CHIEF JUSTICE ARTEMIO V. PANGANIBAN PROFESSORIAL CHAIR ON LIBERTY AND PROSPERITY

A SERIES OF PUBLIC LECTURES

April 18, 2013, Thursday, 1 p.m.
Justitia, 4th Floor Ateneo Professional Schools
Rockwell, Makati City

"Supreme Court Decisions on the Economic Provisions of the Constitution"

by

JUSTICE ADOLFO S. AZCUNA
Chancellor, Philippine Judicial Academy

The present 1987 Constitution, in Article XII, deals with The National Economy and Patrimony. (*See,* Annex "H." Art. XII, Philippine Constitution)

I propose to examine four Supreme Court decisions and one resolution that interpreted these Economic Provisions. These are in the *Manila Hotel* case, the *La Bugal-B'laan* case, the *PLDT* case, and the *Angat Dam* case.

I. The *Manila Hotel* Case

This case dealt with the provision in Sec. 10 of Art. XII that states:

"In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos."

The Manila Hotel Corporation was owned by the Philippine Government. It, in turn, owned the historic, landmark hotel situated in the area of the Rizal Park. The land on which the hotel stood was only leased to it, also by the Philipppine Government (through the GSIS).

It was decided to sell the Manila Hotel Corporation, the hotel and all its assets and liabilities, through sealed bidding. The rules of the bidding were given to all interested parties.

At the opening of the bids, the highest bidder was a Malaysian company and the next highest bidder was a Philippine corporation.

The Philippine corporation informed the Government that it would like to match the bid of the Malaysian company, citing as basis the provision earlier quoted.

The Supreme Court, through Mr. Justice Josue N. Bellosillo, upheld the claim of the Philippine corporation, stating that due to its historic character, the Manila Hotel formed part of the national patrimony, and therefore, preference in purchasing it should be given to the Philippine corporation.

There were criticisms of the Supreme Court decision. I have to state, for the record, that I was one of the counsel for the Philippine corporation. The

criticism assumed that the highest bidder was automatically the winning bidder. This was not true. The rules of the bidding stated that the highest bidder had to meet and comply with all the requirements under the law before being declared the winning bidder and awarded the contract. Among said requirements was the provision of the Constitution on the preference of qualified Filipinos. Hence, the highest bidder was subject to the right to match by the next highest bidder. The Philippine corporation, with its matching bid, was declared the winning bidder and given the Award. There was no previous award set aside by the Court, contrary to newspaper accounts (*Manila Prince Hotel v. GSIS*, G.R. No. 122156, February 3, 1997).

II. *La Bugal-B'laan* Case

This is a mining case. Petitioners are indigenous tribe members who questioned the award of mining rights to a foreign corporation. I did not take part in this case because, I have to disclose again, my former law firm was counsel for the foreign corporation this time.

The issue turned on the interpretation of the following provision of Sec. 2, Art. XII:

"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 term and condition provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

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

The Supreme Court *en banc*, in a decision penned by Justice Conchita Carpio Morales, held:

A. The Decision in the La Bugal-B'laan case (January 27, 2004)

Petitioners are assailing the constitutionality of R.A. No. 7942 (The Philippine Mining Act) which took effect on April 9, 1995. The validity of a Financial and Technical Assistance Agreement (FTAA), a contract which was signed by then President Ramos with WMCP (Western Mining Philippines, Inc.) prior to the effectivity of the Act assailed is likewise under attack. The FTAA with WCMP, a corporation organized under Philippine laws but is at the same time a 100% owned subsidiary of WMC LIMITED, a publicly listed major Australian mining and exploration company, covered close to 100,000 hectares of land in the Mindanao region.

Petitioners likewise assail the validity of the law's implementing rules, DENR Administrative Order 96-40, which was adopted on December 20, 1996.

Petitioners maintain that all three must be struck down as they allow fully foreign owned corporations like WMCP to exploit, explore, and develop Philippine mineral resources in contravention of Article XII, Section 2, paragraphs 2 and 4 of

the 1987 Constitution. They argue that Article XII, Section 2 of the 1987 Constitution retained the Regalian Doctrine and further states that, "exploration and development and utilization of natural resources shall be under the *full control* and *supervision* of the State."

