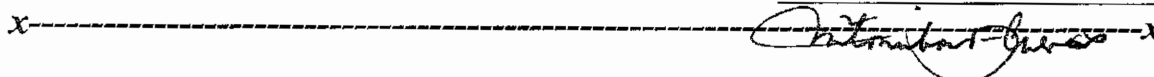
**EN BANC**

**G.R. No. 244063** — ***Lone Congressional District of Benguet Province, represented by Hon. Ronald M. Cosalan, Representative, Petitioner v. Lepanto Consolidated Mining Company and Far Southeast Gold Resources, Inc., Respondents*; and 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 v. Lepanto Consolidated Mining Company and Far Southeast Gold Resources, Inc., Respondents.***

Promulgated:

June 21, 2022



# SEPARATE CONCURRING OPINION

**DIMAAMPAO, *J.*:**

I respectfully concur with the *ponencia* insofar as it denies the Petition of the Lone Congressional District of Benguet Province in G.R. No. 244063 and vacates the Final Arbitral Award in G.R. No. 244216.

All the same, keeping in mind that these Petitions involve a domestic[1] arbitral award, it is judicious to clarify that "manifest disregard of the law" as a ground for *vacatur* is a concept *separate and distinct* from the public policy exception under Article 34 of the Model Law,[2] in relation to Rule 19.10 of the Special ADR Rules.[3] At this juncture, I adopt the highly instructive observations of retired Senior Associate Justice Estela M. Perlas-Bernabe (SAJ Perlas-Bernabe) regarding the dissimilarities between the two.

In truth, **"manifest disregard of the law"** cannot be found in both the Model Law and the New York Convention. Such ground finds its roots in United States case law involving the application of the Federal Arbitration Act (FAA). In *Peebles v. Merill Lynch, et al.,*[4] the Eleventh Circuit of the United States Court of Appeals recognized three different non-statutory bases for *vacatur* of an arbitration award, namely: (a) if the award is arbitrary and capricious; (b) if its enforcement is *contrary to public policy;* and (c) if it evinces a *manifest disregard of the law.*

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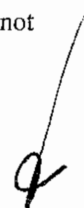
1 Section 32 of the ADR Act of 2004 characterizes "domestic arbitration" as an arbitration that is not international as defined in Article 3 of the Model Law.

2 UNCITRAL Model Law on International Commercial Arbitration.

3 A.M. No. 07-11-08-SC dated 1 September 2009.

4 431 F.3d 1320 (11th Cir. 2005).



As opined by retired SAJ Perlas-Bernabe,[5] based on the pronouncements of the Court in *Asset Privatization Trust v. Court of Appeals*[6] and *Equitable PCI Banking Corp. v. RCBC Capital Corp.,*[7] it is readily apparent that the ground of "manifest disregard of the law" in this jurisdiction is actually intertwined with – as it is demonstrative of – the integrity of the arbitral tribunal or the regularity of the proceedings proper. For indeed, if an award was made in manifest disregard of the law, then the integrity of the arbitral tribunal or the regularity of the proceedings are squarely put into question. In both cases, however, the Court did not expressly conflate manifest disregard of the law with the public policy exception. Concomitantly, in *Duferco International Steel Trading v. T. Klaveness Shipping A/S,*[8] the United States Court of Appeals laid down the requisites that must concur for the invocation of manifest disregard of the law to proper, which did not include violation of public policy.

The **public policy exception** under Rule 19.10 of the Special ADR Rules could be found in Article 34 of the Model Law, which is closely modelled after Article V of the 1985 New York Convention.[9] The recently retired magistrate keenly discerned that the phrase "contrary to the public policy" in the New York Convention has no further exposition within the treaty itself. Still, commentators elucidate that "[a]lthough different jurisdictions define public policy differently, case law tends to refer to a public policy basis for refusing recognition and enforcement of an award under article V(2)(b) of the New York Convention when the core values of a legal system have been deviated from. Invoking the public policy exception is a **safety valve to be used to those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based.**"[10]

To date, the phrase "public policy" still eludes a more precise and universal meaning. Nonetheless, the Court has adopted the *narrow* definition found in the oft-cited case of *Parsons & Whittemore Overseas v. Societe Generate de L 'Industrie du Papier (RAKTA),*[11] *i.e.,* "where enforcement would violate the forum state's most basic notions of morality and justice."[12] Tellingly, according to a recent report by the International Bar Association,[13]

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5 Reflections of retired Senior Associate Justice Estela M. Perlas-Bernabe, p. 8.

6 360 Phil. 768 (1998).

