 (1949), as amended, Art. 95 (e).

[142] Dimagiba, *supra*, at 315, citing Fabrikant, *Oil Discovery and Technical Change in Southeast Asia, Legal Aspects of Production Sharing Contracts in the Indonesian Petroleum Industry*, 101-102, Sections 13C.24 and 13C.25 (1972).

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Other liabilities of the system have also been noted:

> x x x there are functional implications which give the concessionaire great economic power arising from its exclusive equity holding. This includes, first, appropriation of the returns of the undertaking, subject to a modest royalty; second, exclusive management of the project; third, control of production in the natural resource, such as volume of production, expansion, research and development; and fourth, exclusive responsibility for downstream operations, like processing, marketing, and distribution. In short, even if nominally, the state is the sovereign and owner of the natural resource being exploited, it has been shorn of all elements of control over such natural resource because of the exclusive nature of the contractual regime of the concession. The concession system, investing as it does ownership of natural resources, constitutes a consistent inconsistency within the principle embodied in our Constitution that natural resources belong to the State and shall not be alienated, not to mention the fact that the concession was the bedrock of the colonial system in the exploitation of natural resources.[143]

Eventually, the concession system failed for reasons explained by Dimagiba:

> Notwithstanding the good intentions of the Petroleum Act of 1949, the concession system could not have properly spurred sustained oil exploration activities in the country, since it assumed that such a capital-intensive, high risk venture could be successfully undertaken by a single individual or a small company. In effect, concessionaires' funds were easily exhausted. Moreover, since the concession system practically closed its doors to interested foreign investors, local capital was stretched to the limits. The old system also failed to consider the highly sophisticated technology and expertise required, which would be available only to multinational companies.[144]

A shift to a new regime for the development of natural resources thus seemed imminent.

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[143] Agabin, *supra*, at 4.

[144] Dimagiba, *supra*, at 318.

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PRESIDENTIAL DECREE NO. 87, THE 1973 CONSTITUTION AND THE SERVICE CONTRACT SYSTEM

The promulgation on December 31, 1972 of Presidential Decree No. 87,[145] otherwise known as THE OIL EXPLORATION AND DEVELOPMENT ACT OF 1972 signaled such a transformation. P.D. No. 87 permitted the government to explore for and produce indigenous petroleum through "*service contracts*."[146]

"Service contracts" is a term that assumes varying meanings to different people, and it has carried many names in different countries, like "work contracts" in Indonesia, "concession agreements" in Africa, "production-sharing agreements" in the Middle East, and "participation agreements" in Latin America.[147] A functional definition of "service contracts" in the Philippines is provided as follows:

> A service contract is a contractual arrangement for engaging in the exploitation and development of petroleum, mineral, energy, land and other natural resources by which a government or its agency, or a private person granted a right or privilege by the government authorizes the other party (service contractor) to engage or participate in the exercise of such right or the enjoyment of the privilege, in that the latter provides financial or technical resources, undertakes the exploitation or production of a given resource, or directly manages the productive enterprise, operations of the exploration and exploitation of the resources or the disposition of marketing or resources.[148]

In a service contract under P.D. No. 87, service and technology are furnished by the service contractor for which it shall be entitled to the stipulated service fee.[149] The contractor must be

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[145] Amending Presidential Decree No. 8 issued on October 2, 1972, and Promulgating an Amended Act to Promote the Discovery and Production of Indigenous Petroleum and Appropriate Funds Therefor.

[146] Pres. Decree No. 87 (1972), Sec. 4.

[147] Agabin, *supra*, at 6.

[148] M. Magallona, *Service Contracts in Philippine Natural Resources*, 9 WORLD BULL. 1, 4 (1993).

[149] Pres. Decree No. 87 (1972), Sec. 6.

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technically competent and financially capable to undertake the operations required in the contract.[150]

Financing is supposed to be provided by the Government to which all petroleum produce belongs.[151] In case the Government is unable to finance petroleum exploration operations, the contractor may furnish services, technology and financing, and the proceeds of sale of the petroleum produced under the contract shall be the source of funds for payment of the service fee and the operating expenses due the contractor.[152] The contractor shall undertake, manage and execute petroleum operations, subject to the government overseeing the management of the operations.[153] The contractor provides all necessary services and technology and the requisite financing, performs the exploration work obligations, and assumes all exploration risks such that if no petroleum is produced, it will not be entitled to reimbursement.[154] Once petroleum in commercial quantity is discovered, the contractor shall operate the field on behalf of the government.[155]

P.D. No. 87 prescribed minimum terms and conditions for every service contract.[156] It also granted the contractor certain privileges, including exemption from taxes and payment of tariff duties,[157] and permitted the repatriation of capital and retention of profits abroad.[158]

Ostensibly, the service contract system had certain advantages over the concession regime.[159] It has been opined, though, that,

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[150] *Id.*, Sec. 4.

[151] *Id.*, Sec. 6.

[152] *Id.*, Sec. 7.

[153] *Id.*, Sec. 8.

[154] *Ibid.*

[155] *Ibid.*

[156] Pres. Decree No. 87 (1972), Sec. 9.

[157] *Id.*, Sec. 12.

[158] *Id.*, Sec. 13.

[159] Dimagiba draws the following comparison between the service contract scheme and the concession system:

In both the concession system and the service contract scheme, work and financial obligations are required of the developer. Under Republic Act No.

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in the Philippines, our concept of a service contract, at least in the petroleum industry, was basically a concession regime with a production-sharing element.[160]

On January 17, 1973, then President Ferdinand E. Marcos proclaimed the ratification of a new Constitution.[161] Article XIV

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387 and Presidential Decree No. 87, the concessionaire and the service contractors are extracted certain taxes in favor of the government. In both arrangements, the explorationist/developer is given incentives in the form of tax exemptions in the importation or disposition of machinery, equipment, materials and spare parts needed in petroleum operations.

The concessionaire and the service contractor are required to keep in their files valuable data and information and may be required to submit need technological or accounting reports to the Government. Duly authorized representatives of the Government could, under the law, inspect or audit the books of accounts of the contract holder.

In both systems, signature, discovery or production bonuses may be given by the developer to the host Government.

The concession system, however, differs considerably from the service contract system in important areas of the operations. In the concession system, the Government merely receives fixed royalty which is a certain percentage of the crude oil produced or other units of measure, regardless of whether the concession holder makes profits or not. This is not so in the service contract system. A certain percentage of the gross production is set aside for recoverable expenditures by the contractor. Of the net proceeds the parties are entitled percentages of share that will accrue to each of them.

In the royalty system, the concessionaire may be discouraged to produce more for the reason that since the royalty paid to the host country is closely linked to the volume of production, the greater the produce, the more amount or royalty would be allocated to the Government. This is not so in the production sharing system. The share of the Government depends largely on the net proceeds of production after reimbursing the service contractor of its recoverable expenses.

As a general rule, the Government plays a passive role in the concession system, more particularly, interested in receiving royalties from the concessionaire. In the production-sharing arrangement, the Government plays a more active role in the management and monitoring of oil operations and requires the service contractor entertain obligations designed to bring more economic and technological benefits to the host country. (Dimagiba, *supra*, at 330-331.)

[160] Agabin, *supra*, at 6.

[161] The antecedents leading to the Proclamation are narrated in *Javellana v. Executive Secretary*, 50 SCRA 55 (1973):

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on the National Economy and Patrimony contained provisions similar to the 1935 Constitution with regard to Filipino participation in the nation's natural resources. Section 8, Article XIV thereof provides:

> Sec. 8. All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, wildlife, and other natural resources of the Philippines belong to the State. With the exception of agricultural, industrial or commercial, residential and resettlement lands of the public domain, natural resources shall not be alienated, and no license, concession, or lease for the exploration, development, exploitation, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, renewable for not more than twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases beneficial use may be the measure and limit of the grant.

While Section 9 of the same Article maintained the Filipino-only policy in the enjoyment of natural resources, it also allowed Filipinos, upon authority of the Batasang Pambansa, to enter into service contracts with any person or entity for the exploration or utilization of natural resources.

On March 16, 1967, Congress of the Philippines passed Resolution No. 2, which was amended by Resolution No. 4, of said body, adopted on June 17, 1967, calling a convention to propose amendments to the Constitution of the Philippines. Said Resolution No. 2, as amended, was implemented by Republic Act No. 6132 approved on August 24, 1970, pursuant to the provisions of which the election of delegates to said convention was held on November 10, 1970, and the 1971 Convention began to perform its functions on June 1, 1971. While the Convention was in session on September 21, 1972, the President issued Proclamation No. 1081 placing the entire Philippines under Martial Law. On November 29, 1972, the President of the Philippines issued Presidential Decree No. 73, submitting to the Filipino people for ratification or rejection the Constitution of the Republic of the Philippines proposed by the 1971 Constitutional Convention, and appropriating funds therefor, as well as setting the plebiscite for such ratification on January 15, 1973.

On January 17, 1973, the President issued Proclamation No. 1102 certifying and proclaiming that the Constitution proposed by the 1971 Constitutional Convention "has been ratified by an overwhelming majority of all the votes cast by the members of all the Barangays (Citizens Assemblies) throughout the Philippines, and has thereby come into effect."

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

The concept of service contracts, according to one delegate, was borrowed from the methods followed by India, Pakistan and especially Indonesia in the exploration of petroleum and mineral oils.[162] The provision allowing such contracts, according to another, was intended to "enhance the proper development of our natural resources since Filipino citizens lack the needed capital and technical know-how which are essential in the proper exploration, development and exploitation of the natural resources of the country."[163]

The original idea was to authorize the government, not private entities, to enter into service contracts with foreign entities.[164] As finally approved, however, a citizen or private entity could be allowed by the National Assembly to enter into such service contract.[165] The prior approval of the National Assembly was deemed sufficient to protect the national interest.[166] Notably, none of the laws allowing service contracts were passed by the

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[162] BERNAS, S.J., *supra*, at 1016, Note 28, citing Session of November 25, 1972.

[163] Agabin, *supra*, at 1, quoting Sanvictores, *The Economic Provisions in the 1973 Constitution,* in ESPIRITU, 1979 *PHILCONSA READER ON CONSTITUTIONAL AND POLICY ISSUES* 449.

[164] BERNAS, S.J., *supra*, at 1016, Note 28, citing Session of November 25, 1972.

[165] *Ibid.*

[166] *Ibid.*

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Batasang Pambansa. Indeed, all of them were enacted by presidential decree.

On March 13, 1973, shortly after the ratification of the new Constitution, the President promulgated Presidential Decree No. 151.[167] The law allowed Filipino citizens or entities which have acquired lands of the public domain or which own, hold or control such lands to enter into service contracts for financial, technical, management or other forms of assistance with any foreign persons or entity for the exploration, development, exploitation or utilization of said lands.[168]

Presidential Decree No. 463,[169] also known as THE MINERAL RESOURCES DEVELOPMENT DECREE OF 1974, was enacted on May 17, 1974. Section 44 of the decree, as amended, provided that a lessee of a mining claim may enter into a service contract with a qualified domestic or foreign contractor for the exploration, development and exploitation of his claims and the processing and marketing of the product thereof.

Presidential Decree No. 704[170] (THE FISHERIES DECREE OF 1975), approved on May 16, 1975, allowed Filipinos engaged in commercial fishing to enter into contracts for financial, technical or other forms of assistance with any foreign person, corporation or entity for the production, storage, marketing and processing of fish and fishery/aquatic products.[171]

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[167] Allowing Citizens of the Philippines or Corporations or Associations at least Sixty Per Centum of the Capital of which is Owned by such Citizens to Enter into Service Contracts with Foreign Persons, Corporations for the Exploration, Development, Exploitation or Utilization of Lands of the Public Domain, Amending for the purpose certain provisions of Commonwealth Act No. 141.

[168] Pres. Decree No. 151 (1973), Sec. 1.

[169] Providing for A Modernized System of Administration and Disposition of Mineral Lands and to Promote and Encourage the Development and Exploitation thereof.

[170] Revising and Consolidating All Laws and Decrees Affecting Fishing and Fisheries.

[171] Pres. Decree No. 704 (1975), Sec. 21.

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Presidential Decree No. 705[172] (THE REVISED FORESTRY CODE OF THE PHILIPPINES), approved on May 19, 1975, allowed "forest products licensees, lessees, or permitees to enter into service contracts for financial, technical, management, or other forms of assistance . . . with any foreign person or entity for the exploration, development, exploitation or utilization of the forest resources."[173]

Yet another law allowing service contracts, this time for geothermal resources, was Presidential Decree No. 1442,[174] which was signed into law on June 11, 1978. Section 1 thereof authorized the Government to enter into service contracts for the exploration, exploitation and development of geothermal resources with a foreign contractor who must be technically and financially capable of undertaking the operations required in the service contract.

Thus, virtually the entire range of the country's natural resources — from petroleum and minerals to geothermal energy, from public lands and forest resources to fishery products — was well covered by apparent legal authority to engage in the direct participation or involvement of foreign persons or corporations (otherwise disqualified) in the exploration and utilization of natural resources through service contracts.[175]

THE 1987 CONSTITUTION AND TECHNICAL OR FINANCIAL ASSISTANCE AGREEMENTS

After the February 1986 Edsa Revolution, Corazon C. Aquino took the reins of power under a revolutionary government. On March 25, 1986, President Aquino issued Proclamation No. 3,[176] promulgating the Provisional Constitution, more popularly

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[172] Revising Presidential Decree No. 389, otherwise known as The Forestry Reform Code of the Philippines.

[173] Pres. Decree No. 705 (1975), Sec. 62.

