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G.R. No. 244063 — LONE CONGRESSIONAL DISTRICT OF BENGUET PROVINCE, REPRESENTED BY HON. RONALD M. COSALAN, REPRESENTATIVE, *petitioner*, ***versus*** **LEPANTO CONSOLIDATED MINING COMPANY AND FAR SOUTHEAST GOLD RESOURCES, INC.,** *respondents*;

G.R. No. 244216 — REPUBLIC OF THE PHILIPPINES, REPRESENTED BY THE MINES AND GEOSCIENCES BUREAU OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (MGB-DENR), *petitioner*, ***versus*** **LEPANTO CONSOLIDATED MINING COMPANY AND FAR SOUTHEAST GOLD RESOURCES, INC.,** *respondents*.

Promulgated:

June 21, 2022

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CONCURRING OPINION

CAGUIOA, *J.*:

The instant consolidated petitions ask this paramount question: What are the effects of the requirements of Free and Prior Informed Consent (FPIC) and Certification of the National Commission on Indigenous Peoples (NCIP Certification) previewed by Republic Act No. (RA) 7942 or the Philippine Mining Act of 1995 (Philippine Mining Act) and embodied in RA 8321 or the Indigenous People's Rights Act of 1997 (IPRA) on a bid for the renewal of a Mineral Production Sharing Agreement (MPSA) first executed prior to the effectivity of said laws. Necessarily, the query here for the Court's determination is whether or not an MPSA may be renewed on its original terms without regard to or compliance with the additional policy-imbued conditions that have been straightforwardly required by laws that were legislated during the MPSA's original term.

I concur with the *ponencia*'s granting of the petitions on the basis of the following findings: (i) the arbitral award in favor of respondents must be vacated; (ii) the rule on arbitral autonomy is not absolute as one notable exception to this is when it is against public policy; (iii) the arbitral award here was a clear violation of public policy of protecting the rights of the indigenous peoples; and that (iv) respondents have no vested right in the MPSA renewal since a mining agreement is a mere privilege.

In order to sufficiently elucidate the premises of the instant concurrence, a brief recollection of the factual history of the dispute is in order.

This controversy involves the 25-year term MPSA No. 001-90 (MPSA No. 001-90) dated March 3, 1990 wherein the Department of Environment and Natural Resources (DENR) authorized respondents Lepanto Consolidated Mining Company and Far Southeast Gold Resources, Inc. (collectively, respondents) to undertake mining operations on a tract of land in Mankayan, Benguet, which the *ponencia* itself acknowledges as one that covers part of the ancestral domains of the Mankayan Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs).[1]

The only determinative issue here pertains to the sought renewal of the MPSA, in light of new laws enacted after it was executed, particularly, the Philippine Mining Act which was enacted in 1995, and the IPRA, which was enacted in 1997. The Philippine Mining Act regulates the exploration, development and utilization of mineral resources, while the IPRA, for its part: (i) enjoins all departments and government agencies from granting, issuing, renewing concessions, licenses, leases or product-sharing agreements without prior NCIP Certification that the area subject of the same does not overlap with any ancestral domain, and (ii) requires the FPIC of the affected ICCs/IPs as a condition for the issuance of the NCIP Certification, among others.

The above dispute came to a head when, approaching the expiration of MPSA No. 001-90, respondents wrote the Mines and Geosciences Bureau-Cordillera Administrative Region (MGB-CAR) and expressed their intention to renew the same for another 25 years, pursuant to the renewal clause therein which provides that the same shall be renewable for another period of 25 years upon such terms and conditions as may be mutually agreed upon by the parties or as may be provided by law.[2]

The MGB-CAR replied that respondents' application for renewal would be endorsed to the NCIP for appropriate action, with particular attention to the requirements of FPIC and NCIP Certification. Respondents questioned the endorsement to the NCIP, argued that MPSA No. 001-90 was exempted from the FPIC and NCIP Certification requirements, and alleged that said conditions were an impairment of their vested rights. Respondents wrote to the DENR and later served it with a Demand for Arbitration. They also obtained a Writ of Preliminary Injunction from Branch 149, Regional Trial Court of Makati City (RTC) which enjoined the DENR, MGB and NCIP from disturbing their mining operations in the area pending resolution of the dispute.

When the dispute was brought before the Arbitral Tribunal pursuant to the arbitration clause in MPSA No. 001-90, the Arbitral Tribunal found that the issues brought to it were arbitrable and thereafter held that: (i) the FPIC and the NCIP Certification were "unfavorable future legislation

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1 *Ponencia*, p. 3.
2 Id. at 5.

requirement[s]"[3] and were prejudicial to respondents; (ii) the renewability of the MPSA was a vested right of respondents, and that the imposition of the FPIC and the NCIP Certification which were not contained in MPSA No. 001-90, was an outright confiscation of respondents' investments; and that (iii) MPSA No. 001-90 was deemed renewed since the correspondence between parties showed that respondents already complied with all the requirements, except for the FPIC and the NCIP Certification.