7 595 Phil. 537 (2008).

8 333 F.3d 383, 389 (2nd Cir., 2003).

9 See Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: report of the Secretary-General, 25 March 1985, A/CN.9/264, p. 72 Available at: <https://undocs.org/en/A/CN.9/264>

10 Reflections of retired Senior Associate Justice Estela M. Perlas-Bernabe, p. 5; citing New York Convention Guide, Article V(2)(b). Available at: <https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac_view=-1>.

11 508 F.2d 969 (2d Cir. 1974).

12 See *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited,* 844 Phil. 813 (2018).

13 See Report on the Public Policy Exception in the New York Convention – A Report by the IBA Subcommittee on Recognition and Enforcement of Foreign Arbitral Awards dated October 2015, p. 16. Available at: < https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/Icc585ac3773

it remains difficult to draw up a catalog of violations of substantive public policy, save for "awards **giving effect to <u>illegal activities</u>**"[14] or "**<u>universally condemned</u> activities** such as terrorism, drug trafficking, prostitution, pedophilia, corruption or fraud in international commerce."[15]

As touched upon by retired SAJ Perlas-Bernabe,[16] the Court in *Maynilad Water Services, Inc. v. Center for Popular Movement*[17] refused to recognize an arbitral award as being contrary to public policy because it would adversely affect the public at large and lead to an unequal treatment of water consumers in different locales. Furthermore, the Court held that the confirmation of the award would be illegal as it was violative of Republic Act (R.A.) No. 6234, *viz.*:

> Indeed, recognizing and enforcing the arbitral award in *Mabuhay Holdings* will have no injurious effect to the public, unlike confirming the arbitral award in this case. The arbitral award in *Mabuhay Holdings* adversely affected a private entity. On the other hand, the arbitral award which allowed Maynilad to include its corporate income taxes in the computation of water rates **will adversely affect the public at large,** specifically, the water consumers in Service Area West served by Maynilad.
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> **Not only will confirming the arbitral award in favor of Maynilad be injurious to the public; it will result in unequal protection of water consumers Service Area East under Manila Water and those in Service Area West under Maynilad.**
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> In the arbitration commenced by Manila Water against the Republic, the arbitral tribunal therein held that Manila Water cannot include its corporate income taxes in the computation of rates chargeable to water consumers in Service Area East. If the arbitral award in favor of Maynilad is confirmed, this will result in a disproportionate price difference between the water rates in Service Area West and Service Area East. Note that there is no substantial distinction between the water consumers in the respective service areas. This is contrary to the equal protection clause guaranteed by the Constitution.
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> Even confirming the arbitral award in favor of Maynilad **will be illegal.** Under Sections 3(h) and 3(m) of <u>Republic Act No. 6234</u>, the MWSS is mandated to fix **"just and equitable rates."**
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> **Certainly, allowing Maynilad to include its corporate income taxes in the rates chargeable to water consumers – taxes which, to repeat, do not inure to the benefit of water consumers – will result not**

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[14] Id.; emphasis and underscoring supplied.

[15] Id.; citing Maxi Scherer, *England,* p. 14; Charles Nairac, *France,* par. 21; Dominique Brown-Berset, *Switzerland,* p. 5; and Bennar Balkaya, *Turkey,* p. 6. Emphasis and underscoring supplied.

[16] Reflections of retired Senior Associate Justice Estela M. Perlas-Bernabe, pp. 6-7.

[17] G.R. Nos. 181764, 187380, 207444, 208207, 210147, 213227, 219362, and 239938, 7 December 2021; emphases and underscoring supplied, original citation omitted.

**only in unjust but also inequitable rates. A large segment of the water consuming public will be made to pay for something that has no direct benefit to them, while some will enjoy water services without the shouldering the same burden. This cannot be allowed.**

All told, confirming the Final Award in *Maynilad Water Services, Inc. v. Metropolitan Waterworks and Sewerage System and Regulatory Office,* which allows Maynilad to include its corporate income tax in the subsequent charging years, will injure the public. **The award, therefore, cannot be recognized for being contrary to public policy.**

Given the foregoing discourse, it is respectfully recommended that the extensive discussion of the subtle yet material distinctions between manifest disregard of the law and the public policy exception as grounds for *vacatur* of an arbitral award, as submitted by retired SAJ Perlas-Bernabe during our deliberations, be included in the *ponencia* for the guidance of both the Bench and the Bar, as follows –

***On the one hand*****, manifest disregard of law** pertains to – as it demonstrates – the grounds to vacate relative to the integrity of the arbitral tribunal, as well as the regularity of the proceedings proper. This ground hearkens to the well-settled rule that a mere error in the interpretation of the applicable law by the Arbitral Tribunal would not be sufficient ground to vacate the award. "[B]ecause arbitrators do not necessarily have a background in law, they cannot be expected to have the legal mastery of a magistrate. There is a greater risk that an arbitrator might misapply the law or misappreciate the facts *en route* to an erroneous decision." In effect, the parties agree to shoulder the risk of a misapplication of law when they agree to submit their dispute to arbitration.

