

REPUBLIC OF THE PHILIPPINES  
SUPREME COURT  
Manila

FIRST DIVISION

DIDIPIO EARTH-SAVERS' MULTI-PURPOSE  
ASSOCIATION, INCORPORATED (DESAMA),  
Et Al.,

*Petitioners,*

**G.R. No. 157882**

- versus -

ELISEA GOZUN, in her capacity as the  
Secretary of the Department of  
Environment and Natural Resources  
(DENR), et al.,

*Respondents.*

For Prohibition, Mandamus with  
prayer for Temporary Restraining  
Order

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**MOTION FOR RECONSIDERATION**  
(Of the Decision Dated March 30, 2006)

Petitioners, through counsels, respectfully aver that -

Petitioners received their copy of the Decision promulgated by this Honorable Court on March 30, 2006 through registered mail on April 7, 2006, which reads -

*“WHEREFORE, the instant petition for prohibition and mandamus is hereby DISMISSED. Section 76 of Republic Act No. 7942 and Section 107 of DAO 96-40; Republic Act No. 7942 and its Implementing Rules and Regulations contained in DAO 96-40 - insofar as they relate to financial and technical assistance agreements referred to in paragraph 4 of section 2 of Article XII of the Constitution are NOT UNCONSTITUTIONAL.”*

Since the fifteenth (15<sup>th</sup>) day or the last day within which the petitioners can move for the reconsideration of said Decision falls on a Saturday, April 22, 2006, this Motion is being filed on April 24, 2006, the next working day following a non-working day.

Availing of their rights under section 1, Rule 52 of the Rules of Court, petitioners move for the reconsideration of the Decision promulgated on March 30, 2006 based on the following:

## GROUNDS

### I

An *en banc* decision is mandatory in cases where the constitutionality of a law is being challenged.

### II

The power of eminent domain is inherent and exclusive to the State and may not be delegated to private entities.

### III

The Mining Act and its implementing rules and regulations allow unjust taking in violation of Section 9, Article III of the Constitution.

### IV

The Mining Act and its implementing rules and regulations violate the due process requirements, under Section 1, Article III of the Constitution, in the valid exercise of the power of eminent domain.

### V

The 'public use' character of mining was not factually established and proved.

## DISCUSSION

### I

**An *en banc* decision is mandatory in cases where the constitutionality of a law is being challenged.**

Section 4(2), Article VIII of the 1987 Constitution requires that all cases involving the constitutionality of a treaty, international or executive agreement, or law have to be heard and decided by the Supreme Court *en banc*. In the case at bar, the Court *en banc* --

“[R]esolved to return th[e] case to the First Division for promulgation of its unanimous Decision upholding the constitutionality of the Mining Law and the related executive issuances, and dismissing the Petition. There is no need for the

Court *en banc* to tackle the case because the Decision of the First Division did not declare unconstitutional any law or regulation; it merely followed the Court *en banc*'s earlier Decision in La Bugal B'laan vs. Ramos. In any event, the First Division's Decision is AFFIRMED.”

A cursory reading of the Constitutional provision cited above will not reveal any exemption thereto. The Court sitting *en banc* should have discussed and deliberated on the merits of the case and not just affirmed the decision of the First Division. The procedure observed herein does not substantially comply with Section 4(2), Article VIII of the Constitution because it should be the Court *en banc* that ruled on the constitutionality questions. If the Court merely decided to assign the crafting of the decision to the First Division, it would have complied with its constitutional mandate.

## II

**The power of eminent domain is inherent and exclusive to the State and may not be delegated to private entities.**

Eminent domain is a power inherent to the State that enables it to forcibly acquire private property for public use and upon payment of just compensation to the owner.<sup>1</sup> As a case cited in a Commentary<sup>2</sup> puts it -

“The right of eminent domain is usually understood to be the ultimate right of the sovereign power to appropriate, not only the public but the private property of all citizens within the territorial sovereignty, to public purpose.”

The power of eminent domain is an absolute and plenary power lodged with the legislature. It is also traditionally executive but the “power is dormant until the legislature sets it in motion.”<sup>3</sup> The rule that a delegated power may not be delegated further admits of some exceptions. The issue at bar is not an exception.