When petitioners filed a petition to vacate the Arbitral Award before the RTC, the latter ordered the vacation of the same for the following reasons: (i) the Arbitral Tribunal exceeded its authority since the resolution of the controversy was not confined to the terms of the contract but involved the application of the IPRA and the Philippine Mining Act; (ii) the IPRA was an exercise of the State's police power in protecting IP rights, which is superior to respondents' principle of non-impairment of contracts; and (iii) the parties cannot dispense with the requirement without contravening the underlying public policy embodied in the IPRA on the promotion and protection of the rights of the ICCs/IPs.

On appeal before the Court of Appeals (CA), the CA set aside the RTC Resolution and reinstated the Arbitral Award, and ruled that: (i) the RTC committed grave abuse of discretion when it vacated the Arbitral Award and held that the dispute relates to the correct interpretation and enforceability of the MPSA's renewal provision; hence, it is a proper subject of arbitration; (ii) the Arbitral Tribunal has authority and jurisdiction to interpret and apply relevant laws in resolving the disputes presented before it; and (iii) the grounds for vacating an arbitral award are not concerned with the correctness of the award, but only with the validity of the arbitration agreement or the regularity of the arbitration proceedings.[4]

Ruling now on the consolidated petitions which challenge the CA's Decision, the *ponencia* grants them, reverses the CA, finds that the Arbitral Award in favor of respondents must be vacated[5] and finds that: (i) the RTC can review the substantive merits of an arbitral award based on what it perceives as errors of law or fact committed by the arbitral tribunal; and (ii) the Arbitral Tribunal exceeded its authority when it determined that the FPIC and the NCIP Certification were violative of the principle of non-impairment of contracts.

The *ponencia* finds merit in petitioners' invocation of the Arbitral Award's violation of public policy, and rules that the Arbitral Tribunal's determination and exemption of respondents from the IPRA requirement of

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3 Id. at 8.

4 Decision in CA-G.R. SP No. 146806 dated April 30, 2018, penned by Associate Justice Maria Elisa Sempio Diy, with Associate Justices Jose C. Reyes, Jr. (now a retired Member of the Court) and Franchito N. Diamante concurring. The CA Resolution dated January 14, 2019, which denied petitioners' Motion for Reconsideration, was penned by Associate Justice Maria Elisa Sempio Diy, with Associate Justices Franchito N. Diamante and Rodil V. Zalameda (now a Member of the Court) concurring.

5 *Ponencia*, pp. 17-18.

the FPIC and the NCIP Certification Precondition did not relate to a mere interpretation of law, but instead contravenes compelling public policy on the protection of the rights of the ICCs/IPs to their ancestral domains.[6]

In view of the above context, I join the *ponencia*, with the groundwork for the same outlined in the following discussions.

Preliminarily, it is perhaps worth articulating as a matter of framework that the instant controversy is not one which may be justly and sufficiently resolved by simply referring to the four corners of the MPSA in question.

At once, the Court must recognize, as it does, that the legal issue here presented reaches beyond the limited confines of contractual matters between parties and the oft-referred to principle of non-impairment of contracts, and more importantly rises to the level of constitutional proportions set in a complex balancing act and cross-section between and among the following: (i) a private contractor's interest in recovering investments; (ii) the Government's role as the grantor of permits for mining explorations and operations as well as the regulator thereof; and finally (iii) the State's duty to protect and preserve the rights of the ICCs/IPs who are evidently not party to the agreement between the private contractor and the Government, but whose self-determination and sense of integrity are irreversibly intertwined with the land that is subject of the same.

It is my considered view that given the above interaction of varying interests and duties, the Legislature, in its wisdom, stepped in when it enacted two pivotal and far-reaching laws in 1995 and 1997, *i.e.*, the Philippine Mining Act and the IPRA, respectively, and categorically imposed by law what may have been impossible to achieve if left to the aspirations of voluntary altruism and self-denial. With two legislations, the law expressly provided for a mechanism to ensure the protection of the ICCs/IPs who previously and far too often had no say in matters of great import to the resilience of their culture of way of life.

Given that two important and *unrepealed laws* expressly impose a requirement pursuant to the protection of indigenous rights, I submit that it is therefore only incumbent upon the Court to remind that arbitral awards, however respected in their autonomy, do not enjoy unqualified deference when exercised imperfectly or in excess, ***or when otherwise are clearly violative of expressed public policy***. In the same vein, the Court here must also caution, lest a belief to the contrary pervades, that there can be no inalienable or vested right on matters that are purely conditioned privileges granted by the government, especially when measured against overarching constitutional matters that are imbued with public interest.

The rationale for the above position is two-tiered, and will be discussed in *seriatim*.

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[6] Id. at 22.