***On the other hand*****, the public policy exception** is a broader concept that goes beyond an arbitral tribunal's manifest disregard of law. In the words of the New York Convention Guide, it 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 fundaments on which it is based. When the Judiciary is called upon to either confirm, modify, or vacate an award, **it becomes its duty to ensure that no illegality or impropriety is proliferated by the stamp of imprimatur placed on the arbitral award.** While courts may not set aside an arbitral award on errors of law or fact, their solemn duty to uphold the Constitution behooves them to nonetheless ensure that the interests of the State and the public at large are not undermined by upholding the agreement of private parties. At the end of the day, **the freedom to contract is not absolute;** hence, when private actions result in an injustice or are prejudicial to the interests of the public, the courts have the authority to intervene for the sake of the public good.[18]

In this case, the Final Arbitral Award allowed respondent mining companies to freely circumvent the obligatory requirement expressed in

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[18] Reflections of retired Senior Associate Justice Estela M. Perlas-Bernabe, p. 9; original citations omitted.

Section 59 of the Indigenous Peoples Rights Act (IPRA) of 1997[19] that the Free and Prior Informed Consent (FPIC) of the Indigenous Cultural Communities or Indigenous Peoples (ICCs/IPs) concerned must first be secured before the National Commission on Indigenous Peoples (NCIP) can issue the necessary certification for the issuance, renewal, or grant of any concession, license, lease, or production-sharing agreement. Upon this point, the FPIC of the ICCs/IPs is a safeguard to ensure their genuine participation in decision-making and to protect their rights in plans, programs, projects, activities, and other undertakings that will impact upon their ancestral domains – consistent with their inherent right to self-governance and self-determination and their free pursuit of economic social and cultural development. As part of this self-governance, they have the right to participate in decision-making on matters that affect them, and the right to determine their priorities for development.[20]

Not only did the Final Arbitral Award in this case contravene the FPIC requirement under Section 59 of the IPRA, but it also went against the spirit of Section 56[21] of the same law. On this score, I echo the argument of retired SAJ Perlas-Bernabe that the proponents of House Bill (H.B.) No. 9125 and Senate Bill (S.B.) No. 1728 – the precursors of the IPRA – "clarified on multiple occasions that **the protection of existing property regimes pertained to <u>non-IPs'</u> landownership rights, whether of an imperfect or perfect title, within ancestral domains; otherwise, this would defeat the purpose of the IPRA.** It was further accentuated that **Ancestral Domain Rights are themselves vested rights which deserve protection[,]**"[22] to wit:

<u>Interpellations of Representative Lagman for House Bill No. 9125</u>[23]

> MR. LAGMAN. Let me go to another subject and this is on vested rights. Section 3(a) and 56 of [the] Senate Bill No. 1728 subject ancestral domain's recognition to "vested rights." Both references to prior vested rights should be deleted. Subjected Senate Bill No. 1728 to vested rights misses a crucial point in the struggle for the recognition of ancestral domain rights. **<u>Ancestral Domain Rights are themselves vested rights.</u>** They are prior vested rights in point of time. Time immemorial possession in the concept of owner excludes property from the public domain. This has been the rule in this jurisdiction since 1909 in the case of *Cariño v. Insular Government.* These lands cannot be taken from their owners outright without offending the Bill of Rights. In the disguise of protecting vested rights, the Senate has opted to protect rights crafted out of contracts and concessions and not time immemorial possession and use. **<u>This defeats the purpose of IPRA.</u>**

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19 R.A. No. 8371, approved on 29 October 1997.

20 See *Kilusang Magbubukid ng Pilipinas v. Aurora Pacific Economic Zone and Freeport Authority,* G.R. No. 198688, 24 November 2020; citing Sections 13, 16, and 17 of the IPRA.

21 "*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."

22 Reflections of retired Senior Associate Justice Estela M. Perlas-Bernabe, p. 11.

23 Id. at 11-12; citing House of Representatives Records, 26 August 1997, pp. 528-530.

May we know whether there is a similar provision in the House version?

