Assailing the Constitutionality of Executive Order No. 79 on the Ground of *Ultra Vires* Executive Legislation

Juan Fidel F. Nograles[*]

> *Executive legislation, state control of popular liberties, military courts, and arbitrary executive action were governmental features attacked by the men who fought for freedom, not because they were inefficient or unsuccessful, but because they were dangerous and oppressive.*
>
> — Clinton Rossiter[1]

---

[*] '12 J.D., *with honors*, Ateneo de Manila University Law School. The Author currently works at the Supreme Court of the Philippines under Justice Martin S. Villarama, Jr. He previously wrote *Capitalizing on Capital: The Supreme Court's Obiter Dictum in Defining Capital Under the Constitution*, 58 ATENEO L.J. 231 (2013).

Cite as 58 ATENEO L.J. 757 (2013).

1. Sanidad v. Comission on Elections, 73 SCRA 333, 395 (1976) (J. Fernando, concurring and dissenting opinion) (citing CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 294 (1948 ed.)).

I. BACKGROUND

Last 6 July 2012, President Benigno S. Aquino, Jr. issued Executive Order (E.O.) No. 79, entitled "Institutionalizing and Implementing Reforms in the Philippine Mining Sector Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources."[2] In proclaiming the Chief Executive's policy on mining, E.O. No. 79 provides a regulatory framework for the implementation of a responsible mining platform, which revolves around enhancing environmental protection, increasing government revenues, and promoting socio-economic development.[3] In particular, the objectives of E.O. No. 79 are based on the six-point agenda adopted by President Aquino's Climate Change Adaptation and Mitigation and Economic Development Cabinet Clusters which established the policy foundation for responsible mining.[4] These objectives focus on the achievement of the following:

(1) "Ensure mining's contribution to ... sustainable development;"[5]

(2) "Adopt international best practices and promotion of good governance and integrity in the sector;"[6]

(3) "Ensure the protection of the environment [through] the adoption of technically and scientifically sound and generally accepted methods as well as indigenous best practices;"[7]

(4) "Ensure the consistency of local issuances with the Constitution and national laws;"[8]

(5) "Ensure a fair, adequate, and equitable shared economic benefit for the country and the people;"[9] and

(6) "Deliver[y] [of] effective management of the mining sector."[10]

---

2. *See* Office of the President, Institutionalizing and Implementing Reforms in the Philippine Mining Sector Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources, Executive Order No. 79 [E.O. No. 79] (July 26, 2012).

3. *Id.*

4. Department of Environment and Natural Resources (DENR), Rules and Regulations Implementing E.O. No. 79 as Amended, Executive Order No. 79, § 2 (2012).

5. *Id.* § 2 (a).

6. *Id.* § 2 (b).

7. *Id.* § 2 (c).

8. *Id.* § 2 (d).

9. *Id.* § 2 (e).

II. STATEMENT OF THE PROBLEM

Despite President Aquino's noble objectives in reforming the mining legal landscape, it is respectfully submitted that the President exceeded his rule-making powers when he issued E.O. No. 79. Specifically, this Essay will seek to establish that provisions of E.O. No. 79 purport to expand the limited coverage of some mining laws, suspend the implementation of an important provision in a statute, and impair the rights granted by existing laws.[11] Arguably, these provisions are fraught with legal infirmities because the Chief Executive does not have the power to rewrite our laws.[12] On the contrary, it is his imperative Constitutional duty to ensure that our laws are faithfully executed.[13]

Admittedly, "[t]he President is granted [ ] Ordinance Power under Chapter 2, Book III of [E.O.] No. 292,"[14] otherwise known as the Administrative Code of 1987.[15] Section 2 thereof defines Executive Orders as "[a]cts of the President providing for rules of a general or permanent character in implementation or execution of constitutional or statutory powers[.]"[16] In *Abakada Guro Party List v. Purisima*,[17] the Supreme Court declared that the President's power to issue Executive Orders is a delegated legislative power from Congress.[18] The Court held that

> [e]xecutive orders are not the vehicles for rules of a general or permanent character in the *implementation or execution of laws*. They are the vehicle for rules of a general or permanent character in the *implementation or execution of the constitutional or statutory powers of the President himself*. Since by definition, the statutory powers of the President consist of a specific delegation by Congress, it necessarily follows that the faculty to issue executive orders to implement such delegated authority emanates not from any inherent executive power but from the authority delegated by Congress.[19]

---

10. Rules and Regulations Implementing E.O. No. 79, § 2 (f).
11. *See* E.O. No. 79, §§ 1, 4, & 5.
12. *See* Official Gazette, Philippine Government, *available at* http://www.gov.ph/about/gov/ (last accessed Dec. 2, 2013).
13. PHIL. CONST. art. VII, § 17.
14. David v. Macapagal-Arroyo, 489 SCRA 160, 247 (2006) (citing Office of the President, Instituting the "Administrative Code of 1987," Executive Order No. 292 [ADMINISTRATIVE CODE OF 1987] Book III, Chapter 2 (July 25, 1987)).
15. *Id.*
16. ADMINISTRATIVE CODE OF 1987, Book III, Chapter 2, § 2.
17. Abakada Guro Party List v. Purisima, 562 SCRA 251 (2008).
18. *Id.* at 303 (J. Carpio, separate concurring opinion).
19. *Id.* at 297.

As a delegated legislative power, the issuance of an executive order by the President must not be *ultra vires*.[20] Thus, such executive order "must not supplant or modify the Constitution ... and other existing laws[.]"[21] In *United BF Homeowner's Association v. BF Homes, Inc.*,[22] the Court described the scope and limitations of an executive order as follows —

> The rule-making power of a public administrative body is a delegated legislative power, which it may not use either to abridge the authority given it by Congress or the Constitution or to enlarge its power beyond the scope intended. Constitutional and statutory provisions control what rules and regulations may be promulgated by such a body, as well as with respect to what fields are subject to regulation by it. It may not make rules and regulations which are inconsistent with the provisions of the Constitution or a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute.[23]

In *Abakada Guro Party List*, the Court cited Justice Antonio Eduardo B. Nachura, who described the rule-making power of executive officials as "the exercise of delegated legislative power, involving no discretion as to what the law shall be, but merely the authority to fix the details in the execution or enforcement of a policy set out in the law itself."[24]

In *Ople v. Torres*,[25] the Court ruled that the exercise by the executive of legislative powers is subject to strict scrutiny by the courts because "[t]he blurring of the demarcation lines between [legislative and executive power]"[26] will ultimately result in an imbalance of power.[27]

In view of the above, E.O. No. 79 will be rigorously examined in relation to jurisprudence on executive legislation.

III. REVIEW OF E.O. NO. 79

20. Executive Secretary v. Southwing Heavy Industries, Inc., 482 SCRA 673, 698 (2006).

21. *Id.*

22. United BF Homeowner's Association v. BF Homes, Inc., 310 SCRA 304 (1999).

23. *Id.* at 315-16 (Citing Conte v. Commission on Audit, 264 SCRA 19, 30-31 (1996)).