[174] An Act to Promote the Exploration and Development of Geothermal Resources.

[175] Magallona, *supra*, at 6.

[176] Declaring a National Policy to Implement the Reforms Mandated by the People, Protecting their Basic Rights, Adopting a Provisional Constitution, and Providing for an Orderly Transition to a Government under a New Constitution.

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referred to as the Freedom Constitution. By authority of the same Proclamation, the President created a Constitutional Commission (CONCOM) to draft a new constitution, which took effect on the date of its ratification on February 2, 1987.[177]

The 1987 Constitution retained the Regalian doctrine. The first sentence of Section 2, Article XII states: "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."

Like the 1935 and 1973 Constitutions before it, the 1987 Constitution, in the second sentence of the same provision, prohibits the alienation of natural resources, except agricultural lands.

The third sentence of the same paragraph is 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 proceeds from the concept of *jura regalia*, as well as the recognition of the importance of the country's natural resources, not only for national economic development, but also for its security and national defense.[178] Under this provision, the State assumes "a more dynamic role" in the exploration, development and utilization of natural resources.[179]

Conspicuously absent in Section 2 is the provision in the 1935 and 1973 Constitutions authorizing the State to grant licenses, concessions, or leases for the exploration, exploitation, development, or utilization of natural resources. By such omission, the utilization of inalienable lands of public domain through

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[177] CONST., Art. XVIII, Sec. 27; *De Leon v. Esguerra*, 153 SCRA 602 (1987).

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

[179] *Ibid.*

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"license, concession or lease" is no longer allowed under the 1987 Constitution.[180]

Having omitted the provision on the concession system, Section 2 proceeded to introduce "unfamiliar language":[181]

> 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.

Consonant with the State's "full supervision and control" over natural resources, Section 2 offers the State two "options."[182] One, the State may directly undertake these activities itself; or two, it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or entities at least 60% of whose capital is owned by such citizens.

A third option is 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.

While the second and third options are limited only to Filipino citizens or, in the case of the former, to corporations or associations at least 60% of the capital of which is owned by Filipinos, a fourth allows the participation of foreign-owned corporations. The fourth and fifth paragraphs of Section 2 provide:

> 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

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[180] *Ibid.*

[181] J. BERNAS, S.J., *THE INTENT OF THE 1986 CONSTITUTION WRITERS* 812 (1995).

[182] *Miners Association of the Philippines, Inc. v. Factoran, Jr., supra.*

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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.

Although Section 2 sanctions the participation of foreign-owned corporations in the exploration, development, and utilization of natural resources, it imposes certain limitations or conditions to agreements with such corporations.

First, the *parties* to FTAAs. Only the *President*, in 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, the *size* of the activities: only *large-scale* exploration, development, and utilization is allowed. The term "large-scale usually refers to very capital-intensive activities."[183]

Third, the *natural resources subject of the activities* is restricted to *minerals, petroleum and other mineral oils,* the intent being to limit service contracts to those areas where Filipino capital may not be sufficient.[184]

Fourth, *consistency with the provisions of statute*. The agreements must be *in accordance with the terms and conditions provided by law.*

Fifth, Section 2 prescribes certain *standards* for entering into such agreements. The agreements must be *based on real contributions to economic growth and general welfare of the country.*

Sixth, the agreements must contain *rudimentary stipulations* for the *promotion of the development and use of local scientific and technical resources.*

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[183] III *RECORDS OF THE CONSTITUTIONAL COMMISSION* 255.

[184] *Id.*, at 355-356.

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

Finally, the *scope* of the agreements. While the 1973 Constitution referred to "service contracts for financial, technical, management, or other forms of assistance" the 1987 Constitution provides for "agreements . . . involving *either financial or technical assistance.*" It bears noting that the phrases "service contracts" and "management or other forms of assistance" in the earlier constitution have been omitted.

By virtue of her legislative powers under the Provisional Constitution,[185] President Aquino, on July 10, 1987, signed into law E.O. No. 211 prescribing the interim procedures in the processing and approval of applications for the exploration, development and utilization of minerals. The omission in the 1987 Constitution of the term "service contracts" notwithstanding, the said E.O. still referred to them in Section 2 thereof:

> Sec. 2. Applications for the exploration, development and utilization of natural resources, including renewal applications and applications for approval of operating agreements and mining *service contracts*, shall be accepted and processed and may be approved x x x [Italics supplied.]

The same law provided in its Section 3 that the "processing, evaluation and approval of all mining applications . . . operating agreements and *service contracts* . . . shall be governed by Presidential Decree No. 463, as amended, other existing mining laws, and their implementing rules and regulations. . . ."

As earlier stated, on the 25th also of July 1987, the President issued E.O. No. 279 by authority of which the subject WMCP FTAA was executed on March 30, 1995.

On March 3, 1995, President Ramos signed into law R.A. No. 7942. Section 15 thereof declares that the Act "shall govern the exploration, development, utilization, and processing of all mineral resources." Such declaration notwithstanding, R.A. No.

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[185] CONST. (1986), Art. II, Sec. 1.

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7942 does not actually cover all the modes through which the State may undertake the exploration, development, and utilization of natural resources.

The State, being the owner of the natural resources, is accorded the primary power and responsibility in the exploration, development and utilization thereof. As such, it may undertake these activities through four modes:

The State may directly undertake such activities.

(2) The State may enter into co-production, joint venture or production-sharing agreements with Filipino citizens or qualified corporations.

(3) Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens.

(4) For the large-scale exploration, development and utilization of minerals, petroleum and other mineral oils, the President may enter into agreements with foreign-owned corporations involving technical or financial assistance.[186]

Except to charge the Mines and Geosciences Bureau of the DENR with performing researches and surveys,[187] and a passing mention of government-owned or controlled corporations,[188] R.A. No. 7942 does not specify how the State should go about the first mode. The third mode, on the other hand, is governed by Republic Act No. 7076[189] (the People's Small-Scale Mining

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[186] *Cruz v. Secretary of Environment and Natural Resources, supra*, Puno, *J.*, Separate Opinion.

[187] Rep. Act No. 7942 (1995), Sec. 9.

[188] SEC. 82. *Allocation of Government Share.* — The Government share as referred to in the preceding sections shall be shared and allocated in accordance with Sections 290 and 292 of Republic Act No. 7160 otherwise known as the Local Government Code of 1991. In case the development and utilization of mineral resources is undertaken by a government-owned or -controlled corporation, the sharing and allocation shall be in accordance with Sections 291 and 292 of the said Code.

[189] An Act Creating A People's Small-Scale Mining Program and for other purposes.

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Act of 1991) and other pertinent laws.[190] *R.A. No. 7942 primarily concerns itself with the second and fourth modes.*

Mineral production sharing, co-production and joint venture agreements are collectively classified by R.A. No. 7942 as "mineral agreements."[191] The Government participates the least in a mineral production sharing agreement (MPSA). In an MPSA, the Government grants the contractor[192] the exclusive right to conduct mining operations within a contract area[193] and shares in the gross output.[194] The MPSA contractor provides the financing, technology, management and personnel necessary for the agreement's implementation.[195] The total government share in an MPSA is the excise tax on mineral products under Republic Act No. 7729,[196] amending Section 151(a) of the National Internal Revenue Code, as amended.[197]

In a co-production agreement (CA),[198] the Government provides inputs to the mining operations other than the mineral

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[190] Rep. Act No. 7942 (1995), Sec. 42.

[191] *Id.*, Secs. 3 (ab) and 26.

[192] "Contractor" means a qualified person acting alone or in consortium who is a party to a mineral agreement or to a financial or technical assistance agreement. (*Id.*, Sec. 3[g].)

[193] "Contract area" means land or body water delineated for purposes of exploration, development, or utilization of the minerals found therein. (*Id.*, Sec. 3[f].)

[194] "Gross output" means the actual market value of minerals or mineral products from its mining area as defined in the National Internal Revenue Code (*Id.*, Sec. 3[v]).

[195] *Id.*, Sec. 26 (a).

[196] An Act Reducing Excise Tax Rates on Metallic and Non-Metallic Minerals and Quarry Resources, amending for the purpose Section 151 (a) of the National Internal Revenue Code, as amended.

[197] Rep. Act No. 7942 (1995), Sec. (80).

[198] *Id.*, Sec. 26 (b).

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resource,[199] while in a joint venture agreement (JVA), where the Government's enjoys the greatest participation, the Government and the JVA contractor organize a company with both parties having equity shares.[200] Aside from earnings in equity, the Government in a JVA is also entitled to a share in the gross output.[201] The Government may enter into a CA[202] or JVA[203] with one or more contractors. The Government's share in a CA or JVA is set out in Section 81 of the law:

> The share of the Government in co-production and joint venture agreements shall be negotiated by the Government and the contractor taking into consideration the: (a) capital investment of the project, (b) the risks involved, (c) contribution to the project to the economy, and (d) other factors that will provide for a fair and equitable sharing between the Government and the contractor. The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

All mineral agreements grant the respective contractors the exclusive right to conduct mining operations and to extract all mineral resources found in the contract area.[204] A "qualified person" may enter into any of the mineral agreements with the Government.[205] A "qualified person" is

> any citizen of the Philippines with capacity to contract, or a corporation, partnership, association, or cooperative organized or

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[199] "Mineral resource" means any concentration of minerals/rocks with potential economic value. (*Id.*, Sec. 3[ad].)

[200] *Id.*, Sec. 26 (c).

[201] *Ibid.*

[202] *Id.*, Sec. 3 (h).

[203] *Id.*, Sec. 3 (x).

[204] *Id.*, Sec. 26, last par.

[205] *Id.*, Sec. 27.

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authorized for the purpose of engaging in mining, with technical and financial capability to undertake mineral resources development and duly registered in accordance with law at least sixty *per centum* (60%) of the capital of which is owned by citizens of the Philippines x x x[206]

The fourth mode involves "financial or technical assistance agreements." An FTAA is defined as "a contract involving financial or technical assistance for large-scale exploration, development, and utilization of natural resources."[207] Any qualified person with technical and financial capability to undertake large-scale exploration, development, and utilization of natural resources in the Philippines may enter into such agreement directly with the Government through the DENR.[208] For the purpose of granting an FTAA, a legally organized foreign-owned corporation (any corporation, partnership, association, or cooperative duly registered in accordance with law in which less than 50% of the capital is owned by Filipino citizens)[209] is deemed a "qualified person."[210]

Other than the difference in contractors' qualifications, the principal distinction between mineral agreements and FTAAs is the maximum contract area to which a qualified person may hold or be granted.[211] "Large-scale" under R.A. No. 7942 is

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[206] *Id.*, Sec. 3 (aq).

[207] *Id.*, Sec. 3 (r).

[208] *Id.*, Sec. 33.

[209] *Id.*, Sec. 3 (t).

[210] *Id.*, Sec. 3 (aq).

[211] The maximum areas in cases of mineral agreements are prescribed in Section 28 as follows:

SEC. 28. *Maximum Areas for Mineral Agreement.* — The maximum area that a qualified person may hold at any time under a mineral agreement shall be:

(a) Onshore, in any one province —

(1) For individuals, ten (10) blocks; and

(2) For partnerships, cooperatives, associations, or corporations, one hundred (100) blocks.

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determined by the size of the contract area, opposed to the amount invested (US$50,000,000.00), which was the standard under E.O. 279.

Like a CA or a JVA, an FTAA is subject to negotiation.[212] The Government's contributions, in the form of taxes, in an FTAA is identical to its contributions in the two mineral agreements, save that in an FTAA:

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.[213]

(b) Onshore, in the entire Philippines —

(1) For individuals, twenty (20) blocks; and

(2) For partnerships, cooperatives, associations, or corporations, two hundred (200) blocks.

(c) Offshore, in the entire Philippines —

(1) For individuals, fifty (50) blocks;

(2) For partnerships, cooperatives, associations, or corporations five hundred (500) blocks; and

(3) For the exclusive economic area, a larger area to be determined by the Secretary.

The maximum areas mentioned above that a contractor may hold under a mineral agreement shall not include mining/quarry areas under operating agreements between the contractor and a claimowner/lessee/permittee/licensee entered into under Presidential Decree No. 463.

On the other hand, Section 34, which governs the maximum area for FTAAs provides:

SEC. 34. *Maximum Contract Area.* — The maximum contract area that may be granted per qualified person, subject to relinquishment shall be:

(a) 1,000 meridional blocks onshore;

(b) 4,000 meridional blocks offshore; or

(c) Combinations of (a) and (b) provided that it shall not exceed the maximum limits for onshore and offshore areas.

[212] *Id.*, Sec. 33.

[213] *Id.*, Sec. 81.

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III

Having examined the history of the constitutional provision and statutes enacted pursuant thereto, a consideration of the substantive issues presented by the petition is now in order.

THE EFFECTIVITY OF EXECUTIVE ORDER NO. 279

Petitioners argue that E.O. No. 279, the law in force when the WMC FTAA was executed, did not come into effect.

E.O. No. 279 was signed into law by then President Aquino on July 25, 1987, two days before the opening of Congress on July 27, 1987.[214] Section 8 of the E.O. states that the same "shall take effect *immediately*." This provision, according to petitioners, runs counter to Section 1 of E.O. No. 200,[215] which provides:

> SECTION 1. Laws shall take effect *after fifteen days following the completion of their publication* either in the Official Gazette or in a newspaper of general circulation in the Philippines, unless it is otherwise provided.[216] [Italics supplied.]

On that premise, petitioners contend that E.O. No. 279 could have only taken effect fifteen days after its publication at which time Congress had already convened and the President's power to legislate had ceased.

