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# ARTICLES

## All That Glitters: Foreign Investment in Mining Trumps the Environment in the Philippines

ALAN KHEE-JIN TAN\*

### I. INTRODUCTION

In recent months, the mining industry in the Philippines has once again ignited controversy over its social, economic, and environmental impacts. The Supreme Court of the Philippines, after issuing a decision in early 2004<sup>1</sup> that restricted the involvement of foreign capital in mining operations, spectacularly reversed itself in a subsequent review of the same case.<sup>2</sup> In the process, the Court fell in with the government's pro-mining stance, a position deemed critical to attracting foreign investment and saving the country's faltering economy. As analyzed here, the case speaks volumes not only of the inherent tensions between the environment and development in the Philippines, but also of the Court's deference to the executive in times of perceived economic peril.

In addition, the case bodes ill for the environment and for affected local communities when the business of extracting natural resources is pitted against the need to attract foreign investment. Here, it appears that foreign investment (or more precisely, the spectre of losing it) has become a powerful tool to legitimize reve-

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1. *La Bugal-B'laan Tribal Ass'n v. Ramos*, G.R. No. 127882, 421 S.C.R.A. 148. (Jan. 27, 2004). (Phil.) [hereinafter *La Bugal* (Jan. 27, 2004)], available at <http://www.supremecourt.gov.ph/jurisprudence/2004/jan2004/127882.htm>.

2. *La Bugal-B'laan Tribal Ass'n v. Ramos*, G.R. No. 127882, 421 S.C.R.A. 148. (Dec. 1, 2004). (Phil.) [hereinafter *La Bugal* (Dec. 1, 2004)], available at <http://www.supremecourt.gov.ph/jurisprudence/2004/dec2004/127882.htm>.

nue-generating activities with destructive impact. The troubling thing is that this is happening most in those very countries, like the Philippines, that can least afford the social and environmental costs arising from such activities. That the financial benefits of natural resource exploitation are seen to accrue mostly to foreign commercial interests can only exacerbate the local communities' sense of alienation and injustice.

## II. BACKGROUND TO THE *LA BUGAL* LITIGATION

In 1997, an organization of indigenous people lodged a petition before the Supreme Court of the Philippines, challenging the constitutionality of Republic Act No. 7942, the 1995 Mining Act of the Philippines.<sup>3</sup> The case—*La Bugal-B'laan Tribal Association v. Victor O. Ramos, Secretary, Department of Environment and Natural Resources (La Bugal)*<sup>4</sup>—also challenged the validity of the Implementing Rules and Regulations (IRRs)<sup>5</sup> enacted pursuant to the Mining Act, as well as a Financial and Technical Assistance Agreement (FTAA) entered into between the Philippine Government and a mining company.<sup>6</sup>

At the crux of the dispute were various provisions in the Mining Act and IRRs, which allegedly placed the mining industry in the hands of foreign interests.<sup>7</sup> A constitutional issue thus arose as to whether the Mining Act was inconsistent with provisions in the 1987 Constitution, which expressly limited the involvement of

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3. An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation, Rep. Act 7942 (1995) (Phil.) [hereinafter Mining Act of 1995], *construed in La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying n.5.

4. *La Bugal* (Jan. 27, 2004), *supra* note 1.

5. Dep't of Env'tl & Nat. Resources Admin. Order No. 96-40 (Dec. 19, 1996), available at <http://www.mgb.gov.ph/policies/Revised%20IRR/DAO%2096-40.htm>, *construed in La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying n.5 (issued after the 1996 Marcopper accident, *see infra* note 60, to strengthen the mining industry's environmental and social obligations).

6. Mining Act of 1995, *supra* note 3, ch. VI (Financial or Technical Assistance Agreement). (The Mining Act of 1995 defines an FTAA as "a contract involving financial or technical assistance for large-scale exploration, development, and utilization of natural resources." *Id.* § 3(r)). The FTAA in question was entered into between the President and the Western Mining Corporation Philippines, Inc. (WMCP) on March 30, 1995.

7. *See, e.g.*, the following sections of the Mining Act of 1995, *supra* note 3: § 23 (rights and obligations of exploration permittee), § 33 (eligibility of contractor in an FTAA), § 35 (terms and conditions for FTAAAs), § 39 (conversion of FTAA into a mineral production-sharing agreement) and § 56 (issuance of mineral processing permit to FTAA contractor), *construed in La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying nn.39-40.

foreign corporations in natural resource operations.<sup>8</sup> Consequently, the *La Bugal* case cannot be simply understood as a mining or environmental dispute *per se*; it was, at its core, a fundamental challenge alleging that one of the nation's key laws on natural resource exploitation violated the Constitution's provisions on national patrimony. However, as analyzed below, the fact that the case took on a constitutional dimension meant that the Court finally disposed of it on narrow constitutional grounds, without adequately addressing the underlying ecological and social repercussions.

The starting point for analysis is the 1987 Philippine Constitution. Article XII, Section 2 of the Constitution vests ownership and control of natural resources in the state.<sup>9</sup> As a general rule, it provides that the state may directly undertake exploration, development, and utilization of natural resources; or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens or corporations or associations that are at least 60-percent owned by Filipinos.<sup>10</sup> Hence, there is a 40-percent limit to the involvement of foreign capital. However, Paragraph 4 of Article XII, Section 2 goes on to provide that the President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for the large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils.<sup>11</sup> This provision formed the

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8. CONST. (1987), Art. XII, § 2, (Phil.), construed in *La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying nn.39-40.

9. CONST. (1987), Art. XII, § 2, ¶ 1, (Phil.).

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 . . . . The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.

*Id.*

10. *Id.* "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." *Id.*

11. *Id.* ¶ 4.

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.

*Id.*

constitutional and legal basis for the FTAA commonly entered into between the government and foreign mining companies pursuant to the 1995 Mining Act.<sup>12</sup>

The *La Bugal* litigation turned on whether such FTAA effectively handed control over mining and minerals to 100-percent foreign-owned companies, thereby violating the Constitution's restriction on foreign capital.<sup>13</sup> At issue was a particular FTAA signed in March 1995 between the administration of then-President Fidel Ramos and a company called Western Mining Corporation Philippines, Inc. (WMCP).<sup>14</sup> WMCP was a wholly owned subsidiary of the Western Mining Corporation Holdings Limited of Australia.<sup>15</sup> The WMCP FTAA covered an area of 99,387 hectares of land in South Cotabato, Sultan Kudarat, Davao del Sur, and North Cotabato, all regions in the resource-rich southern island of Mindanao.<sup>16</sup> The La Bugal-B'laan Tribal Association, a local indigenous people's group whose ancestral lands were affected by the mining operations, commenced a legal challenge to the FTAA in February 1997.<sup>17</sup>

In its desire to attract the mining dollar, the Philippine government had introduced a series of pro-mining legislation and pol-

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12. See, e.g., Mining Act of 1995, *supra* note 3, ch. VI. See also *id.* § 3(r).

13. *La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying n.222.

14. The WMCP FTAA had been signed on March 30, 1995 pursuant to Executive Order 279 (1987), Authorizing the Secretary of Environment and Natural Resources to Negotiate and Conclude Joint Venture Co-Production, or Production-Sharing Agreements for the Exploration, Development and Utilization of Mineral Resources and Prescribing the Guidelines for Such Agreements and Those Agreements Involving Technical or Financial Assistance by Foreign-Owned Corporations for Large-Scale Exploration, Development, and Utilization of Minerals, Exec. Ord. No. 279 (1987) (Phil.) [hereinafter Exec. Order No. 279], available at [http://www.denr.gov.ph/policy/1987/EO\\_1987\\_279.pdf](http://www.denr.gov.ph/policy/1987/EO_1987_279.pdf). The Mining Act of 1995 took effect thereafter.