The present Section 2 does not contain the provision in the 1935 and 1973 Constitutions authorizing the State to grant licenses, concessions, or leases for the exploration, exploitation, development, or utilization of natural resources. Thus, the utilization of inalienable lands of public domain through license, concession, or lease is *no longer allowed* under the 1987 Constitution.

The phrase "*management or other forms of assistance*" found in the 1973 Charter has been deleted in the present Charter which now allows only "*technical and financial assistance."* The management or operation of mining activities by foreign contractors, the primary feature of service contracts was precisely the evil the drafters of the 1987 Constitution sought to avoid.

Petitioners also aver that the constitutional provision allowing the President to enter into FTAAs is an exception to the rule that participation in the nation's natural resources is reserved exclusively to Filipinos. Accordingly such provision must be construed strictly against their enjoyment by non-Filipinos.

The FTAA between WMCP and the Philippine government is a "service contract" and is therefore unconstitutional. Section 1.3 of the FTAA grants WMCP, a fully foreign owned corporation, the "exclusive right to explore, exploit, utilize and dispose of all minerals and by-products that may be produced from the contract area."

Section 1.2 of the same agreement provides that WMCP shall provide "all financing, technology, management, and personnel necessary for the Mining Operations." These contractual stipulations and related provisions in the FTAA taken together, grant WMCP beneficial ownership over natural resources that properly belong to the State and are intended for the benefit of its citizens.

WCMP for their part anchors their right on E.O. 279, issued by former President Aquino on July 25, 1987, which authorizes the DENR to accept, consider, and evaluate proposals from foreign owned corporations or foreign investors for contracts or agreements involving either technical or financial assistance for large scale exploration, development, and utilization of minerals which upon appropriate recommendation of the (DENR) Secretary, the president may execute with foreign proponent. WMCP also contended that the annulment of the FTAA would violate a treaty between the Philippines and Australia providing for the protection of Australian investments.

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

The Court found for the petitioners.

WHEREFORE the petition is GRANTED. The Court hereby declares unconstitutional and void:

(1) The following provisions of R.A. No. 7942:
    a. The proviso in Section 3;
    b. Section 23;
    c. Section 33-41;
    d. Section 56;
    e. The second and third paragraphs of Section 81, and
    f. Section 90.
(2) All provisions of DAO 96-40, s. 1996 which are not in conformity with this Decision, and
(3) The FTAA between the Government of the Republic of the Philippines and WMC Philippines, Inc.

SO ORDERED. (*La Bugal B'laan Tribal Association Inc., et al. V. Victor O. Ramos, Secretary, Department of Environment and Natural Resources; Horacio Ramos, Director,Mines and Geosciences Bureau (MGB-DENR); Ruben Torres, Executive Secretary; and WMC (Philippines) Inc.,* G.R. No. 127882, 27 January 2004*)*

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

Vitug, J., see Separate Opinion*.*

Panganiban, J., see Separate Opinion*.*

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

Azcuna, no part, one of the parties was a client.

A Resolution was penned by then Associate Justice Artemio V. Panganiban for the Court En Banc, as follows:

B. The Resolution of the La Bugal-B'laan case (December 1, 2004)

This is a Petition for Prohibition and Mandamus challenges the constitutionality of:

1. Republic Act No. 7942 (The Philippine Mining Act of 1995);
2. its Implementing Rules and Regulations (DENR Administrative Order No. [DAO] 96-40); and
3. the Financial and Technical Assistance Agreement [FTAA] dated March 30, 1995, executed by the government with Western Mining Corporation (Philippines), Inc. (WMCP).

On January 27, 2004, the Court *en banc* promulgated its Decision granting the Petition and declaring the unconstitutionality of certain provisions of R.A. No. 7942; DAO 96-40; as well as the entire FTAA executed between the government and WMCP. The Court found that the FTAAs are similar to service contracts prohibited by the 1987 Constitution.

Separate Motions for Reconsideration were filed, and the case was set for Oral Argument on June 29, 2004. On December 1, 2004, the Court reversed and set aside its earlier January 27, 2004 Decision.

1. Mootness

On January 23, 2004, WMC sold its shares in WMCP to Sagittarius Mines, Inc., 60% of whose equity was held by Filipinos. The FTAA had been transferred from WMCP to Sagittarius.

The case pending in the Court of Appeals is a dispute between two Filipino companies (Sagittarius and Lepanto), both claiming the right to purchase the foreign shares in WMCP. Regardless which side wins, the FTAA would still be in the hands of a qualified Filipino company.