In addition to the grounds under RA 876, the Special ADR Rules also govern the instant case, which adds another exceptional ground for vacatur of an arbitral award: clear affront to public policy

In addition to the grounds provided for under Section 24 of RA 876 or The Arbitration Law, also applicable to the instant controversy is A.M. No. 07-11-08-SC or the Special Rules of Court on Alternative Dispute Resolution (Special ADR Rules). Made effective on October 30, 2009 pursuant to the country's policy to move towards a more arbitration friendly regime, Rule 1.1 of the Special ADR Rules enumerates the cases which the Special ADR Rules cover, which includes the vacation of domestic arbitration awards, to wit:

RULE 1: GENERAL PROVISIONS

Rule 1.1. *Subject matter and governing rules.* —The Special Rules of Court on Alternative Dispute Resolution (the "Special ADR Rules") shall apply to and govern the following cases:

a. Relief on the issue of Existence, Validity, or Enforceability of the Arbitration Agreement;
b. Referral to Alternative Dispute Resolution ("ADR");
c. Interim Measures of Protection;
d. Appointment of Arbitrator;
e. Challenge to Appointment of Arbitrator;
f. Termination of Mandate of Arbitrator;
g. Assistance in Taking Evidence;
h. **Confirmation, Correction or Vacation of Award in Domestic Arbitration;**
i. Recognition and Enforcement or Setting Aside of an Award in International Commercial Arbitration;
j. Recognition and Enforcement of a Foreign Arbitral Award;
k. Confidentiality/Protective Orders; and
l. Deposit and Enforcement of Mediated Settlement Agreements. (Emphasis supplied)

As mentioned in the *ponencia*, the Special ADR Rules bring to the table another exception to the general rule and policy of judicial restraint with respect to intervening or reviewing an arbitral award: violation of the State's public policy.

First articulated in Article 34 of the 1985 UNCITRAL Model Law,[7] this exceptional ground for vacation or setting aside an award on account of

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[7] Article 34. *Application for setting aside as exclusive recourse against arbitral award*
1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
2. An arbitral award may be set aside by the court specified in article 6 only if:
(a) the party making the application furnishes proof that:

conflict with the country's public policy was first carried over into the municipal context in Article 4.34, Rule 5, Chapter 4[8] of the Implementing

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(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State. (Emphasis supplied)

[8] **Article 4.34. Application for Setting Aside an Exclusive Recourse against Arbitral Award.**

(a) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with second and third paragraphs of this Article.

(b) An arbitral award may be set aside by the Regional Trial Court only if:

(i) the party making the application furnishes proof that:

(aa) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Philippines; or

(bb) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(cc) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(dd) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of ADR Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with ADR Act; or

(ii) the Court finds that:

Rules and Regulations (IRR) of the ADR Act of 2004, in relation to international commercial arbitration, and Rule 19.10 of the Special ADR Rules which applies also to domestic arbitration.

For the more specific interest of the instant case, Rule 19.10 of the Special ADR Rules provides:

> **Rule 19.10.** ***Rule on judicial review on arbitration in the Philippines.*** — As a general rule, the court can only vacate or set aside the decision of an arbitral tribunal upon a clear showing that the award suffers from any of the infirmities or grounds for vacating an arbitral award under Section 24 of Republic Act No. 876 or under Rule 34 of the Model Law in a domestic arbitration, or for setting aside an award in an international arbitration under Article 34 of the Model Law, or for such other grounds provided under these Special Rules.
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> If the Regional Trial Court is asked to set aside an arbitral award in a domestic or international arbitration on any ground other than those provided in the Special ADR Rules, **the court shall entertain such ground for the setting aside or non-recognition of the arbitral award only if the same amounts to a violation of public policy**.
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> The court shall not set aside or vacate the award of the arbitral tribunal merely on the ground that the arbitral tribunal committed errors of fact, or of law, or of fact and law, as the court cannot substitute its judgment for that of the arbitral tribunal. (Emphasis supplied)

Even in the *en banc* case of *Global Medical Center of Laguna, Inc. v. Ross Systems International, Inc.*,[9] where the Court reaffirmed the policy of judicial non-interference in construction arbitral awards of the Construction Industry Arbitration Commission (CIAC), the Court there nevertheless clearly laid down that the preferred arbitral autonomy is circumscribed either by challenges to the very integrity of the arbitral tribunal or allegations that the arbitral award violates the Constitution or the law, in which cases the Court may revisit the entire arbitral award, *viz.*:

> Far from being absolute, however, the general rule proscribing against judicial review of factual matters admits of exceptions, **with the standing litmus test that which pertain to either a challenge on the integrity of the arbitral tribunal, or <u>otherwise an allegation of a violation of the Constitution or positive law</u>**.
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> x x x x
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> In other words, the scenarios that will trigger a factual review of the CIAC's arbitral award must fall within either of the following sets of grounds:

(aa) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Philippines; or

(bb) the award is in conflict with the public policy of the Philippines. (Emphasis supplied)

[9] G.R. No. 230112, May 11, 2021, accessed at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67423>.