The power of eminent domain may be delegated by Congress to a few, and hereby exclusive, bodies such as government entities, local government units and

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<sup>1</sup> Section 9, Article III, Constitution (1987). See NAPOCOR vs. Spouses Gutierrez et al, G.R. No. 60077, 18 January 1991; Association of Small Landowners in the Philippines, Inc., et al vs. Hon. Secretary of Agrarian Reform, G.R. No. 78742, 14 July 1989; Manotok et al vs. NHA, G.R. Nos. L55166-67, 21 May 1987.

<sup>2</sup> Bernas, Joaquin, S.J. The 1987 Constitution of the Republic of the Philippines: A Commentary (1996), citing Charles River Bridge vs. Warren Bridge at 347.

<sup>3</sup> Ibid.

private entities operating public utilities.

The law is clear. Only private entities that operate public utilities work as exception to the rule barring further delegation of an already delegated power.

The Court in its Decision, citing Presidential Decree No. 512, ruled that -

“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 is not expressly repealed by Section 76 of Rep. Act No. 7942 and neither are the former statues impliedly repealed by the former. These two provisions can stand together even if Section 76 of Rep. Act No. does not spell out the grant of the privilege to exercise eminent domain which was present in the old law.”<sup>4</sup>

The Court also upheld the Financial and Technical Assistance Agreement of Climax-Arimco Mining Corporation, which allows it to negotiate for the acquisition of lands in violation of the exclusive sovereign right to exercise the power of eminent domain.

As an absolute power, it may not be restricted except by the requirements of the ‘public use’ character of the taking and the determination of payment of just compensation. Any provision in the subject statute that imposes additional restrictions<sup>5</sup> on the power of eminent domain is invalid.

Under section 9, Article III of the Constitution, there are three

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<sup>4</sup> *Decision* at 21-22.

<sup>5</sup>An example of such additional restriction which is invalid is **section 94(d)** of Republic Act 7942 which states that –

“Section 94. Investment Guarantees – The contractor shall be entitled to the basic rights and guarantees provided in the Constitution and such other rights recognized by the government as enumerated hereunder:

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(d) Freedom from expropriation – The right to be free from expropriation by the Government of the property represented by investments or loans, or of the property of the enterprise except for public use or in the interest of national welfare or defense and upon payment of just compensation. In such cases, foreign investors or enterprises shall have the right to remit sums received as compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate prevailing at the time remittance.”

requirements for a valid exercise of the power of eminent domain. There should be (1) taking for (2) public use and (3) upon payment of just compensation. The Court, in the case at bar, has declared Section 76 of Republic Act 7942 as a taking provision. Two other requirements then remain unsettled.

In the issue of whether or not section 76 of Republic Act 7942 (hence, *Mining Act*) and section 107 of Department Order 96-40 (hence, *DAO 96-40*) constitute taking, the Court highlighted Presidential Decree No. 512 and declared that -

“Hampered by the difficulties and delays in securing surface rights for the entry into private lands for purposes of mining operations, Presidential Decree No. 512 dated 19 July 1974 was passed into law in order to achieve full and accelerated mineral resources development. Thus, Presidential Decree No. 512 provides for a new system of surface rights acquisition by mining prospectors and claimants. Whereas in Commonwealth Act No. 137 and Presidential Decree No. 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; this time, the power of eminent domain may now be **invoked** by mining operators for the entry, acquisition and use of private lands...”<sup>6</sup>

According to the Court,

“Considering that Section 1 of Presidential Decree No. 512 granted the qualified mining operators the authority to exercise eminent domain and since this grant of authority is deemed incorporated in Section 76 of Rep. Act No. 7942, **the inescapable conclusion is that the latter provision is a taking provision.**”<sup>7</sup>  
(Emphasis supplied)

However, in the case at bar, the Court, after declaring that section 76 of the Mining Act is a taking provision, backtracked and said that -

“Eminent domain is not yet called for at this stage since there are still various avenues by which surface rights can be acquired other than expropriation. The FTAA provision under attack merely facilitates the implementation of the FTAA given to CAMC and shields it from violating the Anti-Dummy law.”<sup>8</sup>

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<sup>6</sup> *Decision* at 21.

<sup>7</sup> *Ibid* at 22-23.

<sup>8</sup> *Ibid* at 25.

The concept of “taking” assumes that the surface owners and/or possessors refuse to sell hence necessitating the exercise of the Government of its sovereign power of eminent domain. By saying that section 76 of Republic Act No. 7942 is a taking provision, the Court has ruled on the impossibility or the inability to still enter into voluntary agreements or sale between the surface owners and the mining contractor.

The Court already clarified this point in *Association of Small Landowners vs. Secretary of Agrarian Reform*<sup>9</sup>. Thus,

“Eminent domain is an inherent power of the State that enables it to forcibly acquire private lands intended for public use upon payment of just compensation to the owner. Obviously, there is no need to expropriate where the owner is willing to sell under terms also acceptable to the purchaser, in which case, an ordinary deed of sale may be agreed upon by the parties. *It is only where the owner is unwilling to sell, or cannot accept the price or other conditions offered by the vendee, that the power of eminent domain will come into play to assert the paramount authority of the State over the interests of the property owner.*” (Emphasis supplied)

The Court in its Decision misapplied the doctrine it enunciated in the *La Bugal*<sup>10</sup> case. In that case, there was no finding of taking and therefore the said ruling is of no moment and is therefore irrelevant.

### III

#### **The Mining Act and its implementing rules and regulations allow unjust taking in violation of Section 9, Article III of the Constitution.**

Eminent domain is the power of the State while expropriation is merely the procedure by which the State is to exercise this power. The Court confuses the two by saying that there is yet no need to exercise the power of eminent domain simply because there are other avenues through which surface rights may be obtained.

The power of eminent domain is already at play when the State takes

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<sup>9</sup> Association of Small Landowners of the Philippines vs. Secretary of Agrarian Reform, G.R. No. 78742, 14 July 1989.

<sup>10</sup> La Bugal B'laan Tribal Association, Inc. vs. Ramos, G.R. No. 127882, 1 December 2004.

property.<sup>11</sup> In this case, the Court admits that the State takes property by virtue of Section 76 of the Mining Act. Therefore, upon the effectivity of the Mining Act and the execution of the Financial and Technical Assistance Agreements, the State is already exercising its power of eminent domain.

Accordingly, the pre-conditions to the exercise of this power must have already been complied with, even by mere provision of the determination that the taking is for public use and by providing a basis for the determination of just compensation. As will be explained later, neither of these two pre-conditions has been met.

Section 9, Article III of the Constitution is unequivocal. Taking of private property must be for public use and upon just compensation.

“Obviously, however, the power is not without limits: first, the taking must be for public use, and second, that just compensation must be given to the private owner of the property. These twin proscriptions have their origin in the recognition of the necessity of achieving balance between the State interests on the one hand and private rights upon the other hand, by effectively restraining the former and affording protection to the latter.”<sup>12</sup>

This arbitrary and encompassing exercise of the power of eminent domain under Section 76 of the Mining Act is precisely the abuse from which the Constitution protects private rights. Further, it must be pointed out that the Mining Act subscribes to these proscriptions but only as regards the expropriation of property “represented by investments or loans, or of the property of the [mining] enterprise”.<sup>13</sup> In so doing, the Mining Act extends the constitutional protection exclusively to mining concessionaires thereby violating the constitutional demands of equal protection of the law.

Any taking that does not comply with these constitutional restrictions is unlawful. And, any law allowing for this unlawful exercise must be struck down for its patent unconstitutionality.

#### IV

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<sup>11</sup> Republic vs. Vda. De Castellvi, G.R. No. 146587, 2 July 2002.

<sup>12</sup> Ibid.

<sup>13</sup> *Supra* note 5.

**Section 76 of Republic Act 7942 and section 107 of Department Order 96-40 violate the due process requirements, under Section 1, Article III of the Constitution, in the valid exercise of the power of eminent domain.**

Section 1, Article III of the 1987 Constitution mandates that “no person shall be deprived of life, liberty or property without due process of the law, nor shall any person be denied the equal protection of laws”. This paramount right serves as check on the acts of the State to ensure that the rights of individuals are protected and respected. Thus, in the case of *Manotok*--

“The due process clause cannot be rendered nugatory every time a specific decree or law orders the expropriation of somebody’s property and provides its own particular manner of taking the same. Neither should the courts adopt a hands-off policy just because the public use has been ordained as existing by the decree or the just compensation has been fixed and determined beforehand by a statute.”<sup>14</sup>

Therefore, the validity of the exercise of eminent domain even if it emanated directly from Congress through a statute should still be subjected to judicial scrutiny. The Court had occasion to clarify this in a recent case and said that the exercise of the power of eminent domain may appear to be ‘harsh and encompassing’ but judicial review limits the exercise thereof by looking at (1) adequacy of the compensation, (2) the necessity of the taking, and (3) the public-use character of the purpose of the taking.<sup>15</sup>

*The Mining Act and its implementing rules and regulations do not provide for the determination and payment of just compensation which violates section 9, Article III of the Constitution.*

Just compensation is defined as the full and fair equivalent of the property taken from its owner by the expropriator.<sup>16</sup> It has been described as the just and complete equivalent of the loss which the owner of the thing expropriated has to suffer by reason of the expropriation.<sup>17</sup> What makes the compensation just is when

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<sup>14</sup> *Supra* note 6.

<sup>15</sup> *Robern Development Corporation vs. Quitain et al*, G.R. No. 135042, 23 September 1999.

<sup>16</sup> *Supra* note 5.

<sup>17</sup> *Supra* note 2, at 352.

the owner of the property expropriated receives a sum equivalent to what is fair market value.<sup>18</sup>

The Court in its Decision ruled that -

“While the Court declares that the assailed provision is a taking provision, this does not mean that it is unconstitutional on the ground that it allows taking of property without the determination of public use and the payment of just compensation.<sup>19</sup>

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There is also no basis for the claim that the Mining Law and its implementing rules and regulations do not 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.<sup>20</sup>” (Emphasis supplied)

Contrary to the Court’s pronouncement, the Mining Act and its implementing rules and regulations, particularly the subject provisions, do not provide for the determination of payment of just compensation. A re-examination of the cited provisions becomes essential. The pertinent provisions are cited anew. Thus --

Section 76. Entry into Private Lands and Concession Areas -

“Subject to prior notification, holders of mining rights shall not be prevented from entry into private lands and concession areas by surface owners, occupants or concession areas 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 in the implementing rules and regulations ...” (Emphasis supplied in bold)

The pertinent provisions in the implementing rules and regulations, Department Order 96-40, are -

Section 105. Entry into Lands

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<sup>18</sup> Ibid.

<sup>19</sup> *Decision* at 23

<sup>20</sup> *Decision* at 26.

“The holder(s) of mining right(s) shall not be prevented from entry into its/their contract/mining area(s) for the purpose(s) of exploration, development and/or utilization...”

#### Section 107. Compensation to the Surface Owner and Occupant

“Any **damage** done to the property of the surface owner, 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 section 104 above shall be properly and justly compensated...”

The Court in deciding this case relied on Sections 105, 106 and 107 of Department Order 96-40 to allegedly show that the questioned legislation actually provide for the payment of just compensation. The above-cited provisions, and on which the Court based its interpretation, refer to **PAYMENT OF COMPENSATION FOR DAMAGES INCURRED** in either actual mining operation or installation of machineries, et al. This is not the just compensation being referred to in relation to the exercise of the power of eminent domain.

What is required under the Constitution is **JUST COMPENSATION FOR THE TAKING** itself and not just for the subsequent payment of damage after entry. In the case of *Familara vs. J.M. Tuason & Co.*,<sup>21</sup> it was held that the application of a provision of law which “places restraint upon the exercise and enjoyment by the owner of certain rights over its property, is justifiable only if the government takes possession of the land and is in a position to make a coetaneous payment of just compensation to its owner.” Thus --

“To hold a mere declaration of an intention to expropriate, without instituting the corresponding proceeding therefore before the courts, with assurance of just compensation, would already preclude the exercise by the owner of his rights of ownership over the land, or bar the enforcement of any final ejectment order that the owner may have obtained over an intruder of the land, is to sanction an act which is indeed confiscatory and therefore offensive to the Constitution. For it must be realized that in a condemnation case, it is from the condemnor’s taking possession of the property that the owner is deprived of the benefits of ownership, such as possession, management and disposition thereof.”

It cannot be over-emphasized that taking without determining the payment

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<sup>21</sup> *Familara vs. J.M. Tuason & Co* 49 SCRA 338 (1973).

of just compensation is unconstitutional. The Constitution demands that for the exercise of eminent domain to be valid, the three elements should be present - *there is a taking but only for public use and upon payment of just compensation*. This Court has already ruled that the questioned provision, section 76 of the Mining Act, is a taking provision. Under the Mining Act and its implementing rules and regulations, there was absolutely no mention of or provision for the payment of just compensation arising from the taking. The Court cannot do anything else but to declare the questioned provisions as unconstitutional.

The Court read sections 105, 106 and 107 of Department Order 96-40 to mean that not only do they provide for the determination of payment of just compensation but also provide for the jurisdiction of the administrative agencies to determine the adequateness and amount of just compensation. The Court in deciding in such a manner is dangerously treading into law-making in reading what is not written in the law.

The Court interpreted the sections to refer to the venue in which the surface owner, occupant or concessionaire can challenge the adequateness of the just compensation. The main problem is that payment of just compensation is not provided for in the Mining Act and its implementing rules and regulations which are, believe it or not, in violation of section 9, Article III of the Constitution. How can the surface owners, occupants or concessionaires even bring up the matter of just compensation when the provision is only for compensation for damages?

**The Mining Act and its implementing rules and regulations allow taking without payment of just compensation, which is patently illegal under the 1987 Constitution.**

*Determination of payment of just compensation should be judicial in both form and function.*

The process for determination of just compensation follows an unconstitutional process mandated under Presidential Decree No. 512 and Mining Act and its Implementing Rules and Regulations. The Court in its Decision said that-

“There is nothing in the provisions of the assailed law and its implementing rules and regulations that exclude the courts from their jurisdiction to determine just compensation in expropriation proceedings involving mining operations. Although Section 105 confers upon the Panel of Arbitrators the authority to decide cases where surface owners, occupants [and] 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... 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.”

Accordingly, there is nothing in these provisions that provide for judicial determination of just compensation.

The Court cannot base its Decision on the cited provisions as contained in DAO 96-40 because, as it was explained earlier, they refer to compensation for damages incurred and not to payment of just compensation as a result of expropriation or taking. If we take these provisions out of the equation, nothing will remain for the Court to base its Decision on. These sections are but blanket provisions relating to all conflicts arising from surface ownership or possession. There is no specific provision solely for just compensation.

Assuming *arguendo* that the phrase “in the case of disagreement or in the absence of an agreement” can be stretched to include payment of just compensation, it is still violative of the due process requirement under the Constitution.

The question on the judicial determination of just compensation has been settled in the case of *Export Processing Zone Authority vs. Dulay*, in that the Supreme Court held:

**“The determination of ‘just compensation’ in eminent domain cases is a judicial function.** The executive department or legislature may make the initial determinations but when a party claims a violation of the guarantee in the Bill of Rights that private property may not be taken for public use without just compensation, no statute, decree, or executive order can mandate that its own determination shall prevail over the court’s findings. Much less can the courts be precluded from looking into

the ‘just-ness’ of the decreed compensation”<sup>22</sup> (Emphasis ours)

In that case, the Honorable Court declared unconstitutional a law that eliminated the court’s discretion to determine just compensation. Similarly, Republic Act No. 7942 and its implementing Rules also oust the Court of its jurisdiction to determine the payment of just compensation by transferring that power to the Panel of Arbitrators.

The Court wants to persuade us that the determination at the level of the Panel of Arbitrators is only an initial determination which does not work to oust the courts of their jurisdiction.<sup>23</sup> Accordingly, the decision of the Panel of Arbitrators may be appealed to the Mines Adjudicatory Board.<sup>24</sup> Then, the decision of the Mines Adjudicatory Board may still be appealed by petition for review on certiorari to the Supreme Court<sup>25</sup>. The problem with this procedure is that by the time the issue comes to the court, only questions of law may be raised.<sup>26</sup> That leaves the parties with no available venue where they can question the adequateness of the compensation and the necessity of the taking.

The ruling in the case *Philippine Veterans Bank vs. Court of Appeals*<sup>27</sup> is not applicable in the case at bar since the Department of Agrarian Reform was expressly vested with the jurisdiction to adjudicate agrarian reform matters which include the determination of questions of just compensation. There was no such provision under the Mining Act and its implementing rules and regulations. The jurisdiction of the Panel of Arbitrators and the Mines Adjudicatory Board insofar as compensation is concerned is limited only to the determination of compensation for damages arising out of the mining operation or the installation of mining implements and not as regards just compensation in the exercise of eminent domain powers.

Further, the mining disputes arising from the exercise of power of eminent domain are actually disputes between the Government, as the one exercising the power of eminent domain, and the surface owners, occupants and concessionaires.

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<sup>22</sup> Export Processing Zone Authority vs. Dulay (316 SCRA 305).

<sup>23</sup> Section 77(c), RA 7942. Section 107, DENR Admin. Order No. 96-40.

<sup>24</sup> Section 78, Rep. Act No. 7942 (1995).

<sup>25</sup> Last paragraph, section 79, Rep. Act No. 7942 (1995).

<sup>26</sup> Section 1, Rule 45, Rules of Court.

<sup>27</sup> *Philippine Veterans Bank vs. Court of Appeals*, G.R. No. 132767, 18 January 2000.

Therefore, the jurisdiction to decide such issues is lodged originally and exclusively with the courts.

Finally, the Court in its Decision attempts to limit the courts' determination of just compensation by coining the term "involuntary taking". There is no such concept. "Taking", in both legal and colloquial parlance, is by its very nature forcible and in any given case -- involuntary. Taking has to be involuntary; otherwise, the transfer of property and ownership is in the form of sale.

*Reliance on Presidential Decree 512 to determine the amount of just compensation is fatal.*

Section 107 of DAO 96-40 states that "compensation shall be based on the agreement entered into between the holder of mining rights and the surface owner, occupant or concessionaire thereof or where appropriate in accordance with P.D. No. 512." The latter, in turn, states that -

"Provided, further, That to guarantee such compensation to the surface owners, the prospector or claimowner shall post a bond with the Bureau of Mines in an amount to be fixed by the Director of Mines based on the type of property and the prevailing price of lands in the area where prospecting and other mining activities are to be conducted and with surety or sureties satisfactory to the Director of Mines. The decision of the Director of Mines may be appealed within five (5) days from receipt thereof to the Secretary of Natural Resources, whose decision shall be final."

Again, it is obvious from these two provisions that the compensation being referred to is for damages in the course of undertaking the mining activity. That is not what the compensation referred to by the constitutional requirements in the exercise of eminent domain.

However, assuming *arguendo* that section 76 of the Mining Act can still be stretched to include payment of compensation in the exercise of eminent domain, the emphasis given by the Court in its Decision on PD 512 is likewise misplaced since it restricts the judicial determination of the amount of just compensation to an amount indicated in the law that does not use as base, fair market value of the property at the time of taking, which is the prevailing rule.<sup>28</sup> Instead, it followed

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<sup>28</sup> See e.g, Republic vs. Vda. De Castellvi, 58 SCRA 339, 15 August 1974.

the rule in a long line of Presidential Decrees on summary and automatic expropriation issued by President Marcos in his exercise of legislative powers, which Decrees have already been declared unconstitutional by the Supreme Court.<sup>29</sup>

## V

### **The ‘public use’ character of mining was not factually established and proved.**

The Court in its Decision ruled that -

“Mining 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 (citing Executive Order No. 211). The importance of the mining industry for national development is expressed in Presidential Decree No. 463:

WHEREAS, mineral production is a major support of the national economy, and therefore the intensified discovery, exploration, development and wise utilization of the country’s mineral resources are urgently needed for national development.