15. By the time the Supreme Court rendered its first decision in January 2004 (*La Bugal* (Jan. 27, 2004), *supra* note 1), WMCP had become known as Tampakan Mineral Resource Corporation (TMRC). In fact, WMCP had been sold as early as January 2001 to Sagittarius Mines, Inc., a company 60-percent owned by Filipino interests and 40-percent owned by Indophil Resources NL of Australia. The original WMCP FTAA had been duly transferred to Sagittarius, and WMC Resources no longer had an investment in the Philippines; because there was no longer a question of foreign control that violated the Constitution, this raised the issue of mootness during the Court's deliberations. Justice Panganiban, speaking for the majority in the second ruling of December 2004 (*La Bugal* (Dec. 1, 2004), *supra* note 2), felt that FTAA could be entered into with Filipino companies like Sagittarius, and not just with foreign companies. At the same time, the WMCP FTAA could be validly transferred to Sagittarius. Notwithstanding mootness, Justice Panganiban went on to answer the substantive issues raised. See discussion *infra* accompanying notes 83-91.

16. See *La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying n.34.

17. See *La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying nn.30-38.

icies in the 1990s laying out economic sweeteners for the mining industry.<sup>18</sup> President Gloria Macapagal-Arroyo, then a senator, sponsored the passage of the bill that was to become the Mining Act.<sup>19</sup> Enacted in March 1995, the Mining Act commenced a pro-foreign investment climate for the mining industry in the form of liberal economic incentives and political rights for foreign transnational corporations.<sup>20</sup> These included 100-percent ownership and control of more than 81,000 hectares of land for up to fifty years and generous tax holidays and profit repatriation terms.<sup>21</sup>

The FTAA arrangement sanctioned by the Mining Act also gave foreign companies auxiliary entitlements such as timber, water, and easement rights.<sup>22</sup> At the same time, the Act prescribed environmental and social responsibilities for foreign investors. Those responsibilities included minimum expenditures for rehabilitation and community development programs, particularly for affected indigenous communities.<sup>23</sup> Overall, the pro-development nature of the Mining Act was clear, given that its

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18. See David G. Scalise & Patricia J. de Guzman, *Foreign Investment in the Philippines*, 29 GEO. WASH. J. INT'L L. & ECON. 145 (1995); Van V. Mejia, *The Modern Foreign Investment Laws of the Philippines*, 17 TEMP. INT'L & COMP. L.J. 467 (2003). For a history of mining in the Philippines and the recent decline of the industry, see SALVADOR LOPEZ, *ISLES OF GOLD: A HISTORY OF PHILIPPINE MINING* (Oxford Univ. Press 1992) (1990).

19. The predecessor of the Mining Act was the Marcos-era Presidential Decree No. 463, Providing for a Modernized System of Administration and Disposition of Mineral Lands and to Promote and Encourage the Development and Exploitation Thereof, Pres. Dec. No. 463 (1974) (Phil.), available at [http://www.lawphil.net/statutes/presdecs/pd1974/pd\\_463\\_1974.html](http://www.lawphil.net/statutes/presdecs/pd1974/pd_463_1974.html). After the 1987 Constitution was promulgated (following the ouster of President Marcos), an interim law known as Executive Order No. 279 of 1987 governed mining for several years before the 1995 Mining Act was enacted. Exec. Order No. 279, *supra* note 14, was the basis of the first-generation FTAA's. See also An Act Creating a People's Small-Scale Mining Program and for Other Purposes, Rep. Act 7076 (June 27, 1991) (Phil.), available at <http://www.chanrobles.com/repUBLICactno7076.htm> (a separate act governing small-scale mining).

20. M. V. CABALDA ET AL., INT'L INST. FOR ENV'T AND DEV., *SUSTAINABLE DEVELOPMENT IN THE PHILIPPINE MINERALS INDUSTRY: A BASELINE STUDY* (2002), available at [http://www.natural-resources.org/minerals/CD/docs/mmsd/othercountries/184\\_cabalda.pdf](http://www.natural-resources.org/minerals/CD/docs/mmsd/othercountries/184_cabalda.pdf); Karen Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J.L. & SOC. PROBS. 529, 559 (1997).

21. See, e.g., Mining Act of 1995, *supra* note 3, §§ 3(b), 90, 92, 93, 94; Kalikasan-People's Network for the Environment, *Unjust, Unsustainable Mining Industry*, BULATLAT, Vol. V, No. 2, Feb. 13-19, 2005 [hereinafter *Unjust, Unsustainable*], <http://bulatlat.com/news/5-3/5-3-readerpne.html>. (Kalikasan-PNE is an environmental NGO opposed to the mining industry.).

22. See, e.g., Mining Act of 1995, *supra* note 3, ch. XII, §§ 72-76.

23. See Mining Act of 1995, *supra* note 3, chs. X, XI, & § 35(k) (laying out environmental terms and conditions for mining operators).

promulgation was part of the economic reforms instituted in the 1990s to obtain International Monetary Fund (IMF) and World Bank loans.<sup>24</sup> Indeed, the Act formed part of the Ramos Administration's wide-ranging program to embrace trade liberalization and industry deregulation.<sup>25</sup>

The 1987 Constitution was enacted after the ouster of President Ferdinand Marcos in 1986. Designed to impose checks on the executive and to prevent future dictatorships, it provided for features such as a one-term presidency.<sup>26</sup> Along the way, however, the constitutional drafters ended up inserting provisions that amounted to protectionist economic restrictions, including the restriction of foreign ownership in natural resource extraction to a 40-percent share.<sup>27</sup> However, it appeared that the Mining Act's provisions on FTAA's, based as they were on the exception in Paragraph 4 of Article XII, Section 2 of the Constitution, circumvented the general 40-percent restriction on foreign equity.<sup>28</sup> Whether this was indeed correct as a constitutional matter was not tested until the *La Bugal* challenge began. At that point, Australian, American, and Canadian mining corporations had come to dominate the Philippine mining industry pursuant to the FTAA vehicle sanctioned by the Mining Act.<sup>29</sup>

### III. THE SUPREME COURT'S FIRST DECISION— *LA BUGAL I*

Although the *La Bugal* case was filed as early as 1997, it took the Supreme Court seven years to render its decision. This happened in January 2004 when, in a significant (but short-lived) victory for the petitioners, the Court found that the FTAA provisions of the Mining Act, and the WMCP FTAA in particular, were unconstitutional.<sup>30</sup> By a vote of eight to five with one abstention,<sup>31</sup> the Court held that even though both the Act and the WMCP FTAA used the Constitution's language of "agreements . . . involv-

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24. Bobby Tuazon, *High Court Is Courting Disaster*, BULATLAT, Vol. IV, No. 44, Dec. 5-11, 2004, <http://www.bulatlat.com/news/4-44/4-44-disaster.html>.

25. *Id.*

26. CONST. (1987), Art. VII, § 4, (Phil.).

27. CONST. (1987), Art. XII, § 2, (Phil.).

28. *Id.* ¶ 4.

29. Tuazon, *supra* note 24.

30. *La Bugal* (Jan. 27, 2004), *supra* note 1, at text following n.37.

31. *La Bugal* (Jan. 27, 2004), *supra* note 1, (Carpio-Morales, J.) (Davide, Puno, Quisumbing, Carpio, Corona, Callejo, & Tinga, JJ., concurring) (Vitug, Panganiban, Ynares-Santiago, Sandoval-Gutierrez, & Austria-Martinez, JJ., dissenting).

ing either technical or financial assistance,”<sup>32</sup> the FTAA and those agreements proposed by the Mining Act were, in effect, “service contracts” that granted beneficial ownership to foreign contractors over resources that rightly belonged to the Philippines and her citizens.<sup>33</sup> Service contracts, the Court determined, were found in the earlier 1973 Constitution, but had been omitted from the 1987 Constitution for being antithetical to sovereignty over natural resources in that they allowed foreign control over such resources.<sup>34</sup> The Court thus understood such contracts as having been effectively banned by Section 2, Article XII of the 1987 Constitution.<sup>35</sup>

In reading the exception in Paragraph 4 of Article XII, Section 2 literally, the Court concluded that any agreement allowing more than financial and technical assistance or permitting a party to provide any form of managerial assistance would effectively transfer beneficial ownership of natural resources to a foreign-owned corporation and would thus breach the Constitution.<sup>36</sup> In the Court’s opinion, the WMCP FTAA in question exceeded the bounds permitted by the Paragraph 4 exception and would thus constitute a form of “service contract” that was disallowed.<sup>37</sup> In the process, the Court held several provisions of the Mining Act and its IRRs to be invalid, including those allowing foreign companies to hold exploration permits and mineral processing permits.<sup>38</sup>

The issue before the Court went to the heart of the fundamental question regarding the treatment of foreign direct investment in the Philippines: how to reconcile the rigid protectionist restrictions of the 1987 Constitution with the pressing need to attract more foreign investments and capital in 2004.<sup>39</sup> The Court’s interpretation clearly placed the Constitution at odds with the government’s economic priorities.