> (1) Challenge on the integrity of the arbitral tribunal (*i.e.*, (i) the award was procured by corruption, fraud or other undue means; (ii) there was evident partiality or corruption of the arbitrators or of any of them; (iii) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; (iv) one or more of the arbitrators were disqualified to act as such under Section 9 of R.A. 876 or "The Arbitration Law", and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or (v) the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made) and;
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> (2) **Allegation of the arbitral tribunal's violation of the Constitution or positive law.**
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> In addition to the prototypical examples that exceptionally trigger a factual review of the CIAC's arbitral awards, the Court here discerns the merit in adding the otherwise forgotten presumption **that factual findings of the CIAC arbitral tribunal may also be revisited by the Court upon an allegation that the arbitral tribunal committed an act that is violative of the Constitution or other positive laws. To abate fears, the delimitation discerned in the Court's power to review factual findings of the CIAC shall in no way plausibly allow for a situation wherein the Court's hand is stayed from correcting a blatant Constitutional or legal violation because the autonomy of the arbitral process is paramount. Contrarily, the Court underscores that the contracted or very limited grounds for alleging grave abuse of discretion on the part of the CIAC arbitral tribunal, however narrow, are still principally tethered to the courts' primary duty of upholding the Constitution and positive laws.** The addition of the second ground makes plain that no amount of contracting or expanding grounds for grave abuse will ever be permitted to lay waste to the original purpose of the courts and their mandate to uphold the rule of law.[10] (Emphasis and underscoring supplied)

To my mind, therefore, the litmus test that is primarily called for in assessing whether the RTC had the authority to review and vacate the Arbitral Award in question was whether, as submitted by petitioners, the said Award violates public policy under Rule 19.10 of the Special ADR Rules.

The facts and the law of case show that the only defensible conclusion of the Court must be in the **affirmative**.

The Arbitral Award in question, in its blanket exception of the MPSA from the coverage of IPRA, is a clear violation of public policy

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[10] Id.

which allows for its review and vacatur

The factual milieu of this case, with particular focus on how the Arbitral Award found that MPSA No. 001-90 should be renewed without need to comply with the FPIC and NCIP Certification as required by the IPRA, qualifies as a notable exception, *i.e.*, violation of public policy under Rule 19.10 of the Special ADR Rules — which therefore places the Arbitral Award within the scope of judicial review.

Once more, it bears repeating that the overarching exceptional ground under Article 34 of the 1985 UNCITRAL Model Law, as reproduced in Chapter 4 of the IRR of ADR Act of 2004 and Rule 19.10 of the Special ADR Rules, as quoted above, **qualifies that no degree of arbitral autonomy can force the Court to give an *imprimatur* to an award that is demonstrably contrary not only to law but to public policy**.

When the Arbitral Award in question made the legal conclusion that the expiring MPSA No. 001-90 may be renewed without giving any regard to legal requirements that have already been in place as early as five years into said MPSA's 25-year term, said Arbitral Award evidently fell within the sphere of those awards that may be argued as contrary to law, since it finds that the respondents here may completely carve themselves out of the application of existing legal requirements under the IPRA. On this point, alone, I am hard-pressed to find the RTC in error for holding that the Arbitral Tribunal's award may be vacated under Rule 19.10 of the Special ADR Rules for being contrary to law and the public policies that imbued these laws.

Specifically, the Arbitral Award created an exception from the Philippine Mining Act and the IPRA, where no such exceptions were provided for by these laws. In fact, and starkly to the contrary, these laws ***positively require*** **mineral agreements and mining activities to be informed and undertaken with due regard to the very rights that respondents here pray they may be freed from having to reckon with**. This, the Court cannot countenance either in sound law or good conscience, without tearing through the very fabric of the constitutional policy, as reflected in positive legislation and landmark jurisprudential rulings, of upholding the rights of the ICCs/IPs.

For one, the Philippine Mining Act enjoins that mineral resource exploration must be undertaken in a manner that **ensures the protection of communities that may be affected by such activities**. This much is unmistakable in the black letter of the law. For one, its policy declared under Section 2 thereof categorically situates the Philippine Mining Act within the aim of promoting rational exploration of the country's mineral resources in a manner that effectively protects the rights of the collocated[11] affected communities, to wit:

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[11] Herein refers to the communities that are located either within or around the mineral sites in a manner by which any mining activity will inevitably affect them.

> SECTION 2. *Declaration of Policy.* — All mineral resources in public and private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State. It shall be the responsibility of the State to promote their rational exploration, development, utilization and conservation through the combined efforts of government and the private sector in order to **enhance national growth in a way that effectively safeguards the environment and protect the rights of affected communities**. (Emphasis supplied)

More particularly, Section 4 thereof positively vests the State with the duty to uphold the constitutionally safeguarded protection of ICCs/IPs in the process of mineral resource utilization, thus:

> **CHAPTER II**
> **GOVERNMENT MANAGEMENT**
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> SECTION 4. *Ownership of Mineral Resources.* — Mineral resources are owned by the State and the exploration, development, utilization, and processing thereof shall be under its full control and supervision. The State may directly undertake such activities or it may enter into mineral agreements with contractors.
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> **The State shall recognize and protect the rights of the indigenous cultural communities to their ancestral lands as provided for by the Constitution.** (Emphasis supplied)

Still more, even prior to the effectivity of the IPRA, the notion of requiring consent of the ICCs/IPs was already provided for in Section 16, in relation to Section 17, of the Philippine Mining Act, *viz.*:

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

Two years after the Philippine Mining Act took effect, the general requirement of consent on the part of ICCs/IPs whose communities may be affected by mining operations took on a more specific and concrete version, through the FPIC requirement.