24. *Abakada Guro Party List*, 562 SCRA at 294.

25. Ople v. Torres, 293 SCRA 141 (1998).

26. *Id.* at 149.

27. *Id.*

The provisions of E.O. No. 79 can be grouped into the following categories: (1) regulatory provisions; (2) environmental provisions; (3) fund-raising provisions; (4) small-scale mining; and (5) administrative provisions.

A. Regulatory Provisions

The regulatory provisions of E.O. No. 79 seek to administer the grant or issuance of mining agreements, permits, contracts, and other mining rights to applicants.[28]

The first regulatory provision is found in Section 1 of E.O. No. 79 which refers to the areas closed to mining applications or the No-Go zones.[29] In addition to the areas expressly declared by Republic Act (R.A.) No. 7942 or the Philippine Mining Act (Mining Act)[30] and R.A. No. 7586 or the National Integrated Protected Areas System Act (NIPAS Act)[31] to be closed to mining applications, Section 1 provides that no applications for mineral contracts, concessions, and agreements shall be allowed in the following No-Go zones:

> c.) Prime agricultural lands, in addition to lands covered by R.A. No. 6657, or the Comprehensive Agrarian Reform Law of 1988, as amended, including plantations and areas devoted to valuable crops, and strategic agriculture and fisheries development zones and fish refuge and sanctuaries declared as such by the Secretary of the Department of Agriculture (DA);
>
> d.) Tourism development areas, as identified in the National Tourism Development Plan (NTDP); and
>
> e.) Other critical areas, island ecosystems, and impact areas of mining as determined by current and existing mapping technologies, that the [Department of Environment and Natural Resources] (DENR) may

28. *See* E.O. No. 79, §§ 1, 4, & 5.

29. Gil C. Cabacungan, *78 no-mining zones in Aquino EO*, PHIL. DAILY INQ., July 10, 2012, *available at* http://newsinfo.inquirer.net/226212/78-no-mining-zones-in-aquino-eo (last accessed Dec. 2, 2013).

30. Section 19 enumerates the areas closed to mining applications. This is reiterated in Section 1 (a) of E.O. [No.] 79 which provides that "[a]reas expressly enumerated under Section 19 of R.A. [No.] 7942" shall be closed to mining applications. An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation [Philippine Mining Act of 1995], Republic Act No. 7942, § 19 (1995) & E.O. No. 79, § 1.

31. An Act Providing for the Establishment and Management of National Integrated Protected Areas System, Defining its Scope and Coverage, and for Other Purposes [National Integrated Protected Areas System Act of 1992], Republic Act No. 7586, § 3 (1992).

> hereafter identify pursuant to existing laws, rules, and regulations, such as, but not limited to, the NIPAS Act.[32]

Under the Implementing Rules and Regulations of E.O. No. 79 (E.O. No. 79 IRR), the National Mapping and Resource Information Authority (NAMRIA) is mandated to consolidate all the No-Go zones into an integrated map system for the guidance of the general public.[33]

Despite the addition of these three new No-Go zones, E.O. No. 79 still recognizes the validity of the mining contracts, agreements, and concessions granted prior to its effectivity as long as the holders thereof strictly comply with the terms and conditions of their contracts.[34] For this purpose, the DENR is directed to conduct periodic reviews and monitoring of such compliance.[35] On the other hand, all pending mining applications encroaching on the new No-Go zones shall be automatically denied upon the effectivity of E.O. No. 79.[36]

The second regulatory provision imposes a continued moratorium on the grant of mineral agreements pending the enactment of a law determining the revenue-sharing scheme between the government and mining firms, to wit —

> Section 4. Grant of Mineral Agreements Pending New Legislation. No new mineral agreements shall be entered into until a legislation rationalizing existing revenue sharing schemes and mechanisms shall have taken effect. The DENR may continue to grant and issue Exploration Permits under existing laws, rules, and guidelines. The grantees of such permits shall have the rights under the said laws, rules, and guidelines over the approved exploration area and shall be given the right of first option to develop and utilize the minerals in their respective exploration area upon the approval of the declaration of mining project feasibility and the effectivity of the said legislation.
>
> The DENR shall likewise undertake a review of existing mining contracts and agreements for possible renegotiation of the terms and conditions of the same, which shall in all cases be mutually acceptable to the government and the mining contractor.[37]

Under the Mining Act, a mineral agreement refers to any of the following: (1) Mineral Production Sharing Agreement; (2) Co-Production

---

32. E.O. No. 79, § 1.

33. Rules and Regulations Implementing E.O. No. 79, § 19.

34. E.O. No. 79, § 1.

35. Rules and Regulations Implementing E.O. No. 79, § 4.

36. *Id.*

37. E.O. No. 79, § 4.

Agreement; or (3) Joint-Venture Agreement.[38] These mineral agreements are specifically defined by law in the following manner:

> (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.
>
> (b) *Co-production agreement* is an agreement between the Government and the contractor wherein the Government shall provide inputs to the mining operations other than the mineral resource.
>
> (c) *Joint venture agreement* is an agreement where a joint-venture company is organized by the Government and the contractor with both parties having equity shares. Aside from earnings in equity, the Government shall be entitled to a share in the gross output.[39]

Thus, the moratorium does not apply to the issuance of an Exploration Permit (EP) or a Financial or Technical Assistance Agreement (FTAA). The EP is defined as a license to "conduct exploration of minerals in specified areas"[40] while the FTAA is a "contract involving financial or technical assistance for large-scale exploration, development, and utilization of mineral resources."[41] Meanwhile, the E.O. No. 79 IRR expressly allows the issuance of other mining permits, such as the Mineral Processing Permit, Government Seabed Quarry Permit, Special Minerals Extraction Permit, and Industrial Sand and Gravel Permit.[42] In the application for an EP, the E.O. No. 79 IRR provides that the meridional blocks shall be used as basis for identifying areas.[43]

The above moratorium does not apply in case of an expansion of existing contract areas where there is "an imminent and/or threatened economic disruption, such as shortage of critical commodities and raw materials that could adversely affect priority government projects and/or economic activities as determined by the Economic Development Cabinet Cluster."[44] On the other hand, a restriction has been imposed on the National Government-Owned Mining Assets which refer to the following areas —

---

38. Philippine Mining Act of 1995, § 26.

39. *Id.* (emphases supplied).

40. *Id.* § 20.

41. *Id.* § 3 (r).