MR. ANDOLANA. In this House version, Mr. Speaker, Your Honor, we have Section 61 which states, and I quote: "Existing Property Rights Regimes. – Property rights within the ancestral domains already exiting upon effectivity of this Act, shall be recognized and respected."

**This presupposes, Mr. Speaker, Your Honor, a situation where, in accordance with the existing law like under our [T]orrens system where titles have been issued to private individuals and where there is an existing claim and/or continuous, peaceful, open possession of this land by members of the indigenous cultural communities, then these property rights within this ancestral domain may be respected and recognized.**

**It presupposes, Mr. Speaker, Your Honor, that these lands are already privately owned and duly titled in accordance with Commonwealth Act No. 141 and other related laws.**

MR. LAGMAN. So, in other words, Section 61 is of the same import as the cited provisions in the Senate bill, Your Honor.

MR. ANDOLANA. **Yes, it is the position of your committee to limit these property rights as defined under the law. And these are, as I earlier said, private titled properties where titles are issued under Commonwealth Act No. 141 or other related laws or the Homestead Law, Free Patent Law, although it may be situated within the ancestral domain.**

**However, if these property rights are owned by indigenous people, then it is within what we call ancestral domain and forms part of the property of the cultural communities.**

Interpellations of Senator Osmeña for Senate Bill No. 1728[24]

**Senator Osmeña.** Mr. President, what happens if some or most of these **lands have already been titled in the names of those who are not members of the indigenous cultural communities?** What will happen to their ownership thereof?

**Senator Flavier.** That is an excellent question, Mr. President, **because that is the main concern of many people, particularly those in Baguio with whom I had a dialogue because they are already on site. That is the reason Section 61 was provided for in the bill which states that property rights within the ancestral domains already existing upon the effectivity of this Act shall be recognized and respected.**

Interpellations of Senator Gonzales for Senate Bill No. 1728[25]

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[24] Id. at 12; citing Senate Records, 20 November 1996, pp. 631 and 634.

[25] Id. at 12-13; citing Senate Records, 4 December 1996, pp. 861-863 and 866.

**Senator Gonzales.** So that would be the same answer if I ask the gentleman the question: How many of these ancestral lands are already in the possession of third parties who are nonmembers with respect to agricultural lands which they, or by their predecessors-in-interest, have been in **open, public, peaceful, and adverse possession over a period of 30 years and to which they have now an imperfect title, and, therefore, entitled to judicial confirmation under existing laws?**

**Senator Flavier.** I agree, Mr. President. **They would be entitled. In fact, we were rather careful in making sure, through Section 61, that these property rights are respected.**

**xxx**

**Senator Gonzales.** Yes, Mr. President. As it reads, it actually runs counter to the Torrens system, the purpose of which is to quiet title. It is an action *in rem* which vests in the registered owner ownership that is indefeasible and imprescriptible.

In the language of the Supreme Court, a registered owner need not wait at the portals of the court and sit *de mirador tu casa* for fear of losing his property.

**Senator Flavier.** I will be happy to have that clarified, Mr. President. If it is necessary to remove that phrase to remove all doubts, I will be happy because **within the bill we were very careful in making sure that existing property rights are respected.**

**If the gentleman's point is whether the Torrens Title system is reserved, my answer is yes.** To the extent that it contravenes this particular line, I will be happy to have it clarified.

Bicameral Conference Committee Discussions for H.B. No. 9125 and S.B. No. 1728[26]

HON. DRILON. Mr. Chairman, I must articulate what was brought up to me by some sectors downstairs and this is the phrase in our bill, in our version which says, "subject to vested rights..." They brought to my attention and asked me what exactly do we mean "subject to vested rights." And they said, this is my amendment. I do not recall if this is my amendment, but I do recall that I did raise the question on the...in instances where the land is already covered by Transfer Certificate of Title or other form of title. What will happen and that is why, that was in the interpelation [sic]. Now, yung "subject to vested rights," this is a...this was brought up to me as a little broad. I do not know if this is a matter that we should redefine more precisely in a more precise term.

CHAIRMAN FLAVIER. Yes, I'm open. I also recall that apart from Senator Frank Drilon, Senator Enrile also raised the same issue and I took the position then when I was being interpelated [sic] na **yung may mga hawak na ng lupa, huwag na nating guluhin. That is why we put that**

[26] Id. at 13; citing Record of the Bicameral Conference Committee, 9 October 1997, pp. 623-626.