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32. CONST. (1987), Art. XII, § 2, ¶ 4, (Phil.).

33. *La Bugal* (Jan. 27, 2004), *supra* note 1, at text following n.261.

34. *Id.* at text accompanying n.228. See also *infra* note 39 and accompanying text. See generally Merlin M. Magallona, *Service Contracts in Philippine Natural Resources*, 9 WORLD BULLETIN 1 (1993); Victorio Mario A. Dimagiba, *Service Contract Concepts in Energy*, Vol. LVII PHIL. L.J. 307 (1982).

35. *La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying n.261.

36. *Id.* at text accompanying nn.223-28. See also John Tivey & Ben Macdonald, *Constitutional Validity of FTAA's and Philippine Mining Law*, ENERGY & RESOURCES (Freehills, Sydney, Austl.), Apr. 8, 2004 [hereinafter *Constitutional Validity*], [http://www.freehills.com.au/publications/publications\\_1187.asp](http://www.freehills.com.au/publications/publications_1187.asp).

37. *La Bugal* (Jan. 27, 2004), *supra* note 1, at text accompanying nn.293-99.

38. *Id.* at text accompanying n.280.

39. See Ruben James Croft, *Opinion, Free Foreign Investment from the Past, Advance the National Interest*, THE MANILA TIMES, Dec. 6, 2004, available at <http://www.manilatimes.net/national/2004/dec/06/yehey/opinion/20041206opi6.html>.



Apart from the constitutional backdrop, the *La Bugal* case must be understood within the context of the government's accelerated drive to pump up the economy in general and the ailing mining industry in particular. Despite the passage of the Mining Act and its IRRs, foreign investment in the Philippine mining industry remained lukewarm in the following years. There were several reasons for this, including the general lack of confidence in the Philippine economy;<sup>40</sup> bureaucratic inefficiency in approving permits;<sup>41</sup> volatility in world metal markets;<sup>42</sup> opposition by local communities;<sup>43</sup> and, importantly, the very uncertainty surrounding FTAA's and the prospect of their being challenged before the courts.<sup>44</sup>

The mining issue had also been complicated by the enactment of the Indigenous People's Rights Act (IPRA) of 1997,<sup>45</sup> which contained numerous provisions that were inconsistent with the Mining Act. For one thing, the IPRA gives indigenous communities preferential rights and safeguards over natural resource exploitation in their ancestral domains.<sup>46</sup> Given that many potential mining sites are located within ancestral lands, the IPRA became an immediate obstacle to the mining industry.<sup>47</sup>

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40. See, e.g., *Mess in Manila*, THE ECONOMIST (LONDON), July 16, 2005, at 72 (detailing the impact of political uncertainty on investor confidence).

41. The Mineral Action Plan, issued in 2004, was precisely meant to fast-track permit approvals. National Policy Agenda on Revitalizing Mining in the Philippines, Mineral Action Plan for Exec. Ord. Nos. 270 and 270A [hereinafter MAP], available at [www.mgb.gov.ph/map/map\\_final.pdf](http://www.mgb.gov.ph/map/map_final.pdf) (last visited Nov. 10, 2005). See also A Statement Calling for the Scrapping of the Philippine Mining Act of 1995 and the Rejection of the Mineral Action Plan of the Arroyo Government (Nov. 11, 2004) [hereinafter Statement], <http://www.minesandcommunities.org/Action/press493.htm>.

42. See, e.g., *Unjust, Unsustainable*, *supra* note 21.

43. See, e.g., Tyrone Velez, *Church Leaders, Lumads Gear for Anti-Mining Protests in Mindanao*, BULATLAT, Vol. V, No. 1, Feb. 6-12, 2005, <http://www.bulatlat.com/news/5-1/5-1-mindanao.html>; Catherine Coumans, *The Successful Struggle Against Submarine Tailings Disposal in Marinduque, Philippines*, MININGWATCH CANADA, Apr. 2002, [http://www.miningwatch.ca/updir/Marinduque\\_STD\\_Struggle.pdf](http://www.miningwatch.ca/updir/Marinduque_STD_Struggle.pdf); CABALDA ET AL., *supra* note 20, at 58-60.

44. See, e.g., Croft, *supra* note 39.

45. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous People, Creating a National Commission of Indigenous People, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and Other Purposes, Rep. Act 8371 (Oct. 29, 1997) (Phil.) [hereinafter IPRA], available at <http://www.chanrobles.com/republicactno8371.htm>.

46. *Id.* ch. III, §§ 4-8. For a comment on IPRA's impact, see THE ECONOMIST, *Undetermined in the Philippines*, Nov. 29, 1997, at 42.

47. The constitutionality of the IPRA was challenged before the Supreme Court, which affirmed its validity by default; because the Justices were evenly divided even after redeliberation, the petition was dismissed. *Cruz v. Sec'y of Env't & Natural*

To address the problem of declining foreign investments in mining, then-Senator, now-President Gloria Arroyo issued Executive Order 270 (E.O. 270) in January 2004, which outlined a national policy agenda on revitalizing the mining industry.<sup>48</sup> Interestingly, E.O. 270 was promulgated just days before the Supreme Court issued its ruling. Clearly, the government had hoped that the Court would fall in line and uphold the validity of the Mining Act. Pursuant to E.O. 270, a high-level policy document known as the Mineral Action Plan (MAP) was prepared.<sup>49</sup> The MAP, swiftly finalized by June 2004, sought to amend the IRRs to the Mining Act to fast-track procedures for processing mining applications and issuing the requisite permits.<sup>50</sup> Contrary to Republic Act 7160, the MAP sought to centralize decision-making and dilute the authority of local governments over mining issues.<sup>51</sup> The government justified its actions on the ground that the country was facing a severe fiscal crisis and critically needed foreign

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Res., G.R. No. 135385 (S.C., Dec. 6, 2000), available at <http://www.supremecourt.gov.ph/jurisprudence/2000/dec2000/135385.htm>. Justice Puno wrote in a separate opinion that ancestral lands did not constitute part of the public domain and that IPRA merely granted to indigenous peoples certain rights, but not ownership, over natural resources in their ancestral domains. Hence, the *Cruz* decision does not preclude the state or non-indigenous people from undertaking activities within these domains. However, because the Court was evenly divided on many points, the decision is largely seen as having cast more uncertainty on the issue. For more information on the conflict between the IPRA and the Mining Act, see Marissa L. Hughes, *Indigenous Rights in the Philippines: Exploring the Intersection of Cultural Identity, Environment, and Development*, 13 GEO. INT'L ENVTL. L. REV. 3, 14-16 (2000); Patricia Thompson, *Human Rights and the Environment: Philippines Indigenous Peoples Rights Act*, 1998 COLO. J. INT'L ENVTL. L. & POL'Y Y.B. 179 (1998). For more information on indigenous peoples in the Philippines and Asia in general, see Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998); Michael C. Howard, *Mining, Development and Indigenous Peoples in Southeast Asia*, 22 J. BUS. ADMIN. 93 (1994); Jose Mencion Molintas, *The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts*, 21 ARIZ. J. INT'L & COMP. L. 269 (2004).

48. National Policy Agenda on Revitalizing Mining in the Philippines, Exec. Ord. No. 270 (Jan. 16, 2004) (Phil.) [hereinafter Exec. Ord. No. 270], available at [http://www.mgb.gov.ph/policies\\_eo270.htm](http://www.mgb.gov.ph/policies_eo270.htm).