Respondents, on the other hand, counter that the validity of E.O. No. 279 was settled in *Miners Association of the Philippines v. Factoran, supra.* This is of course incorrect for the issue in *Miners Association* was not the validity of E.O.

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[214] *Kapatiran v. Tan.* 163 SCRA 371 (1988).

[215] Providing for the Publication of Laws either in the Official Gazette or in a Newspaper of General Circulation in the Philippines as a Requirement for their Effectivity.

[216] Section 1, E.O. No. 200 was subsequently incorporated in the Administrative Code of 1987 (Executive Order No. 292 as Section 18, Chapter 5 (Operation and Effect of Laws), Book I (Sovereignty and General Administration).

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No. 279 but that of DAO Nos. 57 and 82 which were issued pursuant thereto.

Nevertheless, petitioners' contentions have no merit.

It bears noting that there is nothing in E.O. No. 200 that prevents a law from taking effect on a date other than — even before — the 15-day period after its publication. Where a law provides for its own date of effectivity, such date prevails over that prescribed by E.O. No. 200. Indeed, this is the very essence of the phrase "unless it is otherwise provided" in Section 1 thereof. Section 1, E.O. No. 200, therefore, applies only when a statute does not provide for its own date of effectivity.

What *is* mandatory under E.O. No. 200, and what due process requires, as this Court held in *Tañada v. Tuvera*,[217] is the publication of the law for

> without such notice and publication, there would be no basis for the application of the maxim "*ignorantia legis n[eminem] excusat.*" It would be the height of injustice to punish or otherwise burden a citizen for the transgression of a law of which he had no notice whatsoever, not even a constructive one.

While the effectivity clause of E.O. No. 279 does not require its publication, it is not a ground for its invalidation since the Constitution, being "the fundamental, paramount and supreme law of the nation," is deemed written in the law.[218] Hence, the due process clause,[219] which, so *Tañada* held, mandates the publication of statutes, is read into Section 8 of E.O. No. 279. Additionally, Section 1 of E.O. No. 200 which provides for publication "either in the Official Gazette or in a newspaper of general circulation in the Philippines," finds suppletory application. It is significant to note that E.O. No. 279 was actually published in the Official Gazette[220] on August 3, 1987.

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[217] 136 SCRA 27 (1985).

[218] *Manila Prince Hotel v. Government Service Insurance System*, 267 SCRA 408 (1997).

[219] CONST., Art. 3, Sec. 1.

[220] 83 O.G. (Suppl.) 3528-115 to 3528-117 (August 1987).

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From a reading then of Section 8 of E.O. No. 279, Section 1 of E.O. No. 200, and *Tañada v. Tuvera,* this Court holds that E.O. No. 279 became effective *immediately* upon its publication in the Official Gazette on August 3, 1987.

That such effectivity took place after the convening of the first Congress is irrelevant. At the time President Aquino issued E.O. No. 279 on July 25, 1987, she was still validly exercising legislative powers under the Provisional Constitution.[221] Article XVIII (Transitory Provisions) of the 1987 Constitution explicitly states:

> Sec. 6. The incumbent President shall continue to exercise legislative powers until the first Congress is convened.

The convening of the first Congress merely precluded the exercise of legislative powers by President Aquino; it did not prevent the effectivity of laws she had previously enacted.

There can be no question, therefore, that E.O. No. 279 is an effective, and a validly enacted, statute.

THE CONSTITUTIONALITY OF THE WMCP FTAA

Petitioners submit that, in accordance with the text of Section 2, Article XII of the Constitution, FTAAs should be limited to "*technical* or *financial* assistance" only. They observe, however, that, contrary to the language of the Constitution, the WMCP FTAA allows WMCP, a fully foreign-owned mining corporation, to extend more than mere financial or technical assistance to the State, for it permits WMCP to manage and operate every aspect of the mining activity.[222]

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[221] *Miners Association of the Philippines, Inc. v. Factoran, Jr., supra.*

[222] Petitioners note in their Memorandum that the FTAA:

> . . . guarantees that wholly foreign owned [WMCP] entered into the FTAA in order to facilitate "the large scale exploration, development and commercial exploitation of mineral deposits that may be found to exist within the Contract area." [Section 1.1] As a contractor it also has the "exclusive right to explore, exploit, utilize, process and dispose of all mineral products and by-products

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Petitioners' submission is well-taken. It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people who adopted it.[223] This intention is to be sought in the constitution itself, and the apparent meaning of the words is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction.[224] What the Constitution says according to the text of the provision, therefore, compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say.[225] Accordingly, following the literal text of the Constitution, assistance accorded by foreign-owned corporations

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thereof that may be derived or produced from the Contract Area." [Section 1.3] Thus, it is divided into an "exploration and feasibility phase" [Section 3.2 (a)] and a "construction, development and production phase." [Section 3. 2 (b).]

Thus, it is this wholly foreign owned corporation that, among other things:

(a) operates within a prescribed contract area [Section 4],

(b). opts to apply for a Mining Production Sharing Agreement [Section 4.2],

(c) relinquishes control over portions thereof at their own choice [Section 4.6],

(d) submits work programs, incurs expenditures, and makes reports during the exploration period [Section 5].

(e) submits a Declaration of Mining Feasibility [Sections 5.4 and 5.5],

(f) during the development period, determines the timetable, submits work programs, provides the reports and determines and executes expansions, modifications, improvements and replacements of new mining facilities within the area [Section 6],

(g) complies with the conditions for environmental protection and industrial safety, posts the necessary bonds and makes representations and warranties to the government [Section 10.5].

The contract subsists for an initial term of twenty-five (25) years from the date of its effectivity [Section 3.1] and renewable for a further period of twenty-five years under the same terms and conditions upon application by private respondent [Section 3.3]. (*Rollo*, pp. 458-459.)

[223] H. C. BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* § 8.

[224] *Ibid.*

[225] *J.M. Tuason & Co., Inc. v. Land Tenure Association*, 31 SCRA 413 (1970).

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in the large-scale exploration, development, and utilization of petroleum, minerals and mineral oils should be limited to "technical" or "financial" assistance only.

WMCP nevertheless submits that the word "technical" in the fourth paragraph of Section 2 of E.O. No. 279 encompasses a "broad number of possible services," perhaps, "scientific and/or technological in basis."[226] It thus posits that it may also well include "the area of *management or operations* . . . so long as such assistance requires specialized knowledge or skills, and are related to the exploration, development and utilization of mineral resources."[227]

This Court is not persuaded. As priorly pointed out, the phrase "management or other forms of assistance" in the 1973 Constitution was deleted in the 1987 Constitution, which allows only "technical or financial assistance." *Casus omisus pro omisso habendus est.* A person, object or thing omitted from an enumeration must be held to have been omitted intentionally.[228] As will be shown later, the management or operation of mining activities by foreign contractors, which is the primary feature of service contracts, was precisely the evil that the drafters of the 1987 Constitution sought to eradicate.

Respondents insist that "agreements involving technical or financial assistance" is just another term for service contracts. They contend that the proceedings of the CONCOM indicate "that although the terminology 'service contract' was avoided [by the Constitution], the concept it represented was not." They add that "[t]he concept is embodied in the phrase 'agreements involving financial or technical assistance.'"[229] And point out how members of the CONCOM referred to these agreements as "service contracts." For instance:

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[226] *Rollo*, p. 580.

[227] *Ibid.* Italics supplied.

[228] *People v. Manantan*, 115 Phil. 657 (1962); *Commission on Audit of the Province of Cebu v. Province of Cebu*, 371 SCRA 196 (2001).

[229] *Rollo*, p. 569.

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

MR. VILLEGAS. That is right.

SR. TAN. So those are the safeguards?

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

SR. TAN. Thank you, Madam President.[230] [Italics supplied.]

WMCP also cites the following statements of Commissioners Gascon, Garcia, Nolledo and Tadeo who alluded to service contracts as they explained their respective votes in the approval of the draft Article:

MR. GASCON. Mr. Presiding Officer, I vote no primarily because of two reasons: One, the provision on service contracts. I felt that if we would constitutionalize any provision on service contracts, this should always be with the concurrence of Congress and not guided only by a general law to be promulgated by Congress.x x x[231] [Italics supplied.]

x x x x x x x x x.

MR. GARCIA. Thank you.

I vote no. x x x

Service contracts are given constitutional legitimization in Section 3, even when they have been proven to be inimical to the interests of the nation, providing as they do the legal loophole for the exploitation of our natural resources for the benefit of foreign interests. They constitute a serious negation of Filipino control on the use and disposition of the nation's natural resources, especially with regard to those which are nonrenewable. [232] [Italics supplied.]

x x x x x x x x x

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[230] III Record of the Constitutional Commission 351-352.

[231] V Record of the Constitutional Commission 844.

[232] *Id.*, at 841.

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MR. NOLLEDO. While there are objectionable provisions in the Article on National Economy and Patrimony, going over said provisions meticulously, setting aside prejudice and personalities will reveal that the article contains a balanced set or provisions. I hope the forthcoming Congress will implement such provisions taking into account that Filipinos should have real control over our economy and patrimony, and if foreign equity is permitted, the same must be subordinated to the imperative demands of the national interest.

x x x x x x x x x.

It is also my understanding that service contracts involving foreign corporations or entities are resorted to only when no Filipino enterprise or Filipino-controlled enterprise could possibly undertake the exploration or exploitation of our natural resources and that compensation under such contracts cannot and should not equal what should pertain to ownership of capital. In other words, the service contract should not be an instrument to circumvent the basic provision, that the exploration and exploitation of natural resources should be truly for the benefit of Filipinos.

Thank you, and I vote yes.[233] [Italics supplied.]

x x x x x x x x x.

MR. TADEO. *Nais ko lamang ipaliwanag ang aking boto.*

Matapos suriin ang kalagayan ng Pilipinas, ang saligang suliranin, pangunahin ang salitang "imperyalismo." Ang ibig sabihin nito ay ang sistema ng lipunang pinaghaharian ng iilang monopolyong kapitalista at ang salitang "imperyalismo" ay buhay na buhay sa National Economy and Patrimony *na nating ginawa. Sa pamamagitan ng salitang* "based on," *naroroon na ang* free trade *sapagkat tayo ay mananatiling tagapagluwas ng hilaw na sangkap at tagaangkat ng yaring produkto. Pangalawa,* ***naroroon pa rin*** *ang* parity rights, *ang* service contract, *ang 60-40* equity *sa* natural resources. ***Habang naghihirap ang sambayanang Pilipino, ginagalugad naman ng mga dayuhan, ang ating likas na yaman. Kailan man ang Article on National Economy and Patrimony ay hindi nagpaalis sa pagkaalipin ng ating ekonomiya sa kamay ng mga dayuhan.*** *Ang solusyon sa suliranin ng bansa ay dalawa lamang: ang pagpapatupad ng tunay na reporma sa lupa at ang*

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[233] *Id.*, at 842.

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national industrialization. *Ito ang tinatawag naming pagsikat ng araw sa Silangan. Ngunit ang mga* landlords and big businessmen *at ang mga komprador ay nagsasabi na ang free trade na ito, ang kahulugan para sa amin, ay ipinipilit sa ating sambayanan na ang araw ay sisikat sa Kanluran. Kailan man hindi puwedeng sumikat ang araw sa Kanluran.* I vote no.[234] [Italics supplied.]

This Court is likewise not persuaded.

As earlier noted, the phrase "service contracts" has been deleted in the 1987 Constitution's Article on National Economy and Patrimony. If the CONCOM intended to retain the concept of service contracts under the 1973 Constitution, it could have simply adopted the old terminology ("service contracts") instead of employing new and unfamiliar terms ("agreements . . . involving either technical or financial assistance"). Such a difference between the language of a provision in a revised constitution and that of a similar provision in the preceding constitution is viewed as indicative of a difference in purpose.[235] If, as respondents suggest, the concept of "technical or financial assistance" agreements is identical to that of "service contracts," the CONCOM would not have bothered to fit the same dog with a new collar. To uphold respondents' theory would reduce the first to a mere euphemism for the second and render the change in phraseology meaningless.

An examination of the reason behind the change confirms that technical or financial assistance agreements are not synonymous to service contracts.

[T]he Court in construing a Constitution should bear in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied. A doubtful provision will be examined in light of the history of the times, and the condition and circumstances under which the Constitution was framed. The object is to ascertain the reason which induced the framers of the Constitution to enact the particular provision and the purpose sought to be accomplished thereby, in order to construe the whole as to

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[234] *Id.* at 844.

[235] *Vide Cherey v. Long Beach*, 282 NY 382, 26 NE 2d 945, 127 ALR 1210 (1940), cited in 16 Am Jur 2d Constitutional Law § 79.

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make the words consonant to that reason and calculated to effect that purpose.[236]

As the following question of Commissioner Quesada and Commissioner Villegas' answer shows, the drafters intended to do away with service contracts which were used to circumvent the capitalization (60%-40%) requirement:

MS. QUESADA. The 1973 Constitution used the words "service contracts." In this particular Section 3, is there a safeguard against the possible control of foreign interests if the Filipinos go into co-production with them?

MR. VILLEGAS. Yes. In fact, *the deletion of the phrase "service contracts" was our first attempt to avoid some of the abuses in the past regime in the use of service contracts to go around the 60-40 arrangement.* The safeguard has been introduced — and this, of course can be refined — is found in Section 3, lines 25 to 30, where Congress will have to concur with the President on any agreement entered into between a foreign-owned corporation and the government involving technical or financial assistance for large-scale exploration, development and utilization of natural resources.[237] [Italics supplied.]