42. Rules and Regulations Implementing E.O. No. 79, § 7.

43. *Id.*

44. *Id.*

> [M]ining areas, mining tenements[,] and/or claims previously held by operators, including, but not limited to, Basay Mining Corporation/CDCP Mining Corporation, Marinduque Mining and Industrial Corporation, Nonoc Mining and Industrial Corporation, and Hercules Minerals and Oils, Inc., which were previously assigned by government financial institutions[,] and/or government-owned or controlled corporations to the Asset Privatization Trust/ Privatization and Management Office[.][45]

Specifically, the E.O. No. 79 IRR provides that mining rights over the aforementioned National Government-Owned Mining Assets can be acquired only through an FTAA awarded through competitive public bidding.[46]

The third regulatory provision pertains to the establishment of mineral reservations under Section 5 of E.O. No. 79.[47] This Provision lays down the legal basis for the creation of Mineral Reservations, to wit —

> Section 5. Establishment of Mineral Reservations. Potential and future mining areas with known strategic mineral reserves and resources shall be declared as Mineral Reservations for the development of strategic industries identified in the Philippine Development Plan and a National Industrialization Plan, pursuant to the pertinent provisions of RA No. 7942, after proper consultation with all concerned stakeholders such as, but not limited to, residents of affected communities, LGUs, the business sector, and non-government and civil society organizations.
>
> This shall be without prejudice to the agreements, contracts, rights[,] and obligations previously entered into by and between the government and mining contractors/operators.[48]

Under the E.O. No. 79 IRR, the Mines and Geosciences Bureau (MGB) is directed to enhance its efforts in exploration, research, and development in order to determine mineral resources and reserves in coordination with local governments and indigenous communities.[49]

The final regulatory provision defines the scope and limitations of the legislative powers of local governments in relation to the promulgation of mining ordinances. Specifically, Section 12 of E.O. No. 79 limits the power of local legislative bodies to the "imposition of reasonable limitations on mining activities conducted within their respective territorial jurisdictions that are consistent with national laws and regulations."[50]

---

45. *Id.* § 3 (g).

46. *Id.* § 7.

47. E.O. No. 79, § 5.

48. *Id.*

49. Rules and Regulations Implementing E.O. No. 79, § 8.

50. E.O. No. 79, § 12.

B. Environmental Provisions

The environmental provisions of E.O. No. 79 are designed to advance the interests of the various industry stakeholders.

The first environmental provision is a mandate on the DENR to "ensure that the environmental standards in mining ... [are] strictly enforced"[51] as provided by Section 2 of E.O. No. 79.[52]

For this reason, the E.O. No. 79 IRR empowers the MGB Director or Regional Director to require the mining contractor or permit holder to undertake corrective actions to rectify environmental damage, and to summarily impose suspension orders. Hence,

> [w]hen any mining operatio[n] violates the provisions of [ ] R.A. No. 7942 and its [IRRs], the [E.O.] and the Presidential Directives, and other applicable laws and regulations, the MGB Director/Regional Director shall require the mining contractor/permitee/permit holder/operator concerned to undertake the necessary remediation measures for the affected areas, including any communities involved, and shall summarily issue pertinent suspension order/s until the danger is removed.[53]

Similarly, the E.O. No. 79 IRR also empowers the Environmental Management Bureau (EMB) Director or Regional Director to enjoin the illegal activities of the mining contractor or permit holder and to impose the corresponding penalties therefor —

> [o]n the other hand, the [EMB] Director/Regional Director shall issue Notice of Violation/s and Cease and Desist Order/s, and/or impose fines and penalties from the mining contractor/permitee/permit holder/operator concerned for violation/s of the Environmental Compliance Certificate (ECC) and/or the provisions of Presidential Decree (P.D.) No. 1586, [DENR Administrative Order] No. 2003-30[,] and other environmental laws.[54]

Finally, the E.O. No. 79 IRR espouses strict compliance with the environmental management record.[55] Relevantly, the term "environmental management record" is defined as

> a mining applicant's compliance with all environmental standards in its past resource use ventures and that its present technical and financial capability meet all the requirements to undertake resource protection, restoration and/or rehabilitation of degraded areas[,] and similar activities: *Provided*, that

51. *Id.* § 2.

52. *Id.*

53. Rules and Regulations Implementing E.O. No. 79, § 5.

54. *Id.*

55. *Id.*

> this shall not be required in cases where the mining applicant has no previous experience in resource use ventures, locally or internationally[.][56]

Thus, the E.O. No. 79 IRR imposes a permanent disqualification from the acquisition of mining rights to those mining applicants with questionable environmental management records.[57] Furthermore, this penalty imposes personal liability on the stockholders and members of the board of directors of disqualified corporations, thus —

> [m]ining rights shall be granted only to those who are able to strictly comply with the environmental management record requirement, among other pertinent requirements, pursuant to the applicable provisions of R.A. No. 7942, the E.O. and the Presidential Directives, and other applicable laws and regulations. *Thus, all mining applicants, including the individual owners/officials of juridical entities, with record(s) of environmental incidents, where the required remediation measures for the affected areas under applicable laws and regulations were not implemented by them, such as, but not limited to, destructive tailings spill and indiscriminate mining operation, shall be permanently disqualified from acquiring mining rights and operating mining projects.* This shall not be required in cases where the mining applicant has no previous experience in resource use ventures, locally or internationally.[58]

The second environmental provision is another mandate on the DENR to lead a multi-stakeholder team, which will conduct a review of the performance of existing mining operations as provided by Section 3 of E.O. No. 79.[59] This review examines compliance of the mining operations with the terms and conditions stipulated in their mining contract and the provisions of the applicable law, such as the Mining Act and the Labor Code.[60]

In addition to this review, the E.O. No. 79 IRR orders the DENR to undertake a cleansing of non-moving mining rights holders in accordance with DENR Memorandum Order No. 2010-04.[61] This issuance imposes three regulatory measures in the cleansing of non-moving mining rights holders: (1) strict implementation of the Three Letters-Notice Policy; (2) denial of mining applications due to rejection of the request for free and prior informed consent; and (3) imposition of additional grounds for the denial of mining applications.[62]

---

56. *Id.* § 3 (b).

57. *Id.*

58. *Id.* § 5 (emphasis supplied).

59. *See* E.O. No. 79, § 3.

60. *Id.*

61. Rules and Regulations Implementing E.O. No. 79, § 6.

62. DENR, DENR Memorandum Order No. 2010-04 [DENR Memo. Order No. 2010-04], B.1-3 (Mar. 12, 2010).

The last environmental provision enjoins both the DENR and the EMB to study the adoption of the Programmatic Environmental Impact Assessment (PEIA), in accordance with the Environmental Impact Statement System under Presidential Decree (P.D.) No. 1586, entitled "Establishing an Environmental Impact Statement System including other Environmental Related Measures and for Other Purposes."[63] For this purpose, both agencies are directed to issue administrative regulations for the implementation of the PEIA.[64]

C. Fund-Raising Provisions

The fund-raising provisions of E.O. No. 79 are geared towards increasing the share of the Government from mining revenues.

Thus, one of the salient provisions of E.O. No. 79 is the imposition of the competitive public bidding requirement on the following: (1) the award of mining rights and mining tenements over areas with known and verified mineral resources which includes those owned by the Government and all expired mining tenements;[65] and (2) the development and utilization of all abandoned ores and valuable metals in mine wastes and mill tailings which are generated by both previous and presently defunct mining operations.[66]

In the grant of rights over areas with known and verified mineral resources, the law provides that the competitive public bidding must satisfy the social acceptability requirement.[67] Relevantly, E.O. No. 79 IRR requires a dialogue with various stakeholders.[68] It provides that

> '[s]ocial acceptability' refers to the acceptability of a project by affected communities based on timely and informed participation in a consultation process, particularly with regard to environmental impacts that are of concern to them. It is not a simple 'yes' or 'no' vote where the majority wins. It includes addressing valid concerns through a series of dialogues, information[,] and negotiation among stakeholders, especially with the people living in surrounding communities[.][69]

63. E.O. No. 79, § 17.

64. *Id.*

65. *Id.* § 6.