49. MAP, *supra* note 41.

50. Statement, *supra* note 41.

51. The Local Government Code of 1991, Rep. Act 7160 (1991) (Phil.), available at <http://www.chanrobles.com/localgov1.htm> (the law governing decentralization of power to local government units). Provincial governments have not uncommonly used this Code to justify interferences with mining operators, illustrating the uncertainty in reconciling the Code with the Mining Act. See CABALDA ET AL., *supra* note 20, at 73-75 (citing the examples of the provinces of Capiz and Mindoro Oriental). Disagreements over the sharing of mining revenue with the central government have also occurred. See *id.* at 75.

investment in the mining industry.<sup>52</sup> At the same time, the government promised that the MAP would be implemented in a responsible manner that adhered to the principles of "sustainable development."<sup>53</sup>

To buttress its arguments, the government released estimates of the Philippines' mineral wealth. Government agencies, including the Board of Investments and the National Economic Development Authority (NEDA), famously estimated the mineral potential to be in the vicinity of \$840 billion.<sup>54</sup> President Arroyo even claimed that this amount would be more than enough to erase the government's budget deficit and other fiscal woes for years to come.<sup>55</sup> The government also claimed that new and expanded mining projects would generate millions in tax revenues and thousands of new jobs.<sup>56</sup>

The government's claims as to the economic benefits of mining drew tremendous skepticism, particularly among civic groups and local communities. From the very start, the Mining Act had been strongly opposed by a broad coalition of interest groups, including environmental organizations, indigenous and farmers associations, human rights organizations, and church groups.<sup>57</sup> Their claims that the Act was ecologically destructive and repre-

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52. See, e.g., Roel Landingin, *Macapagal Warns of Philippines Fiscal Crisis*, FINANCIAL TIMES (LONDON), Aug. 24, 2004, at 1. For a response, see generally CHRISTIAN AID, *BREAKING PROMISES, MAKING PROFITS—MINING IN THE PHILIPPINES*, A CHRISTIAN AID AND PIPLINKS REPORT (2004), [http://www.christianaid.org.uk/indepth/412philippines/Philippines\\_report.pdf](http://www.christianaid.org.uk/indepth/412philippines/Philippines_report.pdf).

53. See Exec. Ord. No. 270, *supra* note 48, § 1. For a commentary, see Roderick T. dela Cruz, *Reviving Mining to Get Foreign Capital*, THE MANILA TIMES, Dec. 8, 2003, available at <http://www.manilatimes.net/others/special/2003/dec/08/20031208spe1.html>.

54. See Cai U. Ordinario, *Mining Sector Development to Hike Economic Output, According to NEDA*, THE MANILA TIMES, Aug. 7, 2004, available at <http://www.manilatimes.net/national/2004/aug/07/yehey/business/20040807bus5.html>. Indeed, the majority judges in the second Supreme Court decision quoted National Economic Development Authority (NEDA) Secretary Romulo Neri's \$840-billion estimate to justify their holding. See *infra* note 98 and accompanying text.

55. See *Philippines: Mining Act is Unconstitutional*, NEWSNOTES (Maryknoll Office for Global Concerns, Wash., D.C.), May-June 2005, at 5, available at <http://www.maryknollogc.org/newsnotes/may-jun05.pdf>.

56. See Dorothy Kosich, *Philippines Wants Chinese Mining Investment*, MINEWEB, Aug. 23, 2004, [http://www.mineweb.net/sections/junior\\_mining/342979.htm](http://www.mineweb.net/sections/junior_mining/342979.htm) (quoting Secretary Neri).

57. Groups that are continuing to oppose the Mining Act include the National Council of Churches in the Philippines (NCCP), Kalikasan-People's Network for the Environment, Alliance of Indigenous Peoples in the Philippines (known by its Filipino acronym KAMP), and the Cordillera People's Alliance and Initiatives for Peace in Mindanao (INPEACE).

sented a “sell-out” of national patrimony struck a resonant chord with many ordinary Filipinos, whose instinctive (and protectionist) response was to insist on the “Filipino first” policy enshrined in the Constitution.<sup>58</sup> In fact, such rhetoric even led to radical calls for the nationalization of the mining industry for the sole benefit of Filipinos.<sup>59</sup>

At the same time, large-scale mining has long been a sensitive ecological and social issue in the Philippines, given the history of serious mining accidents such as the Marinduque Marcopper disaster of 1996.<sup>60</sup> Such accidents, coupled with mining companies’ frequent failure to rehabilitate areas ravaged by mining operations and their conflicts with displaced indigenous communities, have inflamed widespread opposition to foreign mining. Thus, despite the Mining Act laying down detailed environmental and social obligations for mining companies,<sup>61</sup> public skepticism has been overwhelming. This is quite simply due to the mining industry’s poor record in fulfilling (and that of the government in enforcing) the requisite obligations.<sup>62</sup>

Opposition to mining is particularly pronounced because the major mining operations are conducted by foreign-owned companies that are seen to be acting only in their own interests. In particular, these companies are portrayed as being keen to take

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58. See, e.g., Press Release, Legal Rights and Natural Resources Center–Kasama sa Kalikasan, The Battle is Far From Over (Jan. 20, 2005) [hereinafter *The Battle*], <http://www.minesandcommunities.org/Action/press522.htm>. The “Filipino First” policy was first instituted by President Carlos Garcia in the 1960s.

59. See, e.g., *Unjust, Unsustainable*, *supra* note 21.

60. In March 1996, a huge mine-tailings spill occurred at the Marcopper-Placer Dome mining operation on the island of Marinduque, discharging toxic tailings into rivers in the vicinity. The livelihoods of local communities were severely affected as a result of the incident. It is believed to be the worst industrial pollution disaster in Philippine history. See generally Coumans, *supra* note 43.

61. On paper, the environmental and social provisions are comprehensive. Apart from the Environmental Protection and Enhancement Program and the Rehabilitation/Decommissioning Plan laid out in the Mining Act and its IRRs, various other laws and DENR Administrative Orders prescribe strict environmental rules for the industry. In particular, the environmental impact statement (EIS) system laid out by the DENR’s Administrative Order 96-37 (now replaced by DAO 2003-03) prescribes social acceptability procedures to follow in obtaining project approval. See, e.g., CABALDA ET AL., *supra* note 20, at 20-30.

62. For instances of public opposition to mining, see CABALDA ET AL., *supra* note 20, at 58-60. On mining and community conflicts, see Robert Weissman, *Recent Development: “Development” and the Denial of Human Rights in Ramos’s Philippines*, 7 HARV. HUM. RTS. J. 251, 263 (1994). On environmental challenges in the Philippines in general, see ROBIN BROAD WITH JOHN CAVANAGH, *PLUNDERING PARADISE: THE STRUGGLE FOR THE ENVIRONMENT IN THE PHILIPPINES* (1993).

advantage of lax labor and environmental standards in the developing world.<sup>63</sup> That these companies had a hand in lobbying for and crafting the “foreign-friendly” mining policies of the 1990s—including the controversial Mining Act—further incited public suspicion.<sup>64</sup>

On its part, the government’s foreign investment justification for mining drew criticism for ignoring systemic factors contributing to poverty such as corruption, overpopulation, and mismanagement. Philippine environmental NGOs cited international studies<sup>65</sup> showing that resource-abundant countries tend to be excessively reliant on their export commodities, thereby exposing them to the vagaries of price fluctuations in the global market.<sup>66</sup> This “curse of natural resources” tends to afflict, in particular, mineral-intensive economies.<sup>67</sup> The NGOs also pointed to the fact that the Philippines runs up a “mineral deficit” by exporting the bulk of its raw minerals overseas while importing large quantities of metal manufactures such as iron and steel.<sup>68</sup> At the same time, the NGOs charged that the government had totally ignored the huge environmental and social costs of mining activities. In such a climate, the Mining Act of 1995 and the subsequent MAP were readily portrayed as an outright betrayal of national patrimony to foreign interests.<sup>69</sup>

The January 2004 decision of the Supreme Court nullifying the WMCP FTAA was thus a huge victory for the anti-mining lobby.<sup>70</sup> At the same time, the decision was met with utter dismay on the part of the government and the investor community at large. The Arroyo administration was clearly embarrassed by the ruling, given that it had only just unveiled proposals for the Min-

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63. Tuazon, *supra* note 24.