In a subsequent discussion, Commissioner Villegas allayed the fears of Commissioner Quesada regarding the participation of foreign interests in Philippine natural resources, which was supposed to be restricted to Filipinos.

MS. QUESADA. Another point of clarification is the phrase "and utilization of natural resources shall be under the full control and supervision of the State." In the 1973 Constitution, this was limited to citizens of the Philippines; but it was removed and substituted by "shall be under the full control and supervision of the State." Was the concept changed so that these particular resources would be limited to citizens of the Philippines? Or would these resources only be under the full control and supervision of the State; meaning, noncitizens would have access to these natural resources? Is that the understanding?

MR. VILLEGAS. No, Mr. Vice-President, if the Commissioner reads the next sentence, it states:

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[236] *Civil Liberties Union v. Executive Secretary*, 194 SCRA 317, 325 (1991).

[237] III *Record of the Constitutional Commission* 278.

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> Such activities may be directly undertaken by the State, or it may enter into co-production, joint venture, production-sharing agreements with Filipino citizens.
>
> So we are still limiting it only to Filipino citizens.
>
> x x x x x x x x x.
>
> MS. QUESADA. Going back to Section 3, the section suggest that:
>
> > The exploration, development, and utilization of natural resources . . . may be directly undertaken by the State, or it may enter into co-production, joint venture, production-sharing agreements with . . . corporations or associations at least sixty per cent of whose voting stock or controlling interest is owned by such citizens.
>
> Lines 25 to 30, on the other hand, suggest that in the large-scale exploration, development and utilization of natural resources, the President with the concurrence of Congress may enter into agreements with foreign-owned corporations even for technical or financial assistance.
>
> I wonder if this part of Section 3 contradicts the second part. I am raising this point for fear that foreign investors will use their enormous capital resources to facilitate the actual exploitation or exploration, development and effective disposition of our natural resources to the detriment of Filipino investors. I am not saying that we should not consider borrowing money from foreign sources. What I refer to is that foreign interest should be allowed to participate only to the extent that they lend us money and give us technical assistance with the appropriate government permit. In this way, we can insure the enjoyment of our natural resources by our own people.
>
> MR. VILLEGAS. *Actually, the second provision about the President does not permit foreign investors to participate. It is only technical or financial assistance — they do not own anything — but on conditions that have to be determined by law with the concurrence of Congress. So, it is very restrictive.*
>
> *If the Commissioner will remember, this removes the possibility for service contracts which we said yesterday were avenues used in the previous regime to go around the 60-40 requirement.*[238] [Italics supplied.]

The present Chief Justice, then a member of the CONCOM, also referred to this limitation in scope in proposing an amendment to the 60-40 requirement:

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[238] *Id.*, at 316-317.

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MR. DAVIDE. May I be allowed to explain the proposal?

MR. MAAMBONG. Subject to the three-minute rule, Madam President.

MR. DAVIDE. It will not take three minutes.

The Commission had just approved the Preamble. *In the Preamble we clearly stated that the Filipino people are sovereign and that one of the objectives for the creation or establishment of a government is to conserve and develop the national patrimony. The implication is that the national patrimony or our natural resources are exclusively reserved for the Filipino people. No alien must be allowed to enjoy, exploit and develop our natural resources. As a matter of fact, that principle proceeds from the fact that our natural resources are gifts from God to the Filipino people and it would be a breach of that special blessing from God if we will allow aliens to exploit our natural resources.*

I voted in favor of the Jamir proposal because *it is not really exploitation that we granted to the alien corporations but only for them to render financial or technical assistance. It is not for them to enjoy our natural resources.* Madam President, our natural resources are depleting; our population is increasing by leaps and bounds. Fifty years from now, if we will allow these aliens to exploit our natural resources, there will be no more natural resources for the next generations of Filipinos. It may last long if we will begin now. Since 1935 the aliens have been allowed to enjoy to a certain extent the exploitation of our natural resources, and we became victims of foreign dominance and control. The aliens are interested in coming to the Philippines because they would like to enjoy the bounty of nature exclusively intended for Filipinos by God.

And so I appeal to all, for the sake of the future generations, that if we have to pray in the Preamble "to preserve and develop the national patrimony for the sovereign Filipino people and for the generations to come," we must at this time decide once and for all that our natural resources must be reserved only to Filipino citizens.

Thank you.[239] [Italics supplied.]

The opinion of another member of the CONCOM is persuasive[240] and leaves no doubt as to the intention of the framers to eliminate service contracts altogether. He writes:

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[239] III *Record of the Constitutional Commission* 358-359.

[240] *Vera v. Avelino*, 77 Phil. 192 (1946).

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Paragraph 4 of Section 2 specifies large-scale, capital-intensive, highly technological undertakings for which the President may enter into contracts with foreign-owned corporations, and enunciates strict conditions that should govern such contracts. x x x

This provision balances the need for foreign capital and technology with the need to maintain the national sovereignty. It recognizes the fact that as long as Filipinos can formulate their own terms in their own territory, there is no danger of relinquishing sovereignty to foreign interests.

Are service contracts allowed under the new Constitution? No. Under the new Constitution, foreign investors (fully alien-owned) can NOT participate in Filipino enterprises except to provide: (1) Technical Assistance for highly technical enterprises; and (2) Financial Assistance for large-scale enterprises.

The intent of this provision, as well as other provisions on foreign investments, is to prevent the practice (prevalent in the Marcos government) of skirting the 60/40 equation using the cover of service contracts.[241] [Italics supplied.]

Furthermore, it appears that Proposed Resolution No. 496,[242] which was the draft Article on National Economy and Patrimony, adopted the concept of "agreements . . . involving either technical or financial assistance" contained in the "Draft of the 1986 U.P. Law Constitution Project" (U.P. Law draft) which was taken into consideration during the deliberation of the CONCOM.[243] The former, as well as Article XII, as adopted, employed the same terminology, as the comparative table below shows:

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[241] J. NOLLEDO, *THE NEW CONSTITUTION OF THE PHILIPPINES ANNOTATED* 924–926 (1990).

[242] Resolution to Incorporate in the New Constitution an Article on National Economy and Patrimony.

[243] *The Chair of the Committee on National Economy and Patrimony, alluded to it in the discussion on the capitalization requirement:*

MR. VILLEGAS. We just had a long discussion with the members of the team from the UP Law Center who provided us a draft. The phrase that is contained here which we adopted from the UP draft is "60 percent of voting stock." (III Record of the Constitutional Commission 255.)

Likewise, in explaining the reasons for the deletion of the term "exploitation":

MR. VILLEGAS. Madam President, following the recommendation in the UP draft, we omitted "exploitation" first of all because it is believed to be subsumed under "development" and secondly because it has a derogatory connotation. (*Id.*, at 358.)

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DRAFT OF THE UP LAW CONSTITUTION PROJECT	*PROPOSED RESOLUTION NO. 496 OF THE CONSTITUTIONAL COMMISSION*	*ARTICLE XII OF THE 1987 CONSTITUTION*
SEC. 1. All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, flora and fauna and other natural resources of the Philippines 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. Such activities may be directly undertaken by the state, or it may enter into co-production joint venture, production sharing agreements with Filipino citizens or corporations or associations sixty percent of whose voting stock or	SEC. 3. All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, 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. Such activities may be directly undertaken by the State, or it may enter into co-production joint venture, production-sharing agreements with Filipino citizens or corporations or associations at least sixty percent of whose voting stock or controlling interest is	SEC. 2. All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, 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

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controlling interest is owned by such citizens for a period of not more than twenty-five years, renewable for not more than twenty-five years and under such terms and conditions as may be provided by law. In case as to 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.	owned by such citizens. Such agreements shall be for a period of twenty-five years, renewable for not more than twenty-five years, and under such term 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 for water power, beneficial use may be the measure and limit of the grant.	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 case 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 National Assembly may by law allow small scale utilization of natural resources by Filipino citizens.	The Congress may by law allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming in rivers, lakes, bays, and lagoons.	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-

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		workers in rivers, lakes, bays, and lagoons.
The National Assembly, may by two-thirds vote of all its members by special law provide the terms and conditions under which a foreign-owned corporation may enter into agreements with the gov't. involving *either technical or financial assistance* for large-scale exploration, development, or utilization of natural resources. [Italics supplied.]	The President with the concurrence of Congress, by special law, shall provide terms and conditions under which a foreign-owned corporation may enter into agreements with the government involving *either technical or financial assistance* for large-scale exploration, development, and utilization of natural resources. [Italics supplied.]	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. [Italics supplied.]
		The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

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The insights of the proponents of the U.P. Law draft are, therefore, instructive in interpreting the phrase "technical or financial assistance."

In his position paper entitled *Service Contracts: Old Wine in New Bottles*?, Professor Pacifico A. Agabin, who was a member of the working group that prepared the U.P. Law draft, criticized service contracts for they "lodge exclusive management and control of the enterprise to the service contractor, which is reminiscent of the old concession regime. Thus, notwithstanding the provision of the Constitution that natural resources belong to the State, and that these shall not be alienated, the service contract system renders nugatory the constitutional provisions cited."[244] He elaborates:

> Looking at the Philippine model, we can discern the following vestiges of the concession regime,,thus:
>
> 1. Bidding of a selected area, or leasing the choice of the area to the interested party and then negotiating the terms and conditions of the contract; (Sec. 5, P.D. 87)
>
> 2. *Management of the enterprise vested on the contractor, including operation of the field if petroleum is discovered;* (Sec. 8, P.D. 87)
>
> 3. *Control of production and other matters such as expansion and development;* (Sec. 8)
>
> 4. *Responsibility for downstream operations — marketing, distribution, and processing may be with the contractor* (Sec. 8);
>
> 5. Ownership of equipment, machinery, fixed assets, and other properties remain with contractor (Sec. 12, P.D. 87);
>
> 6. Repatriation of capital and retention of profits abroad guaranteed to the contractor (Sec. 13, P.D. 87); and
>
> 7. *While title to the petroleum discovered may nominally be in the name of the government, the contractor has almost unfettered control over its disposition and sale*, and even the domestic requirements of the country is relegated to a *pro rata* basis (Sec. 8).

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[244] *Id.*, at 12.

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In short, our version of the service contract is just a rehash of the old concession regime x x x Some people have pulled an old rabbit out of a magician's hat, and foisted it upon us as a new and different animal.

The service contract as we know it here is antithetical to the principle of sovereignty over our natural resources restated in the same article of the [1973] Constitution containing the provision for service contracts. If the service contractor happens to be a foreign corporation, the contract would also run counter to the constitutional provision on nationalization or Filipinization, of the exploitation of our natural resources.[245] [Italics supplied. Underscoring in the original.]

Professor Merlin M. Magallona, also a member of the working group, was harsher in his reproach of the system:

x x x the nationalistic phraseology of the 1935 [Constitution] was retained by the [1973] Charter, but the essence of nationalism was reduced to hollow rhetoric. The 1973 Charter still provided that the exploitation or development of the country's natural resources be limited to Filipino citizens or corporations owned or controlled by them. However, the martial-law Constitution allowed them, once these resources are in their name, to enter into service contracts with foreign investors for financial, technical, management, or other forms of assistance. Since foreign investors have the capital resources, the actual exploitation and development, as well as the effective disposition, of the country's natural resources, would be under their direction, and control, relegating the Filipino investors to the role of second-rate partners in joint ventures.

Through the instrumentality of the service contract, the 1973 Constitution had legitimized at the highest level of state policy that which was prohibited under the 1973 Constitution, namely: the exploitation of the country's natural resources by foreign nationals. The drastic impact of [this] constitutional change becomes more pronounced when it is considered that the active party to any service contract may be a corporation wholly owned or foreign interests. In such a case, the citizenship requirement is completely set aside, permitting foreign corporations to obtain actual possession, control, and [enjoyment] of the country's natural resources.[246] [Italics supplied.]

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[245] *Id.*, at 15-16.

[246] M. Magallona, *Nationalism and Its Subversion in the Constitution 5*, in II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT.

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Accordingly, Professor Agabin recommends that:

Recognizing the service contract for what it is, we have to expunge it from the Constitution and reaffirm ownership over our natural resources. That is the only way we can exercise effective control over our natural resources.

This should not mean complete isolation of the country's natural resources from foreign investment. *Other contract forms which are less derogatory to our sovereignty and control over natural resources — like technical assistance agreements, financial assistance [agreements], co-production agreements, joint ventures, production-sharing — could still be utilized and adopted without violating constitutional provisions. In other words, we can adopt contract forms which recognize and assert our sovereignty and ownership over natural resources, and where the foreign entity is just a pure contractor instead of the beneficial owner of our economic resources.*[247] [Italics supplied.]

Still another member of the working group, Professor Eduardo Labitag, proposed that:

2. *Service contracts as practiced under the 1973 Constitution should be discouraged, instead the government may be allowed, subject to authorization by special law passed by an extraordinary majority to enter into either technical or financial assistance.* This is justified by the fact that as presently worded in the 1973 Constitution, a service contract gives full control over the contract area to the service contractor, for him to work, manage and dispose of the proceeds or production. It was a subterfuge to get around the nationality requirement of the constitution.[248] [Italics supplied.]

In the annotations on the proposed Article on National Economy and Patrimony, the U.P. Law draft summarized the rationale therefor, thus:

5. The last paragraph is a modification of the service contract provision found in Section 9, Article XIV of the 1973 Constitution

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[247] Agabin, *supra*, at 16.

[248] E. Labitag, *Philippine Natural Resources: Some Problems and Perspectives* 17 in II DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT.

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as amended. This 1973 provision shattered the framework of nationalism in our fundamental law (see Magallona, "*Nationalism and its Subversion in the Constitution*"). Through the service contract, the 1973 Constitution had legitimized that which was prohibited under the 1935 constitution — the exploitation of the country's natural resources by foreign nationals. Through the service contract, acts prohibited by the Anti-Dummy Law were recognized as legitimate arrangements. *Service contracts lodge exclusive management and control of the enterprise to the service contractor, not unlike the old concession regime where the concessionaire had complete control over the country's natural resources, having been given exclusive and plenary rights to exploit a particular resource and, in effect, having been assured of ownership of that resource at the point of extraction* (see Agabin, "*Service Contracts: Old Wine in New Bottles*"). Service contracts, hence, are antithetical to the principle of sovereignty over our natural resources, as well as the constitutional provision on nationalization or Filipinization of the exploitation of our natural resources.

Under the proposed provision, only technical assistance or financial assistance agreements may be entered into, and only for large-scale activities. These are contract forms which recognize and assert our sovereignty and ownership over natural resources since the foreign entity is just a pure contractor and not a beneficial owner of our economic resources. The proposal recognizes the need for capital and technology to develop our natural resources without sacrificing our sovereignty and control over such resources by the safeguard of a special law which requires two-thirds vote of all the members of the Legislature. This will ensure that such agreements will be debated upon exhaustively and thoroughly in the National Assembly to avert prejudice to the nation.[249] [Italics supplied.]

The U.P. Law draft proponents viewed service contracts under the 1973 Constitution as grants of beneficial ownership of the country's natural resources to foreign owned corporations. While, in theory, the State owns these natural resources — and Filipino citizens, their beneficiaries — service contracts actually vested foreigners with the right to dispose, explore for, develop,

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[249] *I DRAFT PROPOSAL OF THE 1986 U.P. LAW CONSTITUTION PROJECT* 11-13.

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exploit, and utilize the same. Foreigners, not Filipinos, became the beneficiaries of Philippine natural resources. This arrangement is clearly incompatible with the constitutional ideal of nationalization of natural resources, with the Regalian doctrine, and on a broader perspective, with Philippine sovereignty.

The proponents nevertheless acknowledged the need for capital and technical know-how in the large-scale exploitation, development and utilization of natural resources — the second paragraph of the proposed draft itself being an admission of such scarcity. Hence, they recommended a compromise to reconcile the nationalistic provisions dating back to the 1935 Constitution, which reserved all natural resources exclusively to Filipinos, and the more liberal 1973 Constitution, which allowed foreigners to participate in these resources through service contracts. Such a compromise called for the adoption of a new system in the exploration, development, and utilization of natural resources in the form of technical agreements or financial agreements which, necessarily, are distinct concepts from service contracts.

The replacement of "service contracts" with "agreements . . . involving either technical or financial assistance," as well as the deletion of the phrase "management or other forms of assistance," assumes greater significance when note is taken that the U.P. Law draft proposed other equally crucial changes that were obviously heeded by the CONCOM. These include the abrogation of the concession system and the adoption of new "options" for the State in the exploration, development, and utilization of natural resources. The proponents deemed these changes to be more consistent with the State's ownership of, and its "full control and supervision" (a phrase also employed by the framers) over, such resources. The Project explained:

3. In line with the State ownership of natural resources, the State should take a more active role in the exploration, development, and utilization of natural resources, than the present practice of granting licenses, concessions, or leases — hence the provision that said activities shall be under the full control and supervision of the State. There are three major schemes by which the State could undertake

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these activities: first, directly by itself; second, by virtue of co-production, joint venture, production sharing agreements with Filipino citizens or corporations or associations sixty per cent (60%) of the voting stock or controlling interests of which are owned by such citizens; or third, with a foreign-owned corporation, in cases of large-scale exploration, development, or utilization of natural resources through agreements involving either technical or financial assistance only. x x x

At present, under the licensing concession or lease schemes, the government benefits from such benefits only through fees, charges, *ad valorem* taxes and income taxes of the exploiters of our natural resources. Such benefits are very minimal compared with the enormous profits reaped by theses licensees, grantees, concessionaires. Moreover, some of them disregard the conservation of natural resources and do not protect the environment from degradation. The proposed role of the State will enable it to a greater share in the profits — it can also actively husband its natural resources and engage in developmental programs that will be beneficial to them.

4. Aside from the three major schemes for the exploration, development, and utilization of our natural resources, the State may, by law, allow Filipino citizens to explore, develop, utilize natural resources in small-scale. This is in recognition of the plight of marginal fishermen, forest dwellers, gold panners, and others similarly situated who exploit our natural resources for their daily sustenance and survival.[250]

Professor Agabin, in particular, after taking pains to illustrate the similarities between the two systems, concluded that the service contract regime was but a "rehash" of the concession system. "Old wine in new bottles," as he put it. *The rejection of the service contract regime, therefore, is in consonance with the abolition of the concession system.*

In light of the deliberations of the CONCOM, the text of the Constitution, and the adoption of other proposed changes, there

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[250] *Id.*, at 9-11. Professor Labitag also suggests that:

x x x The concession regime of natural resources disposition should be discontinued. Instead the State shall enter into such arrangements and agreements like co-production, joint ventures, *etc.* as shall bring about effective control and a larger share in the proceeds, harvest or production. (Labitag, *supra*, at 17.)

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is no doubt that the framers considered and shared the intent of the U.P. Law proponents in employing the phrase "agreements . . . involving either technical or financial assistance."

While certain commissioners may have mentioned the term "service contracts" during the CONCOM deliberations, they may not have been necessarily referring to the concept of service contracts under the 1973 Constitution. As noted earlier, "service contracts" is a term that assumes different meanings to different people.[251] The commissioners may have been using the term loosely, and not in its technical and legal sense, to refer, in general, to agreements concerning natural resources entered into by the Government with foreign corporations. These loose statements do not necessarily translate to the adoption of the 1973 Constitution provision allowing service contracts.

It is true that, as shown in the earlier quoted portions of the proceedings in CONCOM, in response to Sr. Tan's question, Commissioner Villegas commented that, other than congressional notification, the only difference between "future" and "past" "service contracts" is the requirement of a general law as there were no laws previously authorizing the same.[252] However, such remark is far outweighed by his more categorical statement in his exchange with Commissioner Quesada that the draft article "does not permit foreign investors to participate" in the nation's natural resources — which was exactly what service contracts did — except to provide "technical or financial assistance."[253]

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[251] *Vide* Note 147.

[252] *Vide* Note 230. The question was posed before the Jamir amendment and subsequent proposals introducing other limitations.

Comm. Villegas' response that there was no requirement in the 1973 Constitution for a law to govern service contracts and that, in fact, there were then no such laws is inaccurate. The 1973 Charter required similar legislative approval, although it did not specify the form it should take: "The Batasang Pambansa, in the national interest, may allow such citizens. . . . to enter into service contracts. . . ." As previously noted, however, laws authorizing service contracts were actually enacted by presidential decree.

[253] *Vide* Note 238.

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In the case of the other commissioners, Commissioner Nolledo himself clarified in his work that the present charter prohibits service contracts.[254] Commissioner Gascon was not totally averse to foreign participation, but favored stricter restrictions in the form of majority congressional concurrence.[255] On the other hand, Commissioners Garcia and Tadeo may have veered to the extreme side of the spectrum and their objections may be interpreted as votes against any foreign participation in our natural resources whatsoever.

WMCP cites Opinion No. 75, s. 1987,[256] and Opinion No. 175, s. 1990[257] of the Secretary of Justice, expressing the view that a financial or technical assistance agreement "is no different in concept" from the service contract allowed under the 1973 Constitution. This Court is not, however, bound by this interpretation. When an administrative or executive agency renders an opinion or issues a statement of policy, it merely interprets a pre-existing law; and the administrative interpretation of the law is at best advisory, for it is the courts that finally determine what the law means.[258]

In any case, 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 reserved exclusively to Filipinos. Accordingly, such provision must be construed strictly against their enjoyment by non-Filipinos. As Commissioner Villegas emphasized, the provision is "very restrictive."[259] Commissioner Nolledo also remarked that "entering into service contracts is an exception to the rule on protection of natural resources for the interest of the nation and, therefore, being an exception, it should be subject, whenever

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[254] *Vide* Note 241.

[255] *Vide* Note 231.

[256] Dated July 28, 1987.

[257] Dated October 3, 1990.

[258] *Peralta v. Civil Service Commission*, 212 SCRA 425 (1992).

[259] *Vide* Note 238.

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possible, to stringent rules."[260] Indeed, exceptions should be strictly but reasonably construed; they extend only so far as their language fairly warrants and all doubts should be resolved in favor of the general provision rather than the exception.[261]

With the foregoing discussion in mind, this Court finds that R.A. No. 7942 is invalid insofar as said Act authorizes service contracts. Although the statute employs the phrase "financial and technical agreements" in accordance with the 1987 Constitution, it actually treats these agreements as service contracts that grant beneficial ownership to foreign contractors contrary to the fundamental law.

Section 33, which is found under Chapter VI (Financial or Technical Assistance Agreement) of R.A. No. 7942 states:

> SEC. 33. *Eligibility.* — Any qualified person with technical and financial capability *to undertake large-scale exploration, development, and utilization of mineral resources* in the Philippines may enter into a financial or technical assistance agreement directly with the Government through the Department. [Italics supplied.]

"*Exploration*," as defined by R.A. No. 7942,

> means the searching or prospecting for mineral resources by geological, geochemical or geophysical surveys, remote sensing, test pitting, trenching, 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.[262]

A legally organized foreign-owned corporation may be granted an exploration permit,[263] which vests it with the right to conduct exploration for all minerals in specified areas,[264] *i.e.*, to enter, occupy and explore the same.[265] Eventually, the foreign-owned

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[260] III RECORD OF THE CONSTITUTIONAL COMMISSION 354.

[261] *Salaysay v. Castro*, 98 Phil. 364 (1956).

[262] Rep. Act No. 7942 (1995), Sec. 3 (q).

[263] *Id.*, Sec. 3 (aq).

[264] *Id.*, Sec. 20.

[265] *Id.*, Sec. 23, first par.

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corporation, as such permittee, may apply for a financial and technical assistance agreement.[266]

"*Development*" is

the work undertaken to explore and prepare an ore body or a mineral deposit for hiring, including the construction of necessary infrastructure and related facilities.[267]

"*Utilization*" "means the extraction or disposition of minerals."[268] A stipulation that the proponent shall *dispose* of the minerals and byproducts produced at the highest price and more advantageous terms and conditions as provided for under the implementing rules and regulations is required to be incorporated in every FTAA.[269]

A foreign-owned/-controlled corporation may likewise be granted a mineral processing permit.[270] "*Mineral processing*" is the milling, beneficiation or upgrading of ores or minerals and rocks or by similar means to convert the same into marketable products.[271]

An FTAA contractor makes a warranty that the mining *operations* shall be conducted in accordance with the provisions of R.A. No. 7942 and its implementing rules[272] and for work programs and minimum expenditures and commitments.[273] And it obliges itself to furnish the Government records of geologic, accounting, and other relevant data for its mining operation.[274]

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[266] *Id.*, Sec. 23, last par.

[267] *Id.*, Sc. 3 (j).

[268] *Id.*, Sec. 3 (az).

[269] *Id.*, Sec. 35 (m).

[270] *Id.*, Secs. 3 (aq) and 56.

[271] *Id.*, Sec. 3 (y).

[272] *Id.*, Sec. 35 (g).

[273] *Id.*, Sec. 35 (h).

[274] *Id.*, Sec. 35 (l).

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"*Mining operation*," as the law defines it, means *mining activities* involving *exploration, feasibility, development, utilization, and processing*.[275]

The underlying assumption in all these provisions is that the foreign contractor manages the mineral resources, just like the foreign contractor in a service contract.

Furthermore, Chapter XII of the Act grants foreign contractors in FTAAs the same auxiliary mining rights that it grants contractors in mineral agreements (MPSA, CA and JV).[276] Parenthetically,

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[275] *Id.*, Sec. 3 (af).

[276] SEC. 72. *Timber Rights.* — Any provision of the law to the contrary notwithstanding, a *contractor* may be granted a right to cut trees or timber within his mining areas as may be necessary for his mining operations subject to forestry laws, rules and regulations: *Provided*, That if the land covered by the mining area is already covered by exiting timber concessions, the volume of timber needed and the manner of cutting and removal thereof shall be determined by the mines regional director, upon consultation with the *contractor*, the timber concessionaire/permittee and the Forest Management Bureau of the Department: *Provided, further,* That in case of disagreement between the contractor and the timber concessionaire, the matter shall be submitted to the Secretary whose decision shall be final. The *contractor* shall perform reforestation work within his mining area in accordance with forestry laws, rules and regulations. [Italics supplied.]

SEC. 73. *Water Rights.* — A *contractor* shall have water rights for mining operations upon approval of application with the appropriate government agency in accordance with existing water laws, rules and regulations promulgated thereunder: *Provided*, That water rights already granted or vested through long use, recognized and acknowledged by local customs, laws and decisions of courts shall not thereby be impaired: *Provided, further,* That the Government reserves the right to regulate water rights and the reasonable and equitable distribution of water supply so as to prevent the monopoly of the use thereof. [Italics supplied.]

SEC. 74. *Right to Possess Explosives.* — A *contractor/exploration permittee* shall have the right to possess and use explosives within his contract/permit area as may be necessary for his mining operations upon approval of an application with the appropriate government agency in accordance with existing laws, rules and regulations promulgated thereunder: *Provided,* That the Government reserves the right to regulate and control the explosive accessories to ensure safe mining operations. [Italics supplied.]