Finding its roots mainly in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the Philippines adopted in September 13, 2007, the FPIC is required in all decision-making processes that affect the ICCs/IPs or their territories, such as those that may involve

relocation (Articles 10),[12] the practice of their cultures and traditions (Article 11),[13] and the implementation of legislative or administrative measures (Article 19).[14]

More specifically, Articles 28, 29 and 32 require the governments to obtain the FPIC of the ICCs/IPs on matters that affect the utilization and preservation of their territories, as well as empowers the latter to seek redress in case of non-compliance of the FPIC condition, thus:

> Article 28
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> 1. **Indigenous peoples have the right to redress**, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the **lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent**.
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> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
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> Article 29
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> 1. Indigenous peoples have the **right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources**. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
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> 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
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> 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

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[12] Article 10.
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

[13] Article 11.
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

[14] Article 19.
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

x x x x

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or **use of their lands or territories and other resources**.

2. States **shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources**.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact. (Emphasis and underscoring supplied)

Furthermore, the above UNDRIP pronouncements took on a more concrete and municipal version when the IPRA was passed into law on October 29, 1997, within the larger and constitutional policy structure of recognizing and promoting all the rights of the ICCs/IPs, as broadly provided for under Section 2 thereof, *viz.*:

> SECTION 2. *Declaration of State Policies.* — The State shall recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) hereunder enumerated within the framework of the Constitution:
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> a) The State shall recognize and promote the rights of ICCs/IPs within the framework of national unity and development;
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> b) **The State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural [well-being] and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain**;
>
> c) The State shall recognize, respect and protect the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national laws and policies;
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> d) The State shall guarantee that members of the ICCs/IPs regardless of sex, shall equally enjoy the full measure of human rights and freedoms without distinction or discrimination;
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> e) The State shall take measures, with the participation of the ICCs/IPs concerned, to protect their rights and guarantee respect for their cultural integrity, and to

> ensure that members of the ICCs/IPs benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; and
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> f) The State recognizes its obligations to respond to the strong expression of the ICCs/IPs for cultural integrity by assuring maximum ICC/IP participation in the direction of education, health, as well as other services of ICCs/IPs, in order to render such services more responsive to the needs and desires of these communities.
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> Towards these ends, the **State shall institute and establish the necessary mechanisms to enforce and guarantee the realization of these rights, taking into consideration their customs, traditions, values, beliefs, interests and institutions, and to adopt and implement measures to protect their rights to their ancestral domains.** (Emphasis supplied)

Expressly, Section 3(g) of the IPRA adopted the UNDRIP definition of FPIC and defined it thus:

> SECTION 3. Definition of Terms. — x x x
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> g) *Free and Prior Informed Consent* — as used in this Act shall mean the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community;

Still more pertinently in the evaluation of the renewability of MPSA No. 001-90, Section 59 in relation to Section 57 of the IPRA enjoins all concerned government agencies and instrumentalities from granting or entering into product-sharing agreements, among others, without the compliance with the FPIC requirement, to wit:

> SECTION 57. *Natural Resources within Ancestral Domains.* — The ICCs/IPs shall have priority rights in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domains. A non-member of the ICCs/IPs concerned may be allowed to take part in the development and utilization of the natural resources for a period of not exceeding twenty-five (25) years renewable for not more than twenty-five (25) years: ***Provided*, That a formal and written agreement is entered into with the ICCs/IPs concerned or that the community, pursuant to its own decision making process, has agreed to allow such operation**: *Provided, finally*, That the NCIP may exercise visitorial powers and take appropriate action to safeguard the rights of the ICCs/IPs under the same contract.
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> x x x x

> SECTION 59. *Certification Precondition.* — **All departments and other governmental agencies shall henceforth be strictly enjoined from issuing, *renewing*, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain.** Such certification shall only be issued after a field based investigation is conducted by the Ancestral Domains Office of the area concerned: *Provided*, That no certification shall be issued by the NCIP without the free and prior informed and written consent of ICCs/IPs concerned: *Provided, further*, That no department, government agency or government-owned or -controlled corporation may issue new concession, license, lease, or production sharing agreement while there is a pending application for a CADT: ***Provided, finally*, That the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process.** (Emphasis and underscoring supplied)

As demonstrated in the phraseology of Section 59 of the IPRA as quoted above, the imposition of the FPIC as a requirement for product-sharing agreements includes the prayer for *renewal* of existing ones that are approaching the end of their terms. Therefore, respondents' submission that MPSA No. 001-90 may be automatically renewed without due regard for any new requirements under the law that did not exist when the MPSA was first granted suffers from much hubris and little support. Contradistinctively, upon the expiration of MPSA No. 001-90 in 2015, the requirements of the FPIC and the NCIP certification for all mineral agreements are already in place, to which the renewability of the expired MPSA must henceforth be subjected.