**Irrefragably, mining is an industry which is of public benefit.**

That public use is negated by the fact that the state would be taking private properties for the benefit of private mining firms or mining contractors is not at all true.” (Emphasis supplied)

*The public-use character of mining is neither expressly provided nor factually proved.*

Public use is defined broadly, in that as long as the purpose of the taking is public then the power of eminent domain comes into play.<sup>30</sup>

The Court looked at Executive Order 211 and Presidential Decree 463 to glean what is the public-use character of mining. This is not proper considering that the reference as to what is the public-use character of mining should be made on what the Mining Act and its implementing rules and regulations express it to be.

*Public use equals public benefit?*

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<sup>29</sup> Manotok, supra.

<sup>30</sup> Heirs of Juancho Ardon v. Reyes, G.R. Nos. L-60549, L-60553 to 60555, 26 October 1983.

The Court asserts that, “*mining is an industry which is of public benefit*”. It is not made clear as to how it can benefit the public and as to how it can serve a public use.

Mining is not a necessary undertaking and its character is not for public use. It is the individual, the domestic and/or foreign corporation that undertake mining in this country, for profit. It has no apparent or express public use. It does not refer to any activity necessary or incidental to the State’s functions.

Just a cursory review of the provisions of the Mining Law and the questioned FTAA will show that the State’s obligation is really to ensure that mining contractors do not come out of the mining venture poorer than when they came in as guaranteed by the incentives from the Board of Investments to acquire corporate tax and other tax and duty holidays and the assurance of prompt repatriation of the pre-operating expenses and property expenses of the mining contractor.

The lack of full control by the State in the operation and management of a mining enterprise may make whatever sharing arrangements entered into as ineffective as shown in fact by the section on fiscal regime in the Mining Act and the CAMC FTAA, more so, in the measly amount that constitutes the government’s share.

This falls under the concept of *diseconomy* wherein the State is put into an economic disadvantage as a consequence of its lack of control over its non-renewable resources like mineral resources. Its real presence, therefore, negates the ‘public benefit’ reasoning that the Court adapted in this case.

No viable empirically proven causation between restricted investments in extractive natural resource industries, such as mining, and slower growth was presented, besides simply asserting it to be a truism that restricting investments in extractive natural resources slows growth.

The natural resources curse, on the other hand, is a phenomenon that is demonstrable empirical fact. With few exceptions, countries that rely the most on

their natural resources sector are the ones that exhibit the slowest growth. Empirical and analytic studies<sup>31</sup> prove that contrary to the common belief that economic prosperity is a given for resource-rich countries, the truth is that they tended to be high-priced economies and, consequently, tended to miss out on export-led growth. Natural resource abundance can crowd out drivers of growth, such as traded-manufacturing activities, education and even growth-promoting entrepreneurial activities. Reliance on the public benefit, or economic growth, through mining has no empirical leg to stand on and therefore should not be the basis of any form of judicial assumption or notice.

Given that the public-use character of mining is not expressly provided and that public benefit is not factually and sufficiently established, in the absence, therefore, of the declaration of public use in the challenged statute, the criteria of real contributions to economic growth and the general welfare of the country should now be used as basis for examination.

Section 2 of Article XII of the Constitution mandates that any agreement entered into by the State should be based on real contributions to economic growth and the general welfare of the country.

However, given the terms and conditions the government entered into with CAMC through the FTAA, before any real contributions to economic growth can be realized, however, it is stated that CAMC has to first fully recover its pre-operating expenses and property expenses incurred during the pre-operating expenses. Only after this has happened can the government have the right to share in the net revenue<sup>32</sup>, which, based on the interpretation given by the Court in *La Bugal*, only refer to taxes, fees and duties; these constitute what is known as the 'government share'.