64. *Id.*

65. These include the study of developing countries over twenty years by economists Jeffrey Sachs and Andrew Warner showing that countries with higher rates of natural resource exports had slower rates of per capita growth. JEFFREY D. SACHS & ANDREW M. WARNER, *NATURAL RESOURCE ABUNDANCE AND ECONOMIC GROWTH* (1995, rev. 1997 & 1999). See also Jeffrey D. Sachs & Andrew M. Warner, *Natural Resources and Economic Development: The Curse of Natural Resources*, 45 *EURO. ECON. REV.* 827 (2001).

66. SACHS & WARNER, *supra* note 65.

67. Sachs & Warner, *supra* note 65, at 837. See also Press Release, Cordillera Peoples Alliance, CPA Press Statement on the International Mining Investment Conference—February 2-4, 2005, Makati, Metro Manila (Feb. 2, 2005), <http://www.minesandcommunities.org/Action/press522.htm>.

68. *Unjust, Unsustainable*, *supra* note 21.

69. CABALDA ET AL., *supra* note 20, at 61-62.

70. *La Bugal* (Jan. 27, 2004), *supra* at note 1.

eral Action Plan (MAP) and was aggressively wooing foreign investors to pump money into the mining industry. On its part, the mining lobby swiftly warned of the dire effects the decision would have on investor confidence. Top government officials, including the President and several congressmen, senators, and department secretaries, subsequently lent their voices to the chorus urging the Supreme Court to review its decision.<sup>71</sup> The Secretary of NEDA, Romulo Neri, was particularly forceful in identifying the huge losses for the country should foreign mining operations be maintained as unconstitutional.<sup>72</sup>

Meanwhile, the big transnational oil and mining companies, no doubt wary over the security of their investments, began to campaign intensely for the Supreme Court to reverse its decision. The ruling was feared to have unnerved not only foreign investors in the metal mining industry, but also the oil and gas and cement sectors.<sup>73</sup> These sectors also involved foreign-owned companies operating largely under the same forms of contracts and mineral processing permits used by the metal mining industry.<sup>74</sup> Overnight, all these arrangements risked being challenged as well. The Court's decision would thus have automatically removed any possibility for foreign investors to own 100 percent of *any* mining project under an FTAA, or to hold exploration and processing permits.<sup>75</sup>

#### IV. *LA BUGAL II*—THE COURT REVERSES ITSELF

Under Philippine law, a decision of the Supreme Court does not come into effect until the expiration of a specified time period for lodging a motion for reconsideration.<sup>76</sup> Given the split decision in the first ruling and the presence of several powerful dissenting opinions, the signals for reconsideration appeared strong. And so

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71. See, e.g., Aya Fabros, *Mine Matters: The Supreme Court and the Mining Decision Reversal* (Jan. 31, 2005), <http://www.ipd.ph/features/2005/MineMatters.html>; Press Release, Kalikasan-People's Network for the Environment, Has Anyone Been Surprised by the Arroyo Government's Rise to the Most Corrupt List of the World? (Jan. 28, 2005), <http://www.minesandcommunities.org/Action/press522.htm> (citing, *inter alia*, President Arroyo, Senator Richard Gordon, House Speaker Jose de Venecia, and NEDA Secretary Romulo Neri as advocates for reversal).

72. Neri requested to testify before the Court during its reconsideration, but his views were ultimately submitted through a position paper. See *La Bugal* (Dec. 1, 2004), *supra* note 2, at text accompanying n.20; see also Fabros, *supra* note 71.

73. *Constitutional Validity*, *supra* note 36.

74. *Id.*

75. *Id.*

76. Phil. R. Civ. P. 52, 56B (1997).

it was that the government and WMCP swiftly filed a motion, and the Chamber of Mines of the Philippines (CMP) intervened.<sup>77</sup> In requesting the motion, the government made it clear that the decision had grave implications for the country's desire to attract foreign investment.<sup>78</sup> In the meantime, a lobby to overturn the decision was mounted by the Chamber of Mines, together with the European and American Chambers of Commerce, the governments of Canada, Australia, and the United States, as well as moderate labor unions.<sup>79</sup> From the perspective of the anti-mining camp, a particularly damaging development occurred when Mike Defensor, the Secretary for the Department of Environment and Natural Resources (DENR) (the agency in charge of managing both environmental and mining issues), publicly aligned himself with groups calling for the reversal of the January 2004 decision.<sup>80</sup>

In wielding the spectre of (lost) investment confidence, the government had sent clear signals to the Supreme Court that its decision simply could not stand. Even as it was filing its motion for reconsideration, the government was busy initiating the Mineral Action Plan (MAP), the policy document that was meant to reinvigorate the mining industry.<sup>81</sup> Indeed, E.O. 270, which laid down the legal basis for the MAP, was issued on January 16, 2004, just eleven days before the Court released its original ruling.<sup>82</sup> In leading up to the reconsideration proceedings, another executive order outlining a pro-mining policy and amending the earlier order was issued in April 2004.<sup>83</sup> In the meantime, public consultations on the MAP were held in April and May 2004; the MAP itself became endorsed in June 2004; and in September 2004, the President issued a memorandum circular directing all government agencies to begin implementing the MAP.<sup>84</sup>

In such a politically driven atmosphere, there was little doubt that the first Supreme Court decision would be reversed. Indeed,

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77. See *The Battle*, *supra* note 58.

78. See *Fabros*, *supra* note 71.

79. *Tuazon*, *supra* note 24.

80. *Id.*

81. *MAP*, *supra* note 41.

82. Exec. Ord. No. 270, *supra* note 48.

83. Exec. Ord. No. 270A (Apr. 20, 2004) (Phil.) (amending Exec. Ord. No. 270), available at [http://www.mgb.gov.ph/policies\\_eo270a.htm](http://www.mgb.gov.ph/policies_eo270a.htm).

84. Mem. Circular No. 67 from the Office of the President of the Phil. to All Heads of Dep'ts, Chiefs of Bureaus and Offices/Instrumentalities of the Nat'l and Local Gov'ts and Others Concerned (Sept. 13, 2004), available at [http://www.ops.gov.ph/records/mc\\_no67.htm](http://www.ops.gov.ph/records/mc_no67.htm).

the issue had become so politicized that it was being hailed as a test case for the country's commitment to foreign investment. With industry groups and all segments of government lining up to criticize the decision, the pressure on the Supreme Court was immense. The issuance of the MAP, in particular, had presented what amounted to a *fait accompli*. On December 1, 2004, the Court duly issued its decision granting the motion for reconsideration and reversing its earlier ruling.<sup>85</sup> The decision went ten to four with one abstention,<sup>86</sup> with the majority judges famously opining that "the Constitution should be read in broad life-giving strokes" and should "not be used to strangle economic growth or to serve narrow, parochial interests."<sup>87</sup> Thus, in less than a year, the indigenous people fighting the mining cause had been reduced to "narrow, parochial interests" holding the nation's economic survival hostage!

In upholding the constitutionality of the Mining Act, the IRRs, and the WMCP FTAA, the Court explicitly endorsed the government's opening of the mining industry to foreign transnational corporations.<sup>88</sup> On the specific issue of whether FTAA's amounted to service contracts, the majority judges sought to give a different interpretation than the earlier bench. They felt that the commissioners who drafted the 1987 Constitution did not effectively seek to ban such contracts, but instead sought to limit agreements that went against Filipinos' interests.<sup>89</sup> Here, the majority judges agreed that FTAA's were in fact service contracts, but with safeguards; and that they were saved by Paragraph 4 of Article XII, Section 2, a provision inserted precisely as an exception to the 60/40 rule.<sup>90</sup> In other words, the WMCP FTAA in question fell well within the bounds laid down by Paragraph 4.<sup>91</sup>

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85. *La Bugal* (Dec. 1, 2004), *supra* note 2.

86. *Id.* (Panganiban, J.) (Davide, Sandoval-Gutierrez, Austria-Martinez, Garcia, Puno, Quisumbing, Corona, Tinga, & Chico-Nazario, JJ., concurring) (Ynares-Santiago, Carpio, Carpio-Morales, & Callejo, JJ., dissenting) (Azcona, J., abstaining). Justice Panganiban's 246-page majority decision is reportedly the longest in Philippine Supreme Court history. Five Justices who originally voted against the Mining Act and its FTAA provisions—Chief Justice Davide and Justices Puno, Quisumbing, Corona and Tinga—now voted to uphold their legality.

87. *La Bugal* (Dec. 1, 2004), *supra* note 2, at text accompanying n.5.

88. The Court upheld the FTAA in its entirety save for sections 7.8 and 7.9, which were held invalid as contrary to public policy and as grossly disadvantageous to the government. *Id.* at text accompanying nn.83-91.

89. *Id.* at text accompanying nn.51-52.

90. *Id.* at text accompanying n.78.

91. *Id.* at text accompanying nn.48-49.



The majority judges further pointed out that the Philippines, despite its wealth of natural resources, had insufficient capacity and expertise to conduct extraction operations, and, necessarily, had to rely on foreign capital.<sup>92</sup> In this regard, the Court added that the Constitution's drafters knew that agreements with foreign companies would entail not mere financial or technical assistance, but substantial foreign investment in and management of large-scale mining enterprises.<sup>93</sup> In essence, Paragraph 4 could accommodate agreements that go beyond financial or technical assistance.<sup>94</sup> At the same time, the Court's detailed examination of the Mining Act and other instruments reveals that the state, through the President, retains and exercises full control over natural resources, notwithstanding the involvement of a foreign party through an FTAA. As such, there is no question of the state's role being negated or relinquished. It would thus not be unconstitutional to allow a wide measure of discretion to the President to negotiate FTAA's with foreign interests.

The majority judges' ruling also throws light on the important issue of separation of powers between the executive and judiciary. In upholding the legality of foreign control over mining, the Court singularly felt that it was in no position to second-guess the government in economic decision-making. In this regard, "the Constitution should be construed to grant the President and Congress sufficient discretion and reasonable leeway to enable them to attract foreign investment and expertise."<sup>95</sup> Very tellingly, the Court felt that the judiciary should not interfere inordinately in the exercise of the presidential power of control over the exploration, development, and utilization of natural resources.<sup>96</sup> This was especially so given that the Constitution gave express roles to the President and Congress, but not to the judiciary.<sup>97</sup>

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92. *Id.* at text accompanying nn.75-77.

93. *Id.* at text accompanying nn.51-54.

94. *Id.* at text accompanying n.38. In interpreting the phrase "involving either technical or financial assistance" in Para. 4, Section 2, Art. XII of the Constitution, Justice Panganiban emphasized that the word "involving" must connote non-exclusivity. *Id.*

95. *Id.* at text accompanying n.5.

96. *Id.*

97. *Id.*; CONST. (1987), Art. XII, (Phil.).

## V. A DAMNING BLOW TO LOCAL COMMUNITIES AND THE ENVIRONMENT

While such deference to the executive is not unexpected in a system that subscribes to the separation of powers between the different branches of government, what is remarkable is the extent to which the majority judges endorsed the government's arguments on foreign investments. Agreeing that the mining industry needed to be revitalized, the Court explicitly accepted the government's justification in the form of the \$840 billion in promised mineral worth.<sup>98</sup> In addition, the Court felt that it must not intrude into policy matters and must allow the President and Congress maximum discretion in using the country's resources and in securing the assistance of foreign groups to eradicate poverty and create employment.<sup>99</sup> The implication is that it is up to the government alone to manage the nation's mineral wealth *and* to balance the need to jump-start the floundering economy with the protection of the environment and indigenous communities' rights. Whatever priority or preference may be given to mining vis-à-vis other economic or non-economic activities is a question of policy for the President and Congress, not for the courts.

It is this part of the judgment that is troubling. The Court's acute allergy to "non-economic" matters such as environmental and social concerns is baffling. If it is not the Court's duty to safeguard these concerns, then whose is it? The Court would have us believe that it is entirely the executive's prerogative. While it is right to say that the task of attracting foreign investment belongs solely to the government, the Court surely possesses the power to review the legality of the executive's actions, particularly where such actions impinge on established rights.<sup>100</sup> This part of the ruling is tantamount to saying that the issue of balancing development with the environment is wholly non-justiciable.

Even more surprisingly, the Court went on to endorse and praise the government's effort to address the concerns of sustainable mining operations, citing the Arroyo administration's promulgation of E.O. 270 and E.O. 270A "to promote responsible mineral resources exploration, development and utilization, in order to enhance economic growth, in a manner that adheres to the principles of sustainable development and with due regard for justice

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98. *La Bugal* (Dec. 1, 2004), *supra* note 2, at text accompanying n.100.

99. *Id.* at text accompanying n.99.

100. CONST. (1987), Art. VIII, (Phil.).

and equity, sensitivity to the culture of the Filipino people and respect for Philippine sovereignty.”<sup>101</sup> Here, the Court seemed totally oblivious to the litany of criticisms directed by civic groups toward the two executive orders for the deprivation, displacement, and inequities they engender. Moreover, the Court appears confident that the government alone can guarantee the realization of responsible extraction, sustainable development, and whatever other aspirations are contained in the two executive orders. The Court is effectively saying, If the government says it will be done, then so it will; see—it’s there in the executive orders!

In contrast to some other superior courts in Asia, the Supreme Court of the Philippines has consistently upheld the rights of minority communities.<sup>102</sup> Yet, in this instance, it appears to have abdicated its role as defender. Indeed, the majority judges did not stop there. While professing sympathy for the petitioners’ cause, the judges concluded their judgment by pronouncing that “the mineral wealth and natural resources of the country are meant to benefit not merely a select group of people living in the areas locally affected by mining activities, but the entire Filipino nation, *present and future*, to whom the mineral wealth really belongs.”<sup>103</sup> This communitarian message is effectively a signal that the nation’s economy cannot be held hostage to the interests of communities living around the mine sites. This begs the question, What about the compelling evidence that mining and other resource extraction activities tend to benefit an equally select group of people—the mining corporations and their political supporters?

Again, while the outcome of the reconsideration is not in itself surprising (given the political imperative to restore investor confidence), what is startling is the language that the Court employs to castigate the petitioners as obstacles to the national interest.<sup>104</sup> The bulk of the majority’s judgment was focused on establishing the constitutional validity of the Mining Act and the FTAA; however, the precious few paragraphs at the beginning and end of the judgment that did deal with the rights of the petitioners delivered

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101. *La Bugal* (Dec. 1, 2004), *supra* note 2, at text accompanying n.98 (Justice Panganiban quoting section 1 of Executive Order 270).

102. Among its progressive cases is *Oposa v. Factoran*, G.R. No. 101083, 224 SCRA 792. (July 30, 1993). (Phil.), which recognized the right of unborn generations to a sound environment. For an assessment of this case, see Dante B. Gatmaytan, *The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 GEO. INT’L ENVTL. L. REV. 457 (2003).

103. *La Bugal* (Dec. 1, 2004), *supra* note 2, at Epilogue.

104. *See id.*

a mortal blow to these affected communities' interests. Indeed, the only things the petitioners obtained were the Court's full sympathy and a commendation for their efforts to uplift their communities. From there, the Court would have us believe that to accord recognition to the rights of tribal communities would be to deny the rest of the nation its share of the country's wealth. To appreciate the full impact of the judgment, it is necessary to reproduce the Court's words verbatim:

The Constitution of the Philippines is the supreme law of the land. It is the repository of all the aspirations and hopes of *all* the people. We fully sympathize with the plight of Petitioner La Bugal B'laan and other tribal groups, and commend their efforts to uplift their communities. However, we cannot justify the invalidation of an otherwise constitutional statute along with its implementing rules, or the nullification of an otherwise legal and binding FTAA contract.

We must never forget that it is not only our less privileged brethren in tribal and cultural communities who deserve the attention of this Court; rather, all parties concerned—including the State itself, the contractor (whether Filipino or foreign), and the vast majority of our citizens—equally deserve the protection of the law and of this Court. To stress, the benefits to be derived by the State from mining activities must ultimately serve the great majority of our fellow citizens. They have as much right and interest in the proper and well-ordered development and utilization of the country's mineral resources as the petitioners.