There is no transgression of the Constitution by the transfer of the WMCP shares. The first paragraph of Section 2 of Article XII provides that, "*The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens.*" The said provision does not state any express limitation or restriction insofar as arrangements other than production sharing, co-production and joint venture are concerned.

Moreover, the transferee of the FTAA is a Filipino corporation; hence, the lack of prior approval of the Philippine President and notification to the Congress may not be deemed fatal as to render the transfer invalid based on Section 40 of R.A. No. 7942.[1]

2. Whether the Court can still decide the case, even assuming it is moot

The Court has jurisdiction and should continue to proceed to a resolution because the constitutionality of R.A. No. 7942 and its Implementing Rules and Regulations remain in issue.

3. Constitutionality

a. <u>State's control and supervision</u>

R.A. No. 7942 provides for the State's control and supervision over mining operations. The following provisions thereof establish the mechanism of inspection and visitorial rights over mining operations and institute reportorial requirements in this manner:

1. Sec. 8 which provides for the DENR's power of over-all supervision and periodic review for "the conservation, management, development and proper use of the State's mineral resources";

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

2. Sec. 9 which authorizes the Mines and Geosciences Bureau (MGB) under the DENR to exercise "direct charge in the administration and disposition of mineral resources", and empowers the MGB to "monitor the compliance by the contractor of the terms and conditions of the mineral agreements", "confiscate surety and performance bonds", and deputize whenever necessary any member or unit of the Phil. National Police, barangay, duly registered non-governmental organization (NGO) or any qualified person to police mining activities;

3. Sec. 66 which vests in the Regional Director "exclusive jurisdiction over safety inspections of all installations, whether surface or underground", utilized in mining operations.

4. 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.
> x x x x x x x x x
> "(k) Requiring proponent to effectively use appropriate anti-pollution technology and facilities to protect the environment and restore or rehabilitate mined-out areas.
> "(l) The contractors shall furnish the Government records of geologic, accounting and other relevant data for its mining operation, and that books of accounts and records shall be open for inspection by the government. x x x.
> "(m) Requiring the proponent to dispose of the minerals at the highest price and more advantageous terms and conditions.
> "(n) x x x x x x x x x
> "(o) Such other terms and conditions consistent with the Constitution and with this Act as the Secretary may deem to be for the best interest of the State and the welfare of the Filipino people."

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

Moreover, R.A. No. 7942 and DAO 96-40 also provide various stipulations confirming the government's control over mining enterprises.

The setup under R.A. No. 7942 and DAO 96-40 hardly relegates the State to the role of a "passive regulator" dependent on submitted plans and reports. On the contrary, the government agencies

concerned are empowered to approve or disapprove – hence, to influence, direct and change – the various work programs and the corresponding minimum expenditure commitments for each of the exploration, development and utilization phases of the mining enterprise.

b. Section 3(aq) of R.A. No. 7942 – foreign contractor may apply for and hold an exploration permit

The exploration permit is an authorization for the grantee to spend its own funds on exploration programs that are pre-approved by the government, without any right to recover anything should no minerals in commercial quantities be discovered. The State risks nothing and loses nothing by granting these permits to local or foreign firms; in fact, it stands to gain in the form of data generated by the exploration activities.

c. Terms of the WMCP FTAA

The WMCP FTAA contain a slew of stipulations providing for State control and supervision. In sum, the WMCP FTAA **bestows upon the State more than adequate control and supervision over the activities of the contractor and the enterprise.**

d. DAO 99-56, *"Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements"*

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

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

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

The **additional government share** is computed by using one of

three options or schemes presented in DAO 99-56: (1) a fifty-fifty sharing in the cumulative present value of cash flows; (2) the share based on excess profits; and (3) the sharing based on the cumulative net mining revenue.

e. Re Allegation that Mineral resources are effectively given away for free by the law (R.A. No. 7942) in general and by Sections 80, 81, 84 and 112 in particular

We can hardly talk about foreign contractors taking our mineral resources *for free*. It takes a lot of hard cash to even begin to do what they do. *And what they do in this country ultimately benefits the local economy, grows businesses, generates employment, and creates infrastructure*, as discussed above.

f. Re alleged Failure of the Mining Law to ensure real contributions to the economic growth and general welfare of the country, as mandated by Section 2 of Article XII of the Constitution

The government is entitled to an additional share, to be computed based on any one of the following factors: net mining revenues, the present value of the cash flows, or excess profits reckoned against a benchmark rate of return on investments.