In addition, it is similarly precariously sweeping for respondents to operate under the presumption that the FPIC is but a singular technical requirement that they can opt out of in the name of non-impairment of contracts. As the Food and Agriculture Organization (FAO) of the United Nations succinctly puts it:

> FPIC has emerged as an international human rights standard that derives from the collective rights of indigenous peoples to self-determination and to their lands, territories and other properties. For the purposes of this guide it should be considered as **a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use**.
>
> It is thus not a stand-alone right but **an expression of a wider set of human rights protections that secure indigenous peoples' rights to control their lives, livelihoods, lands and other rights and freedoms**. FPIC has been described as a standard that supplements and is a means of effectuating these substantive rights. It thus needs to be respected alongside other rights, including rights relating to self-governance, participation, representation, culture, identity, property and, crucially, lands and territories. Not only should FPIC be respected, but in addition, no measure

> should undermine indigenous peoples' enjoyment of human rights, even in instances where their FPIC has been obtained.[15] (Emphasis supplied)

Even jurisprudentially, the FPIC has also long been held as an integral aspect of the precondition for lawful exploration and mining activities in a land that forms part of an ancestral domain. In the landmark case of *Cruz v. Secretary of Environment and Natural Resources*,[16] then Associate Justice Reynato S. Puno elucidated on the weight of Section 59 of the IPRA, *viz.*:

> Concessions, licenses, lease or production-sharing agreements for the exploitation of natural resources shall not be issued, renewed or granted by all departments and government agencies without prior certification from the NCIP that the area subject of the agreement does not overlap with any ancestral domain. The NCIP certification shall be issued only after a field-based investigation shall have been conducted and the free and prior informed written consent of the ICCs/IPs obtained. Non-compliance with the consultation requirement gives the ICCs/IPs the right to stop or suspend any project granted by any department or government agency.[17]

More recently, in the 2019 case of *Maddela v. Oxiana Philippines, Inc*,[18] which similarly involved a mining exploration in a tract of land that is within an ancestral domain, the Court explained the import of an FPIC, thus:

> Under AO No. 3, FPIC refers to the consensus of all members of the ICCs/IPs, determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the program/project/activity, in a language and process understandable to the community. **The FPIC is given by the concerned ICCs/IPs upon the signing of the Memorandum of Agreement containing the conditions/requirements, benefits, as well as penalties of agreeing parties as basis for the consent.**
>
> Under the same rules, a **Certification Precondition refers to the certification issued by the NCIP that the site covered and affected by any application for concession, license or lease, or production-sharing agreement does not overlap with any ancestral domain area of any indigenous cultural community or indigenous peoples or, if the site is found to be within an ancestral domain area, that the required FPIC was properly obtained from the ICC/IP community concerned in accordance with the provisions of these guidelines.** Section 59 of the IPRA mandates that all departments and other government agencies are strictly enjoined from issuing, renewing, or granting the application without the certification precondition, which is issued only after a field-based investigation is conducted by the Ancestral Domains office of the affected area.

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15 Food and Agriculture Organization, United Nation, *Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition,* Rome, 2014, pp. 4-5, accessed at <https://www.fao.org/3/i3496e/i3496e.pdf>.

16 400 Phil. 904 (2000).

17 Id. at 1012.

18 G.R. No. 198243, February 27, 2019. (Unsigned Resolution)

> **The foregoing requirements tell us that a properly conducted FPIC is an indispensable and integral part of the certification precondition.** Indeed, AO No. 3 delineates the mandatory activities in the conduct of the FPIC process. We note the CA's finding that "[we] carefully perused the Record of the present case and discovered that, indeed, [Oxiana] had complied with the foregoing procedure before the FPIC was granted by the Bugkalots in its favor."[19] (Emphasis supplied)

I must also humbly take exception to the averment of the respondents that the renewability of MPSA No. 001-90 is a vested right, and that the additional requirements under the law may not be considered with respect to its renewal without confiscating their investments. For purposes of freeing this submission from dangerous inaccuracy, it must be recalled that an MPSA is defined under Section 26 of the Philippine Mining Act thus:

> SECTION 26. *Modes of Mineral Agreement.* — For purposes of mining operations, a mineral agreement may take the following forms as herein defined:
>
> (a.) Mineral production sharing agreement is an agreement where the **Government grants to the contractor the exclusive right to conduct mining operations within a contract area and shares in the gross output.** The contractor shall provide the financing, technology, management and personnel necessary for the implementation of this agreement. (Emphasis supplied)

The phraseology of the definition of an MPSA clearly provides that it is not a vested right but a mere grant extended by the Government, that is limited in term and the conditions for the renewal of which, as MPSA No. 001-90 itself recognizes, are subject to mutual agreement or provisions of law. **The nature of the MPSA as argued by the respondents to be "vested" is therefore belied by the fact that (i) the MPSA is a mere grant of a privilege which is term-bound; and (ii) the very MPSA in question itself admits that its renewal is not privileged but subject to mutual agreement or provisions of law.** Respondents, under MPSA No. 001-90, therefore merely enjoy a privilege granted to it by the Government, and awarded in accordance with legal requirements and public policies. The unambiguous pronouncement of the need to review existing grants relating to mining rights wholly negates respondents' submission that the renewal of MPSA No. 001-90 has vested in their favor.

In addition, while it is true that Section 32 of the Philippine Mining Act provides that an MPSA may be renewable for another term not exceeding 25 years under the same terms and conditions thereof, without prejudice to changes mutually agreed upon by the parties, the same provision is deemed modified by the IPRA's later addition of conditions that must be complied with before a mineral agreement may be renewed.