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Sections 72 to 75 use the term "contractor," without distinguishing between FTAA and mineral agreement contractors. And so does "holders of mining rights" in Section 76. A foreign contractor may even convert its FTAA into a mineral agreement if the economic viability of the contract area is found to be inadequate to justify large-scale mining operations,[277] provided that it reduces its equity in the corporation, partnership, association or cooperative to forty percent (40%).[278]

Finally, under the Act, an FTAA contractor warrants that it "has or has access to all the financing, *managerial*, and technical expertise. . . ."[279] This 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.

SEC. 75. *Easement Rights.* — When mining areas are so situated that for purposes of more convenient mining operations it is necessary to build, construct or install on the mining areas or lands owned, occupied or leased by other persons, such infrastructure as roads, railroads, mills, waste dump sites, tailings ponds, warehouses, staging or storage areas and port facilities, tramways, runways, airports, electric transmission, telephone or telegraph lines, dams and their normal flood and catchment areas, sites for water wells, ditches, canals, new river beds, pipelines, flumes, cuts, shafts, tunnels, or mills, the *contractor*, upon payment of just compensation, shall be entitled to enter and occupy said mining areas or lands. [Italics supplied.]

SEC. 76. *Entry into Private Lands and Concession Areas.* — Subject to prior notification, *holders of mining rights* shall not be prevented from entry into private lands and concession areas by surface owners, occupants, or concessionaires when conducting mining operations therein: *Provided*, That any damage done to the property of the surface owner, occupant, or concessionaire as a consequence of such operations shall be properly compensated as may be provided for in the implementing rules and regulations: *Provided, further*, That to guarantee such compensation, the person authorized to conduct mining operation shall, prior thereto, post a bond with the regional director based on the type of properties, the prevailing prices in and around the area where the mining operations are to be conducted, with surety or sureties satisfactory to the regional director. [Italics supplied.]

[277] *Id.*, Sec. 39, first par.

[278] *Id.*, Sec. 39, second par.

[279] *Id.*, Sec. 35 (e).

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By allowing foreign contractors to manage or operate all the aspects of the mining operation, the above-cited provisions of R.A. No. 7942 have in effect conveyed beneficial ownership over the nation's mineral resources to these contractors, leaving the State with nothing but bare title thereto.

Moreover, the same provisions, whether by design or inadvertence, permit a circumvention of the constitutionally ordained 60%-40% capitalization requirement for corporations or associations engaged in the exploitation, development and utilization of Philippine natural resources.

In sum, the Court finds the following provisions of R.A. No. 7942 to be violative of Section 2, Article XII of the Constitution:

(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,[280] 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,[281] which enumerates the terms and conditions for every financial or technical assistance agreement;

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[280] SEC. 23. *Rights and Obligations of the Permittee.* — x x x

The permittee may apply for a mineral production sharing agreement, joint venture agreement, co-production agreement or financial or technical assistance agreement over the permit area, which application shall be granted if the permittee meets the necessary qualifications and the terms and conditions of any such agreement: *Provided* That the exploration period covered by the exploration period of the mineral agreement or financial or technical assistance agreement.

[281] SEC. 35. *Terms and Conditions.* — The following terms, conditions, and warranties shall be incorporated in the financial or technical assistance agreement, to wit:

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(a) A firm commitment in the form of sworn statement, of an amount corresponding to the expenditure obligation that will be invested in the contract area: Provided, That such amount shall be subject to changes as may be provided for in the rules and regulations of this act;

(b) A financial guarantee bond shall be posted in favor of the Government in an amount equivalent to the expenditure obligation of the applicant for any year;

(c) Submission of proof of technical competence, such as, but not limited to, its track record in mineral resource exploration, development, and utilization; details of technology to be employed in the proposed operation; and details of technical personnel to undertake the operation;

(d) Representations and warranties that the applicant has all the qualifications and none of the disqualifications for entering into the agreement;

(e) Representations and warranties that the contractor has or has access to all the financing managerial and technical expertise and, if circumstances demand, the technology required to promptly and effectively carry out the objectives of the agreement with the understanding to timely deploy these resources under its supervision pursuant to the periodic work programs and related budgets, when proper, providing an exploration period up to two (2) years, extendible for another two (2) years but subject to annual review by the Secretary in accordance with the implementing rules and regulations of this Act, and further, subject to the relinquishment obligations;

(f) Representations and warranties that, except for payments for dispositions for its equity, foreign investments in local enterprises which are qualified for repatriation, and local supplier's credits and such other generally accepted and permissible financial schemes for raising funds for valid business purposes, the contractor shall not raise any form of financing from domestic sources of funds, whether in Philippine or foreign currency, for conducting its mining operations for and in the contract area;

(g) The mining operations shall be conducted in accordance with the provisions of this Act and its implementing rules and regulations;

(h) Work programs and minimum expenditures commitments;

(i) Preferential use of local goods and services to the maximum extent practicable;

(j) A stipulation that the contractors are obligated to give preference to Filipinos in all types of mining employment for which they are qualified and that technology shall be transferred to the same;

(k) Requiring the proponent to effectively use appropriate anti-pollution technology and facilities to protect the environment and to

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(5) Section 39,[282] which allows the contractor in a financial and technical assistance agreement to convert the same into a mineral production-sharing agreement;

(6) Section 56,[283] 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:

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restore or rehabilitate mined out areas and other areas affected by mine tailings and other forms of pollution or destruction:

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

(m) Requiring the proponent to dispose of the minerals and byproducts produced under a financial or technical assistance agreement at the highest price and more advantageous terms and conditions as provided for under the rules and regulations of this Act:

(n) Provide for consultation and arbitration with respect to the interpretation and implementation of the terms and conditions of the agreements; and

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

[282] SEC. 39. *Option to Convert into 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.

[283] SEC. 56. *Eligibility of Foreign-owned -controlled Corporation.* — A foreign owned/-controlled corporation may be granted a mineral processing permit.

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(1) Section 3 (g),[284] which defines the term "contractor," insofar as it applies to a financial or technical assistance agreement.

Section 34,[285] which prescribes the maximum contract area in a financial or technical assistance agreements;

Section 36,[286] which allows negotiations for financial or technical assistance agreements;

Section 37,[287] which prescribes the procedure for filing and evaluation of financial or technical assistance agreement proposals;

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[284] SEC. 3. *Definition of Terms.* — As used in and for purposes of this Act, the following terms, whether in singular or plural, shall mean:

x x x x x x x x x

(g) "Contractor" means a qualified person acting alone or in consortium who is a party to a mineral agreement or to a financial or technical assistance agreement.

[285] SEC. 34. *Maximum Contract Area.* — The maximum contract area that may be granted per qualified person, subject to relinquishment shall be:

(a) 1,000 meridional blocks onshore;

(b) 4,000 meridional blocks offshore; or

(c) Combinations of (a) and (b) provided that it shall not exceed the maximum limits for onshore and offshore areas.

[286] SEC. 36. *Negotiations.* — A financial or technical assistance agreement shall be negotiated by the Department and executed and approved by the President. The President shall notify Congress of all financial or technical assistance agreements within thirty (30) days from execution and approval thereof.

[287] SEC. 37. *Filing and Evaluation of Financial or Technical Assistance Agreement Proposals.* — All financial or technical assistance agreement proposals shall be filed with the Bureau after payment of the required processing fees. If the proposal is found to be sufficient and meritorious in form and substance after evaluation, it shall be recorded with the appropriate government agency to give the proponent the prior right to the area covered by such proposal: *Provided*, That existing mineral agreements, financial or technical assistance agreements and other mining rights are not impaired or prejudiced thereby. The Secretary shall recommend its approval to the President.

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Section 38,[288] which limits the term of financial or technical assistance agreements;

Section 40,[289] which allows the assignment or transfer of financial or technical assistance agreements;

Section 41,[290] which allows the withdrawal of the contractor in an FTAA;

The second and third paragraphs of Section 81,[291] which provide for the Government's share in a financial and technical assistance agreement; and

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[288] SEC. 38. *Term of Financial or Technical Assistance Agreement.* — A financial or technical assistance agreement shall have a term not exceeding twenty-five (25) years to start from the execution thereof, renewable for not more than twenty-five (25) years under such terms and conditions as may be provided by law.

[289] SEC. 40. *Assignment/Transfer.* — A financial or technical assistance agreement may be assigned or transferred, in whole or in part, to a *qualified* person subject to the prior approval of the President: *Provided*, That the President shall notify Congress of every financial or technical assistance agreement assigned or converted in accordance with this provision within thirty (30) days from the date of the approval thereof.

[290] *SEC. 41. Withdrawal from Financial or Technical Assistance Agreement.* — The contractor shall manifest in writing to the Secretary his intention to withdraw from the agreement, if in his judgment the mining project is no longer economically feasible, even after he has exerted reasonable diligence to remedy the cause or the situation. The Secretary may accept the withdrawal: Provided, That the contractor has complied or satisfied all his financial, fiscal or legal obligations.

[291] *SEC. 81. Government Share in Other Mineral Agreements.* — x x x

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

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.

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Section 90,[292] which provides for incentives to contractors in FTAAs insofar as it applies to said contractors;

When the parts of the statute are so mutually dependent and connected as conditions, considerations, inducements, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them.[293]

There can be little doubt that the WMCP FTAA itself is a service contract.

Section 1.3 of the WMCP FTAA grants WMCP "the exclusive right to explore, exploit, utilise[,] process and dispose of all Minerals products and by-products thereof that may be produced from the Contract Area."[294] The FTAA also imbues WMCP with the following rights:

(b) to extract and carry away any Mineral samples from the Contract area for the purpose of conducting tests and studies in respect thereof;

(c) to determine the mining and treatment processes to be 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,

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[292] *SEC. 90. Incentives.* — The contractors in mineral agreements, and financial or technical assistance agreements shall be entitled to the applicable fiscal and non-fiscal incentives as provided for under Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987: *Provided*, That holders of exploration permits may register with the Board of Investments and be entitled to the Fiscal incentives granted under the said Code for the duration of the permits or extensions thereof: *Provided, further*, That mining activities shall always be included in the investment priorities plan.

[293] *Lidasan v. Commission on Elections*, 21 SCRA 496 (1967).

[294] *Vide* also WMCP FTAA, Sec. 10.2 (a).

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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 x x x x x x.[295]

All materials, equipment, plant and other installations erected or placed on the Contract Area remain the property of WMCP, which has the right to deal with and remove such items within twelve months from the termination of the FTAA.[296]

Pursuant to Section 1.2 of the FTAA, WMCP shall provide "[all] financing, technology, management and personnel necessary for the Mining Operations." The mining company binds itself to "perform all Mining Operations . . . providing all necessary services, technology and financing in connection therewith,"[297]

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[295] WMCP, Sec. 10.2.

[296] *Id.*, Sec. 11.

[297] *Id.*, Sec. 10.1(a).

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and to "furnish all materials, labour, equipment and other installations that may be required for carrying on all Mining Operations."[298] WMCP may make expansions, improvements and replacements of the mining facilities and may add such new facilities as it considers necessary for the mining operations.[299]

These contractual stipulations, taken together, grant WMCP beneficial ownership over natural resources that properly belong to the State and are intended for the benefit of its citizens. These stipulations are abhorrent to the 1987 Constitution. They are precisely the vices that the fundamental law seeks to avoid, the evils that it aims to suppress. Consequently, the contract from which they spring must be struck down.

In arguing against the annulment of the FTAA, WMCP invokes the Agreement on the Promotion and Protection of Investments between the Philippine and Australian Governments, which was signed in Manila on January 25, 1995 and which entered into force on December 8, 1995.

> x x x Article 2 (1) of said treaty states that it applies to investments whenever made and thus the fact that [WMCP's] FTAA was entered into prior to the entry into force of the treaty does not preclude the Philippine Government from protecting [WMCP's] investment in [that] FTAA. Likewise, Article 3 (1) of the treaty provides that ***"Each Party shall encourage and promote investments in its area by investors of the other Party and shall [admit] such investments in accordance with its Constitution, Laws, regulations and investment policies" and in Article 3 (2), it states that "Each Party shall ensure that investments are accorded fair and equitable treatment."*** The latter stipulation indicates that it was intended to impose an obligation upon a Party to afford fair and equitable treatment to the investments of the other Party and that a failure to provide such treatment by or under the laws of the Party may constitute a breach of the treaty. Simply stated, the Philippines could not, under said treaty, rely upon the inadequacies of its own laws to deprive an Australian investor (like [WMCP]) of fair and equitable treatment

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[298] *Id.*, Sec. 10.1(c).

[299] *Id.*, Sec. 6.4.

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by invalidating [WMCP's] FTAA without likewise nullifying the service contracts entered into before the enactment of RA 7942 such as those mentioned in PD 87 or EO 279.

This becomes more significant in the light of the fact that [WMCP's] FTAA was executed not by a mere Filipino citizen, but by the Philippine Government itself, through its President no less, which, in entering into said treaty is assumed to be aware of the existing Philippine laws on service contracts over the exploration, development and utilization of natural resources. The execution of the FTAA by the Philippine Government assures the Australian Government that the FTAA is in accordance with existing Philippine laws.[300] [Emphasis and italics by private respondents.]

The invalidation of the subject FTAA, it is argued, would constitute a breach of said treaty which, in turn, would amount to a violation of Section 3, Article II of the Constitution adopting the generally accepted principles of international law as part of the law of the land. One of these generally accepted principles is *pacta sunt servanda*, which requires the performance in good faith of treaty obligations.

Even assuming *arguendo* that WMCP is correct in its interpretation of the treaty and its assertion that "the Philippines could not . . . deprive an Australian investor (like [WMCP]) of fair and equitable treatment by invalidating [WMCP's] FTAA without likewise nullifying the service contracts entered into before the enactment of RA 7942 . . .," the annulment of the FTAA would not constitute a breach of the treaty invoked. For this decision herein invalidating the subject FTAA forms part of the legal system of the Philippines.[301] The equal protection clause[302] guarantees that such decision shall apply to all contracts belonging to the same class, hence, upholding rather than violating, the "fair and equitable treatment" stipulation in said treaty.

One other matter requires clarification. Petitioners contend that, consistent with the provisions of Section 2, Article XII of

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[300] *Rollo*, pp. 563-564.

[301] Civil Code, Art. 8.

[302] Const., Art III, Sec. 1.

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the Constitution, the President may enter into agreements involving "*either* technical *or* financial assistance" only. The agreement in question, however, is a technical *and* financial assistance agreement.

Petitioners' contention does not lie. To adhere to the literal language of the Constitution would lead to absurd consequences.[303] As WMCP correctly put it:

> x x x such a theory of petitioners would compel the government (through the President) to enter into contract with two (2) foreign-owned corporations, one for financial assistance agreement and with the other, for technical assistance over one and the same mining area or land; or to execute two (2) contracts with only *one* foreign-owned corporation which has the capability to provide both financial and technical assistance, one for financial assistance and another for technical assistance, over the same mining area. Such an absurd result is definitely not sanctioned under the canons of constitutional construction.[304] [Underscoring in the original.]

Surely, the framers of the 1987 Charter did not contemplate such an absurd result from their use of "either/or." A constitution is not to be interpreted as demanding the impossible or the impracticable; and unreasonable or absurd consequences, if possible, should be avoided.[305] Courts are not to give words a meaning that would lead to absurd or unreasonable consequences and a literal interpretation is to be rejected if it would be unjust or lead to absurd results.[306] That is a strong argument against its adoption.[307] Accordingly, petitioners' interpretation must be rejected.

The foregoing discussion has rendered unnecessary the resolution of the other issues raised by the petition.

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[303] *Vide* Note 223.

[304] *Rollo*, p. 243.

[305] *Civil Liberties Union v. Executive Secretary, supra.*

[306] *Automotive Parts & Equipment Company, Inc. v. Lingad*, 30 SCRA 248 (1969).

[307] *Ibid.*

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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.

SO ORDERED.

Davide, Jr., C.J., Puno, Quisumbing, Carpio, Corona, Callejo, Sr. and *Tinga, JJ.*, concur.

Vitug, and *Panganiban, JJ.*, see separate opinions.

Yanares-Santiago, Sandoval-Gutierrez, and Austria-Martinez, JJ., join *J.* Panganiban's separate opinion.

Azcuna, J., took no part.

VITUG, *J., separate opinion:*

Petitioners, in the instant petition for prohibition and *mandamus*, assail the constitutionality of Republic Act No. 7942, otherwise also known as the Philippine Mining Act of 1995, as well as its Implementing Rules and Regulations (Administrative Order [DAO] 96-40) issued by the Department of Environment and Natural Resources, and the Financial and Technical Assistance Agreement (FTAA) entered into pursuant to Executive Order

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(EO) No. 279, by the Republic of the Philippines and Western Mining Corporation (Philippines), Inc. (WMCP). WMCP is owned by WMC Resources International Pty., Ltd., a wholly owned subsidiary of Western Mining Corporation Holdings Limited, a publicly-listed major Australian mining and exploration company.

The premise for the constitutional challenge is Section 2, Article XII, of the 1987 Constitution which provides:

"All lands of public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wild life, 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. x x x

"x x x x x x x x x.

"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."

After a careful reading of the provisions of Republic Act No. 7942, I join the majority in invalidating the following portions of the law: a) Section 3 (aq) which considers a foreign-owned corporation itself qualified, not only to enter into financial or technical assistance agreements, but also for an exploration or mineral processing permit; b) Section 35 (g), (l), (m) which

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state the rights and obligations of a foreign-owned corporations pursuant to its "mining operations"; and c) Section 56 which provides that foreign-owned or controlled corporations are eligible to be granted a mineral processing permit.

The *ponencia*, so eloquently expressed and so well ratiocinated, would also say that the Philippine Mining Act and its implementing rules or decrees contain provisions which, in effect, authorize the Government to enter into service contracts with foreign-owned corporations, thereby granting beneficial ownership over natural resources to foreign contractors in violation of the fundamental law. Thus, it would strike down Sections 3 (aq), 23, 33 to 41, 56, 81, and 90 of the statute and related sections in DAO 96-40. The FTAA executed between the Government and WMCP is being invalidated for being in the nature of a service contract. The *ponencia* posits that the adoption 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, reflects the intention of the framers to disallow the execution of service contracts with foreign entities for the exploration, development, exploitation and utilization of the country's natural resources.

The proposition is one that I, most respectfully, cannot fully share. The deliberations of the Constitutional Commission do not disclose, in any evident manner, such intention on the part of the drafters, *viz*:

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

"x x x x x x x x x

"MR. SUAREZ. Thank you, Madam President. Will Commissioner Jamir answer a few clarificatory questions?

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"MR. JAMIR. Yes, Madam President.

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

"MR. JAMIR. Yes, Madam President.

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

"MR. JAMIR. *That is correct.*

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

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

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

"MR. JAMIR. That is also correct."[1]

The significance of the change in the terminology is clarified in the following exchanges during the deliberations:

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

"MR. VILLEGAS. *That is right.*

"SR. TAN. So those are the safeguards.

"MR. VILLEGAS. Yes, there was no law at all governing service contracts before."[2]

The Constitutional Commission has also agreed to include the additional requirement that said agreements must be "based on real contributions to the economic growth and general welfare

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[1] III Record of the Constitutional Commission 348.

[2] *Id.*, p. 352.

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of the country." Upon the suggestion of then Commissioner Davide, the scope of "these service contracts" has likewise been limited to large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils. The then Commissioner, explains: "And so, we believe that we should really, if we want to grant *service contracts* at all, limit the same to only those particular areas where Filipino capital may not be sufficient x x x"[3]

The majority would cite the emphatic statements of Commissioners Villegas and Davide that the country's natural resources are exclusively reserved for Filipino citizens[4] and that, according to Commissioner Villegas, "the deletion of the phrase 'service contracts' (is the) first attempt to avoid some of the abuses in the past regime in the use of service contracts to go around the 60-40 arrangement."[5] These declarations do not necessarily mean that the Government may no longer enter into service contracts with foreign entities. In order to uphold and strengthen the national policy of preserving and developing the country's natural resources exclusively for the Filipino people, the present Constitution indeed has provided for safeguards to prevent the execution of service contracts of the old regime, but not of service contracts *per se*. It could not have been the object of the framers of the Charter to limit the contracts which the President may enter into, to mere "agreements for financial and technical assistance." One would take it that the usual terms and conditions recognized and stipulated in agreements of such nature have been contemplated. Basically, the financier and the owner of know-how would understandably satisfy itself with the proper implementation and the profitability of the project. It would be abnormal for the financier and owner of the know-how not to assure itself that all the activities needed to bring the project into fruition are properly implemented, attended to, and carried out. Needless to say, no foreign investor would

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[3] *Id.*, p. 355.

[4] Decision, pp. 69-71.

[5] *Id.*, p. 69.

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readily lend financial or technical assistance without the properincentives, including fair returns, therefor.

The Constitution has not prohibited the State from itself exploring, developing, or utilizing the country's natural resources, and, for this purpose, it may, I submit, enter into the necessary agreements with individuals or entities in the pursuit of a feasible operation.

The fundamental law is deemed written in every contract. The FTAA entered into by the government and WMCP recognizes this vital principle. Thus, two of the agreement's whereas clauses provide:

"WHEREAS, the 1987 Constitution of the Republic of the Philippines provides in Article XII, Section 2 that all lands of the public domain, waters, minerals, coal, petroleum, and other natural resources are owned by the State, and that the exploration, development and utilization of natural resources shall be under the full control and supervision of the State; and

"WHEREAS, the Constitution further provides that the Government may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large scale exploration, development and utilization of minerals."

The assailed contract or its provisions must then be read in conformity with abovementioned constitutional mandate. Hence, Section 10.2 (a) of the FTAA, for instance, which states that "the Contractor shall have the exclusive right to explore for, exploit, utilize, process, market, export and dispose of all minerals and products and by-products thereof that may be derived or produced from the Contract Area and to otherwise conduct Mining Operations in the Contract Area in accordance with the terms and conditions hereof", must be taken to mean that the foregoing rights are to be exercised by WMCP for and in behalf of the State and that WMCP, as the Contractor, would be bound to carry out the terms and conditions of the agreement acting for and in behalf of the State. In exchange for the financial and technical assistance, inclusive of its services, the Contractor enjoys an exclusivity of the contract and a corresponding compensation therefor.

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Except as so expressed elsewhere above, I see, therefore, no constitutional impairment in the enactment of Republic Act No. 7942, as well as its implementing rules, and in the execution by the Government of the Financial and Technical Agreement with WMCP; and I so vote accordingly.

Just a word. While I cannot ignore an impression of the business community that the Court is wont, at times, to interfere with the economic decisions of Congress and the government's economic managers, I must hasten to add, however, that in so voting as above, I have not been unduly overwhelmed by that perception. Quite the contrary, the Court has always proceeded with great caution, such as now, in resolving cases that could inextricably involve policy questions thought to be best left to the technical expertise of the legislative and executive departments.

PANGANIBAN, *J., separate opinion:*

Petitioners challenge the constitutionality of (1) RA 7942 (The Philippine Mining Act of 1995), (2) its Implementing Rules and Regulations (DENR Administrative Order (DAO) 96-40); and (3) the Financial and Technical Assistance Agreement (FTAA) dated March 30, 1995, by and between the government and Western Mining Corporation (Phils.), Inc. (WMCP).

Crux of the Controversy

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

Petitioners thus argue that the FTAA was executed in violation of Section 2 of Article XII of the 1987 Constitution. Allegedly, according to the fourth paragraph thereof, FTAAs entered into by the government with *foreign-owned corporations* are limited to agreements involving merely *technical or financial assistance* to the State for large-scale exploration, development and utilization of minerals, petroleum and other mineral oils. The FTAA in

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question supposedly permits the foreign contractor to *manage and control the mining operations fully,* and is therefore no different from the "service contracts" that were prevalent under the martial law regime, and that are now disallowed by Section 2 of Article XII of the present Constitution.

On January 23, 2001, all the shares of WMC in WMCP — according to the latter's Manifestation subsequently filed with this Court — had been sold to Sagittarius Mines, Inc., in which 60 percent of the equity is Filipino-owned. In the same Manifestation, the Court was further informed that the assailed FTAA had likewise been transferred from WMCP to Sagittarius.

The well-researched *ponencia* of esteemed Justice Conchita Carpio Morales nevertheless declares that the instant case has not been rendered moot by the FTAA's transfer to and registration in the name of *a Filipino-owned corporation*, and that the validity of that transfer remains in dispute and awaits final judicial determination.[1] It then proceeds to decide the instant case on the assumption that WMCP remains a foreign corporation.

Controversy Now Moot

With due respect, I believe that the Court should dismiss the Petition on the ground of mootness. I submit that a decision on the constitutionality issue should await the wisdom of a new day when the Court would have a *live* case before it.

The nullity of the FTAA is unarguably premised upon the contractor being a *foreign* corporation. Had the FTAA been originally issued to a Filipino-owned corporation, we would have had no constitutionality issue to speak of. Upon the other hand, conveyance of the FTAA to a Filipino corporation can be likened to the sale of land to a foreigner who subsequently acquires Filipino citizenship, or who later re-sells the same land to a Filipino citizen. The conveyance would be validated, as the

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[1] That is, the Court of Appeals' resolution of the petition for review — docketed as CA-GR No. 74161 and lodged by Lepanto Consolidated Mining — of the Decision of the Office of the President, which upheld the Order of the DENR secretary approving the transfer to, and the registration of the FTAA in the name of, Sagittarius Mines, Inc.

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property in question would no longer be owned by a disqualified vendee.[2]

Since the FTAA is now to be implemented by a Filipino corporation, how can the Court still declare it unconstitutional? The CA case is a dispute between two Filipino companies (Sagittarius and Lepanto) both claiming the right to purchase the foreign shares in WMCP. So regardless of which side eventually wins, the FTAA would still be in the hands of a qualified Filipino company.

Furthermore, there being no more justiciable controversy, the plea to nullify the Mining Law has become a virtual petition for declaratory relief, over which the Supreme Court has no original jurisdiction.[3]

At bottom, I rely on the well-settled doctrine that this Court does not decide constitutional issues, unless they are the very *lis mota* of the case.[4]

Not Limited to Technical or Financial Assistance Only

At any rate, following the literal text of the present Constitution,[5] the *ponencia* limits to strict technical or financial only the assistance to be provided to the State by foreign-owned corporations for the large-scale exploration, development and utilization of minerals, petroleum, and mineral oils. Such assistance

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[2] *Chavez v. Philippine Estates Authority and Amari*, GR No. 133250, July 9, 2002, May 6, 2003 and November 11, 2003.

[3] *United Residents of Dominican Hill, Inc. v. Commission on the Settlement of Land Problems*, 353 SCRA 782, March 7, 2001; *In Re: Saturnino V. Bermudez*, 145 SCRA 163, October 24, 1986; *Darnoc Realty Development Corp. v. Ayala Corp.*, 202 Phil. 865, September 30, 1982, *De la Llana v. Alba*, 198 Phil. 1, March 12, 1982.

[4] *Mirasol v. Court of Appeals*, 351 SCRA 44, February 1, 2001; *Lalican v. Hon. Vergara*, 342 Phil. 485, July 31, 1997; *Ty v. Trampe*, 321 Phil. 103, December 1, 1995; *People v. Vera*, 65 Phil. 56, November 16, 1937.

[5] Par. 4, Sec. 2 of Art. XII.

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may not include "management or other forms of assistance" or other activities associated with the "service contracts" of the past unlamented regime. Precisely, "*the management or operation of mining activities by foreign contractors, which is the primary feature of service contracts, was x x x the evil that the drafters of the 1987 Constitution sought to eradicate*."

Again, because of the mootness problem, it would be risky to take a *definitive* position on this question. The Court would be speculating on the contents of the FTAA of a prospective foreign company. The requirements of "case and controversy" would be lacking. Suffice it to say, at this point, that the issue even in a live case is not quite that easy to tackle.

First, the drafters' choice of words — their use of the phrase "agreements x x x *involving* x x x technical or financial assistance" — does not absolutely indicate the intent to exclude other modes of assistance. Rather, the phrase signifies the possibility of the inclusion of other activities, provided they bear some *reasonable relationship to and compatibility with* financial or technical assistance.

If the intention of the drafters were strictly to confine foreign corporations to financial or technical assistance and nothing *more*, I am certain that their language would have been *unmistakably restrictive and stringent*. They would have said, for example: "Foreign corporations are *prohibited* from providing management or other forms of assistance," or words to that effect. The conscious avoidance of restrictive wording bespeaks an intent not to employ — in an exclusionary, inflexible and limiting manner — the expression "agreements involving technical or financial assistance."

Second, I believe the foregoing position is supported by the fact that our present Constitution *still recognizes and allows service contracts* (and has not rendered them taboo), albeit *subject to several restrictions and modifications aimed at avoiding the pitfalls of the past*. Below are *some* excerpts from the deliberations of the Constitutional Commission (Concom), showing that its members discussed "technical or financial

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agreements" in the same breath as "service contracts" and used the terms interchangeably:

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

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

MR. SUAREZ: Thank you, Madam President x x x

MR. JAMIR: Yes, Madam President.

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

MR. JAMIR: Yes, Madam President.

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

MR. JAMIR: That is correct.

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

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

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

MR. JAMIR: That is also correct.

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

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MR. JAMIR: That is 100 percent correct x x x

x x x x x x x x x

THE PRESIDENT: The amendment has been accepted by the Committee. May we first vote on the last paragraph?

MR. GASCON: Madam President, that is the point of my inquiry x x x Commissioner Jamir had proposed an amendment with regard to special *service contracts* which was accepted by the Committee. Since the Committee has accepted it, I would like to ask some questions x x x As it is proposed now, such *service contracts* will be entered into by the President with the guidelines of a general law on *service contracts* to be enacted by Congress. Is that correct?

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

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

MR. VILLEGAS: That is right.

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

x x x x x x x x x

MR. GASCON: Yes, it will be up to the body. I feel that the general law to be set by Congress as regards *service contract agreements* which the President will enter into might be too general or since we do not know the content yet of such a law, it might be that certain agreements will be detrimental to the interest of the Filipinos. This is in direct contrast to my proposal which

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

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

MR. GASCON: But my basic problem is that we do not know as of yet the contents of such a general law as to how much constraints there will be in it. And to my mind, although the committee's contention that the regular concurrence from Congress would subject Congress to extensive lobbying, I think that is a risk we will have to take since Congress is a body of representatives of the people whose membership will be changing regularly as there will be changing circumstances every time certain agreements are made. It would be best then to keep in tab and attuned to the interest of the Filipino people, whenever the

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President enters into any agreement with regard to such an important matter as *technical or financial assistance for large-scale exploration, development and utilization of natural resources or service contracts,* the people's elected representatives should be on top of it x x x

x x x x x x x x x

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

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

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

x x x x x x x x x

SR. TAN: Madam President, may I ask a question? x x x Am I correct in thinking that the only difference between these future *service contracts* and the past *service contracts* under Mr. Marcos is the general law to be enacted by the legislature and the notification

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of Congress by the President? That is the only difference, is it not?

MR. VILLEGAS: That is right.

SR. TAN: So those are the safeguards.

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

x x x x x x x x x

MR. SARMIENTO: Maybe we can simplify my proposed amendment, so that it will read: IT SHALL BE THE POLICY OF THE STATE TO PROMOTE, DEVELOP AND EMPLOY LOCAL SCIENTIFIC AND TECHNOLOGICAL RESOURCES x x x

MR. DAVIDE: Could it not be properly accommodated either in the Article on Declaration of Principles and State Policies or in the Article on Human Resources because it would not be germane to the Article on National Economy and Patrimony which we are now treating?

MR. VILLEGAS: I think the intention here, if I understand the amendment to the amendment, is to make sure that when these *technical and scientific services* are rendered by foreigners there would be a deliberate attempt to develop local talents so that we are not forever dependent on these foreigners. Am I right?

MR. DAVIDE: So it is in relation to the *service contracts*? x x x Can it not be stated that the general law providing for *service contracts* shall give priority to the adjective of Commissioner Sarmiento's amendment? It should be in the law itself.

MR. VILLEGAS: That is why it says, 'IT SHALL BE THE POLICY OF THE STATE' immediately following the statement about Congress.

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THE PRESIDENT: Does Commissioner Gascon insist on his proposed amendment?

MR. GASCON: I objected to that amendment and after listening to it again, I feel that I still object on basic principles,

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that every *service contract* to be entered into by the President should be with the concurrence of Congress. I had earlier presented a proposed amendment of 'CONCURRENCE OF TWO-THIRDS VOTE OF ALL THE MEMBERS OF CONGRESS,' but at this point in time, perhaps to simplify choices, since basically the proposal of Commissioner Jamir is to set a general law with regard to *service contracts*, my proposal is to require concurrence of Congress every time a *service contract* is to be made.

THE PRESIDENT: That is clear now. So can we proceed to vote?

MR. NOLLEDO: x x x Madam President, I have the permission of the Acting Floor Leader to speak for only two minutes in favor of the amendment of Commissioner Gascon x x x With due respect to the members of the Committee and Commissioner Jamir, I am in favor of the objection of Commissioner Gascon. Madam President, I was one of those who refused to sign the 1973 Constitution, and one of the reasons is that there were many provisions in the Transitory Provisions therein that favored aliens. I was shocked when I read a provision authorizing *service contracts* while we, in this Constitutional Commission, provided for Filipino control of the economy. We are, therefore, providing for exceptional instances where aliens may circumvent Filipino control of our economy. And one way of circumventing the rule in favor of Filipino control of the economy is to recognize *service contracts*. As far as I am concerned, if I should have my own way, I am for the complete deletion of this provision, *However*, we are presenting a compromise in the sense that *we are requiring* a two-thirds vote of all the Members of Congress as a safeguard. I think we should not mistrust the future Members of Congress by saying that the purpose of this provision is to avoid corruption. We cannot claim that they are less patriotic than we are. I think the Members of this Commission should know that entering into *service contracts* is an exception to the rule on protection

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> of natural resources for the interest of the nation, and therefore, being an exception it should be subject whenever possible to stringent rules. It seems to me that we are liberalizing the rules in favor of aliens.
>
> I say these things with a heavy heart, Madam President. I do not claim to be a nationalist, but I love my country. Although we need investments, we must adopt safeguards that are truly reflective of the sentiments of the people and not mere cosmetic safeguards as they now appear in the Jamir amendment. (Applause) x x x"

The foregoing is but a small sampling of the lengthy discussions of the constitutional commissioners on the subject of service contracts and technical and financial assistance agreements. Quoting the rest of their discussions would have taken up several more pages, and these have thus been omitted for the sake of brevity. *In any event, it would appear that the members of the Concom 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), *when they were crafting and polishing the provisions dealing with financial and/or technical assistance agreements. These provisions ultimately became the fourth and the fifth paragraphs of Section 2 of Article XII of the 1987 Constitution.* Put differently, "technical and financial assistance agreements" were understood by the delegates to include service contracts *duly modified to prevent abuses*.

I respectfully submit that the statements of Commissioner Jose Nolledo, quoted above, are especially pertinent, since they refer specifically to service contracts in favor of aliens. From his perspective, it is clear to me that *the Concom discussions in their entirety* had to do with service contracts that might be given to foreign-owned corporations as exceptions to the general principle of Filipino control of the economy.

Commissioner Nolledo sums up these statements by saying: "*We are, therefore, providing for exceptional instances where*

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aliens may circumvent Filipino control of our economy. And one way of circumventing the rule in favor of Filipino control of the economy is to recognise service contracts. As far as I am concerned, if I should have my own way, I am for the complete deletion of this provision. However, we are preventing a compromise in the sense that we are requiring a two-thirds vote of all the Members of Congress as a safeguard. xxx xxx xxx I think the Members of this Commission should know that entering into service contracts is an exception to the rule on protection of natural resources for the interest of the nation, and therefore, being an exception it should be subject whenever possible, to stringent rules. It seems to me that we are liberalizing the rules in favor of aliens: x x x"

Since the drafters were referring only to service contracts to be granted to foreigners and to nothing else, this fact necessarily implies that we ought not treat the idea of "agreements involving either technical or financial assistance" as having any significance or existence apart from service contracts. In other words, in the minds of the commissioners, the concept of technical and financial assistance agreements did not exist at all apart from the concept of service contracts *duly modified to prevent abuses*.

Interpretation of the Constitution in the Light of Present-Day Realities

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. Current business practices often require borrowers seeking huge loans to allow creditors access to financial records and other data, and probably a seat or two on the former's board of directors; or at least some participation in certain management decisions that may have an impact on the financial health or long-term viability of the debtor, which of course will

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directly affect the latter's capacity to repay its loans. *Prudent lending practices necessitate a certain degree of involvement in the borrower's management process.*

Likewise, *technical assistance*, particularly in certain industries like mining and oil exploration, would likely be from the industry's leading players. It may involve the training of personnel and some form of supervision and oversight with respect to the correct and proper implementation of the technical assistance. The purpose is to ensure that the technical assistance rendered will not go to waste, and that the lender's business reputation and successful track record in the industry will be adequately safeguarded. Thus the technical assistance arrangements often necessarily include interface with the management process itself.

The mining industry is in the doldrums, precisely because of lack of technical and financial resources in our country. If activated properly, the industry could meaningfully contribute to our economy and lead to the employment of many of our jobless compatriots. A hasty and premature decision on the constitutionality of the herein FTAA and the Philippine Mining Act could unnecessarily burden the recovery of the industry and the employment opportunities it would likely generate.

Oral Argument Needed

Given the modern-day reality that even the World Bank (WB) and the International Monetary Fund (IMF) do not lend on the basis merely of bare promissory notes, but on some conditionalities designed to assure the borrowers' financial viability, I would like to hear in an Oral Argument in a *live*, not a moot, *case* what these international practices are and how they impact on our constitutional restrictions. This is not to say that we should bend our basic law; rather, we should find out what kind of FTAA provisions are realistic *vis-a-vis* these international standards and our constitutional protection. Unless there is a *live* FTAA, the Court would not be able to analyze the provisions *vis-a-vis* the Constitution, the Mining Law and these modern day lending practices.

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I mentioned the WB and the IMF, not necessarily because I agree with their oftentimes stringent policies, but because they set the standards that international and multinational financial institutions often take bearings from. The WB and IMF are akin (though not equivalent) to the *Bangko Sentral*, which all Philippine banks must abide by. ***If this Court closes its doors to these international realities and unilaterally sets up its own concepts of strict technical and financial assistance, then it may unwittingly make the country a virtual hermit — an economic isolationist — in the real world of finance.***

I understand that a live case, challenging the Mining Law and an FTAA relevant thereto, is pending before the Second Division of this Court, where it is docketed as GR No. 157882 (*Dipdio Earth Savers Multi-Purpose Association v. Hon. Elisea Gozun*). Can we not consolidate that case with the current one, call an Oral Argument, and then decide the matter more definitively? During the Oral Argument, I believe that the Court should invite as *amici curiae* (1) a lawyer versed in international finance like retired Justice Florentino P. Feliciano, (2) a representative of the Banker's Association of the Philippines, and (3) a leader of the University of the Philippines Law Constitution Project.

Constitutional Interpretation and the Vagaries of Contemporary Events

Finally, I believe 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, the unerring emphasis on flexibility and adaptability.

Commissioner Joaquin Bernas stressed that he voted in favor of the Article, "because it is flexible enough to allow future

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legislators to correct whatever mistakes we may have made."[6] Commissioner Felicitas Aquino 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."[7]

Along the same line, the Court, in *Tañada v. Angara*,[8] stressed the need to interpret the Constitution to cover "refreshing winds of change necessitated by unfolding events":

"x x x Constitutions are designed to meet not only the vagaries of contemporary events. They should be interpreted to cover even future and unknown circumstances. It is to the credit of its drafters that a Constitution can withstand the assaults of bigots and infidels but at the same time bend with the refreshing winds of change necessitated by unfolding events."

Accordingly, I vote to *DISMISS* the Petition.

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[6] *Id.*, p. 840.

[7] *Ibid.*

[8] 272 SCRA 18, May 2, 1997.