66. *Id.* § 7.

67. *Id.* § 6.

68. Rules and Regulations Implementing E.O. No. 79, § 3 (l).

69. *Id.*

On the other hand, the Law mandates that "[a]ll other mining rights and tenements applications shall be processed and approved through existing procedures."[70]

With respect to the development and utilization of abandoned ores and valuable metals, these shall include those which were abandoned in the course of transportation and are not authorized by an Ore Transport Permit, Mineral Ore Export Permit, or Delivery Receipt.[71] Moreover, the Law requires that these abandoned ores and valuable metals must not be the subject of any court proceedings.[72]

However, upon the expiration of the term of the relevant mining contracts, all valuable metals in mine wastes and/or mill tailings in present mining operations shall automatically belong to the Government for development and utilization through competitive public bidding.[73] In addition, the State shall not be held liable for any damages for the appropriation of the structures and facilities relating to such mine wastes and/or mill tailings.[74]

The next fund-raising provision of E.O. No. 79 involves the creation of a multi-stakeholder committee, which will formulate a national program and roadmap based on the Philippine Development Plan and National Industrialization Plan.[75] This Program and roadmap shall be designed to develop "value-adding activities and downstream industries for strategic metallic ores."[76]

Under the E.O. No. 79 IRR, the Secretary of the Department of Trade and Industry (DTI) shall serve as the Chairman of this multi-stakeholder committee.[77] Meanwhile, the following are the members thereof: (1) DENR Secretary; (2) Department of Science and Technology (DOST) Secretary; (3) Department of Finance (DOF) Secretary; (4) National Economic and Development Authority (NEDA) Director-General; (5) Union of Local Authorities of the Philippine (ULAP) President; and (6) various representatives from business organizations, civil society groups, and the academe.[78]

---

70. E.O. No. 79, § 6.

71. Rules and Regulations Implementing E.O. No. 79, § 10.

72. *Id.*

73. *Id.*

74. *Id.*

75. E.O. No. 79, § 8.

76. *Id.*

77. Rules and Regulations Implementing E.O. No. 79, § 11.

78. *Id.*

The last fund-raising provision of E.O. No. 79 is a two-fold mandate imposed on the DENR, Department of Budget and Management (DBM), and the DOF.[79] Firstly, these agencies are directed to ensure the timely release of the share of local government units (LGUs) in the National Wealth under Section 289[80] of Republic Act No. 7160 or the Local Government Code of 1991.[81] Secondly, they must also assess the legislative possibility of increasing the share of such LGUs in mining revenues derived within their territorial jurisdiction and providing direct remittance of such revenues.[82]

D. Small-Scale Mining Provisions

Section 11 of E.O. No. 79 lays down various concrete regulatory measures to improve small-scale mining activities.[83]

The first measure is a mandate on small-scale mining operators to strictly comply with the provisions of R.A. No. 7076, or the People's Small-Scale Mining Act of 1991.[84] Specifically, small-scale mining operations must be pursued only within the declared People's Small-Scale Mining Areas or *Minahang Bayan*.[85] Also, small-scale mining shall not be applicable for metallic minerals except gold, silver, and chromite.[86]

Despite this strict compliance, Small-Scale Mining Permits issued by the Provincial Governors under P.D. No. 1899[87] shall continue to be recognized

79. E.O. No. 79, § 12.

80. An Act Providing for a Local Government Code of 1991 [LOCAL GOVERNMENT CODE OF 1991], Republic Act No. 7160, § 289. This Section provides that "[l]ocal government units shall have an equitable share in the proceeds derived from the utilization and development of the national wealth within their respective areas, including sharing the same with the inhabitants by way of direct benefits." *Id.*

81. E.O. No. 79, § 12.

82. *Id.*

83. *See* E.O. No. 79, § 11.

84. *Id.* § 11 (a).

85. *Id.* § 11 (b) & An Act Creating a People's Small-Scale Mining Program and for Other Purposes [People's Small-Scale Mining Act of 1991], Republic Act No. 7076, § 5 (1991). *See also* Germelina Lacorte, *'Minahang Bayan' pitfalls*, PHIL. DAILY. INQ., July 15, 2012, *available at* http://newsinfo.inquirer.net/228935/minahang-bayan-pitfalls (last accessed Dec. 2, 2013).

86. People's Small-Scale Mining Act of 1991, § 3 (a) & E.O. No. 79, § 11 (d).

87. Establishing Small-Scale Mining as a New Dimension in Mineral Development, Presidential Decree No. 1899, § 2 (1984).

until their expiration date.[88] Thereafter, only the Small-Scale Mining Contracts (SSMC) issued under the R.A. No. 7076 shall be recognized.[89]

The E.O. No. 79 IRR further expands the documentary requirements prior to the issuance of the SSMC to include the following:

> (1) [Environmental Compliance Certificate (ECC)] for the Minahang Bayan secured thru an Environmental Impact Statement from the EMB;
>
> (2) Potential Environmental Impact Report, which is a simplified Environmental Protection and Enhancement Program, and a Final Mine Rehabilitation/Decommissioning Plan duly approved by the MGB Regional Office concerned; and
>
> (3) Community Development and Management Program, a simplified Social Development and Management Program, duly approved by the MGB Regional Office concerned.[90]

Relevantly, the second measure is a mandate to strictly comply with the requirements of the Environmental Impact Statement System under P.D. No. 1586.[91] In connection with this, Section 20 of the E.O. No. 79 IRR directs the EMB to study the implementation of the PEIA for small-scale mining activities.[92]

The third measure is a prohibition on the use of mercury in small-scale mining.[93] E.O. No. 79 IRR extends the scope of this prohibition to the conduct of "[h]ydraulicking (water jetting), compressor mining[,] and [mere possession] of mercury in small-scale mining [and milling] operations[.]"[94]

The fourth measure describes the composition of the Provincial/City Mining Regulatory Boards under Section 24 of R.A. No. 7076.[95] In particular, the MGB Regional Director is designated as chairperson.[96] Meanwhile, the provincial governor or city mayor is the co-chairperson.[97]

---

88. Rules and Regulations Implementing E.O. No. 79, § 14 (a).
89. *See* People's Small-Scale Mining Act of 1991, § 9.
90. Rules and Regulations Implementing E.O. No. 79, § 14 (b).
91. E.O. No. 79, § 11 (a).
92. Rules and Regulations Implementing E.O. No. 79, § 20.
93. E.O. No. 79, § 11 (e).
94. Rules and Regulations Implementing E.O. No. 79, § 14 (c).
95. E.O. No. 79, § 11 (c).
96. People's Small-Scale Mining Act of 1991, § 25.
97. *Id.*

The fifth measure is a mandate on government agencies to facilitate training and seminars for capacity building to small-scale miners, mining cooperatives, and associations.[98]

The final measure is imposed by the E.O. No. 79 IRR to regulate the sale of gold only to the Central Bank of the Philippines and its accredited buyers.[99]

E. Administrative Provisions

E.O. No. 79 contains several administrative provisions to further enhance the regulation of the mining industry.

Section 9 of E.O. No. 79 establishes the Mining Industry Coordinating Council (MICC).[100] This organization shall be headed by the Chairpersons of the Climate Change Adaptation Cabinet Cluster and the Mitigation and Economic Development Cabinet Cluster.[101] Meanwhile, the Secretary of Justice, Chairman of the National Commission on Indigenous Peoples, and President of ULAP shall serve as its members.[102]

The MICC shall have the following powers and functions:

a) Submit a work plan within [60] days from the effectivity of this Order for the implementation of this Order and other reforms related to the mining industry;

b) Ensure continuing dialogue and coordination among all stakeholders in the industry;

c) Conduct and facilitate the necessary capacity and institutional building programs for all concerned government agencies and instrumentalities;

d) Conduct an assessment and review of all mining-related laws, rules and regulations, issuances, and agreements with the view to formulating recommendations to improve the allocation of revenues and risk between the government and the mining sector, to enhance coordination between the National Government and LGUs to ensure implementation of mining laws and regulations, and to properly regulate small-scale mining participants and ensure that they are accountable to the same environmental and social obligations as large-scale mining companies;

98. E.O. No. 79, § 11 (f).

99. Rules and Regulations Implementing E.O. No. 79, § 14 (f) & People's Small Scale Mining Act of 1991, § 17.

100. E.O. No. 79, § 9.

101. *Id.*

102. *Id.*

e) As may be directed by the President, constitute and create a Task Force Against Illegal Mining and seek the assistance of all law enforcement agencies, such as, but not limited, to the Philippine National Police (PNP) and the Armed Forces of the Philippines (AFP) to ensure strict compliance with relevant laws, rules[,] and regulations;

f) Serve as the Oversight Committee over the operations of Provincial/City Mining Regulatory Boards (P/CMRBs);

g) Request the assistance of any government agency or instrumentality, including government-owned and controlled corporations and LGUs, in the implementation of this Order;

h) Submit periodic reports to the President on the status of the implementation of this Order; and

i) Perform such other functions and acts as may be necessary, proper or incidental to the attainment of its mandates and objectives, or as may be directed by the President.[103]

In addition to the above, the MICC is also tasked to review for recommendation to the President of the Philippines the national program and roadmap for the development of value-adding activities and downstream industries for strategic metallic ores drafted by the multi-stakeholder committee.[104]

To improve the efficiency in mining applications, Section 13 of E.O. No. 79 creates the inter-agency one-stop shop for all mining-related applications and processes.[105] Nevertheless, the same Provision reminds applicants for Mineral Production Sharing Agreements (MPSA), FTAAs, and Joint Venture Agreements (JVA) to still acquire the free, prior, and informed consent of the concerned indigenous people, and to comply with the social acceptability requirement of affected communities.[106]

In line with the creation of the inter-agency one-stop shop, the DENR issued Administrative Order (A.O.) No. 2013-11, entitled "Procedural Guidelines in the Filing and Processing of Applications for Exploration Permit Pursuant to E.O. No. 79, last 21 February 2013."[107] This Regulation establishes a centralized procedure for all EP and FTAA applications which must be filed in the MGB Central Office.[108] After the initial evaluation of

103. *Id.* § 10.

104. Rules and Regulations Implementing E.O. No. 79, § 11.

105. E.O. No. 79, § 13.

106. *Id.*

107. Department of Environment and Natural Resources, Procedural Guidelines in the Filing and Processing of Applications for Exploration Permit Pursuant to E.O. No. 79 [DENR A.O. No. 2013-11] (Feb. 21, 2013).

108. *Id.* § 1.

the EP and FTAA applications, the MGB Central Office shall then forward the applications to the MGB Regional Office which has territorial jurisdiction over the mining area.[109]

To improve transparency, accountability, and governance in the mining sector, Section 14 of E.O. No. 79 mandates that the government shall promote participation in the Extractive Industries Transparency Initiative (EITI).[110] Thus, last 26 November 2013, the President issued Executive Order No. 147 entitled "Creating the Philippine Extractive Industries Transparency Initiative."[111] Section 2 thereof mandates the creation of a multi-stakeholder group headed by the Secretary of the Department of Finance to implement the objectives of the Philippine Extractive Industries Initiative.[112] This group shall be composed of five representatives chosen by the following groups: (1) MICC, (2) business sector, and (3) civil society organizations.[113] As a multi-stakeholder group, it is tasked, *inter alia*, to ensure the commitment of the different stakeholders to the strategic formulation and implementation of the Extractive Industries Transparency Initiative.[114]

In relation to improving transparency, Section 15 of E.O. No. 79 directs the DENR to create a centralized database for all mining-related information.[115] This database must be open to the public as it will be used for the evaluation of future mining projects and for the performance review of existing mining operations.[116] Examples of the data consolidated here are information on existing mining tenements, drilling and production reports, and maps and track records of mining companies.[117]

The last administrative provision is the creation of the integrated map system to aid the planning and decision-making processes of all government agencies.[118] As previously mentioned, the NAMRIA is directed to consolidate all the No-Go zones into such an integrated map system.[119]

---

109. *Id.* § 2.

110. E.O. No. 79, § 14.

111. Office of the President, Creating the Philippine Extractive Industries Transparency Initiative, Executive Order No. 147 [E.O. No. 147] (Nov. 26, 2013).

112. *Id.* § 2.

113. *Id.*

114. *Id.* § 5.

115. E.O. No. 79, § 15.

116. *Id.* & Rules and Regulations Implementing E.O. No. 79, § 18.

117. Rules and Regulations Implementing E.O. No. 79, § 18.

118. E.O. No. 79, § 16.

119. Rules and Regulations Implementing E.O. No. 79, § 19.

Moreover, this mapping system must also include "mining tenement maps, geo-hazard and multi-hazard maps, ancestral lands and domains, protected areas under the NIPAS, and forecast of climate change impacts."[120]

IV. ANALYSIS

After examining the various Sections of E.O. No. 79, it is submitted that several provisions are invalid on the ground of their being *ultra vires* executive legislation. This Essay shall examine each and prove its *ultra vires* nature.

A. Expansion of the No-Go Zones

While the Mining Act and the NIPAS Act expressly provide for the No-Go zones which were restated in Section 1 (a)[121] and 1 (b)[122] of E.O. No. 79, the addition of the three new No-Go zones by E.O. No. 79 is untenable.

These new No-Go zones do not find support in any existing law. Section 19 of the Mining Act enumerates the No-Go zones:

> (1) [M]ilitary and other government reservations, except upon prior written clearance by the government agency concerned;
>
> (2) Near or under public or private buildings, cemeteries, arch[a]eological and historic sites, bridges, highways, waterways, railroads, reservoirs, dams[,] or other infrastructure projects, public or private works including plantations or valuable crops, except upon written consent of the government agency or private entity concerned;
>
> (3) [A]reas covered by valid and existing mining rights;
>
> (4) [A]reas expressly prohibited by law;
>
> (5) [A]reas covered by small-scale miners as defined by law unless with prior consent of the small-scale miners, in which case a royalty payment upon the utilization of minerals shall be agreed upon by the parties, said royalty forming a trust fund for the socioeconomic development of the community concerned; and
>
> (6) Old growth or virgin forests, proclaimed watershed forest reserves, wilderness areas, mangrove forests, mossy forests, national parks provincial/municipal forests, parks, greenbelts, game refuge and bird sanctuaries as defined by law and in areas expressly prohibited under

120. *Id.*

121. E.O. No. 79, § 1 (a). This Section provides that "[a]reas expressly enumerated under Section 19 of R.A. [No.] 7942" shall be closed to mining applications. *Id.*

122. *Id.* § 1 (b). This Section provides that "[p]rotected areas categorized and established under the [NIPAS] under R.A. [No.] 7586" shall be closed to mining applications. *Id.*

> the [NIPAS] under [R.A.] No. 7586, Department [A.O.] No. 25, series of 1992 and other laws.[123]

Under Department A.O. No. 2010-21, entitled Revised Implementing Rules and Regulations of R.A. No. 7942, otherwise known as the Philippine Mining Act of 1995 (Mining Act IRR), the above No-Go zones are divided into two parts.[124]

The first part describes the No-Go zones which are absolutely closed to mining applications, to wit:

> (1) Areas covered by valid and existing mining rights and mining applications subject to Subsection b (3) herein;
>
> (2) Old growth or virgin forests, proclaimed watershed forest reserves, wilderness areas, mangrove forests, mossy forests, national parks, provincial/municipal forests, tree parks, greenbelts, game refuge, bird sanctuaries[,] and areas proclaimed as marine reserves/marine parks and tourist zones as defined by law and identified initial components of the NIPAS pursuant to R.A. No. 7586 and such areas expressly prohibited thereunder, as well as under Department [A.O.] No. 25, Series of 1992, and other laws;
>
> (3) Areas which the Secretary may exclude based, inter alia, on proper assessment of their environmental impacts and implications on sustainable land uses, such as built-up areas and critical watersheds with appropriate barangay/municipal/city/provincial Sanggunian ordinance specifying therein the location and specific boundary of the concerned area;
>
> (4) Offshore areas within 500 meters from the mean low tide level and onshore areas within 200 meters from the mean low tide level along the coast;
>
> (5) In case of seabed/marine aggregate quarrying, offshore areas less than 1,500 meters from the mean low tide level of land or island(s) and where the seabed depth is less than 30 meters measured at mean sea level; and
>
> (6) Areas expressly prohibited by law.[125]

On the other hand, the second part describes the following No-Go zones which can be opened to mining applications subject to the fulfillment of the various conditions, thus:

---

123. Philippine Mining Act of 1995, § 19.

124. DENR, Rules and Regulations Implementing the Philippine Mining Act of 1995, Republic Act No. 7942, § 15 (1995).

125. *Id.* § 15 (a).

(1) Military and other Government Reservations, upon prior written clearance by the Government agency having jurisdiction over such Reservations;

(2) Areas near or under public or private buildings, cemeteries, archaeological and historic sites, bridges, highways, waterways, railroads, reservoirs, dams[,] or other infrastructure projects, public or private works, including plantations or valuable crops, upon written consent of the concerned Government agency or private entity subject to technical evaluation and validation by the Bureau;

(3) Areas covered by FTAA applications which shall be opened for quarry resources mining applications pursuant to Section 53 hereof upon the written consent of the FTAA applicants: [p]rovided, [t]hat sand and gravel permit applications shall not require consent from the FTAA, Exploration Permit[,] or Mineral Agreement applicant, except for Mineral Agreement or Exploration Permit applications covering sand, gravel[,] and/or alluvial gold: [p]rovided, further, [t]hat the Director shall formulate the necessary guidelines to govern this provision;

(4) Areas covered by small-scale mining under R.A. No. 7076/P.D. No. 1899 upon prior consent of the small-scale miners, in which case a royalty payment, upon the utilization of minerals, shall be agreed upon by the concerned parties and shall form a Trust Fund for the socioeconomic development of the concerned community; and

(5) DENR Project Areas upon prior consent from the concerned agency.[126]

While the expansion of the No-Go zones under the Mining Act IRR was made to implement the provisions of the Mining Act,[127] the same cannot be argued for the imposition of the additional No-Go zones under E.O. No. 79.

The additional No-Go zones, under E.O. No. 79, do not bear a reasonable connection with any provision under the Mining Act nor under the Mining Act IRR. Alternatively, in relation to other statutes, they do not have any leg to stand on. For example, R.A. No. 6657, or the Comprehensive Agrarian Reform Law of 1988, does not provide a legal basis for regarding prime agricultural lands as a No-Go zone.[128] Also, R.A. No. 9593, or The Tourism Act of 2009, does not sanction the establishment of a

126. *Id.* § 15 (b).

127. *See* Rules and Regulations Implementing the Philippine Mining Act of 1995, § 8.

128. *See* An Act Instituting a Comprehensive Agrarian Reform Program to Promote Social Justice and Industrialization, Providing the Mechanism for its Implementation, and for Other Purposes [Comprehensive Agrarian Reform Law of 1988], Republic Act No. 6657 (1988).

No-Go zone based on tourism development areas.[129] Specifically, while Section 98 thereof mandates the Tourism Coordinating Council to formulate a National Tourism Development Plan, there is no mention of any tourism development area which must be closed to mining applications.[130]

In *Review Center Association of the Philippines v. Ermita*,[131] the Court nullified an executive order for expanding the scope of a statute.[132] Specifically, in that case, President Gloria Macapagal-Arroyo issued E.O. No. 566, which authorized the Commission on Higher Education (CHED) to supervise the establishment and operation of all review centers in the Philippines.[133] In striking down the executive order, the Court said that there was an undue expansion of the jurisdiction of the Commission on Higher Education as found under R.A. No. 7722.[134] This law particularly limited the supervisory powers of the CHED only to public and private institutions of higher education.[135] Thus, when the executive order imposed on the Commission on Higher Education the additional duty of supervising review centers, it unduly expanded the scope of R.A. No. 7722.[136]

Similarly, in *Executive Secretary v. Southwing Heavy Industries, Inc.*,[137] the Court also declared the nullity of an executive order for expanding the coverage of a statute.[138] Here, President Macapagal-Arroyo issued E.O. No. 156, which extended the prohibition on the importation of used cars to the Subic Bay Freeport.[139] The Court ruled that such prohibition was an invalid expansion of R.A. No. 7227, which guarantees the free flow of goods into the Subic Bay Freeport.[140]

---

129. *See* An Act Declaring a National Policy for Tourism as an Engine of Investment, Employment, Growth and National Development, and Strengthening the Department of Tourism and its Attached Agencies to Effectively and Efficiently Implement that Policy, and Appropriating Funds Therefor [The Tourism Act of 2009], Republic Act No. 9593 (2009).

130. *Id.* § 98.

131. Review Center Association of the Philippines v. Ermita, 583 SCRA 428 (2009).

132. *Id.* at 455.

133. *Id.* at 433-34.

134. *Id.* at 448.

135. *Id.*

136. *Id.*

137. Executive Secretary v. Southwing Heavy Industries, Inc., 482 SCRA 673 (2006).

138. *Id.* at 704.

139. *Id.* at 677.

140. *Id.* at 698.

Thus, E.O. No. 79 is *ultra vires* as it illegally expands the list of No-Go zones under the Mining Act and the Mining Act IRR.

B. Moratorium on the Grant of Mineral Agreements

The moratorium on the grant of mineral agreements illegally suspends the implementation of Section 27 of the Mining Act, which categorically provides for the issuance of mineral agreements to a qualified person.[141] The Section states that

> [a] qualified person may enter into any of the [ ] three modes of mineral agreement with the government for the exploration, development[,] and utilization of mineral resources: Provided, [t]hat in case the applicant has been in the mining industry for any length of time, he should possess a satisfactory environmental track record as determined by the Mines and Geosciences Bureau and in consultation with the Environmental Management Bureau of the Department.[142]

Under the Mining Act IRR, the following are the qualified persons to enter into a mineral agreement:

(1) In case of an individual — must be a Filipino citizen of legal age and with capacity to contract;[143] or

(2) in case of a corporation, partnership, association, or cooperative — must be organized or authorized for the purpose of engaging in mining, duly registered in accordance with law, at least 60% of the capital of which is owned by Filipino citizens.[144]

It is submitted that the President, through the issuance of an executive order, cannot suspend the operation of a statute.

As early as 1908, the Court has declared that "the power of administrative officials to promulgate rules and regulations in the implementation of a statute is necessarily limited only to carrying into effect what is provided in the legislative enactment."[145] In 1914, the Court, in *United States v. Tupasi Molina.*,[146] ruled that administrative issuances must be

141. Philippine Mining Act of 1995, § 27.

142. *Id.*

143. Rules and Regulations Implementing the Philippine Mining Act of 1995, § 5 (c).

144. *Id.*

145. Miners Association of the Philippines, Inc. v. Factoran Jr., 240 SCRA 100, 112 (1995).

146. United States v. Tupasi Molina., 29 Phil. 119 (1914).

in harmony with the provisions of the law, and should be ultimately directed towards its implementation.[147]

Subsequently, in a long litany of cases, the Court has consistently described the scope and limitations of the rule-making power of executive officials, to wit —

> The [rule-making power] ... must be confined to details for regulating the mode or proceeding to carry into effect the law as it has been enacted, and it cannot be extended to amending or adding to the requirements of the statute itself ... and not to embrace matters not covered [by the statute]. Rules that subvert the statute may not be framed under a delegation of power to the executive.[148]

In the present case, the Mining Act and the Mining Act IRR do not provide concrete instances wherein an executive official can suspend the grant of mineral agreements. A qualified person is entitled to the issuance of a mineral agreement as long as he or she satisfies the requisites under the law. Thus, the President exceeded his rule-making powers when he imposed the moratorium on the grant of mineral agreements.

C. Right of First Option Versus Exclusive Right

The right of first option granted to the holders of EP under Section 4 of E.O. No. 79 directly contravenes Section 24 of the Mining Act.[149] While Section 4 of E.O. No. 79 provides that the approval of the declaration of the mining project feasibility will result in the acquisition of the right of first option by the EP holder,[150] Section 24 of the Mining Act declares otherwise, to wit —

> A holder of an exploration permit who determines the commercial viability of a project covering a mining area may, within the term of the permit, file with the Bureau a declaration of mining project feasibility accompanied by a work program for development. *The approval of the mining project feasibility and compliance with other requirements provided in this Act shall entitle the holder to an exclusive right to a mineral production sharing agreement or other mineral agreements or financial or technical assistance agreement.*[151]

147. *Id.* at 124.

148. University of Santo Tomas v. Board of Tax Appeals, 93 Phil. 376, 382 (1953). *See also* Wise & Co. v. Meer, 78 Phil. 655, 676 (1947) & Del Mar v. The Philippine Veterans Administration, 51 SCRA 340, 349 (1973) as to invalid regulations.

149. *See* E.O. No. 79, § 4 & Philippine Mining Act of 1995, § 24.

150. E.O. No. 79, § 4.

151. Philippine Mining Act of 1995, § 24 (emphasis supplied).

The Mining Act IRR reinforces the above Provision by imposing additional procedural requirements before acquiring the exclusive right to the mineral agreement or FTAA. Said IRR provides —

> Section 30. Declaration of Mining Project Feasibility. If results of exploration reveal the presence of mineral deposits economically and technically feasible for mining operations, the Permittee shall, within the term of the Exploration Permit, file a declaration of mining project feasibility. The approval of the declaration of mining project feasibility by the Director shall grant the Permittee the exclusive right to a Mineral Agreement or FTAA over the permit area: Provided, That the Order approving the declaration of mining project feasibility shall be posted on the bulletin boards of the Bureau and the Regional Office concerned for at least one week: Provided, further, That failure of the Permittee to apply for Mineral Agreement or FTAA within a period of one year from the date of approval of the declaration of mining project feasibility shall mean automatic cancellation of the said declaration.
>
> In case of failure to file the declaration of mining project feasibility during the total term of four years of the Exploration Permit for non-metallic minerals or six years of the same Exploration Permit for metallic minerals, the Permittee may apply for further renewal of the Exploration Permit, which may be granted by the Secretary for another term of [two] years for the very purpose of preparing or completing the feasibility studies, and filing of the declaration of mining project feasibility and the pertinent Mineral Agreement or FTAA application. The complete and final exploration report shall be required in this renewal of the Exploration Permit. The Bureau shall issue the prescribed form for the Exploration Permit: Provided, That in case the Exploration Permit expires prior to the approval of the declaration of mining project feasibility and/or filing of the Mineral Agreement or FTAA application, the said Exploration Permit shall be deemed automatically extended until such time that the Mineral Agreement or FTAA application is approved.
>
> The application for Mineral Agreement or FTAA by a Permittee shall be accompanied by five sets of the mandatory requirements as provided for in Sections 35 and 53, respectively, hereof.
>
> The processing of the application for a Mineral Agreement or FTAA shall be in accordance with Chapters VI and VII, respectively, of these implementing rules and regulations.[152]

In *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*,[153] the Court provided the legal effects of the approval of the declaration of mining project feasibility. The Court held that

> [p]ursuant to Section 24 of [R.A. No.] 7942, an [E]xploration [P]ermit [G]rantee who determines the commercial viability of a mining area may,

152. Rules and Regulations Implementing the Philippine Mining Act of 1995, § 30.

153. La Bugal-B'Laan Tribal Association, Inc. v. Ramos, 445 SCRA 1 (2004).

> within the term of the permit, file with the MGB a declaration of mining project feasibility accompanied by a work program for development. The approval of the mining project feasibility and compliance with other requirements of [R.A. No.] 7942 vests in the [G]rantee the exclusive right to an MPSA or any other mineral agreement, or to an FTAA.[154]

In a more recent case, the Court said that upon approval of the declaration of the mining project feasibility, the EP holder can then apply for a mineral agreement or FTAA.[155]

The granting of the right of first option under E.O. No. 79 is an unauthorized amendment of the Mining Act and its IRR which provide for the *exclusive right* to a mineral agreement or FTAA.