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[19] Id.

Still more, neither does respondents' citation of Section 56 of the IPRA support their averment of an effective blanket guarantee of renewal of MPSA No. 001-90. Section 56 of the IPRA assures that upon IPRA's effectivity, existing property rights within the ancestral domains are to be recognized and respected, *viz.*:

> SECTION 56. *Existing Property Rights Regimes.* — Property rights within the ancestral domains already existing and/or vested upon effectivity of this Act, shall be recognized and respected.

Section 56, however, only guarantees that *existing* property rights are to be *recognized and respected*. Section 56 does not, however, extend so far as to guarantee the *renewal* of property rights that have ceased to exist upon the expiration of a contract that grants the same. Section 56 of the IPRA, on respecting existing property rights on the ancestral domains, is not irreconcilable with the requirement of FPIC and NCIP Certification insofar as the property interests of respondents are concerned. Quite the contrary, Section 56 only provides that the enactment of the IPRA does not amount to an effective ground for displacement or abortion of existing property rights (*e.g.*, MPSA rights) on the ancestral domains, **but does not extend to any assurance that existing MPSAs, upon their expiration, may be renewed and carved out of the categorical requirements introduced by the new laws**.

In other words, Section 56 of the IPRA, as applied to MPSA No. 001-90, only guarantees that throughout the duration of its original 25-year term, or from 1990-2015, respondents may not be denied the enjoyment of their property rights as granted by the same. This, as far as the records show, appears to be the case since despite the passing of the Philippine Mining Act and the IPRA in 1995 and 1997, respectively, the MPSA of the respondents continued to be respected on the subject property until its expiration in March 2015. So that when respondents sought the renewal of their MPSA in 2015, the Philippine Mining Act and the IPRA have already been in place for over 20 years and 18 years respectively, throughout said period respondents' MPSA was recognized and respected.

However, when MPSA No. 001-90 expired in March 2015, the renewal of the same is an *entirely different consideration* that has taken it outside of the contemplation of Section 56. Upon the expiration of the term of effectivity of MPSA No. 001-90, there was effectively no longer any existing property right to be respected within the provision of Section 56. Until and unless it is renewed in compliance of all the pertinent conditions that must bear upon its renewal pursuant to law and public policy. Stated differently, a question of a renewal of the same MPSA with the same terms for another 25 years can no longer be had with a complete disregard of new laws and concomitant new requirements and conditions that are clearly already in place.

This is clearly what is not only recognized but unequivocally provided for in the very renewal clause of MPSA No. 001-90 itself, under Section 3.1 thereof, which is cited by the *ponencia*, to wit:

> 1) Section 3.1 of the MPSA 001-90 stating that the term of twenty-five (25) years is "renewable for another period of 25 years **upon such terms and conditions as may be mutually agreed upon by the parties *or as may be provided by law***[.]"[20] (Emphasis and underscoring supplied)

Necessarily, contrary to respondents' submission, and as clearly provided in the text of the renewal clause of MPSA No. 001-90, the renewability of the said MPSA for another 25 years is ***not*** exempt from legal conditions that may be further provided by law, but instead shall be *subject thereto*.

Within the much larger context of the interplay between financial interests of investors in mineral agreements *vis-à-vis* the rights of the ICC/IPs in their ancestral domains, the "conditions x x x as may be provided by law" that the renewal clause of MPSA No. 001-90 speaks of undoubtedly includes the FPIC and the NCIP Certification, since they are the pertinent new requirements that have been added by legislation with respect to the grant and renewal of mineral agreements.

Consequently, as correctly held by the RTC, the question of whether the terms of the MPSA may be wholesale renewed without having to comply with the FPIC and the NCIP Certification is not only one which can be resolved with reference to the four corners of MPSA No. 001-90, but instead clearly goes into a legal issue on the reach of subsequently introduced laws that are imbued with public policy. Given this, the RTC did not overstep the bounds of its authority when it went into ruling on this legal question of the effects of the Philippine Mining Act and the IPRA on the plausibility of renewal of MPSA No. 001-90 for respondents, since such a pivotal question is within the competence of the courts.

More crucially, the RTC not only acted within its jurisdiction when it ordered that the Arbitral Award in question be vacated, but that it similarly acted well in accord with prevailing laws and jurisprudence when it did so. Certainly, the courts cannot be forced to affirm an arbitral award that is neither consistent with laws and public policy nor absolute and unqualified in its autonomy.

As the Court held in the case of *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited*,[21] public policy is the "safety valve" to be resorted to when a arbitral award may not be respected without abandoning fundamental precepts of the legal system, *viz.*:

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[20] *Ponencia*, p. 5.

[21] 844 Phil. 813 (2018).