Whether we consider the near term or take the longer view, we *cannot* overemphasize the need for an *appropriate balancing of interests and needs*—the need to develop our stagnating mining industry and extract what NEDA Secretary Romulo Neri estimates is some US\$840 billion (approx. PhP47.04 trillion) worth of mineral wealth lying hidden in the ground, in order to jumpstart our floundering economy on the one hand, and on the other, the need to enhance our nationalistic aspirations, protect our indigenous communities, and prevent irreversible ecological damage.

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Verily, the mineral wealth and natural resources of this country are meant to benefit not merely a select group of people living in the areas locally affected by mining activities, but the entire Filipino nation, *present and future*, to whom the mineral wealth really belong. This Court has therefore weighed carefully the rights and interests of all concerned, and decided for the greater good of the greatest number. JUSTICE FOR ALL,

not just for some; JUSTICE FOR THE PRESENT AND THE FUTURE, not just for the here and now.<sup>105</sup>

Far from seeking a balance between the interests of developers and affected communities (however difficult this may be), the Court swung the pendulum in the favour of the pro-mining lobby. In other words, there was little attempt at reconciliation; the Court adopted a simple all-or-nothing utilitarian stance, suggesting that those who stand in the path of the collective good must simply give way. In this regard, the Court's approach is hardly different from the Constitution's own inflexible and unsophisticated treatment of foreign capital—that certain interests are simply less worthy of protection or promotion. The decision is totally uncharacteristic of a superior court tasked with the high ideal of balancing different interests and defending the rights of the minority.

It is undeniable that the Court came under tremendous pressure to recognize the importance of foreign investments and to defer to the executive in economic matters.<sup>106</sup> In the process, however, the Court glossed over the constitutional proscription against foreign control of natural resources, itself admittedly archaic and obstructive to development (more on this below at VI). It was also telling that the decision came just a month before a major international mining conference was convened in Manila. The investor conference had been organized in early February 2005 by the Chamber of Mines of the Philippines with the support of various government departments with the aim of revitalizing the international community's interest in the Philippine mining industry.<sup>107</sup> Following the Supreme Court's reversal, the government identified twenty-three mining projects for foreign participation, holding up the potential of millions of dollars in mineral revenue.<sup>108</sup> It is expected that the Court's reversal of its earlier decision now paves the way for the Department of Environment

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105. *Id.* (emphasis by the Court).

106. *See supra* text accompanying notes 70-72 (detailing the pressure from the executive branch of government).

107. Many NGOs feel that the Supreme Court's decision to overturn its earlier ruling was clearly rushed in time for the Mining Conference in order to send a positive message to foreign investors. *See, e.g.,* Noel Godinez, *IP, Environment, Church Groups Picket International Mining Confab*, BULATLAT, Vol. V, No. 1, Feb. 6-12, 2005, <http://www.bulatlat.com/news/5-1/5-1-mining.html>.

108. Tuazon, *supra* note 24; Velez, *supra* note 43; Godinez, *supra* note 107.

and Natural Resources (DENR) to assess the twenty-three projects favorably.<sup>109</sup>

The Court's about-face triggered the dismay and opposition of civic groups throughout the country, and several NGOs, religious organizations, and local community groups have vowed to continue their opposition to foreign mining companies.<sup>110</sup> Mining-affected communities all over the archipelago now fear that the Court's endorsement of mining will lead to the approval of more large-scale mining projects.<sup>111</sup> In the meantime, the government has predictably hailed the Court's reversal, with the President even calling the Court's decision to reverse an "act of statesmanship done in the national interest."<sup>112</sup> In February 2005, the Court solidified its stance by quashing a further motion for reconsideration, this time lodged by La Bugal to persuade the Court to change its mind.<sup>113</sup> In its response to this last-ditch effort to defeat the mining lobby, the Court said that no new issues had arisen for it to reconsider its December 2004 decision.<sup>114</sup>

## VI. HOW THE COURT COULD HAVE DONE IT

To reiterate, what is troubling is not so much the Court's deference to the government in economic matters, but the fashion in which it summarily dismissed the legitimacy of the petitioners' claims. In this regard, the decision is an alarming precedent for all future cases in which affected communities or civic groups attempt to challenge developmental projects that prejudice their rights, be these mining, logging, industrial, or settlement projects. In many ways, the Court has restricted its flexibility in deciding such future cases. Indeed, it will be difficult for the Court to strike down any project that is claimed to be for the national good, particularly if foreign investor confidence is invoked.

In retrospect, the Court could have arrived at the same conclusion in the *La Bugal* case, but with a more refined and sophisti-

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109. Tuazon, *supra* note 24.

110. See Velez, *supra* note 43; Godinez, *supra* note 107.

111. The Battle, *supra* note 58.

112. See Press Release, Office of the Press Secretary to the President, GMA Points to SC Decision as the Proverbial 'Silver Lining' (Dec. 2, 2004), <http://www.news.ops.gov.ph/archives2004/dec02.htm>.

113. *La Bugal-B'laan Tribal Ass'n v. Ramos*, G.R. No. 127882, 421 SCRA 148 (Feb. 1, 2005). (Phil.), available at <http://www.supremecourt.gov.ph/jurisprudence/2005/feb2005/127882.htm> (all the judges maintained their December 2004 positions, including the four dissenting judges).

114. *Id.*

cated calibration of the interests involved. First, the Court could have interpreted the Constitution's admittedly archaic provisions to differentiate between various types of foreign projects. Second, the Court could have insisted on a more stringent balancing mechanism such as environmental impact assessments being properly conducted as a prerequisite to project approval. Third, there was no need for the Court to go so far as to malign the indigenous communities by labeling them "parochial interests" that obstruct the national interest.

On the constitutional matter, the Court's resting on the narrow scope of the exception in Paragraph 4 does not wish away the larger problem with Article XII, Section 2, which is the uniform and unsophisticated restriction of foreign direct investment to 40 percent of ownership.<sup>115</sup> The Court sought support in the FTAA exception, but this will only lay the ground for more squabbles in the future as the government and development interests lobby to broaden the ambit of the exception. As the hunger for foreign investment intensifies, it will increasingly seem anomalous for the government to usher in investments by way of the exception and yet maintain the fiction of national patrimony. If the Court is correct in its second ruling that the constitutional framers intended the exception to extend beyond mere financial and technical assistance,<sup>116</sup> then it will have effectively rendered the general prohibition worthless. Here, the Court could have signaled to the executive and legislature that the Constitution might be in great need of an amendment in the light of modern developmental imperatives.

The blanket restriction on foreign investment also fails to differentiate between different types of foreign investors; the projects they bring in; the relative importance to the economy; and the social, ecological, and national security impacts.<sup>117</sup> A uniform and rigid restriction can only chill the whole investment climate, as it has surely done in the Philippines. Even with the Supreme Court's second ruling, foreign investors will remain wary of constitutional challenges to their projects as long as the Constitution maintains its hostile tenor. Relying on a tenuous exception does little to comfort investors.

On the whole, foreign investment regulation must be made much more flexible by employing a case-by-case examination that

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115. CONST. (1987), Art. XII, § 2, (Phil.).

116. *La Bugal* (Dec. 1, 2004), *supra* note 2, at text accompanying nn.51-52.

117. *See also* Croft, *supra* note 39.

allows the imposition of specific requirements and conditions (or even outright rejections) on sensitive projects that may have a harmful impact on the nation.<sup>118</sup> The Supreme Court would have done well to signal this point. In any event, a rigid adherence to protectionism and national patrimony is archaic and out of kilter with a liberalizing, developing economy that depends so much on foreign investments. Again, the solution to balancing foreign and local interests is to negotiate and impose conditions, not to impose blanket restrictions.

By utilizing balancing mechanisms (and this is an extension of the point made above), conditions can and should rightly be imposed to balance the respective interests at play. Here, the Court could have insisted on the strengthening of means such as the environmental impact study (EIS) or assessment process, which can be usefully employed to identify competing demands and to lay down remedial or alleviating measures. The EIS mechanism is already well-established in Philippine law. Its procedures are administered by the DENR in its assessment of the environmental and social impact of proposed projects.<sup>119</sup> What the Court dictates, though, is to leave EIS studies and appraisal to the sole discretion of the executive through the DENR.

The reality, of course, is that EIS procedures can be compromised by the pressure exerted by project proponents, including foreign investors and government figures themselves.<sup>120</sup> Not uncommonly, these procedures are either influenced to support a particular predetermined outcome, or are simply carried out as a perfunctory exercise that has no bearing on the ultimate outcome. To be fair, this is a common phenomenon in many other countries. In any event, EIS/EIA studies can be successful in reconciling competing demands, but typically only when all parties are willing to accommodate other interests. No doubt foreign investment

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118. *Id.*

119. Establishing An Environmental Impact Statement System, Including Other Environmental Management Related Measures and for Other Purposes, Pres. Dec. No. 1586, § 2 (1978) (Phil.), revised by DENR Administrative Orders No. 96-37, 2000-05, 2000-37, 2003-03.

120. See, e.g., Coumans, *supra* note 43 (detailing the manner in which corporate and political interests can influence EIS approval). For another account of political interference with the system, see Edward E. Yates, *Public Participation in Economic and Environmental Planning: A Case Study of the Philippines*, 22 DENV. J. INT'L L. & POL'Y 107, 114-16 (1993). For a specific example of how EIS requirements were skirted by the developers of a golf course project, see Wilhelmina S. Orozco, *Golf Course is Focus of Antipolo Land Row*, THE MANILA TIMES, Mar. 29, 2004, available at <http://www.manilatimes.net/others/special/2004/mar/29/20040329spe1.html>.



in mining projects would also be subject to EIS procedures, but the Court assumes that these will invariably be carried out in an impartial and uncontentious fashion by the DENR. This is a highly unrealistic assumption.

Given the government's fervor for the mining industry to save the country from economic ruin, there is serious cause to doubt that a rigorous EIS procedure will ever be imposed on foreign mining projects. This is particularly true because none other than the DENR Secretary himself has thrown his weight behind the mining cause.<sup>121</sup> Civic groups also worry that the Mining Action Plan's proposal to institute an efficient one-stop-shop process for approving mining permits will seriously compromise the DENR's ability to scrutinize the environmental and social records of mining proponents.<sup>122</sup> From a systemic angle, this issue reveals the inherent tensions in a government agency such as DENR, which combines both the environmental-scrutiny and natural-resource-extraction functions. It may be time for these functions to be separated, thus allowing for a truly independent environmental agency to assess project proposals without the risk of conflicts of interest.<sup>123</sup>

Meanwhile, the Court's unqualified confidence in the government's ability to bring about "sustainable mining"—whatever that means—is staggering. The reality of the matter is that few developing countries, not least the Philippines, have a strong track record in reconciling developmental objectives with environmental concerns.<sup>124</sup> The real matter the Supreme Court failed to address is the people's skepticism over the ability of their government to bring about "sustainable development." As far as the people are concerned (disregarding the investors for now), the crisis of confi-

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121. The DENR Secretary's support for the mining industry is not totally incongruous, if we bear in mind that the DENR takes charge of both the protection of the environment and the extraction of natural resources. Thus, the Mining and Geosciences Bureau (MGB), the lead agency tasked with the management and promotion of the mining industry, is constituted within the DENR. See MGB Home Page, <http://www.mgb.gov.ph> (last visited Oct. 21, 2005).

122. *Philippines to Be Drilled*, MULTINATIONAL MONITOR, Vol. 26, No. 1-2, Jan.-Feb. 2005, available at <http://multinationalmonitor.org/mm2005/012005/front.html>.

123. The jury is still out on whether a mega-agency with both environmental and resource extraction functions is preferable to having separate but possibly uncoordinated/competing agencies. In recent years, the fused approach has been gaining popularity—the Philippines' DENR is the oldest such model in the Southeast Asian region, with Thailand, Vietnam and Malaysia recently joining the fold. For an analysis of these developments, see Alan Khee-Jin Tan, *Environmental Law and Institutions in Southeast Asia: A Review of Recent Developments*, VIII SING. Y.B. INT'L L. 177 (2004).

124. See generally Yates, *supra* note 120.

dence is neither in the Constitution nor in the Mining Act, but in their government's ability to reconcile the environment-versus-development debate. This is by no means an easy issue to resolve, but in disposing of the case in purely constitutional and legal terms, the Court has missed the underlying social and environmental tensions that permeated the whole litigation. For that reason alone, the *La Bugal* result may have satisfied the needs of the foreign investors and government for now, but it imparts little long-term stability to the rocky landscape of social and environmental justice. Far from it, the case practically guarantees further protracted disputes between displaced communities and project proponents.

This brings us to the point regarding the affected communities themselves. Simply put, it is unprogressive and wrong to expect these peoples to submit to developmental objectives without seeking to reconcile their interests with those of the project proponents. The Court's ruling pits the good of the general public against the claims of indigenous communities, and subsumes fundamental demands for social justice under the dominant discourse that necessary and inevitable sacrifices must be made in the name of national development.<sup>125</sup> It is a simplistic approach that places the relevant interests at diametrically opposing polarities, with nary an attempt to reconcile—save for an offer of sympathy. It is also this kind of discourse that would lead us to believe that natural resources are a curse, and that their extraction *necessarily* leads to benefits for some and social inequity for others. The reality is more sophisticated: It is not natural resources *per se* that constitute the curse, but a combination of abundant resources, dysfunctional institutions, and rent-seeking.<sup>126</sup> Or, in two words, bad governance. This, the Court ignores.

## VII. CONCLUSION

Ultimately, the *La Bugal* litigation is a reflection of how the politically relevant actors have chosen to view reality in simplistic, two-dimensional terms. Just as the legislature, in enacting the highest law of the land, tars foreign capital as bad, the executive sees foreign investment in mining as the savior for economic

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125. Fabros, *supra* note 71.

126. See generally Halvo Mehlum, Kalle Moene & Ragnar Torvik, *Institutions and the Resource Curse*, in MEMORANDUM FROM DEPARTMENT OF ECONOMICS, UNIVERSITY OF OSLO (Int'l Standard Serial No. 0801-1117, 2002), available at <http://www.oeko-nomi.uio.no/memo/memopdf/memo2902.pdf>.

failure; meanwhile, the judiciary views all communities standing in the way of the collective good as parochial. Along the way, some forget that some foreign capital can be good, that there are other more insidious causes of economic failure, and that not all minority rights constitute tyranny. In this case, while the greater good of the many appears to have been promoted, the failure to address the legitimate fears of the few can only promise more systemic failures in the future. This is not to say that the Court should have struck down foreign mining; surely the Philippines, like any other country, needs foreign investment. The problem with *La Bugal* is not its result, but the way in which the Court summarily rejected minority concerns without creating fair and lasting safeguards.<sup>127</sup>

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127. As a postscript, Justice Artemio Panganiban has declared out of court that there has been a "sunshine effect" cast by his decision in *La Bugal* not only on the mining sector but the entire economy. "[T]here has been a significant increase in foreign investments, a revival of the moribund stock market, a marked improvement in the peso-dollar exchange rate, and an emergence of a favorable business climate." Annie A. Laborte, Justice Panganiban Highlights 'Sunshine Effect' of SC Mining Decision, Supreme Court Public Information Office, May-June 2005, <http://pio.supremecourt.gov.ph/benchmark/05/05-06/05-060546.php> (quoting Justice Panganiban's speech at the Integrated Bar of the Philippines on April 20, 2005). Meanwhile, the embattled Gloria Arroyo continues to fend off charges that she rigged the 2004 presidential election. See THE ECONOMIST, *The Philippines: Under Fire*, July 9, 2005, at 11. Her relief over the Supreme Court's reversal of *La Bugal* was also shortlived, as the Court voted in July 2005 to freeze her administration's expanded sales tax (VAT) law. The court will later consider the constitutionality of the law. Perhaps there is hope of invoking the investor confidence argument?