> **"subject to vested rights,"** but if there is a suggestion for more precise language to define "vested," I will be open, Mr. Senator.
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> HON. DOMINGUEZ. I believe, Mr. Chairman, that this was also interpreted in two sentences, when we covered the concerns of the City of Baguio. That we recognized existing rights over the land in the City of Baguio.
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> CHAIRMAN FLAVIER. There is one possibility and that is, we delete the words "subject to vested rights" and transfer that to the title properties provision on Section 56. Yes. The title of 56 is "Existing Property Rights Regimes". Property Rights within the ancestral domain already existing upon the effectivity of this Act shall be recognized and respected." Or is it already adequately covered, Mr. Senator?
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> HON. DRILON. **Well, 56 is a clear declaration of respect for titles already issued, Section 56.**

Strikingly, anent the renewal of mining permits or licenses, it was edifyingly explicated by retired SAJ Bernabe[27] that during the deliberations of S.B. No. 1728,[28] **"it was clearly discussed that the 'particular permit or license will be allowed to remain in force and will be recognized and respected until it expires.' However, 'upon expiration, they can no longer be renewed without the written consent of the indigenous peoples and without prejudice to cancellation due to violations of terms and conditions of the permit'** furthermore, it was even remarked that **'permits will be issued in the future not only with the written consent but also with the informed consent of the indigenous peoples[.]'"**

In epitome, it is ineludible that the Regional Trial Court (RTC) did not err in vacating the Final Arbitral Award in the first instance because it ran counter to the unequivocal public policy enunciated in the IPRA[29] and the 1987 Constitution[30] itself of recognizing and promoting the rights of ICCs/IPs, such as their right to self-governance and self-determination,[31] as well as their right to their ancestral domains, among others.

***A final cadence.*** In view of the *vacatur* of the Final Arbitral Award in this case under the public policy exception, it is humbly submitted that the intent of the parties to arbitrate the dispute must be honored in fealty to the policy on arbitration under Rule 2.2 of the Special ADR Rules, which states that "[w]here the parties have agreed to submit their dispute to arbitration, courts shall refer the parties to arbitration pursuant to the [Alternative Dispute Resolution (ADR) Act of 2004[32]] bearing in mind that such arbitration

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27 Reflections of retired Senior Associate Justice Estela M. Perlas-Bernabe, p. 14.

28 Id. at 14-15; citing Senate Records, 20 November 1996, pp. 636-637.

29 See Section 2 of the IPRA.

30 See Article II, Section 22, Article XII, Section 5, and Article XIV, Section 17 of the 1987 Constitution.

31 See *Kilusang Magbubukid ng Pilipinas v. Aurora Pacific Economic Zone and Freeport Authority, supra* note 20.

32 R.A. No. 9285, approved on 2 April 2004.

agreement is the law between the parties and that they are expected to abide by it in good faith."

Accordingly, in the case at bench, the RTC must be directed to refer the matter of compliance with the FPIC requirement by respondent mining companies to the same arbitral tribunal or to a new one pursuant to Rule 11.9 of the Special ADR Rules in relation to Section 24 of the Arbitration Law,[33] which provide:

> **Rule 11.9.** *Court action.* – xxx
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> In referring the case back to the arbitral tribunal or to a new arbitral tribunal pursuant to [Section] 24 of Republic Act No. 876, the court may not direct it to revise its award in a particular way, or to revise its findings of fact or conclusions of law or otherwise encroach upon the independence of an arbitral tribunal in the making of a final award.
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> xxx xxx
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> **Section 24.** *Grounds for vacating award.* – xxx
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> **Where an award is vacated, the court, in its discretion, may direct a new hearing either before the same arbitrators or before a new arbitrator or arbitrators** to be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators, and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order. xxx[34]

To be sure, the mandate of the arbitral tribunal in domestic arbitration ends with the termination of the arbitration proceedings.[35] Elsewise stated, upon rendition of the final award, the tribunal becomes *functus officio* and – save for a few exceptions – ceases to have any further jurisdiction over the dispute.[36] One such exception is an application for setting aside an exclusive recourse against arbitral award under Article 5.34 of the Implementing Rules and Regulations (IRR) of the ADR Act of 2004.

**JAPAR B. DIMAAMPAO**
*Associate Justice*

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[33] R.A. No. 876, approved on 19 June 1953.
[34] Emphasis supplied.
[35] See Article 5.32, paragraph (c) of the IRR of the ADR Act of 2004.
[36] See *Fruehauf Electronics Philippines Corporation v. Technology Electronics Assembly and Management Pacific Corporation,* 800 Phil. 721, 744 (2016); original citations omitted.