This right of first option is not the same as the exclusive right under the Mining Act and its IRR. In the right of first option, the holder of the EP is merely given priority in the development and utilization of the minerals. Thus, the right of the holder of the EP is characterized as an inchoate right. On the other hand, the exclusive right under the Mining Act and its IRR refers to a vested right.

In *SGMC Realty Corporation v. Office of the President*,[156] the Court ruled that an implementing regulation must conform, not contradict the provisions of an enabling law.[157] Meanwhile, in *GMCR Inc. v. Bell Telecommunications Philippines Inc.*,[158] the Court declared than an implementing regulation cannot modify, expand, or subtract from the law it is intended to implement.[159] Any rule that is inconsistent with the statute itself is null and void.[160]

D. Expansion of the Grounds for the Establishment of Mineral Reservations

The establishment of mineral reservations under Section 5 of E.O. No. 79 unduly expands the power of the President under Section 5 of the Mining Act.[161]

---

154. *Id.* at 13.

155. Apex Mining Co., Inc. v. Southeast Mindanao Gold Mining Corp., 605 SCRA 100, 117-18 (2009).

156. SGMC Realty Corporation v. Office of the President, 339 SCRA 275 (2000).

157. *Id.* at 279.

158. GMCR Inc. v. Bell Telecommunications Philippines Inc., 271 SCRA 790 (1997).

159. *Id.* at 809-10.

160. *Id.*

161. *See* E.O. No. 79, § 5 & Philippine Mining Act of 1995, § 5.

Specifically, Section 5 of the Mining Act provides that the President can establish mineral reservations in the interest of national development.[162] The same Section provides that

> [*w*]*hen the national interest so requires, such as when there is a need to preserve strategic raw materials for industries critical to national development, or certain minerals for scientific, cultural[,] or ecological value*, the President may establish mineral reservations upon the recommendation of the Director through the Secretary. Mining operations in existing mineral reservations and such other reservations as may thereafter be established, shall be undertaken by the Department or through a contractor; Provided, That a small scale-mining cooperative covered by [R.A.] No. 7076 shall be given preferential right to apply for a small-scale mining agreement for a maximum aggregate area of [ ] 25% of such mineral reservation, subject to valid existing mining/quarrying rights as provided under Section 112[,] Chapter XX hereof. All submerged lands within the contiguous zone and in the exclusive economic zone of the Philippines are hereby declared to be mineral reservations.
>
> A [ ] 10% share of all royalties and revenues to be derived by the government from the development and utilization of the mineral resources within mineral reservations as provided under this Act shall accrue to the Mines and Geosciences Bureau to be allotted for special projects and other administrative expenses related to the exploration and development of other mineral reservations mentioned in Section 6 hereof.[163]

The Mining Act IRR also provides for the same ground for the establishment of mineral reservations by the President; to wit —

> Section 9. Establishment, Disestablishment, or Modification of Boundary of a Mineral Reservation. In all cases, the Director shall conduct public hearings allowing all concerned sectors and communities, interested Nongovernmental and People's Organizations, as well as LGUs, to air their views regarding the establishment, disestablishment[,] or modification of any Mineral Reservation. The public shall be notified by publication in a newspaper of general circulation in the province, as well as by posting in all affected municipalities and barangays, at least 30 days before said hearings are conducted.
>
> The recommendation of the Director shall be in writing stating therein the grounds for the establishment, disestablishment[,] or modification of any specific Mineral Reservation and shall likewise be published after submission to the Secretary.
>
> No recommendation of the Director shall be acted upon by the Secretary unless the preceding paragraph has been strictly complied with.

---

162. Philippine Mining Act of 1995, § 5.

163. *Id.* (emphasis supplied).

> Upon the recommendation of the Director through the Secretary, the President may, subject to valid and existing rights, set aside and establish an area as a Mineral Reservation *when the national interest so requires, such as when there is a need to preserve strategic raw materials for industries critical to national development or certain minerals for scientific, cultural[,] or ecological value*. The Secretary shall cause the periodic review of existing Mineral Reservations by detailed geological, mineral[,] and ecological evaluation for the purpose of determining whether or not their continued existence is consistent with the national interest and upon his/her recommendation, the President may, by proclamation, alter or modify the boundaries thereof or revert the same to the public domain without prejudice to prior existing rights.
>
> In the proclamation of such Mineral Reservations, all valid and existing mining rights shall be respected.[164]

It is submitted that the legal basis for exercising the power of the President to establish mineral reservations, as provided by the provisions above, cannot be expanded by Section 5 of E.O. No. 79.[165] Thus, the declaration of "potential and future mining areas with known strategic mineral reserves and resources"[166] as mineral reservations by the President is untenable.

E. Lack of Standards for the Imposition of the Competitive Public Bidding Requirement

The imposition of the competitive public bidding requirement under Section 6 of E.O. No. 79 lacks concrete and specific standards to determine whether the grant of mining rights shall be acquired through such competitive public bidding or through "existing procedures" under the Mining Act.[167]

Specifically, the reference to "areas with known and verified mineral resources"[168] is ambiguous. In *Nippon Express (Philippines) Corporation v. Commissioner of Internal Revenue*,[169] the Court ruled that a law is deemed ambiguous when it is admissible of two or more meanings.[170] In this case, it

---

164. Rules and Regulations Implementing the Philippine Mining Act of 1995, § 9 (emphasis supplied).

165. E.O. No. 79, § 5.

166. *Id.*

167. *See* E.O. No. 79, § 6.

168. *Id.*

169. Nippon Express (Philippines) Corporation v. Commissioner of Internal Revenue, 693 SCRA 456 (2013).

170. *Id.* at 465 (citing Rizal Commercial Banking Corporation v. Intermediate Appellate Court, 320 SCRA 279, 289 (1999).

is difficult to determine whether the competitive public bidding requirement will apply or the first to file rule under the Mining Act.[171]

V. CONCLUSION

In view of the foregoing, it is therefore recommended that Sections 1, 4, and 5 of E.O. No. 79 be declared null and void on the ground of *ultra vires* executive legislation. Relevantly, Section 20 of E.O. No. 79 provides a Separability Clause which states that "[if] any provision of this Order is declared invalid and unconstitutional, all other provisions unaffected shall remain valid and subsisting."[172]

Meanwhile, Section 6 must be amended to incorporate the standards for applying the competitive public bidding requirement.

171. *See* Philippine Mining Act of 1995, §§ 29 & 37.

172. E.O. No. 79, § 20.