Moreover, foreign contractors can hardly *"repatriate the entire after-tax income to their home countries."*

g. Invalid provisions of the WMCP FTAA

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

Section 7.9 of the WMCP FTAA has effectively given away the State's share without anything in exchange.

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

Being grossly disadvantageous to government and detrimental to the Filipino people, as well as violative of public policy, Section 7.9 must therefore be stricken off as invalid.

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

4. *The proper interpretation of the Constitutional Phrase: "agreements involving either technical or financial assistance"*

At the nucleus of the controversy is paragraph 4 of Section 2 of Article XII of the 1987 Constitution, to *wit*:

> *"Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture or production-sharing agreements with Filipino citizens or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.*
>
> *"The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.*
>
> *"The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays and lagoons.*
>
> *"The President may enter into* ***agreements*** *with foreign-owned corporations* ***involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils*** *according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall*

promote the development and use of local scientific and technical resources.

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

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

The Court declared in its January 27, 2004 Decision that the WMCP FTAA, along with pertinent provisions of R.A. No. 7942, are void for allowing a foreign contractor to have a direct and exclusive management of a mining enterprise. It stressed on "management or other forms of assistance" or other activities associated with the "service contracts" of the martial law regime, since *"the management or operation of mining activities by foreign contractors, which is the primary feature of service contracts, was precisely the evil that the drafters of the 1987 Constitution sought to eradicate."*

Strictly literal or *verba legis* interpretation of paragraph 4 does not lead to the conclusions of the ponencia.

First, the drafters' use of the phrase "*agreements xxx* ***involving*** *either technical or financial assistance"* does not indicate the intent to *exclude* other modes of assistance. The drafters opted to use *involving* when they could have simply said *agreements* ***for*** *financial or technical assistance.* This leads the Court to conclude that the use of the word "involving" implies that these agreements with foreign corporations are not limited to mere financial or technical assistance.

Second, the drafters had ***a conscious and deliberate decision to avoid the use of restrictive wording that bespeaks an intent not to use the expression "agreements x x x involving either technical or financial assistance" in an exclusionary and limiting manner.***

Third, the objective to keep out of foreign hands the management or operation of mining activities or the plan to eradicate service contracts cannot be definitively and conclusively established from the mere failure to carry the same expression or term over to the new Constitution, absent a more specific, explicit and unequivocal statement to that effect. Such would be a *radical shift* by our government, to the great prejudice of the mining sector in particular and our economy in general, merely on the basis of the *omission* of the terms *service contract* from or the failure to carry them over to the new Constitution.

Fourth, a *verba legis* construction shows that paragraph 4 is not to be understood as one limited only to foreign loans (or other forms of financial support) and to technical assistance. **These are provisions permitting participation by foreign companies; requiring the President's report to Congress; and using, as yardstick, contributions based on economic growth and general welfare. These were neither accidentally inserted into the Constitution nor carelessly cobbled together by the drafters in lip service to shallow nationalism.**

Fifth, if Section 2 of Article XII authorizes the State to be the one *directly* and *solely* to undertake the large-scale exploration, development and utilization of a mineral resource, one will have to admit the fiscal and technical implausibility of such undertaking.

Sixth, the inclusion by the drafters of the clause on "technical or financial assistance" recognizes the fact that foreign business entities and multinational corporations are the ones with the resources and know-how to provide technical and/or financial assistance of the magnitude and type required for large-scale exploration, development and utilization of these resources. They 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.

Seventh, if the framers had intended to put an end to service contracts, they would have at least left specific instructions to Congress to deal with these closing-out issues, perhaps by way of general guidelines and a timeline within which to carry them out.

Pertinent portions of the deliberations of the members of the Constitutional Commission (ConCom) conclusively show that they discussed *agreements involving either technical or financial assistance* in the same breadth as *service contracts* and used the terms interchangeably. In sum, the matters established based on a reading of the Concom deliberations is as follows:

- In their deliberations on what was to become paragraph 4, the framers used the term *service contracts* in referring to *agreements x x x involving either technical or financial assistance.*
- They spoke of *service contracts* as the concept was understood in the 1973 Constitution.
- It was obvious from their discussions that they were not about to ban or eradicate *service contracts*.
- Instead, *they were plainly crafting provisions to put in place safeguards that would eliminate or minimize the abuses prevalent during the marital law regime*. In brief, they were

going to permit service contracts with foreign corporations as contractors, but with safety measures to prevent abuses, as an exception to the general norm established in the first paragraph of Section 2 of Article XII. This provision reserves or limits to Filipino citizens -- and corporations at least 60 percent of which is owned by such citizens -- the exploration, development and utilization of natural resources.

- This provision was prompted by the perceived insufficiency of Filipino capital and the felt need for foreign investments in the EDU of minerals and petroleum resources.
- The framers for the most part debated about the sort of safeguards that would be considered adequate and reasonable. But some of them, having more "radical" leanings, wanted to ban service contracts altogether; for them, the provision would permit aliens to exploit and benefit from the nation's natural resources, which they felt should be reserved only for Filipinos.
- In the explanation of their votes, the individual commissioners were heard by the entire body. They sounded off their individual opinions, openly enunciated their philosophies, and supported or attacked the provisions with fervor. Everyone's viewpoint was heard.
- In the final voting, the Article on the National Economy and Patrimony – including paragraph 4 allowing service contracts with foreign corporations as an exception to the general norm in paragraph 1 of Section 2 of the same article – was resoundingly approved by a vote of 32 to 7, with 2 abstentions.

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

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

> (1) The service contract shall be crafted in accordance with a general law that will set standard or uniform terms, conditions and requirements, presumably to attain a certain uniformity in provisions and avoid the possible insertion of terms disadvantageous to the country.
>
> (2) The President shall be the signatory for the

> government because, supposedly before an agreement is presented to the President for signature, it will have been vetted several times over at different levels to ensure that it conforms to law and can withstand public scrutiny.
>
> (3) Within thirty days of the executed agreement, the President shall report it to Congress to give that branch of government an opportunity to look over the agreement and interpose timely objections, if any.

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

SO ORDERED. [LA BUGAL-B'LAAN TRIBAL ASSOCIATION, INC., et al. v. VICTOR O. RAMOS, Secretary, Department of Environment and Natural Resources (DENR), et al. G.R. No. 127882. December 1, 2004]

Davide Jr., C.J., Sandoval-Gutierrez, Austria-Martinez, and *Garcia, JJ.,* concur.

Puno, J., in the result and votes to invalidate sections 3.3; 7.8 and 7.9 of the WMC FTAA.

Quisumbing, J., in the result.

Ynares-Santiago, J., joins dissenting opinion of *J*. Antonio Carpio & *J*. Conchita C. Morales.

Carpio, and Carpio-Morales, JJ., see dissenting opinion.

Corona, J., certifies he voted affirmatively with the majority and he was allowed to do so although he is on leave.

Callejo, Sr., J., concurs to the dissenting opinion of *J*. Carpio.

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

Tinga, and Chico-Nazario, JJ., concur with a separate opinion.

III. The *PLDT* Case

This case deals with Sec. 11 of Article XII on franchises to operate a public utility:

> "Sec. 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty *per centum* of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration,

> or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines."

The point at issue was the meaning of "capital" that must be at least up to sixty per centum owned by Philippine citizens. Is it all the capital, that is, voting and non-voting shares, or only the voting shares.

The Supreme Court *en banc* held that it refers only to voting shares, that is, the shares that vote for directors in the corporation, using as criterion the *control* test, reasoning that the framers of the Constitution wanted to ensure that control of public utilities remained in Filipino hands.

This case was an original petition for prohibition, injunction, declaratory relief and declaration of nullity of the sale of shares of stock of Philippine Telecommunications Investment Corporation (PTIC) by the government of the Republic of the Philippines to Metro Pacific Assets Holdings Inc., (MPAH), an affiliate of First Pacific Limited (First Pacific).

It was brought to the Court by petitioner Wilson P. Gamboa, a stockholder of PLDT who argues in the main that the sale by PTIC of 46 percent of its shares in PLDT to MPAH whose mother company First Pacific already owns 54 percent of PLDT's outstanding capital stock would have the effect of increasing First Pacific's common shareholdings in PLDT from 30.7 to 37 percent, thereby increasing the common shareholdings of foreigners in PLDT to about 81.47 percent in violation of Sec. 11, ART. XII of the 1987 Constitution which limits foreign ownership of the capital of a public utility to not more than 40 percent.

Respondents on the other hand counter that the sale will not violate the 40 percent constitutional limit on foreign ownership of a public utility since PTIC holds only 13.847 percent of the total outstanding common shares of PLDT.

The Court confined its resolution of the instant controversy on the threshold and legal issue of whether the term "capital" in Sec. 11, ART. XII of the Constitution refers to the total common shares only or to the total outstanding capital stock (combined total of common and non-voting preferred shares) of PLDT, a public utility.

Petitioners maintained that the term "capital" found in the Constitution refers to "the ownership of common capital stock subscribed and outstanding, which class of shares alone, under the corporate set-up of PLDT, can vote and elect members of the board of directors."

Respondents on the other hand did not offer any definition of the term "capital," and some of them did not even dispute that more than 40 percent of the common shares of PLDT are held by foreigners.

The Court, through Mr. Justice Antonio T. Carpio, agreed with the petitioners that the term "capital" in the Constitution refers only to shares of stock entitled to vote in the election of directors and thus in the present case only

to common shares, and not to the total outstanding capital stock, comprising both common and non-voting preferred shares.

It reasoned that to construe broadly the term "capital" as the total outstanding capital stock, including both common and *non-voting* preferred shares would grossly contravene the intent and letter of the Constitution that the "State shall develop a self-reliant and independent national economy ***effectively controlled*** by Filipinos." A broad definition unjustifiably disregards who owns the all-important voting stock, which necessarily equates to control of the public utility.

Finally, the Court added that under Section 17(4) of the Corporation Code, the SEC has the regulatory function to reject or disapprove the Articles of Incorporation of any corporation where **"the required percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution."**

WHEREFORE the petition is PARTLY GRANTED.

The Court rules that that the term "capital" in Section 11, ARTICLE XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares).

Respondent Chairperson of the SEC is DIRECTED to apply this definition of the term "capital" in determining the extent of allowable foreign ownership in respondent PLDT Company, and if there is a violation of Section 1, ARTICLE XII of the Constitution, to impose the appropriate sanctions under the law.

SO ORDERED. (*Wilson P. Gamboa v. Finance Secretary Margarito B. Teves et al.,* G.R. No. 176579, 28 June 2011)."

As a postscript to this case, the Court subsequently held that the meaning of "capital" in the Constitutional provision limiting foreign ownership in public utilities, Sec. 11, Art. XII, refers only to shares that can vote in the election of directors. Accordingly, in case of foreign debt converted to equity, the steps needed are: First, identifying into which class of shares the debt shall be converted, whether common shares, preferred shares that have the right to vote in the election of directors or non-voting preferred shares; Second, determine the number of shares with voting right held by foreign entities prior to conversion. If upon conversion, the total number of shares held by foreign entities exceeds 40% of the capital stock with voting rights, the constitutional limit on foreign ownership is violated. Otherwise, the conversion shall be respected. Applying the *Gamboa v. Teves* (2011) rule. (*EXPRESS INVESTMENTS III PRIVATE LTD. AND EXPORT DEVELOPMENT OF CANADA V. BAYAN TELECOMMUNICATIONS. INC., ET AL.*, G.R. Nos. 174457-59, 175418-20 and 177270, Dec. 05, 2012, 1st Div., Villarama, Jr., *J.*)

IV. The *Angat Dam* Case

Finally, the latest decision of the Supreme Court, penned by Justice Martin Villarama, Jr., answers the question whether a foreign-owned or controlled

corporation can purchase a river dam complex.

Article XII in Sec. 2 states:

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

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

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

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

"The President shall notify the Congress of every contract entered into in accordance with the provision, within thirty days from its execution."

The Court said:

> Before us is a petition for *certiorari* and prohibition seeking to permanently enjoin the sale of the Angat Hydro-Electric Power Plant (AHEPP) to Korea Water Resources Corporation (K-Water) which won the public bidding conducted by the Power Sector Assets and Liabilities Management Corporation (PSALM).

Sale of Government-Owned AHEPP to a Foreign Corporation Not Prohibited But Only Filipino Citizens and Corporations 60% of whose capital is owned by Filipinos May be Granted Water Rights.

With respect to foreign investors, the nationality issue had been framed in terms of the character or nature of the power generation process itself, *i.e.*, whether the activity amounts to utilization of natural resources within the meaning of Sec. 2, Art. XII of the Constitution. If so, then foreign companies cannot engage in hydropower generation business; but if not, then government may legally allow even foreign-owned companies to operate hydropower facilities.

The DOJ has consistently regarded hydropower generation by foreign entities as not constitutionally proscribed based on the definition of water appropriation under the Water Code, thus:

> Opinion No. 173, 1984
>
> This refers to your request for opinion on the possibility of granting water permits to foreign corporations authorized to do business in the Philippines x x x
>
> xxx
>
> xxx while the Water Code imposes a nationality requirement for the grant of water permits, the same refers to the privilege "to appropriate and use water." This should be interpreted to mean the extraction of water from its natural source (Art. 9, P.D. No. 1067). Once removed therefrom, they cease to be a part of the natural resources of the country and are the subject of ordinary commerce and may be acquired by foreigners (Op. No. 55, series of 1939). xxx in case of contract of lease, the water permit shall be secured by the lessor and included in the lease as an improvement. The water so removed from the natural source may be appropriated/used by the foreign corporation leasing the property.
>
> Opinion No. 14, s. 1995
>
> The nationality requirement imposed by the Water Code refers to the privilege "to appropriate and use water." This, we have consistently interpreted to mean the extraction of water directly from its natural source. Once removed from its natural source the water ceases to be a part of natural resources of the country and may be subject of ordinary commerce and may even be acquired by foreigners. (Secretary of Justice Op. No. 173,s. 1984; s. 1989; No. 100,s. 1994)
>
> In fine, we reiterate our earlier view that a foreign entity may legally process or treat water after its removal from a natural source by a qualified person, natural or juridical.

Opinion No. 122, s. 1998

> The crucial issue at hand is the determination of whether the utilization of water by the power plant to be owned and operated by a foreign-owned corporation (SRPC) will violate the provisions of the Water Code.
>
> x x x
>
> xxx Due to the distance from the riverbed, water could not enter the power plant absent the dam that traps the flow of the river.
>
> x x x
>
> xxx The water that is used by the power plant could not enter the intake gate without the dam, which is a man-made structure. Such being the case, the source of the water that enters the power plant is of artificial character rather than natural.
>
> x x x
>
> It is also significant to note that NPC, a government-owned and controlled corporation, has the effective control over all elements of the extraction process, including the amount and timing thereof considering that xxx the water will flow out of the power plant, to be used for the generation of electricity, only when the Downsteam Gates are opened, which occur only upon the specific water release instructions given by NPC or SRPC. This specific feature of the agreement, taken together with the above-stated analysis of the source of water that enters the plant, support the view that the nationality requirement embodied in Article XII, Section 2 of the preent Constitution and in Article 15 of the Water Code, is not violated. (Emphasis supplied by the Court)

Under the Water Code concept of appropriation, a foreign company may not be said to be "appropriating" our natural resources if it utilizes the waters collected in the dam and converts the same into electricity through artificial devices. Since the NPC remains in control of the operation of the dam by virtue of water rights granted to it, as determined under DOJ Opinion No. 122, S. 1998, there is no legal impediment to foreign-owned companies undertaking the generation of electric power using waters already appropriated by NPC, the holder of water permit. Such was the situation of hydropower projects under the BOT contractual arrangements whereby foreign investors are allowed to finance or undertake construction and rehabilitation of infrastructure projects and/or own and operate the facility constructed. However, in case the facility requires a public utility franchise, the facility operator must be a Filipino corporation or at least 60% owned by Filipino.

x x x

Section 6(a) of the IRR of R.A. No. 9136 insofar as it directs the transfer of water rights in the privitization of multi-purpose hydropower facilities, is thus merely directory.

It is worth mentioning that the Water Code explicitly provides that Filipino citizens and juridical persons who may apply for water permits should be "duly qualified by law to exploit and develop water resources."

In fine, the Court rules that while the sale of AHEPP to a foreign corporation pursuant to the privatization mandated by the EPIRA did not violate Sec. 2, Art. XII of the 1987 Constitution which limits the exploration, development and the utilization of natural resources under the full supervision and control of the State or the State's undertaking the same through joint venture, co-production or production sharing agreement with Filipino corporations 60% of the capital of which is owned by Filipino citizens, the stipulation in the Asset Purchase Agreement and Operations and Maintenance Agreement whereby NPC consents to the transfer of water rights to the foreign buyer, K-Water contravenes the aforesaid constitutional provision and the Water Code.

Section 6, Rule 23 of the IRR of EPIRA, insofar as it ordered NPC's water rights in multi-purpose hydropower facilities to be included in the sale thereof, is declared as merely directory and not an absolute condition in the privatization scheme. In this case, we hold that NPC shall continue to be the holder of the water permit even as the operational control and day-to-day management of the AHEPP is turned over to K-Water under the terms and conditions of their APA and O&M Agreement, whereby NPC granted authority to K-Water to utilize the waters diverted or collected in the Angat Dam for hydropower generation. Further, NPC and K-Water shall faithfully comply with the terms and conditions of the Memorandum of Agreement on Water Protocol, as well as with such other regulations and issuances of the NWRB governing water rights and water usage.

WHEREFORE, the present petition for *certiorari* and prohibition with prayer for injunctive relief/s is PARTLY GRANTED.

The following DISPOSITIONS are in ORDER:

1) the bidding conducted and the Notice of Award issued by PSALM in favor of a winning bidder, KOREA WATER RESOURCES CORPORATION (K-WATER), are declared VALID and LEGAL;

2) PSALM is directed to FURNISH petitioners with copies of all documents and records in its files pertaining to K-Water;

3) Section 6(a), Rule 23, IRR of the EPIRA, is hereby declared as merely DIRECTORY, and not an absolute condition in all cases where NPC-owned hydropower generation facilities are privatized;

4) NPC shall CONTINUE to be the HOLDER of Water Permit No. 6512 issued by the National Water Resources Board. NPC shall authorize K-Water to utilize the waters in the Angat Dam for hydropower

generation, subject to the NWRB's rules and regulations governing water right and usage. The Asset Purchase Agreement and Operation & Management Agreement between NPC/PSALM and K-Water are thus amended accordingly.

Except for the requirement of securing a water permit, K-Water remains BOUND by its undertakings and warranties under APA and O&M Agreement;

5) NPC shall be a CO-PARTY with K-Water in the Water Protocol Agreement with MWSS and NIA, and not merely as a conforming authority or agency; and

6) The *Status Quo* Order issued by this Court on May 24, 2010 is hereby LIFTED and SET ASIDE.

No pronouncement as to costs.

SO ORDERED. (*Initiatives for Dialogue and Empowerment Through Alternative Legal Services, Inc. (IDEALS, INC.), et al. v. Power Sector Assets and Liabilities Management Corporation (PSALM), et al.,* G.R. No. 192088, Oct. 9, 2012)

V. Conclusion

From the foregoing Supreme Court decisions, it can be gleaned that the Court has taken pains to be faithful to the intent of the framers of the Constitution in enshrining in our fundamental law some key Economic Provisions. This is shown by the recourse to the deliberations of the Constitutional Commission set forth in its Journals and Record, from which the Court often quoted at length to support its interpretation.

The Court thereby gave life to the policy direction stated in the very beginning of Article XII:

> "Section 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.
>
> "The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.
>
> "In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership."

Accordingly, the Court has allowed foreigners to come in where the entry was part of fair competition, but has been vigilant in protecting Philippine citizens in areas where they are expressly granted preference or given control by the fundamental law itself.

And, so, the question arises: How does all this square with the philosophy of Chief Justice Artemio V. Panganiban, that the Court should be strict when it comes to protection of fundamental liberties but liberal in matters of policy directions in economic development.

I submit that the Court has pursued the same course, with this critical difference that where the strictures are laid down in the Constitution itself, not merely by statute, the Court will not hesitate to apply it even if it concerns the economy.

Does this contradict the aforestated philosophy?

I believe it does not. The reason is that in these Constitutionally-mandated rules touching on the economy, the rights of Philippine citizens deserve a similar protection as that given to other fundamental rights. For without the wherewithal of survival given by Economic Rights, the Filipino will have scant use for his other fundamental rights.

Thank you.

ADOLFO S. AZCUNA
Chancellor
Philippine Judicial Academy