The government, on behalf of the State, must stand to receive a larger share as the owner in trust of the mineral resources. It has a larger stake in the exploration, development and utilization of minerals. Because the Constitution requires that the terms and conditions must be provided in a general law on real economic growth and general welfare, the law therefore must be clear as to its

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<sup>31</sup> See SACHS, J.D and WARNER, A.M., *The Curse of Natural Resources*, *European Economic Review* 45, 827 (2001).

<sup>32</sup> 11.2, CAMC FTAA.

bases for computation.

Under the second paragraph of Section 81 of the Mining Act, the government stands to receive taxes, duties, fees and the like from the foreign contractor, and no other. The law does not provide for a basis of determining the equitable share of the government in the light of the risks attendant to mining activities. This is very clear from the provision itself.

Further, the taxes, duties, fees and the like that the government stands to earn from the mining proceeds or profits are not the earnings contemplated by law to be earned by the government. These are not returns on investment. These are imposed on the basis of the taxing power of the State. They are enforced proportional contributions from persons and property, levied by the State by virtue of its sovereignty, for the support of government and for all public needs. They are not the gains or benefits contemplated by law for government to receive in the course of the mining ventures. The State therefore cannot waive its real and realizable income from the mining operations as owner in trust of the mineral resources in exchange of taxes, duties, fees and the like.

While Congress should be given some leeway for determining how it computes for a justifiable and equitable share, it must, in the general law already provide for the basis for its computation. Worse, it cannot delegate the power to determine the guides for computation to the executive. Otherwise, this would result in undue delegation of legislative prerogatives.

Lastly, Republic Act No. 8974 (2000) now governs the expropriation of private properties for national government projects; the latter is defined to include national government infrastructure, engineering works and service contracts. It means that if this law is applied vis-à-vis the taking, as is the situation in the case at bar, the State **must**, upon filing of the complaint and after due notice to the defendant, immediately pay the owner of the property in the amount equivalent to the sum of (1) 100% of the value of the property based on the current relevant zonal valuation of the Bureau of Internal Revenue and (2) the value of the improvements and/or structures on the land to be expropriated.<sup>33</sup>

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<sup>33</sup> Sections 4(a) and 7, Rep. Act No. 8974 (2000).

The current fiscal crisis is already of judicial notice that's why according to the ruling in *La Bugal*, a restrictive interpretation of the financial and technical assistance agreement will not lie. According to the Constitution, the basis should be "real contributions" but there can be no real contribution to economic growth because (1) the compensation of the lands under the FTAA must be immediately paid, per Republic Act 8794, which now applies to national government infrastructure projects, including service contracts and (2) full recovery must first be had by the mining company before the government gets its share under section 81 of Republic Act 7942.

The Court ruling in *Manotok* should give us pause, in that -

"The principle of non-appropriation of private property for private purposes however remains. The legislature, according to the *Guido* case, may not take the property of one citizen and transfer it to another, even for a full compensation, when the public interest is not thereby promoted. The Government still has to prove that expropriation of commercial properties in order to lease them out also for commercial purposes would be "public use" under the Constitution."<sup>34</sup>

If the public use character of the expropriation is not established, and when the Executive, through its agencies, exercises the power of eminent domain in behalf of mining contractors and other private entities, it operationally takes away the property of A and gives it to B.

Upon examination, it is apparent that the Mining Act and its implementing rules and regulations were not able to pass the test and meet the requirements of constitutionality imposed and mandated by Section 9, Article III of the 1987 Constitution.

## PRAYER

WHEREFORE, in view of the foregoing, it is most respectfully prayed that:

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<sup>34</sup> *Supra* note 6.

(a) This Motion for Reconsideration be set for oral argumentation for the purpose of clarifying new issues raised in the Decision promulgated on March 30, 2006;

(b) After notice and hearing --

1. The Decision promulgated on March 30, 2006 be set aside and vacated;
2. Republic Act 7942 and its implementing rules and regulations be declared unconstitutional;
3. The CAMC FTAA be declared unconstitutional, illegal and void;

Such other reliefs that are just and equitable under the premises are likewise prayed for.

Quezon City for Manila, 24 April 2006.

Respectfully submitted.

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