ACQUIRING MINERAL RIGHTS IN THE PHILIPPINES: UPDATES ON MINING LAW AND JURISPRUDENCE*

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I. CONSTITUTIONAL POLICIES ON NATURAL RESOURCES

INTRODUCTION

Article XII, Section 2 of the 1987 Constitution identifies what are included in the term "natural resources":

> All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forest or timber, wildlife, flora and fauna, and other natural resources...

The phrase "other natural resources" is intended to make the enumeration all inclusive and by *ejusdem generis*, this would refer to all species, elements, compounds and substances that exist in their natural, unprocessed state and found "in situ" regardless of their perceived, existing or actual economic value.

A. SCOPE OF NATURAL RESOURCE DEVELOPMENT

In *La Bugal B'laan Tribal Association, Inc. v. Ramos*[1], the Supreme Court dissected Section 2, Article XII of the Constitution on the basic policy on natural resource development and the various ways by which natural resources can be developed:

> 1. All natural resources are owned by the State. Except for agricultural lands, natural resources cannot be alienated by the State.

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[1] G.R. No. 127882, 445 SCRA 1, 228, Dec. 1, 2004.

> 2. The exploration, development and utilization (EDU) of natural resources shall be under the full control and supervision of the State.
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> 3. The State may undertake these EDU activities through either of the following: (a) By itself directly and solely; (b) By (i) co-production; (ii) joint venture; or (iii) production sharing agreements with Filipino citizens or corporations, at least 60 percent of the capital of which is owned by such citizens
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> 4. Small-scale utilization of natural resources may be allowed by law in favor of Filipino citizens.
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> 5. For large-scale EDU of minerals, petroleum and other mineral oils, the President may enter into "agreements with foreign-owned corporations involving either technical or financial assistance according to the general terms and conditions provided by law...

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

B. THE DOCTRINE OF "JUS REGALIA"

The foundation of Philippine law on natural resources is the regalian doctrine that asserts that all natural resources are state-owned. Thus, as in previous Constitutions, Article XII, Section 2 of the 1987 Constitution reaffirms the doctrine of state ownership over all mineral resources[2] but it goes further by asserting that the exploration, development and utilization of natural resources shall be under the full control and supervision of the State.

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[2] Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forest 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 citizen, or corporations or association 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.

When the Philippines was a territory of the United States, the applicable law was the Philippine Bill of 1902. It allowed absolute ownership of mineral properties; titles or patents were issued in favor of individuals or juridical entities as absolute owners thereof. The Philippine Commonwealth adopted the doctrine of *jus regalia* in the Constitution, pursuant to the policy of "conservation of natural resources" for future generations of Filipinos. Thus, Article XII of the 1935 Constitution was entitled: "Conservation and Utilization of Natural Resources".

The argument in support of the regalian doctrine giving state ownership on natural resource was summarized by Aruego:

> The natural resources, particularly the mineral resource which constituted a great source of wealth belonged not only to the generation then but also to the succeeding generations and consequently should be conserved for them. They expressed the fear that, if the freehold system was adopted, some of the mineral lands after they had become private property through the grant of a patent might eventually get into the ownership or control of foreigners to the prejudice of Filipino posterity.[3]

1. Mineral Resources and the Regalian Doctrine

The Philippine Mining Act of 1995, Republic Act No.7942 restates the Regalian doctrine as applied to mineral resources:

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

"Mineral Resources" means any concentration of ores, minerals and/or rocks with proven or potential economic value.[4] "Mineral Land" means any area where mineral resources are found. "Minerals" refer to all naturally occurring inorganic substances in solid, liquid, gas or any

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[3] JOSE M. ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 594 (1937).

[4] Dept. of Environment and Nat'l Resources Adm. Order No. 96-40, Revised Implementing Rules and Regulations of Republic Act 7942, sec. 5.

intermediate state excluding energy materials.[5] The IRR classifies minerals into two classes: metallic and non-metallic.[6] .

a) Landownership Does Not Include Ownership of Minerals

One significant application of the Regalian doctrine is that a person's ownership of a piece of land does not include the right to extract or utilize the said minerals without the permission of the State.

Once minerals are discovered in the land, whatever the use to which such are devoted at the time becomes secondary. If mining operations are conducted, the land being converted to mineral land may not be used by any private party, including the registered owner thereof, for any other purpose that will impede the mining operation to be undertaken therein. But the owner is entitled to compensation for the loss sustained by the landowner, as provided under the Mining Law or in appropriate expropriation proceedings.[7]

The case of *Didipio Earth-Savers' Multi-Purpose Association, Inc. et al., vs. Gozun,*[8] (the Climax case, decided in 2006) involved various property owners who would be affected by mining operations by an FTAA holder, Climax-Arimco Mining Corp. The FTAA of Climax grants the mining company the right of possession of the Exploration Contract Area, and full rights of ingress and egress as well as the right not to be prevented from entry into private lands by surface owners or occupants when prospecting, exploring and exploiting minerals on the contract area. The Supreme Court ruled that the conversion of non-mineral land into mineral land is not an exercise of police power where no just compensation is payable but constitutes "taking" in the sense of expropriation where just compensation is due to affected landowners. This is because property is taken or restricted, in order to allow mining activities by a mining contractor.

The Climax FTAA also lays down the means by which the foreign-owned contractor, disqualified to own land, identifies to the government the specific surface areas within the FTAA contract area to be acquired for the mine infrastructure. The government then acquires ownership of the surface

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[5] DAO 96-40, sec. 5-ax, 5- av. ...such as coal, petroleum, natural gas, radioactive materials and geothermal energy.

[6] DAO 96-40, sec. 5-at, 5-bl.

[7] JOAQUIN BERNAS, S.J. THE 1987 PHILIPPINE CONSTITUTION A COMMENTARY, 1135 (2003 ed.).

[8] G.R. No. 157882, 485 SCRA 586, March 30, 2006.

land areas on behalf of the contractor, through a voluntary transaction in order to enable the latter to proceed to fully implement the FTAA. Eminent domain is not exercised when there are still various avenues by which surface rights can be acquired other than expropriation.

2. Change of Systems in Acquiring Mineral Rights

a) Pre-1935 Regalian Regime: The Patent System

Before the 1935 Constitution, the Philippine Bill of 1902 passed by the U.S. Congress allowed the open and free exploration, occupation and purchase of minerals and the land where they may be found. Patents and certificates of title were issued in favor of the locator or mining claims owner for "patented mineral lands". Those without issued patents or titles remain as "patentable mineral lands" where locators/claim owners acquired possessory rights. The Supreme Court in a long line of cases affirmed the ownership of mineral claims located pursuant to the Philippine Bill of 1902.[9]

As a general rule, the moment the locator discovered a valuable mineral deposit and he perfected his location in accordance with law, the land became the private property of the locators who located and perfected their mineral claims. In *Atok Big Wedge Mining Co. Inc. v. Court of Appeals*[10], the Supreme Court stated that where there is a valid location of mining claim, the area becomes segregated from the public domain and becomes the property of the locator. However in *Sta. Rosa Mining Co. v. Leido, Jr.*, the Supreme Court upheld Presidential Decree 1241 required all patentable claims to be converted into leaseholds, otherwise these will revert to the public domain. The decree states that mere location does not mean absolute ownership, and that the right of a locator of a mining claim is not absolute. It merely segregates the located land or area from the public domain by barring other would-be locators from locating the same and appropriating for themselves the minerals found therein. It is merely a possessory right

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[9] Mc Daniel vs. Apacible and Cuisia, 42 Phil 749 (1922); Salacot Mining Co. v. Rodriguez , 67 Phil. 97; Salacot Mining v. Apacible , 67 Phil. 110; Benguet, Inc. v. Republic, 143 SCRA 466.

"The respondent may claim, however, that inasmuch as a patent has not been issued to the petitioner, he has acquired no property right in said mineral claims. But the Supreme Court of the United States, in the cases of Union Oil Co. v. Smith (249 U. S. 337), and St. Louis Mining & Milling Co. v. Montana Mining Co. (171 U. S. 650), held that even without a patent, the possessory right of a locator after discovery of minerals upon the claim is a property right in the fullest sense, unaffected by the fact that the paramount title to the land is in the United States," McDaniel v. Apacible, *supra.*

[10] G.R. No. 88883, 193 SCRA 71, 76, Jan. 18, 1991

which can be lost through abandonment or forfeiture, or may be revoked for valid legal grounds. [11]

b) Mineral vs. Agricultural (Non-mineral) Use of Land

In the case of *Atok Big Wedge Mining Co. v. IAC and Tuktukan*[12], an individual's possessory rights over the land used for agricultural purposes were declared superior to that of the claim owner of unpatented claims. The possessory rights of mining claim holders under the Philippine Bill of 1902 remained effective for as long as said holders complied with legal requirements to maintain the claimant's mining claim, such as compliance with the annual work obligation. Such continuing compliance effectively prevents these claims from becoming open to relocation. In *Republic vs. Court of Appeals,*[13] the Supreme Court ruled that the land itself cannot be half agricultural and half mineral. The classification must be either completely mineral or completely agricultural. As long as mining operations were being undertaken thereon, or underneath, it did not cease to be mineral and become partly agricultural, just because it was fenced and cultivated by those who occupied the surface.

c) The Regalian Regime under The Leasehold System of the 1935 Constitution, Com. Act No. 137, the 1973 Constitution and Pres. Dec. No. 463

Under the leasehold system, the mining lessee is granted the right to extract all mineral deposits and to remove and utilize the same for his own benefit. The basic principle under the regalian doctrine is that ownership and the right to use land for agricultural, commercial, residential, or for any purpose other than mining does not include the ownership of, nor the right to extract or utilize, the minerals which may be found on or under the surface. The right to extract and utilize the minerals is excluded from all patents as well as Torrens titles granted for agricultural and other types of lands.[14]

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[11] Sta. Rosa Mining Co. vs. Leido, Jr., G.R. No. 49109, 156 SCRA 1, 9, (Dec. 1, 1987)

[12] G.R. No. 63528, 261 SCRA 528, 551 (Sept. 9, 1996)

[13] 160 SCRA 1988, (Jan. 18, 1991)

[14] Pres. Dec. 463 (1974), "Sec. 4. Minerals Excluded from other Rights to Lands- The ownership or the right to use public or private lands whether exposed or submerged, for agricultural, logging, industrial, commercial, residential, petroleum exploration and/or exploitation purposes or for any purpose other than mining, does not include the ownership of, nor the right to develop, exploit or utilize, the mineral deposits found in, on or under the surface of such lands, except with respect to quarry resources as provided for in this Decree."

To implement the new leasehold system, the First National Assembly of the Philippine Commonwealth enacted Commonwealth Act (C.A.) No. 137, otherwise known as the Mining Act of 1936, which granted only leasehold rights to mining claimants, unlike the Philippine Bill of 1902. The leasehold system was carried over to the 1973 Constitution and Pres. Dec. 463, which replaced the old Mining Act.

Note that both the 1935 Constitution and Com. Act No. 137 had provided that any existing right, grant, lease or concession at the time of the inauguration of the Government established under the 1935 Constitution, shall be respected, such as patented and patentable mining claims.[15] However, this reservation in favor of vested rights was neutralized under Pres. Decree No. 1214 promulgated in 1977, which required all the holders of subsisting and valid patentable mining claims located under the Philippine Bill of 1902 to secure mining lease contracts, otherwise, all the rights of locators to their patentable claims (under the Philippine Bill of 1902) will be forfeited and the land reverted back to the public domain. The Supreme Court upheld Pres. Dec. No. 1214 as a valid exercise of the sovereign power of the State.[16] With Pres. Dec. No. 1214, there was complete abolition of all vestiges of the patent system under the Philippine Bill of 1902. Other than the patented claims titled in favor of private persons, the regalian doctrine has been fully implemented.

d) Parity Rights

However, the nationalistic provisions limiting the right to explore, develop and utilize natural resources to Filipino citizens under the 1935 Constitution was eroded by the "Parity Rights" amendments adopted on September 18, 1946.[17] It was an "Ordinance Appended to the Constitution" that granted citizens of the United States and its business enterprises equal rights in the disposition, exploitation, development and utilization of natural

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[15] Act No. 4268 (1935) "Any provision of existing laws, executive order, proclamation to the contrary notwithstanding, all locations of mining claim made prior to February 8, 1935 within lands set apart as forest reserved under Sec. 1826 of the Revised Administrative Code which would be valid and subsisting location except to the existence of said reserve are hereby declared to be valid and subsisting locations as of the date of their respective locations."

[16] Supra, note 26

[17] "Parity Rights" was approved by the First Congress of the Philippine Republic which was established on July 4, 1946.

resources in the Philippines, among them, mining lands and minerals for the period from July 4, 1946 to July 3, 1974.[18]

e) The Contract System under The 1987 Constitution: Leasehold System Abolished

The 1987 Constitution abolished the leasehold system which granted "licenses, concessions or leases" as provided under the 1935 and 1973 Constitutions. In lieu thereof, Article XII, Section 2 of the 1987 Constitution established the constitutional policy of "full control and supervision by the State in the exploration, development and utilization of the country's natural resources." For mineral resources, the state can pursue EDU of mineral resources (a) by itself directly and solely, or (b) by (i) co-production; (ii) joint venture; or (iii) production-sharing agreements with Filipino citizens or corporations, at least 60 percent of the capital of which is owned by such citizens.[19] Currently, private parties can acquire mineral rights only by contractual arrangements through various modes of mining agreements such as the mine production sharing agreements (MPSA) or financial, technical assistance agreements (FTAA) with the government under the new system established under the 1987 Constitution and the Mining Law of 1995, Republic Act No.7974.

The Department of Environment and Natural Resources (DENR) is the primary government agency responsible for the conservation, management, development, and proper use of the State's mineral resources including those in reservations, watershed areas, and lands of the public domain.[20] The Mines and Geosciences Bureau (MGB) under the DENR has direct charge of the administration and disposition of mineral lands and mineral resources.[21]

f) State's Full Control and Supervision

The intent of the 1987 Constitution is for the State to assume a more dynamic role in the exploration, development and utilization of the natural resources of the country to be undertaken by means of direct act of the State, or it may opt to enter into co-production, joint venture, or production-sharing agreements, or it may enter into agreements with

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[18] The elections or plebiscite was held on March 11, 1947, approving this "Ordinance Appended to the Constitution.

[19] Miners' Association Of the Philippines, Inc. v. Factoran, G.R. No. 98332, 240 SCRA 100, Jan. 16, (1995)

[20] Rep. Act. No. 7942, Sec. 6. This is the Philippine Mining Law, "An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conversion."

[21] Rep. Act No. 7942, Sec. 9.

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 contribution to the economic growth and general welfare of the country.

The meaning and extent of "full control and supervision" is explained by the Supreme Court in the recent case of *La Bugal*:[22]

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

g) Levels of Control

There are two levels of control that must be considered. The first level is the control over the corporation which may engage with the State in co-production, joint venture or production sharing agreement. If individuals, they must be Filipino citizens; if corporations, they ownership must be 60% Filipino.

The second level of control is in the operations by the corporate entity or individual. This means that in the case of natural resources, the state must always have some control of the EDU, even if the individual or the corporation engaged in the operations is Filipino.[23] "Full control" is not anathematic to day-to-day management by the contractor, provided that the State retains the power to direct overall strategy; and to set aside, reverse or modify plans and actions of the contractor. It allows delegation to subordinates of contractors, of the performance of managerial, operational,

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[22] G.R. No. 127882, 445 SCRA 1, Dec. 1, 2004.

[23] Bernas, *supra*, note 7 at 1138, 1139.

financial, marketing and other functions. Full residual control of the business, however, is retained by the governing board.

"Full control" cannot be taken literally to mean that the State controls and supervises *everything down to the minutest details and makes all required actions*--- Such a degree of control would be incompatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise it has invested in, to ensure efficient and profitable operation. The government need not micro-manage mining operations and day-to-day affairs. As explained by the court in *La Bugal*, control and supervision allows "*the legitimate exercise by the contractor of a reasonable degree of management prerogative and authority, indispensable to the proper functioning of the mining enterprise.*"

Control by the State may be on a macro level, through the establishment of policies, guidelines, regulations, industry standards and similar measures that would enable government to regulate the conduct of affairs in various enterprises, and restrain activities deemed not desirable or beneficial, with the end in view of ensuring that these enterprises contribute to the economic development and general welfare of the country, conserve the environment, and uplift the well-being of the local affected communities.[24]

h) Transition from Leasehold to Contract System: Balancing Police Power with Other Constitutional Guarantees

On July 10, 1987, Executive Order No 211 prescribed the interim procedures in the processing and approval of applications for the EDU of minerals pursuant to the 1987 Constitution in order to ensure the continuity of mining operations and activities, and to hasten the development of mineral resources. Executive Order No. 279 authorized the DENR Secretary to negotiate and conclude joint venture, co-production, or production sharing agreements and those agreements involving FTAAs with foreign-owned corporations for large-scale EDU.

In upholding these measures to implement the new system, the Supreme Court had to balance contesting interests between the constitutional guarantees against impairment of contracts and police power of the state. The Supreme Court upheld the police power of the state to

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[24] La Bugal B'laan,421 SCRA 148, G.R. No. 127882

modify or amend pre-existing mining leases, citing the "demands of public interest", and "vital public needs."[25]

i) Non-Impairment of Existing Mineral Rights

Section 3(p) of RA 7942 defines an existing mining/quarrying right as "a valid and subsisting mining claim or permit or quarry permit or any mining lease contract or agreement covering a mineralized area granted/issued under pertinent mining laws." Existing mineral rights like those acquired under the patent system of the Philippine Bill of 1902 and the leasehold system under Com. Act 136 and Pres. Dec. 463 are not impaired by the new system of mineral agreements established under the 1987 Constitution and RA 7942. However, measures to preserve and maintain these rights must be complied with, such as those stated under DENR A.O. 57[26].

In a recent case[27], the Supreme Court stated that Section 2 of Article XII of the 1987 Constitution does not apply retroactively to a "license, concession or lease" granted by the government under the 1973 Constitution or before the effectivity of the 1987 Constitution on February 2, 1987 based on the deliberations of the Constitutional Commission that emphasized the intent to apply the said constitutional provision prospectively. While RA 7942 has expressly repealed provisions of mining laws which are inconsistent with its own, it nonetheless respects previously issued valid and existing licenses, as stated in some portions of the law:

1) Section 5 on Mineral Reservations stating that "...the President may establish mineral reservations, subject to valid existing mining/quarrying rights";

2) Section 7 stating that "the Secretary shall periodically review existing mineral reservations without prejudice to prior existing rights." ;

3) Section 18 which states that "all mineral resources in public or private lands, subject to any existing rights or reservations and prior agreements of all parties,";

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[25] Miners' Association, 240 SCRA, Jan. 16, 1995.

[26] Department of Environment and Natural Resources Adm. Order 57, series of 1989. This is the Guidelines of Mineral Production Sharing Agreement Under E.O. 279.

[27] Republic v. Rosemoor Mining and Dev't Corp., et. al., G. R. No. 149927, 426 SCRA 517, Mar. 30, 2004

4) Section 19 (c) prescribing that "Mineral agreement or financial or technical assistance agreement applications shall not be allowed in areas covered by valid and existing mining rights";

5) Section 112 providing that "All valid and existing mining lease contracts, permits/licenses, leases pending renewal, mineral production-sharing agreements granted under Executive Order No. 279, at the date of effectivity of this Act, shall remain valid, shall not be impaired, and shall be recognized by the Government";

6) Section 113 expressly giving "Recognition of Valid and Existing Mining Claims and Lease/Quarry Application. — Holders of valid and existing mining claims, lease/quarry applications shall be given preferential rights to enter into any mode of mineral agreement with the government within two (2) years from the promulgation of the rules and regulations implementing this Act." (Underscoring supplied)

The Supreme Court has ruled in one case that the DAO No. 57 was not a unilateral declaration by government of automatic conversion of all existing mining leases and agreements into production –sharing agreement, but implies negotiation between the Government and the applicants, if they are so minded. Negotiation negates compulsion or automatic conversion. A mineral production-sharing agreement (MPSA) requires a meeting of the minds of the parties after negotiations arrived at in good faith and in accordance with the procedure laid down in the subsequent Administrative Order No. 82.[28]

However, on valid grounds calling for the exercise of police power, the guarantee against impairment will give way to police power. In a recent case involving Proclamation No. 84 (declaring a mining reservation) court ruled that said act cannot be stigmatized as a violation of the non-impairment clause:

> As pointed out earlier, respondents' license is not a contract to which the protection accorded by the non-impairment clause may extend. Even if the license were, it is settled that provisions of existing laws and a reservation of police power are deemed read into it, because it concerns a subject impressed with public welfare. As it is, the non-impairment clause must yield to the police power of the state. [29]

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[28] Bernas, supra, pp.1138-1139

[29] Republic v. Rosemoor, 426 SCRA 517, Mar. 30, 2004.

C. THE PHILIPPINE MINING ACT OF 1995

The declaration of policy in the Philippine Mining Law gives the specific directions and the primary concerns of regulatory agencies that will supervise all aspects of mining operations in the Philippines. The following basic concepts are highlighted:

> (a) State ownership of mineral sources;
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> (b) Combined or joint efforts or economic partnership between government and private enterprise in the exploration, development, utilization and conservation of mineral resources;
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> (c) Safeguard of the environment and protection of affected communities while the permit of economic growth and development of mineral resources.[30]

The Revised Implementing Rules and Regulations (Revised IRR) DENR Adm. Order 96-40, lays down the governing principles and objectives, emphasizing the principle of sustainable development, the promotion of both local and foreign investments in mining, Harmonization of government activities, programs and policies which are pro-environment and pro-people.

The objectives as stated in the Revised IRRs may be summarized as follows: (1) to promote EDU of mineral resources; (2) to enhance contribution of mineral resources to development; (3) to encourage investments in EDU; (4) to promote equitable sharing of benefits and costs in EDU of mineral resources; (5) to enable the government and the investor in EDU to recover their investments.

The potential contribution of the mining industry to economic development and progress is recognized in EO 270[31]. The promotion of both local and foreign investments for the rational exploration, development, utilization and conservation of mineral resources is now a declared policy under the present government to enhance the contribution of mineral resources to economic recovery and national development. The objective is to promote equitable access to economically efficient development and fair sharing of benefits and costs. This includes the

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[30] Republic Act No. 7942, Sec. 2. (1995). This is the Philippine Mining Act of 1995.

[31] Executive Order No. 270 (2004). National Policy Agenda on Revitalizing Mining in the Philippines.

recognition of the right on the part of the investors to recover their share in the production, utilization of mineral resources.

II. ACQUIRING MINERAL RIGHTS

"Mining Right"[32] is the right to explore, develop, or utilize mineral resources under the system established under the new Mining Act. The phrase "the exploitation, development, utilization, and processing thereof" relate to the various stages of mining. Thus "development" means the work undertaken to explore and prepare an ore body or a mineral deposit for mining, including the construction of necessary infrastructure and related facilities. "Development stage" as used exclusively for FTAAs means the period to prepare an explored ore body or mineral deposit for mining including the construction of necessary infrastructure and related facilities.[33] A mining right may be acquired by filing and perfecting a Mining Right Application for mining rights.[34]

There are different modes by which mining rights can be acquired as provided in the various provisions of the mining law. Such application may be filed for the various kinds of mining permits, such as those for small-scale mining, exploration, quarry, sand and gravel, guano, gemstone gathering, mineral agreement (MPSA) or a financial and technical assistance agreement (FTAA) with the government.[35]

The "Contract area" is the subject matter of the mineral agreement over which the contractor will undertake exploration activities and if found to be feasible, to develop and put the area into commercial productive mining operations.[36] It refers to the land or body of water delineated for purposes of exploration, development, or utilization of the minerals found therein. It is quite common for the contract area to be acquired by the applicant from mineral claim owners who have valid and existing rights over the area. This comes with the process of consolidation to increase the contract area applied for coverage in a mineral agreement.

The applicant for a mineral agreement that has consolidated his contract area through various agreements with persons with valid and existing mineral rights/claims should comply with DAO 99-34 which

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[32] DAO 96-40, Sec. 5- bc.
[33] DAO 96-40, Sec. 5- ax.
[34] DAO 96-40, Sec. 5.
[35] Rep. Act No. 7942, Sec. 11.
[36] DAO 96-40, Sec. 5. (m).

requires the approval of Agreements relating to Mining Rights/Applications.[37] He should also register said documents with the Bureau/concerned Regional Office. Any such Agreement that is not duly registered and/or approved by the DENR Secretary shall be deemed void in so far as the Department is concerned.

There are four (4) categories of "qualified persons" who may directly apply for a mineral agreement:

> (1) In case of individuals — must be of legal age, with capacity to contract, and a citizen of the Philippines; or
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> (2) In case of juridical persons: a corporation, partnership, association, or cooperative —at least sixty per centum (60%) of the capital of which is owned by citizens of the Philippines.[38] Juridical persons should be domestic companies, i.e. must be duly registered in accordance with Philippine laws; organized and authorized for the purpose to engage in mining operations.
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> (3) A permittee under an exploration permit may apply for any of the mineral agreements above enumerated including a financial or technical assistance agreement over the permit area, in which case the exploration period covered by the permit shall be included as part of the exploration period of the mineral agreement or financial or technical assistance agreement.39
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> (4) Foreign-owned corporations incorporated in the Philippines are qualified for limited purposes: (a) exploration permit; (b) financial or technical assistance agreement; or (c) mineral processing permit.40 A "Foreign-owned corporation" means any corporation, partnership, association or cooperative duly registered in accordance with law in which less than fifty percent (50%) of the capital is owned by Filipino citizens.41

The first three (3) categories can apply for all types of mineral agreements; the 4th category is qualified for limited purposes only. A determination that a mining applicant for an EP, MA or FTAA is a single

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[37] Department Administrative Order No. 34, Sec. 11. (1999). Clarificatory Guidelines in the Implementation of DENR Administrative Order No. 96-40 or the "Revised Implementing Rules and Regulations of Republic Act No. 7942.

[38] DAO 96-40, Sec. 5-bl.

[39] DAO Sec. 23, (last paragraph)

[40] Rep. Act 7942, Sec. 3, DAO 96-40, Sec 4-ak, al.

[41] Department Memorandum Order No.99-10, Sec. 2.

and separate qualified person shall not be construed as approval or grant of its mining application.

A. FEATURES COMMON TO ALL MODES OF ACQUIRING MINERAL RIGHTS

1. Basic Steps in Contract Processing

a) Applications

The processing of mining agreements has been simplified[42] by decentralizing authorities and reducing the processing time of mining applications. The Mineral Agreement application shall be filed with the Bureau/concerned Regional Office. Any application that transcends two (2) or more regions shall be filed with the Regional Office which has the largest area covered by the application, and a copy shall be furnished the other concerned Regional Office(s) by the applicant.[43] In respect of areas outside mineral reservations, the DENR Secretary shall evaluate and act on the application.[44] Once approved by the DENR Secretary, copies of the agreement will be submitted to the President who submits a list to Congress of every approved mineral agreement within thirty (30) days from its approval by the Secretary.

Area clearance involves the checking of control maps to determine if the area is free or open for mining purposes. Area Status and Clearance is a process that is required of all types of applications for mining contract/permits. Considering the massive investments involved in mining exploration, development and operations, it is essential to ascertain whether a proposed contract area is free and clear of any conflicting rights or claims which preclude its award to a proponent or applicant for a mineral agreement. A master map of the region showing the various land classifications/uses/status in overlays [45] is an effective tool that facilitates determination of area status and clearance.[46] The Bureau/concerned Regional Office(s) shall check in the control maps if the area is free or open for mining applications. In cases of overlapping of claims or of complaints from landowners, NGOs, LGUs and

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[42] Department Memorandum Order No. 2003- 08.
[43] DAO 96-40, Sec. 36.
[44] DAO 96-40, Sec. 41.
[45] DAO 96-40, Sec. 2, DMO No. 98 – 03
[46] DAO 96-40, Sec. 37.

other concerned stakeholders, the Regional Director shall exert all efforts to resolve the same.

If a portion of the area applied for is not open for mining purposes, the concerned Regional Office shall work out the exclusion of the same from the coverage of mineral agreement application. Area clearance will not be given if the area is subject of pre- existing rights, and shall thus be considered a closed area. Where consent/clearance is denied, in case of reservations/ reserves/ project areas under the jurisdiction of the Department/ Bureau/Regional Office, the applicant may appeal the same to the Office of the Secretary.

b) Publication/Posting/Radio Announcement of Notice of an Exploration Permit Application

A Notice of Application for Exploration Permit shall be issued by the Bureau/concerned Regional Office. The publication and radio announcements shall be at the expense of the applicant. And made within the place and period prescribed. A certification that the publication/posting/radio announcement has been complied with shall be issued by the authorized officer. However, previously published valid and existing mining claims are exempted from the publication/posting/radio announcement required under this Section.[47]

c) Areas Open to Mining Applications

The law prescribes the general principle for the grant of mining rights, thus:

> Subject to any existing rights or reservations and prior agreements of all parties, all mineral resources in public or private lands, including timber or forestlands as defined in existing laws, shall be open to mineral agreements or financial or technical assistance agreement applications...[48]

Generally, all mineral resources in public or private lands are open to mining activities except when there are any existing rights or reservations

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[47] DAO 96-40, Sec. 21.
[48] Rep.Act. No. 7942, Sec. 18.

and prior agreements of other parties. As defined, "existing mining/quarrying right"[49] means "a valid and subsisting mining claim or permit or quarry permit or any mining lease contract or agreement covering a mineralized area granted/issued under pertinent mining laws". This exception relates to vested rights of third parties which are protected under the constitutional guarantee against impairment of obligations of contracts. There are also specified areas where mineral agreements or FTAA applications are not allowed. This enumeration is in Section 19 of the said law.

Upon approval of the Mineral Agreement[50] by the Secretary, the same shall be forwarded to the Bureau for numbering. The Director shall notify the Contractor to cause the registration of its Mineral Agreement with the Bureau for areas inside Mineral Reservations or with the concerned Regional Office for areas outside Mineral Reservations. Failure of the Contractor to cause the registration of its Mineral Agreement within the prescribed period shall be a sufficient ground for cancellation of the same.

d) Mandatory Terms and Conditions in Mineral Agreements

The following categories of mandatory provisions must be incorporated in the Mineral Agreement: (i) Term of the Contract; (ii) Contractor's Representations and Warranties ; (iii) Filipino First Policy; (iv) Foreign employment and technologies; (v) Contract area; (vi) Exploration; (vii) Relinquishment; (viii)Safety and Protection of the environment; (ix) Data/accounts/records; (x) Government Share; (xi) Sales Policy; (xii) Settlement of disputes; and (xiii) Compliance.

Term of the Contract

The mineral agreement should provide for a term of not exceeding 25 years from date of execution, subject to renewal for another period not exceeding twenty-five (25) years under the same terms and conditions. Changes as may be mutually agreed upon by the parties, are allowed provided these are not inconsistent with law and do not prejudice the principle of sustainable development.

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[49] DAO 96-40, Sec. 5.
[50] DAO 96-40, Sec. 43.

Contractor's Representations and Warranties

One representation of the contractor in mineral agreements is that he can perform an exploration period up to two (2) years from date of issuance thereof, renewable for like periods but not to exceed a total term of six (6) years for non-metallic minerals exploration or eight (8) years for metallic minerals exploration, subject to annual review and approval by the Director in accordance with the implementing rules and regulations. This period, however, is extendible in cases where further exploration is warranted beyond the six (6) or eight (8) year period, subject to certain conditions.[51] Under a FTAA, a contractor assumes several specific obligations, undertakings and commitments, to be contained in the FTAA agreement. One of the Representations and Warranties requires proof of such competence, such as 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. There are also several mandatory representations and warranties to be incorporated in the FTAA relating to: access to all the financing, managerial and technical expertise and the technology required which can be timely deployed under its supervision pursuant to the periodic work programs and related budgets, when proper.

Filipino First/ Gender Discrimination

This is a stipulation that the Contractor shall give preference to goods and services produced and offered in the Philippines of comparative quality and cost, to the maximum extent practicable. In particular, the Contractor shall give preference to qualified Filipino construction enterprises, construction materials and skills available in the Philippines, Filipino sub-contractors for road construction and transportation, and Philippine household equipment, furniture and food. The Contractor is also obliged to give preference to Filipinos in all types of mining employment for which they are qualified. There should be transfer of technology to the government or local mining company.[52] The same "Filipino First" Policy is also required of an FTAA Contractor.[53]

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[51] DAO 96-40, as amended by DAO 56-04, Section 39 b. and c.
[52] DAO 96-40, as amended by DAO 56-04, Sec. 39. g, h, o, p, v.
[53] DAO 96-40, Sec. 56. q, r.

Foreign Employment and Technologies

Correlated to the Filipino First Policy is a stipulation that alien employment shall be limited to technologies requiring highly specialized training and experience subject to the required approval under existing laws, rules and regulations, and that in every case where foreign technologies are utilized and where alien executives are employed, an effective program of training understudies shall be undertaken.

The Contract Area

There should be a stipulation that the Contractor shall not, by virtue of the Mineral Agreement, acquire any title over the contract/mining area. However, the contractor can acquire the land/surface rights through any mode of acquisition provided for by law.[54] An FTAA contract should contain a firm commitment on the amount of investment in the contract area, and it requires a financial guarantee bond in an amount equivalent to the expenditure obligation. A minimum investment of Fifty Million US Dollars ($50,000,000.00) or its Philippine Peso equivalent for infrastructure and development in the contract area is required.

Relinquishment

A mineral agreement should contain a stipulation that the Contractor may relinquish totally or partially the original contract area during the exploration period.[55] After the exploration period and prior to or upon approval of the "Declaration of Mining Project Feasibility" by the Director, the Contractor shall finally relinquish to the Government any portion of the contract area which shall not be necessary for mining operations and not covered by any declaration of mining feasibility. After final relinquishment the area shall not be more than five thousand (5,000) hectares for metallic minerals and two thousand (2,000) hectares for nonmetallic minerals. However, the Director, with the approval of the Secretary, may allow a Contractor to hold a larger mining area depending upon the nature of the deposit subject to technical verification and evaluation by the Bureau as to the technical/financial capability of the Contractor.

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[54] DAO 96-40, as amended by DAO 56-04, Sec. 39.

[55] DAO 96-40, as amended by DAO 56-04, Sec . 39, d and e.

The obligation to relinquish is likewise an essential condition in an Exploration Permit and FTAA. The rationale behind the rule on relinquishment is to open up portions of the contract area within which the contractor may not have found sufficient mineralization[56]. The relinquished areas become open areas for other interested parties to explore. Each mining area after final relinquishment shall not be more than five thousand hectares, however, a Contractor may be allowed to hold a larger mining area depending upon the nature of the deposit.

Under an Exploration Permit, the Permittee shall annually relinquish at least 20% of the permit area during the first two years of exploration and at least 10% of the remaining permit area annually during the extended exploration period. However, if the permit area is less than five thousand hectares, then no relinquishment is required. The FTAA contract area is subject to a relinquishment of at least twenty-five per centum (25%) of the contract area after two years of exploration. With an exploration program the contractor should be able to determine what portions of the contract area are mineralized or not and he has a period of two years to make such determination. After said two- year period, one-fourth or 25% per cent of the area should be returned/relinquished. If an extension of the exploration period is needed, further relinquishments at the rate of 10% per year of extension is required.

The free areas become open areas. Relinquishment can be done, at any time, and it may be the whole or any portion of the total permit area, by filing a notice of relinquishment with the Bureau/concerned Regional Office. Where the Contractor originally derived its rights to the contract area from claim owners or mining right owners, such part of the contract area relinquished shall be reverted back to the Government. Said claim owners or mining right owners shall have preferential rights over the area and they can signify their intention to enter into a Mineral Agreement with the Secretary.[57]

Renunciation of Areas Covered by Exploration Permit

The Permittee may, at any time, relinquish the whole or any portion of the total permit area by filing a notice of relinquishment with the

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[56] DAO 96-40, Sec. 60.
[57] DAO 96-40, Sec. 60.

Bureau/concerned Regional Office.[58] The relinquishment or cancellation of Exploration Permit, however, does not release the Permittee from any and all obligations it may have, particularly with regard to ecological management, at the time of relinquishment or cancellation.[59]

Renunciation is different from relinquishment. The former is voluntary, an option given to the permittee to reduce his area or to give up his rights over the area covered by the exploration permit. There is no specific area limit or time with respect to renunciation. On the other hand, in relinquishment, the permittee is required to give up a specific percentage of the area per year during the term of the permit.

Safety and Protection of the Environment

The Contractor is required to effectively use the best available appropriate anti-pollution technology and facilities to protect the environment and to restore or rehabilitate mined-out areas and other areas affected by mine waste/mill tailings and other forms of pollution or destruction to adhere to its ECC (Environmental Compliance Certificate) and Pres. Dec. No. 984.[60] This should be undertaken in coordination with the Department Regional Office.[61] More specific environmental protection are required in an FTAA, such as: the effective use of appropriate anti-pollution technology and facilities to protect the environment and to restore or rehabilitate mined out areas and those affected by mine tailings and other forms of pollution or destruction is required.

Community Welfare

Mineral agreements should have a stipulation that the Contractor shall recognize and respect the rights, customs and traditions of local communities, particularly Indigenous Cultural Communities; and that the Contractor shall contribute to the development of the host and neighboring communities of the mining area, local geoscience and mining technology in

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[58] DAO 96-40, Sec. 26.

[59] DAO 96-40, Sec. 29.

[60] Providing for the Revision of Republic Act No. 3931, commonly known as the "Pollution Control Law", and for other purposes.

[61] DAO 96-40, as amended by DAO 56-04. Sec. 39, j, q, u.

accordance with Chapter XIV hereof.[62] An FTAA should have the same provision in favor of Cultural Minorities and Community Development.[63]

Government Share

In the evaluation of the pertinent Mining Project Feasibility Study, the expected life of mine, grade management, mining sequence, and conservation measures are considered. Also, the capability of the project to pay the Government Share and absorb the environmental and social costs shall be strictly taken into consideration. There shall be a provision guaranteeing the payment of the Government Share notwithstanding the grant of any incentives by other Government agency(ies). The number of operating years without tax holidays should be more than the number of operating years with tax holidays. The minimum exploration expenditures for the remaining area after relinquishment shall be based on the approved Exploration Work Program.[64]

Sales Policy

There should be a stipulation in a mineral agreement requiring the Contractor to dispose of the minerals and by-products produced at the highest market price, and to negotiate for more advantageous terms and conditions subject to the right to enter into long-term sales or marketing contracts or foreign exchange and commodity hedging contracts. These should be contracts which the Government acknowledges to be acceptable notwithstanding that the sale price of the minerals may from time to time be lower, or the terms and conditions of sales are less favorable, than that available elsewhere.[65] The same provision should be contained in an FTAA.[66]

Settlement of Disputes/ Arbitration

Mineral agreements and FTAAs should have a stipulation providing for consultation and arbitration with respect to the interpretation and

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[62] DAO 96-40, as amended by DAO 56-04, Sec. 39.
[63] DAO 96-40, Sec. 56.
[64] DAO 96-40, as amended by DAO 56-04, Sec. 39 (d).
[65] DAO 96-40, as amended by DAO 56-04, Sec. 39 (l).
[66] DAO 96-40, Sec. 56.

implementation of the terms and conditions of the Agreement. Both the mining law and Revised IRR have such provisions.[67]

Cancellation, Revocation, Termination

The Revised IRR requires a stipulation that the FTAA shall be canceled, revoked or terminated for failure of the Contractor to comply with the terms and conditions thereof or for other grounds as provided for in Section 230. Should an FTAA be canceled, revoked or terminated, the Contractor shall no longer be required to meet the minimum expenditure requirement for the remaining period.[68]

The grounds for cancellation, revocation and termination are common to Mining Permits, Mineral Agreements or FTAAs, namely:

> a. Violation of any of the terms and conditions of the Permits or Agreements;
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> b. Non-payment of taxes and fees due the Government for two (2) consecutive years; and
>
> c. Falsehood or omission of facts in the application for Exploration Permit, Mineral Agreement, FTAA or other permits which may alter, change or affect substantially the facts set forth in said statements.

Note that the cancellation or withdrawal by the Contractor from the FTAA shall not release it from any and all financial, environmental, legal and/or fiscal obligations including settlement of all obligations that should have accrued to the Government during the term of the FTAA. [69]

Adverse Claims

Any adverse claim, protest or opposition shall be filed directly, with the concerned Regional Office. Adverse claims opposing the application for Exploration Permit shall be resolved by the Panel of Arbitrators pursuant to the provisions of the Act and the IRR. The period for filing is within thirty (30) calendar days from the last date of publication and notice. Upon final resolution of any adverse claim, protest or opposition, the Panel of Arbitrators shall issue a Certification of Finality. Where no adverse claim, protest or opposition is filed after the lapse of the thirty days from the last

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[67] DAO 96-40, Sec. 56, M, O.
[68] DAO 96-40, Sec. 68.
[69] DAO 96-40, Sec. 230.

date of publication/posting/radio announcement, the Panel of Arbitrators shall likewise issue a Certification to that effect within five (5) working days therefrom. No Exploration Permit shall be approved unless the above requirement is fully complied with and any adverse claim/protest/opposition thereto is finally resolved.[70]

Effect of Expiration and Cancellation

The effects of the expiration are common to Exploration Permits, Mineral Agreement and FTAA. The mining operations may be undertaken by the Government through one of its agencies or through a qualified independent Contractor, and in case the mining operations is contracted to a private person, the contract shall be awarded to the highest bidder in a public bidding held after due publication of the notice thereof. In such public bidding, the Contractor shall have the right to equal the highest bid upon reimbursement of all reasonable expenses of the highest bidder. Upon cancellation of a FTAA, the Director shall cause the same to be entered in the registration book and a notice thereof shall be posted on the bulletin board of the Bureau and Regional Office. The mining area covered thereby shall be open to new applicants after such registration and posting of notices of cancellation of the FTAA. Non-payment of taxes and fees causing for the cancellation of a Mining Permit/Mineral Agreement/FTAA shall have also the effect of re-opening the mining area to new applicants.

Rights of the Contractor/ Permittee

The applicant becomes a "contractor" when the mineral agreement is signed between the government and the mining contractor, which shall then give rise to definite rights and obligations.[71] The Contractor, its heirs or successors-in-interest shall have the right to exclusively conduct mining operations within the contract area with full rights of ingress and egress, the right to occupy the same, all other rights provided for in the Act and the IRR; and the obligation to fully comply with the terms and conditions of the Mineral Agreement. Some of the rights provided in various provisions of the mining law consist of: the right to construct and operate any facilities specified in the mineral agreement or approved work program; the right to determine the exploration, mining and treatment process to be utilized in the

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[70] DAO 96-40, Sec. 21.
[71] DAO 96-40, Sec 4. K.

mining operations; to extract, remove, use, dispose of any tailings as authorized by an approval work program, but the tailings cannot be disposed commercially. The obligations are: to secure all permits necessary or desirable for the purposes of mining operations; to pay taxes, and the government share; the right to auxiliary rights and incentives provided by law. [72]

The Permittee, its heirs or successors-in-interest shall have the right to enter, occupy and explore the permit area. If private or other parties are affected, the permittee shall first discuss with the said parties the extent, necessity, and manner of his entry, occupation and exploration and in case of disagreement, a panel of arbitrators shall resolve the conflict or disagreement.[73] Likewise in cases where surface owners, indigenous cultural community and legitimate small-scale miners are affected, the permittee shall first discuss or negotiate with the said party(ies) the extent, necessity and manner of his/her entry, occupation and exploration. In case of disagreement, a Panel of Arbitrators shall resolve the conflict or disagreement.

B. RIGHT OF EMINENT DOMAIN

The evolution of mining laws gives positive indication that mining operators who are qualified to own lands were granted the authority to exercise eminent domain for the entry, acquisition, and use of private lands in areas open for mining operations. This grant of authority extant in Section 1 of Presidential Decree No. 512[74] is not expressly repealed by Section 76 of R.A. 7942[75]. The court stated that these two provisions can stand together even if Section 76 of R.A. 7942 does not spell out the grant

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[72] DAO 96-40, Sec. 44.

[73] Rep. Act. No. 7942, Sec. 23, DAO 96-40, Sec. 24.

[74] "Mineral prospecting, location, exploration, development and exploitation is hereby declared of public use and benefit, and for which the power of eminent domain may be invoked and exercised for the entry, acquisition and use of private lands: Provided, That any person or entity acquiring any option or right on such land after the first publication of the notice of any mining lease covering such land shall not be entitled to the compensation herein provided."

[75] "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."

of the privilege to exercise eminent domain which was present in the old law.[76]

With the grant of authority to exercise eminent domain being deemed incorporated into Section 76 of R.A. 7942, the inescapable conclusion is that the latter is a "taking" provision. Section 76 of Rep. Act No. 7942 was first found in Section 27 of the old Mining Law, Com. Act No. 137 of 1936. Before entering private lands the prospector shall first apply in writing for written permission of the private owner, claimant, or holder, and in case of refusal to grant such permission, or in case of disagreement as to the amount of compensation to be paid for such privilege of prospecting therein, the amount of such compensation shall be fixed by agreement among the prospector, the Director of the Bureau of Mines and the surface owner, and in case of their failure to unanimously agree as to the amount of compensation, all questions at issue shall be determined by the Court. P.D. 463, otherwise known as "The Mineral Resources Development Decree of 1974," also had a similar provision.[77]

Hampered by the difficulties and delays in securing surface rights for the entry into private lands for purposes of mining operations, P.D. 512 was passed into law on July 19, 1974. It provides for a new system of surface rights acquisition by mining prospectors and claimants.

Whereas in Com. Act No. 137 and P.D. 463 eminent domain may only be exercised in order that the mining claimants can build, construct or install roads, railroads, mills, warehouses and other facilities, under P.D. 512, the power of eminent domain may now be invoked by mining operators for the entry, acquisition and use of private lands.

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[76] G.R. No. 157882, 485 SCRA 586, March 30, 2006.

[77] Pres. Dec. 463, "Sec. 12. Entry to Public and Private Lands. — A person who desires to conduct prospecting or other mining operations within public lands covered by concessions or rights other than mining shall first obtain the written permission of the government official concerned before entering such lands. In the case of private lands, the written permission of the owner or possessor of the land must be obtained before entering such lands. In either case, if said permission is denied, the Director, at the request of the interested person may intercede with the owner or possessor of the land. If the intercession fails, the interested person may bring suit in the Court of First Instance of the province where the land is situated. If the court finds the request justified, it shall issue an order granting the permission after fixing the amount of compensation and/or rental due the owner or possessor: Provided, That pending final adjudication of such amount, the court shall upon recommendation of the Director permit the interested person to enter, prospect and/or undertake other mining operations on the disputed land upon posting by such interested person of a bond with the court which the latter shall consider adequate to answer for any damage to the owner or possessor of the land resulting from such entry, prospecting or any other mining operations."

It is a settled rule that to be valid, the taking must be for public use. Public use as a requirement for the valid exercise of the power of eminent domain is now synonymous with public interest, public benefit, public welfare and public convenience. It includes the broader notion of indirect public benefit or advantage. Public use as traditionally understood as "actual use by the public" has already been abandoned.[78]

Public use is indeed present in mining, considering that the industry plays a pivotal role in the economic development of the country and is a vital tool in the government's thrust of accelerated recovery. Mining is an industry which is of public benefit. This is not negated by the fact that the state would be taking private properties for the benefit of private mining firms or mining contractors.[79]

Thus, in the case of *Didipio Earth-Savers' Multi-Purpose Association v. Gozun*,[80] which involved the mining operations of an FTAA holder, Climax-Arimco Mining Corporation, the Supreme Court ruled that the conversion of non-mineral land into mineral land is not an exercise of police power which would justify the lack of compensation. It constituted "taking" in the sense of expropriation where just compensation is due to affected landowners because property is taken or restricted to allow mining activities by a mining contractor. The FTAA of Climax granted the mining company the right of possession of the Exploration Contract Area, and full right of ingress and egress as well as the right not to be prevented from entry into private lands by surface owners or occupants when prospecting, exploring and exploiting minerals on the contract area.

The FTAA of Climax granted the mining company the right of possession of the Exploration Contract Area, and full right of ingress and egress as well as the right not to be prevented from entry into private lands by surface owners or occupants when prospecting, exploring and exploiting minerals on the contract area. This provision was contested by various property owners who would be affected by the mining operations of Climax. The first and second principal issues raised were: Whether or not the Mining Law, R. A. No. 7942 and the Climax FTAA are void because they allow the unjust and unlawful taking of property without payment of just compensation, in violation of Section 9, Article III of the Constitution; and Whether or not the mining act and its implementing rules and regulations

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[78] *Heirs of Juancho Ardona v. Reyes*, 210 Phil. 187, 197 (1983).

[79] Didipio, 485 SCRA 586, March 30, 2006.

[80] *Id.*

are void and unconstitutional for sanctioning an unconstitutional administrative process of determining just compensation.

The entry into private lands referred to in Section 76 of R.A. 9742 is not just a simple right-of-way which is ordinarily allowed under the provisions of the Civil Code. Here, the holders[81] of mining rights enter private lands for purposes of conducting mining activities such as exploration, extraction and processing of minerals. Mining right holders build mine infrastructure, dig mine shafts and connecting tunnels, prepare tailing ponds, storage areas and vehicle depots, install their machinery, equipment and sewer systems. On top of this, under Section 75[82], easement rights are accorded to them where they may build warehouses, port facilities, electric transmission, railroads and other infrastructures necessary for mining operations. All these will definitely oust the owners or occupants of the affected areas of the beneficial ownership of their lands. Without a doubt, taking occurs once mining operations commence.

Relying on established precedents, the Supreme Court stated in *Didipio* that, "a regulation which substantially deprives the owner of his proprietary rights and restricts the beneficial use and enjoyment for public use amounts to compensable taking. In the case under consideration, the entry referred to in Section 76 and the easement rights under Section 75 of Rep. Act No. 7942 as well as the various rights to Climax under its FTAA are no different from the deprivation of proprietary rights in the cases discussed which this Court considered as taking."

The Mining Law and its IRR provide for just compensation in expropriating private properties. Section 76 of Rep. Act No. 7942 and Section 107 of DAO 96-40 provide for the payment of just compensation:

> Section 76...Provided, that any damage 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...

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[81] Gonzales and Panel of Arbitrators v. Climax Mining, Ltd., G.R. No. 161957, February 28, 2005.

[82] "Section 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, tailing 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."

> Section 107. Compensation of the Surface Owner and Occupant- Any damage done to the property of the surface owners, occupant, or concessionaire thereof as a consequence of the mining operations or as a result of the construction or installation of the infrastructure mentioned in 104 above *shall be properly and justly compensated.*
>
> Such compensation shall be based on the agreement entered into between the holder of mining rights and the surface owner, occupant or concessionaire thereof, where appropriate, in accordance with P.D. No. 512. [83]

1. Power of Courts and Panel of Arbitrators to Determine Just Compensation

The high court also confirmed that the determination of just compensation in eminent domain cases is a judicial function. Even as the executive department or the legislature may make the initial determinations, the same cannot prevail over the court's findings. The pertinent provisions of the mining law give no indication that the courts are excluded from taking cognizance of expropriation cases under the mining law.

The original and exclusive jurisdiction of the courts to decide determination of just compensation remains intact despite the preliminary determination made by the administrative agency. As held in an analogous case, *Philippine Veterans Bank v. Court of Appeals*:[84]

> The jurisdiction of the Regional Trial Courts is not any less "original and exclusive" because the question is first passed upon by the DAR, as the judicial proceedings are not a continuation of the administrative determination.

Although Section 105 confers upon the Panel of Arbitrators the authority to decide cases where surface owners, occupants, concessionaires refuse permit holders entry, thus, necessitating involuntary taking, this does not mean that the determination of the just compensation by the Panel of Arbitrators or the Mines Adjudication Board is final and conclusive. The determination is only preliminary unless accepted by all parties concerned. There is nothing wrong with the grant of primary jurisdiction by the Panel of Arbitrators or the Mines Adjudication Board to determine in a

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[83] *Supra* note 80.

[84] *Supra* note 80 at 149.

preliminary matter the reasonable compensation due the affected landowners or occupants.[85]

2. Jurisdiction of Panel of Arbitrators

Still in the Climax case, the relevant question was: Does the Panel of Arbitrators have jurisdiction over the complaint for declaration of nullity and/or termination of the subject contracts on the ground of fraud, oppression and violation of the Constitution? This issue may be distilled into the more basic question of whether the *Complaint* raises a mining dispute or a judicial question. A judicial question is a question that is proper for determination by the courts, as opposed to a moot question or one properly decided by the executive or legislative branch. A judicial question is raised when the determination of the question involves the exercise of a judicial function; that is, the question involves the determination of what the law is and what the legal rights of the parties are with respect to the matter in controversy. On the other hand, a mining dispute is a dispute involving (a) rights to mining areas, (b) mineral agreements, FTAAs, or permits, and (c) surface owners, occupants and claimholders/concessionaires.[86]

Under Republic Act No. 7942, the Panel of Arbitrators has exclusive and original jurisdiction to hear and decide these mining disputes. The Panel's jurisdiction is limited only to those mining disputes which raise questions of fact or matters requiring the application of technological knowledge and experience. It was observed that the trend has been to make the adjudication of mining cases a purely administrative matter. Decisions of the Supreme Court on mining disputes have recognized a distinction between (1) the primary powers granted by pertinent provisions of law to the then Secretary of Agriculture and Natural Resources (and the bureau directors) of an executive or administrative nature, such as granting of license, permits, lease and contracts, or approving, rejecting, reinstating or canceling applications, and (2) controversies or disagreements of civil or contractual nature between litigants which are questions of a judicial nature that may be adjudicated only by the courts of justice. This distinction is carried on even in Rep. Act No. 7942.

In *Climax,* the basic issue in petitioner's *Complaint* is the presence of fraud or misrepresentation allegedly attendant to the execution of the

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[85] *Philippine Veterans Bank v. Court of Appeals*, 379 Phil. 141, 147 (2000).
[86] *Didipio*, supra.

Addendum Contract and the other contracts emanating from it, such that the contracts are rendered invalid and not binding upon the parties. Whether the case involves void or voidable contracts is still a judicial question. It may, in some instances, involve questions of fact especially with regard to the determination of the circumstances of the execution of the contracts. But the resolution of the validity or voidness of the contracts remains a legal or judicial question as it requires the exercise of judicial function. It requires the ascertainment of what laws are applicable to the dispute, the interpretation and application of those laws, and the rendering of a judgment based thereon. Clearly, the dispute is not a mining conflict. It is essentially judicial. The complaint was not merely for the determination of rights under the mining contracts since the very validity of those contracts is put in issue.

The *Complaint* is also not what is contemplated by Rep. Act No. 7942 when it says the dispute should involve FTAAs. It is not exclusively within the jurisdiction of the Panel of Arbitrators just because, or for as long as, the dispute involves an FTAA. It raised the issue of the constitutionality of the FTAA, which is definitely a judicial question, and would clearly involve the exercise of judicial power. The Panel of Arbitrators does not have jurisdiction over such an issue since it does not involve the application of technical knowledge and expertise relating to mining.[87]

Just and Proper Compensation

Section 76 of Rep. Act No. 7942 and Section 107 of DAO 96-40 provide for the payment of just compensation. Any damage done to the property of the surface owners, occupant, or concessionaire thereof as a consequence of the mining operations or as a result of the construction or installation of the infrastructure mentioned in 104 above *shall be properly and justly compensated.* Such compensation shall be based on the agreement entered into between the holder of mining rights and the surface owner, occupant or concessionaire thereof, where appropriate. In cases where there is disagreement, the matter shall be brought before the Panel of Arbitrators. An aggrieved party the remedy to appeal the decision of the Panel of Arbitrators to the Mines Adjudication Board, and the latter's decision may be reviewed by the Supreme Court by filing a petition for review on *certiorari.*[88]

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[87] *Id.*

[88] DAO 96-40, Sec. 211

III. SPECIFIC MODES OF ACQUIRING MINERAL RIGHTS

A. EXPLORATION RIGHTS

Exploration is the first of a long and costly process that ultimately leads to development and commercial productive operation of a mineral resource. The data obtained from exploration activities are important considerations towards a business decision on whether or not a mining project is commercially feasible to justify further massive investments for development and productive operation of a mineral resource.

As defined in Section 4 (q) of the mining law, "exploration" 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."

1. Acquisition of Exploration Rights

Under the new system, the state may directly undertake exploration or it may allow private enterprises to do exploration activities under an "Exploration Permit". A holder of an exploration permit who determines the commercial viability of a project covering a mining area may, within the term of the permit, file with the Bureau a "declaration of mining project feasibility" accompanied by a work program for development.

The approval of the "declaration of mining project feasibility" and compliance with other requirements entitles the holder to an exclusive right to a mineral production sharing agreement or other mineral agreements or FTAA over the permit area.[89] Failure of the Permittee to apply for Mineral Agreement or FTAA within a period of one (1) year from the date of approval of the declaration of mining project feasibility shall mean automatic cancellation of the declaration of mining project feasibility.

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[89] Rep. Act 7942, Sec 24.

2. Nature of Exploration Permits

The nature of exploration permits under the new system of acquiring mineral rights is distinctly illustrated in Southeastern Mindanao Gold Mining Corp. (SEM) vs. Balite Portal Mining Cooperative.90 In this case, the 729 - hectare Diwalwal area which was carved out of the Agusan-Surigao-Davao Forest Reservation had consistently been declared as open for small scale mining, not only under Administrative Order No. 66 but also under a Mines Adjudication Board (MAB) decision that expressly excluded the 729-hectare area from the coverage of the Mineral Production Sharing Agreement (MPSA) filed by SEM on July 23, 1994. In a decision affirmed by the DENR, the Provincial Mining Regulatory Board (PMRB) of Compostela Valley declared the 729-hectare land as a people's small-scale mining area. SEM claimed to have "vested rights" over the area on the basis of an exploration permit issued in its favor over 4,491 hectares of land, under an assignment from Marcopper Mining Co. The petitioner mining company, SEM, relied on the validity of the Exploration Permit (E.P. No. 133) over 4,491 hectares which included the Diwalwal gold rush area. The Court, however, ruled that whether or not the petitioner has a vested right under the Exploration Permit is still an indefinite and unsettled matter.

The ruling defined the nature of permits over natural resources issued under the 1987 Constitution --- as *mere evidences of a privilege granted by the state* which may be amended, modified or rescinded when the national interest so requires. These permits do not vest any permanent or irrevocable rights within the non-impairment of contract clause or due process clause in the Bill of Rights:

> Incidentally, it must likewise be pointed out that under no circumstances may petitioner's rights under EP No. 133 be regarded as total and absolute. As correctly held by the Court of Appeals in its challenged decision, EP No. 133 merely evidences a privilege granted by the State, which may be amended, modified or rescinded when the national interest so requires. This is necessarily so since the exploration, development and utilization of the country's natural mineral resources are matters impressed with great public interest. Like timber permits, mining exploration permits do not vest in the grantee any permanent or irrevocable right within the purview of the non-impairment of contract and due process clauses of the Constitution, since the State, under its all-encompassing police

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90 G.R. 135190, April 3, 2002

> power, may alter, modify or amend the same, in accordance with the demands of the general welfare.[91]

As for the Government, the Mines and Geological Sciences Bureau (MGB) may conduct exploration in any areas other than Mineral Reservations upon its own initiative or upon request by a contractor in areas covered by valid mining claims/contracts/permits. Whatever expenses incurred on account of such exploration activities shall be taken from the appropriation of the Bureau or from the requesting party, as the case may be.[92]

3. Application for Exploration Permit

The procedure for obtaining an Exploration Permit involves the filing with the relevant regional office (or the MGB in case of offshore explorations) of an application, which is processed upon payment of the required fees and submission of five (5) sets of the mandatory requirements as specifically described in the rules.[93]

An exploration permit grants the right to conduct exploration for all minerals in specified areas. The Bureau shall have the authority to grant an exploration Permit to a qualified person.[94] The applicant for an exploration permit must submit the required documents to prove technical capability and financial capacity to perform the work program and comply with the environmental work program and financial plan.[95]

4. Qualified Parties

Exploration activities may be undertaken by a Qualified Person in specified areas as determined by the Director.[96] "Qualified Person" means any Filipino citizen of legal age and with capacity to contract; or a corporation, partnership, association or cooperative organized or authorized for the purpose of engaging in mining, with technical and financial capability to undertake mineral resources development and duly registered in accordance with law, at least sixty percent (60%) of the capital of which is

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[91] *Id.*
[92] DAO 96-40, Chapter XXVI, Sec. 243.
[93] DAO 96-40, Sec 19.
[94] Rep. Act No. 7942, Sec. 20.
[95] DAO 96-40, as amended by DAO 57-99, Sec. 19.
[96] DAO 96-40, Sec 17.

owned by Filipino citizens: Provided, That a legally organized foreign-owned corporation shall be deemed a Qualified Person for purposes of granting an Exploration Permit, FTAA or Mineral Processing Permit only.A legally organized foreign-owned corporation is a qualified person in the granting of exploration permit, financial or technical assistance agreement or mineral processing permit."[97]

5. Term and Renewal of Exploration Permit

The term of an Exploration Permit shall be for a period of two (2) years from date of issuance thereof, renewable for like periods but not to exceed a total term of six (6) years for nonmetallic minerals exploration or eight (8) years for metallic minerals exploration. An application to renew the Exploration Permit should be submitted to the Bureau within sixty (60) calendar days before the expiration of the Exploration Permit. The copy of the application should be furnished the concerned Regional Office. Five (5) sets of the mandatory requirements should accompany the application. Some of the more important requirements are: Justification of renewal, comprehensive and validated technical report on the outcome of the two-year exploration works, including their environmental effects duly prepared, signed and sealed by a licensed Mining Engineer or Geologist, audited report of expenditures incurred during the exploration period, two-year Exploration Work Program duly prepared, signed and sealed by a licensed Mining Engineer or Geologist, and an Environmental Work Program. The DENR and MGB can prescribe other supporting papers. The Secretary may grant the renewal after field verification by the Bureau/concerned Regional Office of the foregoing requirements, which field verification shall be undertaken at the expense of the Permittee.[98]

If the Permittee has substantially implemented the Exploration and Environmental Work Programs as verified by the Bureau/concerned Regional Office, and if it is found that further exploration is warranted the Secretary may further grant renewal of the Exploration Permit. The Permittee shall be required: (1) to set up a performance surety equivalent to the expenditure requirement of the Exploration and Environmental Work Programs and (2) to the conduct of feasibility studies which shall be included during the term of the Exploration Permit.

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[97] DAO 96-40, Sec. 4, cb.
[98] DAO 96-40, Sec 27.

6. Areas Allowed for Exploration Permit

The maximum area that a "qualified person" may apply for or hold at any one time under an Exploration Permit shall be as follows:

> 1) Onshore, in any one province —
>
> a) For individuals — twenty (20) blocks or approximately one thousand six hundred twenty (1,620) hectares and
>
> b) For corporations, partnerships, associations or cooperatives — two hundred (200) blocks or approximately sixteen thousand two hundred (16,200) hectares.
>
> 2) Onshore, in the entire Philippines —
>
> a) For individuals — forty (40) blocks or approximately three thousand two hundred forty (3,240) hectares and
>
> b) For corporations, partnerships, associations or cooperatives — four hundred (400) blocks or approximately thirty-two thousand four hundred (32,400) hectares.
>
> 3) Offshore, in the entire Philippines, beyond five hundred meters (500 m) from the mean low tide level —
>
> a) For individuals — one hundred (100) blocks or approximately eight thousand one hundred (8,100) hectares and
>
> b) For corporations, partnerships, associations or cooperatives — one thousand (1,000) blocks or approximately eighty-one thousand (81,000) hectares.

The concerned Regional Director may cancel the Exploration Permit for failure of the Permittee to comply with any of the requirements and for violation of the terms and conditions under which it is issued. For renewed Exploration Permits, the Secretary upon the recommendation of the Director shall cause the cancellation of the same. Upon cancellation of the Permit covering areas within Government Reservations, the said areas shall automatically be reverted back to its original status.[99]

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[99]DAO 96-40, Sec. 28.

7. Declaration of Mining Project Feasibility

If results of exploration reveal the presence of mineral deposits economically and technically feasible for mining operations, the Permittee may, within the term of the Exploration Permit, file a declaration of mining project feasibility. A declaration of mining project feasibility accompanied by a work program for development is filed with the MGB, by a holder of an exploration permit. The approval of the declaration of mining project feasibility by the Director/concerned Regional Director shall grant the Permittee the exclusive right to a Mineral Agreement or FTAA over the permit area. The failure of the Permittee to apply for Mineral Agreement or FTAA within a period of one (1) year from the date of approval of the declaration of mining project feasibility will result in automatic cancellation of the declaration of mining project feasibility. The approval of the mining project feasibility and compliance with other requirements entitles the holder to an exclusive right to a Mineral Production Sharing agreement (MPSA) or other mineral agreements or financial or technical assistance agreement.[100]

B. FINANCIAL OR TECHNICAL ASSISTANCE AGREEMENTS (FTAA)

1. Constitutional Basis of FTAAs

Paragraph 4 of Section 2 of Article XII of the 1987 Constitution allows the government to enter into financial or technical assistance agreements:

> 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.

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 technical and financial capability to undertake large-scale EDU may enter into such agreement directly with the

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[100]Rep. Act No. 7942, Sec. 24.

Government through the DENR. 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."[101]

2. Financial Requirements

Compared to a mineral agreement, an FTAA is for "large scale" mining. Thus, the maximum contract area to which a qualified person may hold or be granted is larger than in mineral agreements. "Large-scale" under R.A. No. 7942 is determined by the **size of the contract area** and the **minimum amount of invested funds**. In the matter of capitalization[102], the minimum authorized capital requirement is Ten Million Pesos (P10,000,000.00) with a paid-up capital of Two Million Five Hundred Thousand Pesos (P2,500,000.00) for a corporation/association/ cooperative/ partnership. Under DENR Memorandum Order No. 99-10 this shall apply to the principal applicant whether or not this applicant is supported by an operator or service contractor thru an operating agreement or other similar agreements. In the case of a mining application with two or more applicants, the minimum authorized capital of P10 Million and paid-up capital of P 2.5 Million may be required from just one of the co-applicants. After approval of the President of the Republic of the Philippines and prior to registration of the FTAA, an FTAA contractor must comply with the minimum authorized capital stock of Four Million US Dollar (US $4,000,000.00) or its Philippine Peso equivalent.[103]

In the case of a mining application by an individual, the minimum amount of Two Million Five Hundred Thousand Pesos (P2,500,000.00) shall be required as proof of financial capability, which shall be in the form of a bank deposit or credit line.[104]

Under the Revised IRR, the financial commitment of the Contractor relates to minimum ground expenditures during the exploration and pre-feasibility periods as on a per year/per hectare on a graduated basis. A minimum investment of Fifty Million US Dollars ($50,000,000.00) or its Philippine Peso equivalent in the case of Filipino Contractor for

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[101] Rep. Act. No. 7942, Sec. 3, g.
[102] Per DAO No. 99-34
[103] DMO 99-10.
[104] DAO 99-34, Sec. 9.

infrastructure and development in the contract area is required, which was the standard under E.O. 279.

a) FTAAs are "Service Contracts- with Safeguards"

The Supreme Court made an extensive exposition on FTAAs in the La Bugal case.[105] The 1973 Constitution allowed service contracts with any person or entity for the exploration or utilization of natural resources.[106] Service contracts were 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." Several decrees were issued allowing service contracts in various economic activities during the effectivity of the 1973 Constitution, such as in the acquisition of lands of the public domain; exploration, development and exploitation of mineral claims, forest resources and geothermal energy; commercial fishing.[107]

The Supreme Court declared that the present FTAAs are the new "service contracts", sans the abuses of the past regime.[108] The foreign contractors provide capital, technology and technical know-how, and managerial expertise in the creation and operation of large-scale mining/extractive enterprises. The government, through its agencies (DENR, MGB), actively exercises control and supervision over the entire

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[105] *Supra* note 24.

[106] Art. XIV, Sec. 9.

[107] On March 13, 1973, shortly after the ratification of the new Constitution, the President promulgated Pres. Dec. No. 151. 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. Pres. Dec. No. 463, also known as the Mineral Resources Development Decree, was enacted on May 17, 1974. Sec. 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.

Pres. Dec. No. 704 (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.

Pres. Dec. No. 705 (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."

Pres. Dec. No. 1442, signed into law on June 11, 1978; Sec. 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.

[108] La Bugal, supra.

operation. Such service contracts may be entered into *only with respect to minerals, petroleum and other mineral oils.*

The grant of FTAAs is subject to several safeguards, among which are:

> (1) The service contract shall be crafted in accordance with a general law that will set standard or uniform terms, conditions and requirements;
>
> (2) The President shall be the signatory for the government after thorough review at different levels of government to ensure that it conforms to law and can withstand public scrutiny;
>
> (3) Within thirty days of the executed agreement, the President shall report it to Congress to give that branch of government an opportunity to look over the agreement and interpose timely objections, if any.[109]

b) "Fair Return of Investments"

The need for the investor to recover the share and fair return of investment is also recognized. The court recognized the right of businesses to recoup investments and costs and make profits, "as a matter of common business sense and business survival", regardless of nationality: [110]

> Recovery of investments is absolutely indispensable for business survival; and business survival ensures soundness of the economy, which is critical and contributory to the general welfare of the people. *Even government corporations must recoup their investments in order to survive and continue in operation...*[111]

An FTAA is a comprehensive agreement for the foreign-owned corporation's integrated exploration, development and utilization of mineral, petroleum or other mineral oils on a large-scale basis. An FTAA is not merely an agreement for supplying limited and specific financial or technical services to the State.[112] Such agreement, therefore, authorizes the foreign

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[109] Id.

[110] Id.

[111] La Bugal, supra.

[112] Position taken by Petitioners who wanted the FTAA to be nullified. The restrictive view was adopted by the Supreme Court in the original decision. A restrictive application of the provisions on FTAAs would allow merely an agreement for *either* financial *or* technical assistance *only*, for the large-scale exploration, development and utilization of minerals, petroleum and other mineral oils and would exclude foreign management and operation of a mining enterprise. Allowing a foreign contractor to have direct and exclusive

contractor's rendition of a whole range of integrated and comprehensive services, ranging from the discovery to the development, utilization and production of minerals or petroleum products[113].

In the La Bugal case, it was recognized that foreign investors will not enter into such "agreements involving assistance" without requiring arrangements for the protection of their investments, gains and benefits.[114] Foreign corporations usually require that they be given a say in the management of day-to-day operations of the joint venture. They would demand the appointment of their own men such as operations managers, technical experts, quality control heads, internal auditors or comptrollers. Furthermore, they would also require seats on the Board of Directors. All these are to ensure the success of the enterprise and the repayment of the loans and other financial assistance and to make certain that the funding and the technology they supply would not go to waste. They would also want to protect their business reputation and bottom lines. The broader view allows government to negotiate for terms that meet the demands of investors and for measures to protect their investments. Thus, the Supreme Court stated:

> The foreign assistor or contractor assumes all financial, technical and entrepreneurial risks in the EDU activities; hence, it may be given reasonable management, operational, marketing, audit and other prerogatives to protect its investments and to enable the business to succeed. [115]

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management would vest in the foreign company "beneficial ownership" of mineral resources which runs counter to the "full control and supervision" that the State is constitutionally mandated to exercise over the exploration, development and utilization of the country's natural resources.

[113] Position taken by the Chamber of Mines and the DENR. This broader view was adopted by the Supreme Court in its Resolution of the Motion For Reconsideration of the original decision.

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

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

[115] La Bugal, Resolution of Dec. 1, 2004

c) State Supervision and Control vis-à-vis Foreign Investor's Management Prerogatives

State "supervision and control" means that the government does not have to micro-manage the mining operations and dip its hands into the day-to-day affairs of the enterprise in order for it to be considered as having full control and supervision. "Full control and supervision", as mandated in the first paragraph of Section 2 of Article XII, cannot be taken literally to mean that the State controls and supervises *everything involved, down to the minutest details*, and makes *all decisions* required in the mining operations. This strained concept of control and supervision over the mining enterprise would render impossible the legitimate exercise by the contractors of a reasonable degree of management prerogative and authority necessary and indispensable to their proper functioning. The court pointed out that the concept of *control* adopted in the Constitution means that it may be on a macro level, through the establishment of policies, guidelines, regulations, industry standards and similar measures that would enable the government to control the conduct of affairs in various enterprises and restrain activities deemed not desirable or beneficial. [116]

"Full control and supervision" by the State must be understood as one that does not preclude the legitimate exercise of management prerogatives by the foreign contractor. The objective is to ensure that these enterprises contribute to the economic development and general welfare of the country, conserve the environment, and uplift the well-being of the affected local communities. Such a concept of control would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise it invested in, in order to ensure that it is operating efficiently and profitably, to protect its investments and to enable it to succeed.

d) FTAA Not Intended Solely for Foreign Corporation

In *La Bugal,* petitioners claimed that a Filipino corporation is not allowed by the Constitution to enter into an FTAA with the government, as participation of Filipino corporations is limited only to three species of contracts—production sharing, co-production and joint venture—to the exclusion of all other arrangements or variations thereof.

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[116] *Id.*

The Supreme Court disagreed, stating that a textual analysis of the first paragraph of Section 2 of Article XII does not support such restriction against Filipinos: *"It does not take deep knowledge of law and logic to understand that what the Constitution grants to foreigners should be equally available to Filipinos."* It categorically ruled that Filipinos can apply for, and the government can directly enter into, FTAAs with Philippine nationals as long as they are financially and technically qualified to conduct large scale mining operations. Filipino entities can also assume and implement FTAA's previously awarded to foreign corporations.

3. Size of FTAA Contract Area

The Philippine Mining Act, R.A. 7942 prescribed the various limits on the contract areas that can be awarded under an FTAA. 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. [117]

The Revised IRR[118] is more specific:

> a) 1,000 meridional blocks onshore or approximately 81,000 hectares;
>
> b) 4,000 meridional blocks offshore or approximately 324,000 hectares; or
>
> c) Combinations of both 1,000 meridional blocks onshore and 4,000 meridional blocks offshore.

No further area expansion shall be allowed during the duration of the original agreement and/or renewal thereof.

4. Priority Rights Based on Filing of the FTAA Proposal

The FTAA process starts with a Financial or Technical Assistance Agreement (FTAA) Proposal. A FTAA application shall be filed with the concerned Regional Office in areas outside mineral reservation

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[117] Rep. Act. No. 7942, Sec 34.

[118] DAO 96-40, Sec. 51.

Sec. 2. Definition of Terms. b. Block or meridional block means an area bounded by one-half (1/2) minute of latitude and one-half (1/2) minute of longitude, containing approximately eighty-one hectares.

or to the Bureau in areas within mineral reservation.[119] *Such filing/recording gives the proponent the prior right to the area covered by such proposal.* [120] *But this priority right can be defeated by existing mineral agreements, because as mentioned, previously awarded FTAA and other mining rights as prior rights or contracts cannot be impaired or prejudiced.*[121]

Upon receipt of the application, the subject contract area shall be closed to mining right applications for minerals mentioned in Section 53 hereof, and quarry permit applications.[122] But the applied/contract area may be open to mining right applications for other minerals, subject to written consent of the FTAA applicant/Contractor and verification of the Bureau/concerned Regional Office. The other applicant, however, can operate the area applied for pending resolution of the case only after the posting of the bond to be determined by the Director/concerned Regional Director.

5. Submission of Documents By Stages

Submission by stages gives time to the applicant to prepare the mandatory requirements as well as the DENR which is required to verify the relevant requirements in such country(ies) where the applicant conducts or has conducted mining operations. The Regional Office is mandated to regularly provide the Bureau with a list, consolidated map and status report of FTAA applications filed in its jurisdiction.[123]

The stages of the FTAA processing when certain mandatory documents will be filed, are: a. Upon filing of the proposal: documents to establish the identity of the proponent and the location of the proposed contract area;[124] documents on proposed activities to be conducted;[125] proofs of technical competence; and financial capability;[126] b. before approval of the FTAA, specific evidence of its financial commitment;[127] c. prior to construction, development and/or utilization, definite capital

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[119] DAO 96-40, as amended by DAO 57-99, Sec. 53.
[120] Rep. Act No. 7942, Sec. 37.
[121] DAO 96-40, Sec. 54.
[122] Supra note 37
[123] *Id.*
[124] DAO 96-40, as amended by DAO 57-99. Annex 5- A..
[125] *Id.*
[126] *Id.*
[127] *Id.*

investment corresponding to its financial commitment:[128] specifically, an authorized capital of at least Four Million U.S. Dollars (US$4,000,000.00) or its Philippine Peso equivalent; d. prior to construction, development and/or utilization, specific proof of its development and operational plans.

An FTAA is negotiated by the department through a Negotiating Panel where various government agencies are represented, such as: The DENR Secretary, the DENR- MGB, DENR Field Operations Office, the DENR- Legal and Legislative Affairs Office, the concerned DENR-Regional Office(s), Board of Investments (BOI)/ Department of Trade and Industry (DTI), the National Economic and Development Authority (NEDA), and the Department of Finance (DOF).[129]

The Negotiating Panel, upon being satisfied of the terms and conditions of the proposed FTAA and with the applicant's compliance with all the requirements, shall recommend its execution and approval to the President. The President shall notify Congress of the approved FTAA.[130] Upon approval of the FTAA by the President, the same shall be forwarded to the Bureau for numbering and registration upon payment of the required fees. The Bureau/concerned Regional Office shall officially release the FTAA to the Contractor after registration of the same. Failure of the Contractor to cause the registration of its FTAA within the prescribed period shall be sufficient ground for cancellation of the same.[131]

In case portions of the contract area were acquired by the FTAA proponent from third parties with existing mining rights or claims, it is necessary to register said documents of transfer or assignment. Any such agreement that is not duly registered and/or approved by the DENR Secretary shall be deemed void in so far as the Department is concerned.[132]

6. Mandatory Terms and Conditions of FTAA

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 years. [133] A Contractor's mining operations should be limited to its contract/mining area and there should be

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[128] DAO 96-40, as amended by DAO 57-99, Sec. 61, Annex 5- A, c.
[129] DAO 96-40, Sec. 214.
[130] DAO 96-40, Sec. 61.
[131] DAO 96-40, Sec. 63 Sec. 261, 262, 264.
[132] DAO 99-34, Sec. 11, DAO, 96-40, Sec. 262.
[133] Rep. Act No. 7942, Sec. 38.

no interference with the rights of other Contractors or Permit Holders.[134] The Contractor cannot acquire any title over the contract/mining area. However, he may acquire title to land or surface rights through any mode of acquisition provided for by law. There should also be a schedule for relinquishment of portions of the contract area.

a) Timetable of Activities

The activities of each phase of mining operations must be completed by the FTAA contractor within the following periods:

> a. Exploration — up to two (2) years from date of FTAA execution, extendible for another two years subject to compliance of certain requirements;
>
> b. Pre-feasibility study, if warranted — up to two years from expiration of the exploration period;
>
> c. Feasibility study — up to two years from the expiration of the exploration/pre-feasibility study period or from declaration of mining project feasibility; and
>
> d. Development, construction and utilization — remaining years of FTAA.
>
> Any two or more of the above periods may be simultaneously undertaken in one approved contract area, as the need of the Contractor may arise, subject to the pertinent provisions of Section 59 hereof.[135]

b) Judicial Review of FTAA Terms and Conditions: Section 35 of the Mining Law examined

In the La Bugal/Western Mining case[136] the Supreme Court examined the terms and conditions of the Western Mining FTAA to determine if the State has done away with its constitutional mandate of "supervision and control" of natural resources, specifically the mineral resources subject of the FTAA in question.

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[134] DAO, 96-40, Sec. 56.
[135] DAO, 96-40, Sec. 52.
[136] G.R. No. 127882, 445 SCRA 1 Dec. 1, 2004.

The provisions of Section 35 of RA 7942 are also reflected and implemented in Section 56 (g), (h), (l), (m) and (n) of the Implementing Rules, DAO 96-40. R.A. 7942 and DAO 96-40 also provide various stipulations confirming the government's control over mining enterprises.[137]

Other obligations of the FTAA contractor are:

To assist in the development of its mining community, promotion of the general welfare of its inhabitants, and development of science and mining technology (Section 57, RA 7942);

To submit reports (on quarterly, semi-annual or annual basis as the case may be, per Section 270, DAO 96-40), relating to specific activities;

To post a financial guarantee bond in favor of the government in an amount equivalent to its expenditures obligations for any particular year. This requirement is apart from the representations and warranties of the contractor that it has access to all the financing, managerial and technical expertise and technology necessary to carry out the objectives of the FTAA (Section 35-b, -e, and -f, RA 7942).

The Court observed that the "foregoing gamut of requirements, regulations, restrictions and limitations imposed upon the FTAA contractor by the statute and regulations easily demonstrates that the setup in RA 7942 and DAO 96-40 hardly relegates the State to the role of a "passive regulator" dependent on submitted plans and reports. Thus, the Court adopted the position that the State, on a macro level, exercises such

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[137] (1) The contractor is to relinquish to the government those portions of the contract area not needed for mining operations and not covered by any declaration of mining feasibility (Section 35-c, RA 7942; Section 60, DAO 96-40).

(2) The contractor must comply with the provisions pertaining to mine safety, health and environmental protection (Chapter XI, RA 7942; Chapters XV and XVI, DAO 96-40).

(3) For violation of any of its terms and conditions, government may cancel an FTAA. (Chapter XVII, RA 7942; Chapter XXIV, DAO 96-40).

(4) An FTAA contractor is obliged to open its books of accounts and records for inspection by the government (Section 56-m, DAO 96-40).

(5) An FTAA contractor has to dispose of the minerals and by-products at the highest market price and register with the MGB a copy of the sales agreement (Section 56-n, DAO 96-40).

(6) MGB is mandated to monitor the contractor's compliance with the terms and conditions of the FTAA; and to deputize, when necessary, any member or unit of the Philippine National Police, the barangay or a DENR-accredited nongovernmental organization to police mining activities (Section 7-d and -f, DAO 96-40).

(7) An FTAA cannot be transferred or assigned without prior approval by the President (Section 40, RA 7942; Section 66, DAO 96-40).

(8) A mining project under an FTAA cannot proceed to the construction/development/utilization stage, unless its Declaration of Mining Project Feasibility has been approved by the government (Section 24, RA 7942).

mandated supervision and control through the establishment of policies, guidelines, regulations, industry standards and similar measures that would enable the government to control the conduct of affairs in various enterprises and restrain activities deemed not desirable or beneficial. The end in view is ensuring that these enterprises contribute to the economic development and general welfare of the country, conserve the environment, and uplift the well-being of the affected local communities. Such a concept of control would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise it invested in, in order to ensure that it is operating efficiently and profitably, to protect its investments and to enable it to succeed. [138]

7. Rights and Obligations of a FTAA Contractor

The Contractor is bound to exclusively conduct mining operations within the contract area and correspondingly, he has full rights of ingress and egress and the right to occupy the same. He must construct and operate any facilities specified in the FTAA or approved work program and he has the prerogative of determining the exploration, mining and treatment process to be utilized in the mining operations. He has the right to extract, remove, and sell mineral products of the mine. It is his obligation to secure all permits necessary or desirable for the purposes of mining operations.[139]

8. Fiscal Terms of FTAAs

"Government Share" is to be derived from Mining Operations after the Date of Commencement of Commercial Production[140]. It has two aspects: (a) the basic share and (b) the additional share which is determined

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[138] DAO 96-40, Sec. 35, which incorporates into all FTAAs the following terms, conditions and warranties:

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

(h) Work programs and minimum expenditures commitments.

...

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

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

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

...

(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."

[139] DAO, Sec. 64.

[140] DENR Administrative Order No. 2007-12, Revised Guidelines Establishing the Fiscal Regime of FTAAs, Sec. 1.

by a formula stated in the guidelines. The basic government share is "non-negotiable" as this consists of taxes, fees and other charges provided by law. These are collected without waiting for the end of the recovery period. The additional government share is "negotiated" between the government and the contractor and is due and collectible after the end of the recovery period. The Government share in FTAA consists 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 agreements shall commence after the FTAA contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive. [141]

a) Guidelines Establishing the Fiscal Regime of FTAAs

DAO No. 2007– 12 revised the provisions of DAO No. 99-56 relating to the fiscal regime for FTAA which shall be adopted by the Government and Contractors for the large-scale exploration, development and commercial utilization of mineral resources in the country, and provides

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[141] Rep. Act. No. 7942, Sec. 81. "The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the:

a. capital investment of the project;.
b.risks involved;
c. contribution of the project to the economy; and
d. other factors that will provide for a fair and equitable sharing between the Government and the contractor.

The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, of the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

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

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

Sec. 82. "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."

a Pro Forma FTAA[142] embodying such fiscal regime. The objectives [143]are to achieve equitable sharing among the national and local governments, the FTAA Contractor, and concerned communities of the benefits derived from mineral resources to ensure sustainable mineral resources development, and to ensure a fair, equitable, competitive and stable investment regime for the large scale exploration, development and commercial utilization of minerals in accordance with the Mining Act of 1995.

Under the stated general principle[144] that governs the revised fiscal regime, the Total Government Share shall consist of a Basic Government Share and an Additional Government Share. The Basic Government Share shall consist of direct taxes, royalties, fees and other related payments as defined. The Additional Government Share is the amount to be paid by the Contractor when the Basic Government Share is less than fifty percent (50%) of the Net Mining Revenue. The Net Mining Revenue is Gross Output less Deductible Expenses.

"Gross Output" refers to the actual market value of minerals or mineral products from each mine or mineral land operated as a separate entity, without any deduction for mining, processing, refining, transporting, handling, marketing or any other expenses. For minerals or mineral products that are sold or consigned abroad by the Contractor under C.I.F terms, the actual cost of ocean freight and insurance shall be deducted. 'Actual market value" of mineral concentrates, gold and silver bullions or dore' shall be the world price quotations of the refined mineral products content thereof prevailing in the commodity exchanges, after deducting the smelting, refining, treatment, insurance, transportation and other charges incurred in the process of converting mineral concentrates into refined metal traded in those commodity exchanges. [145] "Deductible Expenses" [146] refer to cash operating expenses during a Calendar Year incurred by the Contractor that are directly and reasonably related and are necessary to the Mining Operations. The following cash expenses shall be allowed as "Deductible Expenses" to be deducted from the Gross Output to determine the Net Mining Revenue[147]: (1) Mining, milling, transport and handling expenses together with smelting and refining costs other than smelting and refining

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[142] DAO 2007-12, Sec. 9.
[143] DAO 2007-12, Sec. 2.
[144] DAO 2007-12, Sec. 4.
[145] DAO 2007-12, Sec. 3, m.
[146] DAO 2007-12, Sec. 3, h.
[147] DAO 2007-12 Sec. 3 t. "Net Mining Revenue" refers to the Gross Output less Deductible Expenses.

costs paid to third parties; (2) General and administrative expenses actually incurred by the Contractor; (3) Environmental expenses of the Contractor, (4) Expenses for the development of host and neighboring communities and for the development of geosciences and mining technology, including training costs and expenses (5) Royalty payments to claim owners or surface land owners relating to the Contract Area during the Operating Period, if any; (6) Continuing mine operating development expenses within the Contract Area after the pre-operating period; (7) Interest expenses at not be more than the prevailing international rates charged for similar loans or such other financing related expenses incurred by the Contractor where such loans are necessary for the operations.

Payment for the different fees comprising the Government share is governed by Section 6 of DAO No. 2007-12.

9. Sales of Minerals or Mineral Products

In the sales and exportation of minerals or mineral products the Contractor is enjoined to dispose the minerals and by-products produced in the Contract Area at the highest commercially achievable market price and lowest commercially achievable commissions and related fees under circumstances then prevailing, and to negotiate for sales terms and conditions compatible with world market conditions. The Government shall examine all sales and exportation of minerals or mineral products including the terms and conditions of all sales commitments. [148]

The Contractor may enter into long-term sales and marketing contracts or foreign exchange and commodity hedging contracts for its minerals or mineral products. The Contractor is required to inform the Government when it enters into a marketing agreement or sales contract with foreign and local buyers. Marketing contracts and sales agreements are subject to approval of the Secretary upon recommendation of the Director. Such approved marketing contracts and sales agreements shall be confidential and registered with the Mines and Geosciences Bureau.

Documentary proof of final payment of each and every mineral sale must be submitted upon receipt of its payment from such sales. The documentary proof shall contain information on the F.O.B. gross value of the sales, the particular deductions applied on the sales, initial payments received, if any, and the final net sales value in the denomination of the

[148] DAO 2007-12, Sec. 5.

payment received and its equivalent in Philippine Peso at the time the Contractor received the payment.[149]

a) Sales Commitments With Affiliates

Sales to related parties are required to be at arm's length and in accordance with such terms and conditions at which such agreement would be made if the parties had not been affiliated, with due allowance for normal selling discounts or commissions. Such discounts or commissions allowed the affiliates must be no greater than the prevailing rate so that such discounts or commissions will not reduce the net proceeds of sales to the Contractor below those which it would have received if the parties had not been affiliated.[150] Evidence of the correctness of the figures used in computing the prices, discounts and commissions, and a copy of the sales contract must be submitted to the Government.

Persons are considered affiliates by reason of common share ownership or common control related to the contractor. Thus, a company in which the Contractor holds fifty percent (50%) or more of the shares; or a company which holds fifty percent (50%) or more of the Contractor's shares, or any company affiliated by the same 50% stock ownership to an affiliated company of the Contractor is itself considered an affiliated company for purposes of the FTAA. If the Government has reasonable grounds for believing that a person controls another, the Contractor shall be notified in writing by the Government of that belief and the grounds therefore. The Contractor shall then produce reasonable evidence to the contrary, otherwise the suspected persons shall be deemed and treated as affiliates of the Contractor, and made subject to the restrictions.

b) Protecting the Government's Share

There are various ways by which the government's additional share may be reduced through the increase in the amount of allowable deduction that effectively reduces the net mining revenues and net cash flow of the operations. These can be manipulated in a number of ways, such as through inordinate discounts and commissions, and transfer pricing among affiliates that allow reduced prices obtained by the producer. These results to greater

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[149] DAO 2007-12, Sec. 5 c.
[150] DAO 2007-12, Sec. 5 b.

gains in favor of a related party, which has no obligation to pay the government's due share.

IV. NATURAL RESOURCES

When considering ancestral lands and indigenous peoples, one should bear in mind that when the regalian doctrine was introduced into the Philippines, there was no intent to strip the natives of their ownership of lands already belonging to them. This is the observation in the ruling in *Carino vs. Insular Government*, that "when as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest and never to have been public land." [151]

1. Rights of Indigenous Peoples

Article XII, Section 5 of the 1987 Constitution provides the basis for the more recent legislations on indigenous peoples and their ancestral lands.[152] Ancestral lands are all lands exclusively and actually possessed, occupied, or utilized by indigenous cultural communities by themselves or through their ancestors in accordance with their customs and traditions since time immemorial, and as may be defined and delineated by law.[153]

The Indigenous Peoples Rights Act defines ancestral lands as those "occupied, possessed and utilized by individuals, families and clans who are members of the Indigenous Cultural Communities (ICCs)/Indigenous Peoples (IPs) since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots." [154]

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[151] (G.R. number) 41 Phil.935 (full date, 1909)

[152] "Section 5. The State, subject to the provision of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural minorities to their ancestral lands to ensure their economic, social, and cultural well-being. Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral lands."

[153] Rep. Act No. 7942, Sec. 3 a.

[154] Rep. Act No. 8371, Sec. 3 b. This is the Indigenous Peoples Rights Act, (IPRA) of 1997.

Article XIV, Section 17 of the 1987 Constitution states that "The State shall recognize, respect, and protect the right of indigenous cultural communities to preserve and develop their culture, traditions and institutions. It shall consider these rights in the formulation of national plans and policies." Article XIII, Section 6 also mandates that in "the disposition of other natural resources and agricultural lands of the public domain, the rights of the indigenous cultural minorities to their ancestral lands shall be respected." Pursuant to the above mandate, Congress of the Philippines passed Republic Act No. 8371 on October 29, 1997, otherwise known as the Indigenous Peoples Rights Act of 1997, or the "IPRA" law, with its corresponding implementing rules and regulations adopted on June 9, 1998.[155]

The Supreme Court upheld the constitutionality of the IPRA law based on the grounds that ancestral domain and ancestral lands are not part of lands of the public domain. They are private and thus, the native title held by Filipinos should be recognized, as this excludes them from the coverage of *jura regalia.* However, the right of ownership granted does not include natural resources. The right to negotiate terms and conditions over natural resources covers only exploration to ensure environmental protection. It is not a grant of exploration rights. [156] Furthermore, the limited rights of management refer to utilization as expressly allowed in Section 2 Article XII. What is given is priority right, not exclusive right. It does not preclude the State from entering into co-production, joint venture or production sharing agreement with private entities.

The IPRA directly deals with rights and obligations with respect to ancestral lands and indigenous cultural communities (ICC/IP). This law created a National Commission of Indigenous People (NCIP) under the Office of the President, and which is the primary government agency responsible for the formulation and implementation of policies, plans and programs to recognize, protect and promote the rights of ICCs/IPs.

2. The Philippine Mining Act and Ancestral Domains

The Philippine Mining Act does provide for the acquisition of mineral rights on ancestral lands. But it contains regulatory provisions such as:

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[155] Rules and Regulations Implementing Republic Act No. 8371.
[156] Carino, (g.r. number) 212 U.S.449 (1909)

> Section 16. Opening of Ancestral Lands for Mining Operations- No ancestral land shall be opened for mining operations without prior consent of the indigenous cultural community concerned.
>
> Section 17. Royalty Payments for Indigenous Cultural Communities- In the event of an agreement with an indigenous cultural community pursuant to the preceding section, the royalty payment, upon utilization of the minerals shall be agreed upon by the parties. The said royalty shall form part of a trust fund for the socioeconomic well-being of the indigenous cultural community.

The mining law refers only to "ancestral lands" where consent of the affected community and payment of royalty is necessary in order to conduct mining operations. Thus, before any mining activity is to be conducted over territories that are claimed as ancestral lands, there should be negotiations to get the permission of the indigenous communities to undertake such activities.

Under the mining law[157], to qualify as an ancestral land subject to the protection of the mining act, the following elements must concur:

> 1. The possession, occupation and utilization started "from time immemorial". This is defined in the IPRA as " a period of time when as far back as memory can go, that certain ICCs/IPs are known to have occupied, possessed in the concept of owner, and utilized a defined territory devolved to them, by operation of customary law or inherited from their ancestors, in accordance with their customs and traditions."[158] "Time immemorial" is a distinct feature of "ancestral land" in both definitions under the mining law and the IPRA.
>
> 2. "Exclusive, and actual" possession, occupation and utilization since time immemorial by the indigenous cultural community.
>
> 3. Such possession, occupation and utilization is exercised by the indigenous cultural community.

One provision in the IPRA provides for the precondition that there must first be a certification that the area affected does not overlap any ancestral domain prior to issuance of any permits or licenses. [159] This is an effective protective measure as it involves several government agencies that

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[157] Rep. Act No. 7942, Sec. 3.
[158] Rep. Act No. 8371, Sec. 3.
[159] Rep. Act No. 8371, Sec. 51.

can monitor any action that will be prejudicial to the interests of the indigenous communities. Thus, the law provides that no department of government or other agencies shall issue, renew or grant any concession, license, lease, permit, or enter into any production sharing agreement without such certification.

When the areas affected are within Ancestral Domains all licenses, leases, permits or the like may henceforth be issued only upon compliance with the procedures for securing of free and prior informed consent, pursuant to the Rules and Regulations.[160]

a) FREE AND PRIOR INFORMED CONSENT (FPIC) as An Instrument of Empowerment

The DAO 96-40, the Implementing Rules and Regulations of the Philippine Mining Act of 1995, is more extensive with respect to the acquisition of mining rights over ancestral lands.[161] It discusses two basic concepts: (1) "consent" and (2) "royalties" in connection with acquiring mining rights over ancestral lands of the indigenous people/community. Under the above provision, mining rights can be acquired provided proper consent of the affected ICCs/IPs is obtained and royalties is paid at such amount as may be agreed upon between the mining operator and the affected ICC/IP.

The IRR of the mining law of 1995 requires "Free and Prior Informed consent" that should meet the minimum requirements of public notice. Section 16 defines it in this wise:

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[160] Rules and Regulations Implementing Republic Act No. 8371.

[161] DAO 96-40, Sec. 16. "Ancestral Lands. — In no case shall Mineral Agreements, FTAAs or mining permits be granted in areas subject of Certificates of Ancestral Domains/Ancestral Land Claims (CADC/CALC) or in areas verified by the Department Regional Office and/or other office or agency of the Government authorized by law for such purpose as actually occupied by Indigenous Cultural Communities under a claim of time immemorial possession **except with their prior consent.**

Prior consent refers to prior informed consent obtained, as far as practicable, in accordance with the customary laws of the concerned Indigenous Cultural Community. Prior informed consent should meet the minimum requirements of public notice through various media such as, but not limited to, newspaper, radio or television advertisements, fully disclosing the activity to be undertaken and/or sector consultation wherein the Contractor/ Permit Holder/Permittee should arrange for a community assembly, notice of which should be announced or posted in a conspicuous place in the area for at least a month before the assembly: Provided, That the process of arriving at an informed consent should be free from fraud, external influence and manipulations.

In the event that prior informed consent is secured in accordance with the preceding paragraph, the concerned parties shall agree **on the royalty payment for the concerned Indigenous Cultural Community(ies)** which may not be less than one percent (1%) of the gross output. Expenses for community development may be credited to or charged against said royalty." xxx

"Prior consent refers to prior informed consent obtained, as far as practicable, in accordance with the customary laws of the concerned Indigenous Cultural Community...provided, that the process of arriving at an informed consent should be free from fraud, external influence and manipulations."

The elements of "free and prior informed consent" under the above provision are (a) public notice; (b) community assembly; (c) informed consent; (d) freedom from fraud, external influence or manipulation. Free and prior informed consent is recognized as an instrument of empowerment that enables IPs to exercise their right to self-determination.[162] The provisions on free and prior informed consent shall generally be applicable to all the provisions of the IPRA and the IRR.[163]

The IPRA policy on free and prior informed consent requires that the ICCs/IPs shall, within their communities, determine for themselves policies, development programs, projects and plans to meet their identified priority needs and concerns. The ICCs/IPs shall have the right to accept or reject a certain development intervention in their particular communities.

"Consent" as a condition precedent to the grant of mining rights in ancestral lands" means the "consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of an activity, in a language and process understandable to the community.[164]

Under the IPRA law, among the activities that require "free and prior informed consent" relates to mining activities, to wit:

> (a) Exploration, development, exploitation and utilization of natural resources within ancestral domains/lands;
>
> (b) Research in indigenous knowledge, systems and practices related to agriculture, forestry, watershed and resource management system and technologies, medical and scientific concerns, bio-diversity, bio-prospecting and gathering of genetic resources;
>
> (c) Displacement and relocation;

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[162] DAO 96-40, Sec. 1.
[163] DAO 96-40, Sec. 2.
[164] R.A. 8371, IRR, Rule II Sec. 1 k.

> (d) Archeological explorations, diggings and excavations and access to religious and cultural sites;
>
> (e) Policies affecting the general welfare and the rights of ICCs/IPs; and
>
> (f) Entry of the Military or paramilitary forces or establishment of temporary or permanent military facilities within the domains.[165]

b) Assessment of Acceptance or Rejection of Projects/Plans

The acceptance or rejection of proposed policy, program, project or plan shall be assessed in accordance with the following IPs development framework and value systems for the conservation and protection of: a) Ancestral domains/lands as the ICCs/IPs fundamental source of life; b) Traditional support system of kinship, friendship, neighborhood clusters, tribal and inter-tribal relationships rooted in cooperation, sharing and caring; c) Sustainable and traditional agricultural cycles, community life, village economy and livelihood activities. d) Houses, properties, sacred and burial grounds.[166]

c) Basic Elements in Securing Consent

The basic elements in the consensus building process shall include: (1) at the minimum, information dissemination to all members of the concerned indigenous peoples communities; (2) assessment of the concerns or issues by appropriate assemblies in accordance with customs and traditions; and (3) discernment and initial decision by recognized council of elders; and (4) affirmation of the decision of the Elders by all the members of the community.

The following minimum requirements shall be strictly complied with: a) Proper Notice; b) Discussion; c) Minutes of the Meeting; d) Signed/Thumbmarked decisions; and e) Consent to alternative Proposals:[167] The proponent of any policy, program, project, or activity requiring the Free and Prior Informed Consent of the ICCs/IPs community has the obligation

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[165] R.A. 8371 IRR, Rule II, Sec. 7.

[166] R.A. 8371 IRR, Rule II, Sec. 3.

[167] R.A. 8371 IRR, Rule II, Sec. 5. "Procedure and Requirements for Securing ICCs/IPs Consent. — The consensus building process of each particular indigenous cultural community shall be adhered to in securing the ICCs/IPs' Free and Prior Informed Consent. For purposes of documentation and monitoring, the NCIP shall assist, document and witness the process of securing Free and Prior Informed Consent. xxx"

of full disclosure. He shall also provide an Environmental and Socio-cultural Impact Statement, a cash or surety bond, and must underwrite all expenses attendant to securing the free and prior informed consent of ICCs/IPs.[168]

d) Memorandum of Agreement

As a component part of the process of securing the free and prior informed consent of the concerned ICCs/IPs a Memorandum of Agreement (MOA) shall be executed by and between the proponent, host ICC/IP community, and the NCIP, written in the dialect or language of the concerned ICCs/IPs, with corresponding English and Pilipino translation. The MOA shall stipulate, among others:

> (1) Benefits due the host ICCs/IP communities;
>
> (2) Measures to protect IPs' rights and value systems enumerated in the Section on Free Prior and Informed Consent of these Rules and Regulations;
>
> (3) Responsibilities of the proponent as well as those of the host ICC/IP community and the NCIP;
>
> (4) In case of change of proponent as a result of partnership, joint venture, reorganization, merger, acquisition, sale, or transfer of rights, the terms and conditions of the MOA shall bind the new proponent without necessarily executing another MOA; and
>
> (5) Penalties for non-compliance and/or violation of the terms and conditions.

For the purposes of validity of the Memorandum of Agreement referred to above, the signatories thereto shall be; a) for corporations, partnerships or single proprietorship entities, the authorized officers, representatives, or partners as per Board resolution; b) for the ICC/IP community, all the authorized community elders or traditional leaders, who are registered with the NCIP; and c) the NCIP or authorized representative. The NCIP shall keep a copy of the MOA for records and monitoring purposes.[169]

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[168] R.A. 8371 IRR, Rule II, Sec. 6.
[169] R.A. 8371 IRR, Rule II, Sec. 8

e) Non-Transferability of Consent

The free and prior informed consent granted by the ICCs/IPs for a particular proposed policy, program, project or plan, as a general rule, shall not be transferable to any other party, except in case of merger, reorganization, transfer of rights, acquisition by another entity, or joint venture, provided that there will be no changes in the original plan, program, project or policy. Any transfer shall not prejudice the interest, rights and welfare of the concerned ICCs/IPs.[170]

f) Royalties

The mining law requires the payment of royalties to the indigenous cultural community for the exercise of mining rights in ancestral lands. Under the IRR of R.A. 7942,[171] in the event that prior informed consent is secured, the concerned parties shall agree on the royalty payment for the concerned Indigenous Cultural Community which may not be less than one percent (1%) of the gross output.

Said royalty shall form part of a Trust Fund for the socioeconomic well-being of the Indigenous Cultural Community in accordance with the management plan formulated by the same in the ancestral land or domain area: Provided, That the royalty payment shall be managed and utilized by the concerned Indigenous Cultural Community.

V. ANCESTRAL DOMAIN DEVELOPMENT AND PROTECTION

The ICCs/IPs have the right to freely pursue their economic, social, political and cultural development. They shall formulate and pursue their own plans for the sustainable management and development of the land and natural resources as well as human resources within their ancestral domains based on their indigenous knowledge systems and practices and on the principle of self-determination.

IP development plans and programs may be consolidated into an Ancestral Domain Sustainable Development and Protection Plan (ADSDPP) which shall be the basis of the Five Year Master Plan. This master plan relates to the manner by which the ICCs/IPs will protect the

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[170] R.A. 8371 IRR, Rule II, Sec. 9.
[171] DAO 96-40, Sec 16, par. 3, 4.

domains and the kind or type of development programs adopted and decided by the ICCs/IPs, in relation to livelihood, education, infrastructure, self governance, environment, natural resources, culture and other practical development aspects.[172] The ICCs/IPs shall submit to the municipal and provincial government unit having territorial and political jurisdiction over them their ADSDPP in order for the said LGU to adopt and incorporate the same in the Municipal Development Plan, Municipal Annual Investment Plan, Provincial Development Plan, and Provincial Annual Investment Plan. ICCs/IP communities have the option to convert or modify their existing Ancestral Domain Management Plans prepared by them.

VI. CONCLUDING STATEMENT

From the foregoing review of mining and mining-related laws and policies adopted by several generations of Filipinos as reflected in the various Constitutions that have been approved and ratified under an independent Philippine Republic, there is a common thread that runs through the various policy pronouncements – that the Filipino people want the natural resources of the Philippines to be under the full control of Filipinos to be used solely for the benefit of present and future generations of Filipinos.

The treatment of natural resources as the "patrimony" of the nation and the policy of "conservation" of natural resources adopted in the 1935 Constitution and the more current mandate that natural resources should be utilized on the basis of "sustainable development" are clear futuristic declarations that provide legal basis for inter-generational rights affirmed in favor of future generations of Filipinos.

Let us, therefore, not be blinded by the promise of economic development and prosperity that will result in wanton exploitation of our natural resources when in truth, the benefits to our country and our citizens are but pittance because of "give-aways" in the form of incentives that are likewise wantonly dispensed, with without proper evaluation and consideration of the proper returns to our country and our people.

While we welcome the entry of foreign investments because of an enhanced capability to harness more economic activity and the potential to create jobs for our people who stake their future in our homeland, it is,

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[172] R.A. 8371, IRR, Rule VIII, Part II.

however, imperative that we should be circumspect in the treatment of such foreign investments when they are intended for the exploitation and utilization of our country's natural resources, particularly those that are subject of depletion and exhaustion, lest there will be nothing left for future generations of Filipinos but gaping holes and polluted seas, receding beaches, murky rivers and streams, denuded mountains and barren fields, all on account of the so-called economic development and rapid industrialization, but only for the present generation.

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