> Most arbitral jurisdictions adopt a narrow and restrictive approach in defining public policy pursuant to the pro-enforcement policy of the New York Convention. The public policy exception, thus, is "a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundamentals on which it is based." An example of a narrow approach adopted by several jurisdictions is that the public policy defense may only be invoked "where enforcement [of the award] would violate the forum state's most basic notions of morality and justice." Thus, in Hong Kong, an award obtained by fraud was denied enforcement by the court on the ground that fraud is contrary to Hong Kong's "fundamental notions of morality and justice." In Singapore, also a Model Law country, the public policy ground is entertained by courts only in instances where upholding the award is "clearly injurious to the public good or x x x wholly offensive to the ordinary reasonable and fully informed member of the public."[22]

It is also important to add that while the notion of "public policy" may not have been spelled out in concrete certainties, the guiding definitions of this Court in the earlier cases of *Ferrazzini v. Gsell*[23] (*Gsell*) and *Gabriel v. Monte De Piedad*[24] (*Monte De Piedad*) are *apropos* if not controlling.

In the 1916 case of *Gsell*, the Court ruled that the gravity of the public policy nature of the matter is determined by its source, which includes the Constitution, thus:

> By "public policy," as defined by the courts in the United States and England, is intended that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the "policy of the law," or "public policy in relation to the administration of the law." (Words & Phrases Judicially Defined, vol. 6, p. 5813, and cases cited.) Public policy is the principle under which freedom of contract or private dealing is restricted by law for the good of the public. (Id., Id.) In determining whether a contract is contrary to public policy the nature of the subject matter determines the source from which such question is to be solved. (Hartford Fire Ins. Co. *vs.* Chicago, M. & St. P. Ry. Co., 62 Fed. 904, 906.)
>
> **The foregoing is sufficient to show that there is no difference in principle between the public policy (orden publico) in the two jurisdictions (the United States and the Philippine Islands) as determined by the Constitution, laws, and judicial decisions.**[25] (Emphasis supplied)

Still, in the 1941 case of *Monte De Piedad*, the Court held that although there was yet no clear-cut definition of public policy, a contract that is prohibited by express legislation, among others, may be considered contrary thereto, to wit:

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22 Id. at 843-844.
23 34 Phil. 697 (1916).
24 71 Phil. 497 (1941).
25 Supra note 23, at 711-712.

> The term "public policy" is vague and uncertain in meaning, floating and changeable in connotation. **It may be said, however, that, in general, a contract which is neither prohibited by law nor condemned by judicial decision, nor contrary to public morals, contravenes no public policy. In the absence of express legislation or constitutional prohibition, a court, in order to declare a contract void as against public policy, must find that the contract as to the consideration or thing to be done, has a tendency to injure the public, is against the public good, or contravenes some established interests of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights, whether of personal liability or of private property.** Examining the contract at bar, we are of the opinion that it does not in any way militate against the public good. Neither does it contravene the policy of the law nor the established interests of society.[26] (Emphasis supplied)

The foregoing early definitions of what public policy entails clearly paint the picture of a policy that finds its roots in the Constitution, as well as its affirmation or support in subsequent express legislations.

To my mind, there are perhaps few national policies that can readily fit this operative profile than that of the rights of the ICCs/IPs over their ancestral domains, as recognized in black letter under Section 22, Article II,[27] Section 5, Article XII,[28] and Section 6, Article XIII[29] of the 1987 Constitution, as well as affirmed by the Philippine Mining Act and the IPRA.

Finally, and if I may caution to add, it is perhaps not entirely labored to assume that the requirement of an FPIC on the part of the ICCs/IPs was generally introduced in the Philippine Mining Act, and thereafter pointedly required in the IPRA *precisely* because without such an expression of the same as a legal obligation, private contractors and other mining companies may not be reasonably expected to willingly act against their financial interests in order to ensure that their mining activities do not impair, neglect or defeat acknowledged indigenous rights.

Seeing, as the *ponencia* itself acknowledges[30] the financial toll the FPIC will entail as far as the business interests of the respondents is concerned, I proffer that that is conceivably why the coercive weight of an expressed legal imperative was called for, lest compliance with unpopular laws and

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26 Supra note 24, at 500-501.

27 CONSTITUTION, Art. II, Sec. 22: The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.

28 CONSTITUTION, Art. XII, Sec. 5: The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.
The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

29 CONSTITUTION, Art. XIII, Sec. 6: The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands.
The State may resettle landless farmers and farmworkers in its own agricultural estates which shall be distributed to them in the manner provided by law.

30 Supra note 1, at. 26-27.

financially costly public policies are easily done away with in the name of preserving optimum business opportunities. I am, therefore, unable to imagine any alternative but for the Court here to make the difficult but inevitable ruling that is underpinned by definite law and overriding public policy.

For indeed the interlace of interests involving the mining industry is as complex as it is fragile, and while the Court must acknowledge the value of a more liberalized approach to the exploration of mineral resources in the country, the Court must also notice that said optimization is not an unalloyed benefit. And while the Court understands the financial reversals that respondents fear, the contours of which we can only dimly speculate on, what remains certain and clear as day is the Court's foremost duty to reject unconstitutional mechanisms and escape clauses that facilitate development aggressions on the indigenous communities which the Constitution itself as well as unaltered legislations are already positively guarding against.

Bearing the above in mind, I **CONCUR** with the *ponencia* and vote to **GRANT** the instant petitions.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice