Exploring Exploration: Fitting the Joint Marine Seismic Undertaking and Oil Exploration Laws into the Mold of Section 2, Article XII of the 1987 Constitution

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I. INTRODUCTION

A. Background of Study

The Philippines is composed of 7,107 islands and boasts of a coastline of 36, 289 km,[1] one of the longest coastlines in the world. Because of the geographical nature of the country, Filipinos have always been reliant on the sea, depending on its rich resources for food, communication, and transportation. Undoubtedly, the life and culture of Filipinos have been influenced and ultimately shaped by the abundance of water within and around the archipelago.

The advent of science has shown Filipinos the untapped potential of the oceans. Technology and scientific innovations have allowed other countries to reap the wealth of the bodies of water adjacent to their land, and these advancements have pushed the boundaries of what parts of the ocean humans can take advantage of. No longer limited to fish and coral, nations in other parts of the globe can now explore deeper and farther frontiers in the sea. Machines and computers now serve as their eyes when it comes to

1. Philippines Coastline, *available at* http://www.indexmundi.com/philippines/coastline.html (last accessed May 22, 2010).

resources that are below the ocean floor and buried deep within the earth's crevices.

Sadly, the economic position of the Philippines hinders the country from harvesting all the benefits that the oceans can bring. The framers of the 1987 Constitution recognized the major hurdle standing between Filipinos and the almost unlimited resources of the ocean; thus, the 1987 Constitution, while echoing the Regalian Doctrine or *jura regalia*,[2] has provided for ways through which the government, either alone or in cooperation with other entities, can take the most advantage of Philippine resources through its exploration, development, and utilization.

Section 2, Article XII of the 1987 Constitution provides:

> All lands of public domain, waters, minerals, coal, petroleum and other mineral oils ... and other natural resources are owned by the State .... The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens.
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> ...
>
> The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law.[3]

Pursuant to this mandate, the Congress enacted Republic Act (R.A.) No. 7942, otherwise known as the Philippine Mining Act of 1995, which governs the exploration, development, utilization, and processing of all mineral resources.[4] Its constitutionality was upheld by the Supreme Court in the landmark case of *La Bugal B'laan Tribal Association, Inc. v. Ramos*,[5] and its

2. *See* Miners Association of the Philippines, Inc. v. Factoran, Jr., 240 SCRA 100, 105 (1995).

3. PHIL. CONST. art. XII, § 2.

4. An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation [Philippine Mining Act of 1995], Republic Act No. 7942, § 15 (2000).

5. La Bugal B'laan Tribal Association v. Ramos, 445 SCRA 1 (2004).

implementing rules[6] were also sustained in *Didipio Earth-Savers' Multi-Purpose Association, Inc. (DESAMA) v. Gozun.*[7]

Prior to the present Constitution, Presidential Decree (P.D.) No. 87[8] entitled "The Oil Exploration and Development Act of 1972" was enacted by then President Marcos in 1973. The Decree, recognizing the high degree of technological know-how and vast amounts of capital[9] required in discovering, exploiting, and refining petroleum, introduced service contracts in the oil industry, a system proclaimed by the Court as consistent with Article XII of the 1987 Constitution in the *La Bugal B'laan* case. The decision clarified, however, that the service contract permitted by the current Constitution is one with safeguards that were not present in the 1973 Constitution. These safeguards were placed in order to prevent the abuses and evils that persisted in dealings involving service contracts during the Marcos regime. Specifically, the decision stated that the service contract can only be entered into with respect to minerals, petroleum, and other mineral oils, with the following requirements:

> (1) The service contract shall be crafted in accordance with a general law that will set standard or uniform terms, conditions and requirements, presumably to attain a certain uniformity in provisions and avoid the possible insertion of terms disadvantageous to the country.
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> (2) The President shall be the signatory for the government because, supposedly before an agreement is presented to the President for signature, it will have been vetted several times over at different levels to ensure that it conforms to law and can withstand public scrutiny.
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> (3) Within thirty days of the executed agreement, the President shall report it to Congress to give that branch of government an opportunity to look over the agreement and interpose timely objections, if any.[10]

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6. Rules and Regulations Implementing the Philippine Mining Act of 1995 (1997).

7. Didipio Earth-Savers' Multi-Purpose Association, Inc. (DESAMA) v. Gozun, 485 SCRA 586 (2006).

8. Amending Presidential Decree No. 8 Issued on October 2, 1972 and Promulgation of an Amended Act to Promote the Discovery and Production of Indigenous Petroleum and Appropriate Funds Therefor [The Oil Exploration and Development Act of 1972], Presidential Decree No. 87 (1983).

9. Gabriel L. Villareal & Barbara Anne C. Migallos, *Oil Exploration Contracts under P.D. 87*, 53 P.L.J. 367, 368 (1978).

10. *La Bugal B'laan Tribal Association*, 445 SCRA at 125.

The government has thus since entered into various agreements involving the exploration, development, and utilization (EDU) of petroleum resources in the Philippines with both local and foreign corporations.[11] As of January 2007, the Department of Energy (DOE) reported that 28 service contracts and one geophysical survey and exploration contract are active and ongoing.[12]

Perhaps none of these EDU contracts have stirred as much controversy as the Joint Marine Seismic Undertaking (JMSU) entered into by the Philippine National Oil Company (PNOC) with the national oil companies of China and Vietnam. It has been criticized by both politicians and private citizens alike as a contract that derogates the sovereignty of the Philippines, as it involves an area that is highly disputed in South East Asia — the Spratly Islands and the corresponding area of the South China Sea. Moreover, the circumstances surrounding the contract are shrouded in mystery. Firstly, the manner of the negotiation and perfection of the JMSU is unconventional. It is unclear which piece of legislation the PNOC observed when it entered into this agreement. There was no paper trail left by this transaction; no proof of compliance with the law's requirements regarding oil exploration contracts was ever presented. Secondly, there is a question of whether the activities involved under the JMSU are exploration activities which make it fall within the purview of oil and petroleum exploration laws.[13] Thirdly, the parties involved in the JMSU seem to be unauthorized under the Constitution to enter into such an agreement. Finally, the amount of control and participation that the government will have over the operations of the contact remains unclear. The controversy and political noise over the JMSU

11. *See* Petroleum Exploration History, *available at* http://www.doe.gov.ph/ER/Oil.htm (last accessed May 22, 2010).

12. *Id.*

13. The Agreement provides for the joint acquisition of seismic data in order to assess the petroleum resource potential of the Agreement Area. The first phase of the seismic survey commenced on Sep. 1 and ended on Nov. 16, 2005 with a total coverage of 11,021.65 line km. The Chinese seismic vessel M/V Nan Hai 502 of China Oilfield Services Ltd. (COSL) was contracted to conduct the survey. A representative each from PNOC EC, CNOOC, and PetroVietnam were onboard the vessel during the entire period of seismic acquisition. The data gathered from the survey, as well as additional data sourced from PNOC and CNOOC were then processed in Vietnam. Interpretation immediately followed in Manila with PNOC EC as operator of the activity. Second phase of the 2D seismic acquisition campaign began in October 2007 and is expected to be completed in January 2008 with target coverage of 11,827.47 line km.

The Joint Marine Seismic Undertaking, *available at* http://www.pnoc-ec.com.ph/jmsu.html (last accessed May 22, 2010).

has caused the government not to renew the contract[14] when it expired in 1 July 2008, and the issue has, like most issues in Philippine politics, remained unresolved.

It must be remembered that the 1987 Constitution only authorizes six methods through which EDU can be undertaken by the Philippine government, namely:

> (1) By *itself* directly and solely;
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> (2) By (i) *co-production*; (ii) *joint venture*; or (iii) *production sharing agreements* with Filipino citizens or corporations, at least 60 percent of the capital of which is owned by such citizens;
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> (3) *Small-scale utilization* of natural resources may be allowed by law in favor of Filipino citizens;
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> (4) For *large-scale* EDU of minerals, petroleum and other mineral oils, the President may enter into 'agreements with foreign-owned corporations involving either *technical or financial assistance* according to the general terms and conditions provided by law.'[15]

On the one hand, Section 2, Article XII of the Constitution provides that those agreements under the second subsection may be entered into only with Filipino citizens, or corporations or associations at least 60 % of whose capital is owned by such citizens.[16] On the other hand, the same section states that the method of EDU under the fourth subsection may be entered into with foreign-owned corporations[17] by the President. These contracts

14. Abigail L. Ho, RP-China-Vietnam Exploration Deal on Spratlys Lapses, Philippine Daily Inquirer, July 8, 2008, *available at* http://www.inquirer.net/specialfeatures/spratlys/view.php?db=1&article=20080711-147739 (last accessed May 22, 2010) [hereinafter Ho, Spratlys Lapses].

15. *La Bugal B'laan Tribal Association*, 445 SCRA at 100-01 (emphasis supplied).

16. PHIL. CONST. art. XII, § 2.

17. This is the only way through which foreign-owned corporations may constitutionally participate in the EDU of the natural resources of the Philippines. *See* The Regulatory Climate for Mining in the Philippines, *available at* http://www.philsol.nl/pir/v2/RegClimate-99b.htm (last accessed May 22, 2010). *See also La Bugal B'laan Tribal Association*, 445 SCRA at 93, 100-01. The Supreme Court here said that the Constitution did not foreclose the Filipinos' right to participate in EDU through FTAAs, viz:

> At bottom, we find completely outlandish petitioners' contention that an FTAA could be entered into by the government only with a foreign corporation, *never with a Filipino enterprise*. Indeed, the nationalistic provisions of the Constitution are all anchored on the protection of Filipino interests. How petitioners can now argue that foreigners have the exclusive right to FTAAs totally overturns the entire basis of the Petition — preference for the Filipino in the

shall pertain only to minerals, petroleum, and other mineral oils. Further, the section poses additional conditions, viz:

> (1) That the same would be according to the general terms and conditions provided by law;
>
> (2) That it be based on real contributions to the economic growth and general welfare of the country;
>
> (3) That the State shall promote the development and use of local scientific and technical resources in such agreements; and
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> (4) The President must notify the Congress of every contract entered into in accordance with this provision within thirty days from its execution.

Since the JMSU involves foreign corporations, the contract automatically falls outside the ambit of joint venture, co-production, or production sharing agreements, as these arrangements are reserved only for Filipinos and Filipino corporations. The participation of the Chinese and Vietnamese oil companies necessarily means that it can only be characterized as an FTAA; consequently, its constitutionality should be studied in light of the Organic Document's requirements for a valid FTAA, as interpreted by the Supreme Court in *La Bugal B'laan*.

B. Statement of the Problem

This Note tackles two major problems, beginning with the laws governing oil exploration. The law governing oil exploration, the Oil Exploration and Development Act of 1972, was enacted in 1973. Its validity under the 1987 Constitution as interpreted in *La Bugal B'laan* has never been tested, and the sufficiency of its provisions under the 1987 regime of service contracts is yet to be studied. Thus, oil and petroleum agreements still follow a dated decree that observes the obsolete type of service contracts, without any of the safeguards installed by the 1987 Constitution.

Next, the provisions of the JMSU must be scrutinized, as almost everything about the agreement is suspect. First, there is uncertainty over the Agreement Area involved in the JMSU. Since the contract covers a portion of the hotly-contested Spratly Islands, there is doubt regarding whether the 142,886 km^2 of research area is Philippine territory. Second, nobody knows what the contract is about. No one has truly explained what

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> exploration, development and utilization of our natural resources. *It does not take deep knowledge of law and logic to understand that what the Constitution grants to foreigners should be equally available to Filipinos.*

La Bugal B'laan Tribal Association, 445 SCRA at 93, 100-01 (emphasis supplied).

"seismic work"[18] entails, as many have called such activity to be "pre-exploration,"[19] and thus, outside the ambit of Section 2, Article XII of the Constitution, which governs only exploration. Third, the creation of a Joint Operating Committee[20] is also unprecedented, as such types of bodies are not normally resorted to when it comes to contracts involving EDU. Fourth, the ownership, rights, and obligations over the information acquired during the research period[21] are also unique. According to the JMSU, the information gathered during the Agreement Term and within five years thereafter shall remain confidential, and the data gathered shall be jointly owned by the oil companies concerned. Fifth, the parties involved in the contract are questionable aspects of the agreement itself. The 1987 Constitution specifically states that contracts with foreign corporations must be entered into by the President; the signatory of the JMSU, however, is Eduardo V. Mañalac, the President and CEO of PNOC. Moreover, the role of PNOC in oil and petroleum EDU must be reviewed since it was created under the 1973 Constitution; its powers and responsibilities must be aligned with the current Constitution.

C. Objectives

This Note has three objectives: (1) To show that the Agreement Area of the JMSU falls within Philippine territory, making it proper to scrutinize the contract under Philippine laws; (2) To characterize the JMSU and to determine its constitutionality; and (3) To provide an updated law for the exercise of the Executive's power to enter into contracts involving exploration, development, and utilization of the country's oil and petroleum resources. The provisions of P.D. No. 87 must be amended not only to contain the new methods of exploration available, but also to incorporate the safeguards set forth by the Constitution, as interpreted by the Supreme Court.

The existence of the contract such as the JMSU, which concerns a new form of data gathering not covered by P.D. No. 87, proves the inadequacy of the current legal framework regarding EDU. The political turmoil that the JMSU created is also evidence of the fact that the laws involving oil and petroleum exploration are unclear and misunderstood. The government

18. Article 4, A Tripartite Agreement for Joint Marine Scientific Research in Certain Areas in the South China Sea By and Among China National Offshore Oil Corporation and Vietnam Oil and Gas Corporation and Philippine National Oil Corporation (on file with author) [hereinafter JMSU].

19. Alecks P. Pabico, The Spratlys Deal: Selling out Philippine Sovereignty?, The Daily PCIJ, Mar. 17, 2008, *available at* http://www.pcij.org/blog/?p=2249 (last accessed May 22, 2010) [hereinafter Pabico, Spratlys Deal].

20. JMSU, *supra* note 18, art. 5.

21. *Id.* art. 10.

cannot be paralyzed by the lack of laws that will answer to the constant expansion of methods of research and study, and its efforts to explore its own resources cannot be put on a standstill because of the public's clamor of unconstitutionality. Opportunities to further explore the wealth of the country cannot be ignored; the current laws must be updated to provide the government with the widest, most beneficial leeway, still consistent with the framework of the 1987 Constitution and the *La Bugal B'laan* case, to make valuable decisions regarding EDU that would advance the interest of the Filipino people.

D. Significance of Study

The government cannot remain blind to the fact that the national coffers are dry and inadequate to meet the Filipino population's needs. There is an obvious lack of capital in the Philippines, so much so that the government is unable to process and take advantage of the natural wealth bestowed upon the Philippines. Providing resilient guidelines for EDU of oil and petroleum resources will allow the country to fully reap the benefits of its marine resources and to distribute its benefits to a larger chunk of the population. The gaps in the current legal framework for oil exploration have tied the hands of the Executive and have exposed such contracts to attacks concerning its validity and constitutionality; hence, the full benefits of these contracts are not enjoyed. Oil exploration contracts are met with political turmoil and public dissent; filling in the gaps in the laws will stabilize the environment of oil EDU.

Further, the consequences of not having clear legislation ripple throughout the international arena, as the Executive can and will be viewed as powerless to harness the natural resources of its own country. The vulnerability of these contracts and agreements to suits will discourage investments, turn away infusion of foreign capital into the local market, and ultimately stunt the growth of the Philippine economy. The natural resources of the Philippines will remain locked up and unutilized by those who need it the most. All these can be prevented if proper legislation is installed.

E. Scope and Limitations

Exploration, development, and utilization can cover an entire breadth of topics, ranging from mining of metal reserves, quarrying, small-scale mining, and coal, among others, including the exploring for methods to harness other sources of energy such as wind, solar, and ocean. Given this, the scope of this Note shall be limited to the following: First, this Note shall only focus on off-shore exploration of oil and petroleum resources. Development and utilization of the same shall not be discussed, and shall be outside the ambit of the proposed amending law.

Second, this Note shall only discuss the terms and provisions of the JMSU. Other contracts involving petroleum exploration entered into by the Government or by any of its instrumentalities shall not be covered. Third, concerns over national security shall also not be touched upon by this Note. This is especially important in the discussion of the Agreement Area of the JMSU, as there have been some military action in the Spratlys area.

Fourth, the environmental effects of offshore exploration, seismic activities, and geological and geophysical surveys shall not be tackled. The environmental effects of seismic exploration are far too complex and should be covered by another study for the subject to be done some justice. Fifth, tax issues, such as exemptions, tax holidays, incentives, and the like given to companies who participate in oil and petroleum exploration shall also be outside the sphere of this Note. Thus, the amended law to be proposed shall exclude these topics as well.

F. The Regalian Doctrine under the 1987 Constitution

The Supreme Court, in the 1972 case of *Lee Hong Hok v. David*,[22] made the "well-known distinction in public law" between the concepts of *imperium* and *dominium*. *Imperium* refers to the government authority appropriately embraced in the concept of sovereignty, while *dominium* is defined as the capacity of the state to own or acquire property.[23] Under *dominium*, the State may provide for the exploitation and use of lands and other natural resources, including their disposition, except as limited by the Constitution.[24] Further, it was the foundation of early Spanish decrees embracing the feudal theory of *jura regalia* or the Regalian Doctrine, which means that all lands were held by the Crown.[25] This was implicitly recognized in *Cariño v. Insular Government*.[26] Stripped of its royal overtones, the Regalian Doctrine means that ownership of all lands is vested in the State,[27] and has been adopted by 1935,[28] 1973,[29] and 1987 Constitutions of the Philippines.

22. Lee Hong Hok v. David, 48 SCRA 372 (1977).

23. More appropriately, the Court defined it as "lands held by the state in its proprietary character."

    Id. at 377.

24. *Id.*

25. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1178 (2009 ed.).

26. Cariño v. Insular Government, 41 Phil. 935, 939 (1909). ("It is true that Spain, in its earlier decrees, embodied the universal feudal theory that all lands were held from the Crown.").

27. BERNAS, *supra* note 25. The objectives of this doctrine are the following:

The assumption of the Regalian Doctrine ushered in the constitutional policy espoused in Section 2, Article XII of the 1987 Constitution,[30] which declares that:

> All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are *owned by the State* .... The exploration, development, and utilization of natural resources shall be under the *full control and supervision* of the State.[31]

The phrase "full control and supervision of the State" reinforces the power and primary responsibility of the State to control the exploration, development, and utilization of the country's natural resources.[32] No longer is the utilization of inalienable lands of public domain through "license,

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(1) To insure the conservation of natural resources for Filipino posterity;

(2) To serve as an instrument for national defense, helping prevent the extension into the country of foreign control through peaceful economic penetration; and

(3) To prevent making the Philippines a source of international conflicts with the consequent danger to its internal security and independence.

HECTOR S. DE LEON, TEXTBOOK ON THE PHILIPPINE CONSTITUTION 362 (2005).

28. 1935 PHIL. CONST. art. XIII, § 1 (superseded 1971). This section provides that "All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, and other natural resources of the Philippines *belong to the State*" (emphasis supplied).

29. 1973 PHIL. CONST. art. XIV, § 8 (superseded 1987). This section provides that "All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, wildlife, and other natural resources of the Philippines *belong to the state*" (emphasis supplied).

30. *See Miners Association of the Philippines, Inc.*, 240 SCRA at 105-06.

31. PHIL. CONST. art. XIV, § 8 (emphasis supplied).

32. JOSE N. NOLLEDO, THE NEW CONSTITUTION OF THE PHILIPPINES ANNOTATED 92 (1990) [hereinafter NOLLEDO, CONSTITUTION]. The Regalian Doctrine also holds that when one claims ownership over a portion of the public domain, he or she must be able to show title from the state according to any of the recognized modes of acquisition of title. *Lee Hong Hok*, 48 SCRA at 379. The result is that there is a presumption that all resources found either in public lands or private lands belong to the State; thus, lands not otherwise appearing to be clearly within private ownership are presumed to belong to the State. Unless public land is shown to have been reclassified as alienable or disposable, and subsequently alienated by the State, it remains part of public domain. DE LEON, *supra* note 27, at 361-62.

concession or lease"[33] permissible under the 1987 Constitution.[34] Rather, the State may opt to directly undertake these activities by itself; by entering into co-production, joint venture, or production-sharing agreements with other persons; or by entering into agreement with foreign-owned corporations for large scale exploration, development, and utilization.[35] These new methods were precipitated by the desire for the State to take on a more active role in controlling the development of natural resources, rather than the mere granting of concessions and leases.[36] In addition, they also underline the principle of Filipinization of the development and utilization of natural resources.[37]

G. JMSU in light of R.A. No. 9522[38]

Given that R.A. No. 9522 encloses the Kalayaan Island Group (KIG) as a regime of islands, the said area covered by the JMSU comes under the control of the State pursuant to the goal of controlling the development of natural resources. No longer can its proponents hide under the veil of "territorial dispute" and allege that the area which the JMSU covers is outside of Philippine territory.[39] Before the passage of R.A. No. 9522, critics of the JMSU claimed that 24,000 km^2 of the Agreement Area is Philippine territory[40] and clearly outside the reach of China and Vietnam.[41]

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33. 1935 PHIL. CONST. art. XIII, § 1 (superseded 1971); 1973 PHIL. CONST. art. XIV, § 8 (superseded 1987).

34. *Miners Association of the Philippines, Inc.*, 240 SCRA at 105.

35. *Id.* at 106.

36. NOLLEDO, CONSTITUTION, *supra* note 32.

37. *Id.*

38. An Act To Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes, Republic Act. No. 9522 (2009).

39. *See* Miriam Grace Go, A Policy of Betrayal (second of three parts), *available at* http://newsbreak.com.ph/index.php?option=com_content&task=view&id=4298&Itemid=88889066 (last accessed May 22, 2010) [hereinafter Go, Betrayal, Part 2]. Mañalac refuses to acknowledge that some 80% of the JMSU site is within the Philippines' 200-nautical-mile exclusive economic zone, and therefore should not have been referred to in the agreement as a disputed area. "200 nautical miles from where? Where's the baseline? Where's the map?" he said in a press conference.

40. Alecks P. Pabico, Stirrings Over Spratlys, The Daily PCIJ, Mar. 10, 2008, *available at* http://www.pcij.org/blog/?p=2232 (last accessed May 22, 2010).

41. *See* Joel R. San Juan, SC asked: void JMSU, *available at* http://www.businessmirror.com.ph/05222008/headlines09.html (last accessed May 22, 2010).

It is now proper to study the activities authorized by the JMSU vis-a-vis the activities authorized by the Philippine laws and jurisprudence. The next Section will tackle the activities allowed within the territory of the Philippines, and the extent over which foreigners can participate in the same.

II. EXPLORATION, DEVELOPMENT, AND UTILIZATION (EDU) UNDER CURRENT LEGAL AND JURISPRUDENTIAL FRAMEWORK

There are two laws and one significant Supreme Court decision which make up the entire framework for exploration, development, and utilization of the Philippines' natural resources. The basic structure of the framework is this: mineral resources are governed by R.A. No. 7942, enacted under the 1987 Constitution, while petroleum resources are governed by P.D. No. 87, promulgated under the 1973 Constitution. The Supreme Court has dealt with the issue of EDU under the 1987 Constitution, specifically regarding FTAAs, in one case, *La Bugal-B'laan Tribal Association, Inc. v. Ramos*,[42] and it was here that R.A. No. 7942 was bestowed as constitutional. No such case involving the constitutionality of P.D. No. 87, however, has ever been written. These three documents shall be discussed below.

A. The Philippine Mining Act of 1995

Upheld by the Supreme Court in December 2004 in the landmark case *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, R.A. No. 7942 was enacted by Congress in affirmation of the Regalian Doctrine enshrined in Article XII of the 1987 Constitution.[43] It has been hailed as one of the world's most sophisticated mining laws,[44] and its passage opened the Philippine mining industry to foreign investments and ensured corporate social responsibility on the part of the mining companies for environmental protection and sustainable development of the country's resources.[45] The scope of the law is the "exploration, development, utilization, and processing of all mineral resources,"[46] with minerals being further defined as "all naturally occurring inorganic substance in solid, gas, liquid, or any intermediate state *excluding*

42. This was the December 2004 resolution reversing the original January 2004 decision of the Court. The original decision deconstitutionalized the service contract regime and The Philippine Mining Act of 1995.

43. JOSE NOLLEDO, THE NEW MINING LAWS OF THE PHILIPPINES 2 (1996).

44. Ambassador Delia D. Albert, Message at The Philippine Mining Investment Seminar, June 8, 2005, *available at* http://www.jogmec.go.jp/mric_web/koenkai/050608/Philippine%20Mining%20Investment%20Seminar.pdf (last accessed May 22, 2010).

45. 2005 Annual Survey of Philippine Business and Industry (Preliminary Results) Mining and Quarrying Sector, *available at* http://www.census.gov.ph/data/sectordata/aspbi05_sectctx.html (last accessed May 22, 2010).

46. Philippine Mining Act of 1995, § 15.

energy materials such as coal, petroleum, natural gas, radioactive materials, and geothermal energy."[47] Given that the scope of the law is limited, the discussion that follows will be a brief overview only, as R.A. No. 7942 is inapplicable to queries which involve petroleum contracts.

R.A. No. 7942 declares the Regalian Doctrine to be state policy,[48] and provides for three major methods through which an investor can access the mineral resources of the Philippines, namely: exploration permit (EP), the mineral agreement, and the financial or technical assistance agreement, or FTAA.

B. Exploration Permit

According to Section 20 of R.A. No. 7942, an EP "grants the right to conduct exploration for all minerals in specified areas. The [Mines and Geosciences] Bureau [under the Department of Environment and Natural Resources (DENR)] shall have the authority to grant an exploration permit." The EP shall allow the permittee the right to "enter, occupy and explore" the area[49] for a period of two years.[50] If a mineral deposit is found and has potential commercial viability, the permit holder has the right to enter into any type of mineral agreement or financial or technical agreement with the government.[51]

C. Mineral Agreements

R.A. No. 7942 provides for three forms of mineral agreements: the mineral production sharing agreement, the co-production agreement, and the joint-venture agreement,[52] each of which is mentioned in Section 2, Article XII of the 1987 Constitution. A mineral agreement grants to the contractor the right to conduct mining operations and to extract all mineral resources found in a specified area for a period of 25 years, renewable for another 25 years.

Section 26 defines each type of mineral agreement. First, a mineral production sharing agreement (MPSA) is an "agreement where the

47. *Id.* § 3, ¶ aa (emphasis supplied).

48. *Id.* § 2. In addition, the section provides that "[i]t 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."

49. *Id.* § 23.

50. *Id.* § 21.

51. The Regulatory Climate for Mining in the Philippines, *supra* note 17. *See* Philippine Mining Act of 1995, § 24.

52. Philippine Mining Act of 1995, § 26.

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."[53] Second, a 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."[54] Third, a 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."[55]

It can be said that the difference between the modes of mineral agreements is the extent to which the government is involved in the mining operation. In an MPSA, the government merely grants the right to the mineral resources whereas the contractor provides the financing, technology, management and personnel for the implementation of the agreement. In a co-production agreement, the government contributes other resources in addition to the right to the mineral resources. A joint venture agreement requires the government and the contractor to organize a joint venture company in which both parties have equity shares. In all three cases, the mining contractor should be either a Filipino citizen or a corporation having at least 60% Filipino equity.[56]

D. Financial or Technical Assistance Agreement (FTAA)

For large-scale exploration, development, and utilization of mineral resources, Section 33 provides that an FTAA may be entered upon directly with the Government through the DENR. The agreement shall be negotiated by the DENR and executed and approved by the President. Moreover, the law commands the President to notify the Congress of all FTAAs within 30 days from execution and approval thereof,[57] pursuant to the Constitutional mandate directing the same. The FTAA is the only method provided in R.A. No. 7942 that allows foreign corporations to participate in the mining of Philippine resources.

53. *Id.* § 26 (a).

54. *Id.* § 26 (b).

55. *Id.* § 26 (c).

56. The Regulatory Climate for Mining in the Philippines, *supra* note 17. *See* Philippine Mining Act of 1995, § 24.

57. Philippine Mining Act of 1995, § 36.

E. Presidential Decree No. 87, Governing Petroleum Exploration

As it stands, P.D. No. 87 governs contracts that involve oil and petroleum. This law ushered in the era of service contracts, a change from the concession system upheld under The Petroleum Act of 1949, or R.A. No. 387.[58] The service contract regime was entered into with the goal of making the government pro-active,[59] and its attractive terms encouraged foreign oil investors to come in, especially in offshore areas.[60]

A service contract has been defined as a:

> [C]ontractual arrangement for engaging in the exploitation and development of petroleum, mineral, energy, land and other natural resources, whereby a government or an agency thereof, or a private person granted a right or privilege by said government, authorizes the other party — the service contractor — to engage or participate in the exercise of such right or the enjoyment of the privilege, by providing financial or technical resources, undertaking the exploitation or production of a given resource, or directly managing the productive enterprise, operations of the exploration and exploitation of the resources, or the disposition or marketing of said resources.[61]

In an article written by Gabriel Villareal and Barbara Migallos, the service contract adopted under P.D. No. 87 is similar to the production sharing contract (PSC) which originated in Indonesia — "The outstanding characteristic of the PSC is that sovereignty and management capacity remain with the host country. Meanwhile, the foreign contractors explore and extract minerals on contract terms contemplating payments out of a percentage of total production from the enterprise."[62]

The DOE, in its official site, declares P.D. No. 87 as the "the legal basis for the exploration and development of indigenous petroleum resources authorizing the grant of service contracts entered into thru public bidding, or

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58. An Act To Promote The Exploration, Development, Exploitation, And Utilization Of The Petroleum Resources Of The Philippines; To Encourage The Conservation Of Such Petroleum Resources; To Authorize The Secretary Of Agriculture And Natural Resources To Create An Administration Unit And A Technical Board In The Bureau Of Mines; To Appropriate Funds Therefor; And For Other Purposes, Republic Act No. 397 (1949).

59. Alfredo C. Ramos, *An Update on Oil and Gas Exploration in the Philippines*, 9 FOREIGN RELATIONS J. 90, 90 (1994).

60. *Id.*

61. *La Bugal B'laan Tribal Association, Inc.*, 445 SCRA at 81 (citing n. 9, Prof. M. Magallona, *Service Contracts in Philippine Natural Resources*, 9 WORLD BULLETIN 1, 4 (1993)). This was also in the original January 2004 decision of the case. La Bugal B'laan Tribal Association, Inc. v. Ramos, 421 SCRA 148, 199 (2004).

62. Villareal & Migallos, *supra* note 9, at 370.

through negotiations."[63] According to the Supreme Court in the *La Bugal B'laan* case,

> under P.D. 87, the service contractor undertook and managed the petroleum operations subject to government oversight. The service contractor was required to be technically competent and financially capable to undertake the necessary operations, as it provided all needed services, technology and financing; performed the exploration work obligations; and assumed all related risks. It could not recover any of its expenditures, if no petroleum was produced. In the event petroleum is discovered in commercial quantity, the contractor operated the field for the government. Proceeds of the sale of the petroleum produced under the contract were then applied to pay the service fee due the contractor and reimburse it for its operating expenses incurred.[64]

It is important to note, however, that P.D. No. 87 was enacted under the 1973 Constitution, whose Section 9, Article XIV reads:

> The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital which is owned by such citizens. The Batasang Pambansa, in the national interest, may allow such citizens, corporations or *associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management, or other forms of assistance* are hereby recognized as such.[65]

P.D. No. 87 was promulgated in recognition of the fact that the process of discovering, exploiting, and refining petroleum and other natural resources requires a high degree of technology and capital. It had the aim of putting in practical terms the policy of entering into service contracts for the exploitation of petroleum resources.[66] In line with this, Section 2 of the same law declares that the policy of the state is to "hasten the discovery and production of indigenous petroleum." This it seeks to do through the "utilization of government and private resources," whether local or foreign, through the methods embodied in the Act. The standard required for these agreements is that the arrangements should be:

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63. Oil: Governing Laws and Issuances, *available at* http://www.doe.gov.ph/ER/oilL&I.htm (last accessed May 22, 2010).

64. *La Bugal B'laan Tribal Association, Inc.*, 445 SCRA at 81 (citing n. 9, Prof. M. Magallona, *Service Contracts in Philippine Natural Resources*, 9 WORLD BULLETIN 1, 4 (1993)).

65. 1973 PHIL. CONST. art. XIV, § 9 (superseded 1987) (emphasis supplied).

66. Villareal & Migallos, *supra* note 9, at 368.

> [C]alculated to yield the maximum benefit to the Filipino people and the revenues to the Philippine Government for use in furtherance of national economic development, and to assure just returns to participating private enterprises, particularly those that will provide the necessary services, financing and technology and fully assume all exploration risks.[67]

The law provides for two methods through which EDU can be undertaken: directly, by the State, as defined in Section 4, or indirectly, through the service contract, as defined by Section 6. Direct exploration by the State is subject to existing private rights.[68]

F. Service Contracts (SC)

1. Parties to the SC

Section 5 provides that the Petroleum Board (now DOE), with the approval of the President, shall execute the service contract. The contract may be executed in any one of two ways: one, through public notice, pre-qualification, and public bidding; or two, through negotiations. Negotiations can only occur if bids are requested and none are submitted or if the ones submitted are found to be disadvantageous to the government.[69]

Generally, Section 6 provides that the nature of the service contract is such that service and technology are furnished by the service contractor, while financing is provided by the government. All petroleum found shall belong to the government, and the contractor shall be entitled to a stipulated service fee. Normally, the service fee is an amount not exceeding 40% of what remains from the gross proceeds from production after deducting the operating expenses and the 15% Filipino participation incentive, if allowable.[70] In the event that the Government is unable to finance these activities, Section 7 provides that the contract may stipulate that the contractor provide, in addition to services and technology, the financing required to be able to exert maximum efforts to discover and produce petroleum as soon as possible ("The proceeds of sale of the petroleum produced under the contract shall be the source of funds for payments of the service fee and the operation expenses due the contractor.").[71]

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67. P.D. No. 87, § 2.

68. *Id.* § 4.

69. *Id.* § 5; Villareal & Migallos, *supra* note 9, at 371.

70. P.D. No. 87, § 8, ¶ 2. According to Section 28 of the Decree, the Filipino participation incentive is a government subsidy granted to the contractor who has allowed Philippine citizens or corporations to have a minimum participating interest of 15% in the contract area.

71. *Id.* § 7.

2. Obligations under the SC

Section 8 of P.D. No. 87 provides that the Government shall oversee the management of the operations contemplated in the contract. However, the section also declares that:

> [T]he contractor, which may be a consortium, shall undertake, manage and execute petroleum operations. The contract may authorize the contractor to take and dispose of and market either domestically or for export all petroleum produced under the contract subject to supplying the domestic requirements of the Republic of the Philippines on a pro-rata basis.[72]

According to the same Section, aside from providing services, technology, and financing, the contractor shall perform the exploration work obligations stated in the contract; operate the field on behalf of the government, if petroleum in commercial quantity is found; assume all risks if no petroleum is found; promptly furnish the DOE with geological data, information and other reports which it may require; maintain detailed technical records and accounts of its operations; conform to government regulations; maintain the site and equipment in good order and allow access to these to authorized inspectors; give inspectors from the DOE and the BIR full access to their books, accounts, and records for tax and fiscal purposes; and be subject to Philippine income tax. Further, Section 9 states that the contractor shall be subject to laws of general application affecting labor, health, safety, and ecology insofar as they do not conflict with the provisions of P.D. No. 87.

For the Government's part, Section 8 provides that it shall, through the DOE, reimburse the contractor for all operating expenses not exceeding 70% of the gross proceeds from production in any year. This is in addition to the obligation of paying the service fee, subject to the operating expenses that the contractor shall have incurred. The form and manner of payment is subject to agreement.

3. Exploration Period

Villareal and Migallos break down the legal requirements for the exploration period of a service contract pursuant to P.D. No. 87. Under Section 9, the original exploration period is seven years. It is extendible to three years if the contractor has not been in default in its exploration work and other obligations. Villareal and Migallos wrote:

> If oil is discovered on the tenth year, the contractor may request for a one-year extension to determine whether it is in commercial quantity. If the oil discovered is in commercial quantity, the contractor may retain the delineated production area plus 12.5% of the original area awarded.

72. *Id.* § 8.

> If discovery is made during the exploration period, the contract with respect to the production area shall remain in force for the 10-year exploration period and for an additional period of 25 years; thereafter it shall be renewable for another 15 years under the terms and conditions agreed upon by the parties upon renewal.[73]

G. Financial or Technical Assistance under the La Bugal B'laan Case

To date, the most comprehensive decision regarding the interpretation of Section 2, Article XII of the 1987 Constitution is the *La Bugal B'laan* case decided in December 2004. While the issue of the case was the validity of R.A. No. 7942, the Supreme Court went into a lengthy discussion of FTAAs as mentioned in Section 2, Article XII, without delineating whether these FTAAs applied to only minerals as defined in R.A. No. 7942 or if it included also petroleum resources as covered by P.D. No. 87. Taking the discussion of the Supreme Court as a whole, the proponent is led to believe that the interpretation given as to what FTAAs are pertain to FTAAs in general, that is, those agreements that involve, as stated in Article XII of the 1987 Constitution, "large scale EDU of minerals, *petroleum*, and other mineral oils."[74]

For convenience's sake, the relevant paragraph of Section 2, Article XII is reproduced:

> The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.
>
> The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.[75]

To untangle the web of confusion introduced by the new language of Section 2, the Supreme Court began by pronouncing that the word "involving" in Section 2 allows "for the possibility that matters, other than those explicitly mentioned, could be made part of the agreement ... [the word] implies that these agreements ... are not limited to mere financial or technical assistance."[76] Next, the High Court rejected the petitioners' contention that the deletion of the phrase service contracts from the present Constitution means that such arrangements were banned. On the contrary,

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73. Villareal & Migallos, *supra* note 9, at 373.

74. PHIL. CONST. art. XII (emphasis supplied).

75. PHIL. CONST. art. XII, § 2.

76. *La Bugal B'laan Tribal Association, Inc.*, 445 SCRA at 104.

the Court maintained that "such intent cannot be definitively and conclusively established from the mere failure to carry the same expression or term over to the new Constitution absent a more specific, explicit and unequivocal statement to that effect."[77] In addition, the Supreme Court said that the stricter standards and procedure imposed, such as the requirement of reporting to Congress and the standard that agreements should be based on real contributions to the economic growth and general welfare of the country are contrary to the claim that only financial or technical assistance is allowed by the Constitution, as Section 20, Article VII governs the duties of the President when it comes to foreign loans.[78] Further, the standard imposed would make more sense if it were applied to a major business investment in a principal sector of the industry.[79]

The more important question that the Supreme Court considered, however, is the amount of control given to the contractor rendering financial or technical assistance to the country. The Court opined:

> [B]y specifying such "agreements involving assistance," the drafters necessarily gave implied assent to everything that these agreements necessarily entailed; or that could reasonably deemed necessary to make them tenable and effective, including management authority with respect to the day-to-day operations of the enterprise and measures for the protection of the interests of the foreign corporation, PROVIDED THAT Philippine sovereignty over natural resources and full control over the enterprise undertaking the EDU remains firmly in the state.[80]

To understand the true meaning of the 1987 text, the Supreme Court studied the intention of the framers. The Court found, after going through the records of the Constitutional Commission (ConCom), that the framers discussed FTAAs "in the same breadth as service contracts and used the terms interchangeably."[81] In fact, during the discussions of the ConCom, it was mentioned that "the only difference between these future service contracts and the past service contracts under Mr. Marcos is the general law to be enacted by the legislature and the notification of Congress by the President."[82] The Supreme Court went on to summarize the ConCom deliberations which concern FTAAs in this manner:

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77. *Id.* at 105-06.

78. *Id.* at 107.

79. *Id.* at 108.

80. *Id.* at 111 (emphasis supplied).

81. *Id.* at 114.

82. 3 Record of the 1986 Constitutional Commission 352 (1986) [hereinafter 3 Record].

> (1) In their deliberations on what was to become paragraph 4, the framers used the term *service contracts* in referring to *agreements x x x involving either technical or financial assistance.*
>
> (2) They spoke of *service contracts* as the concept was understood in the 1973 Constitution.
>
> (3) It was obvious from their discussions that they were not about to ban or eradicate *service contracts.*
>
> (4) Instead, *they were plainly crafting provisions to put in place safeguards that would eliminate or minimize the abuses prevalent during the marital law regime.* In brief, they were going to permit service contracts with foreign corporations as contractors, but with safety measures to prevent abuses, as an exception to the general norm established in the first paragraph of Section 2 of Article XII. This provision reserves or limits to Filipino citizens — and corporations at least 60 percent of which is owned by such citizens — the exploration, development and utilization of natural resources.
>
> (5) This provision was prompted by the perceived insufficiency of Filipino capital and the felt need for foreign investments in the EDU of minerals and petroleum resources.
>
> The framers for the most part debated about the sort of safeguards that would be considered adequate and reasonable. But some of them, having more 'radical' leanings, wanted to ban service contracts altogether; for them, the provision would permit aliens to exploit and benefit from the nation's natural resources, which they felt should be reserved only for Filipinos.[83]

In no uncertain terms did the Supreme Court say that these FTAAs are in fact service contracts between foreign corporations acting as contractors on the one hand, and the government as principal or "owner" of the works on the other hand. In the new breed of service contracts, "the foreign contractors provide capital, technology and technical know-how, and managerial expertise in the creation and operation of large-scale mining/extractive enterprises; and the government, through its agencies (DENR, Mine and Geosciences Bureau), actively exercises control and supervision over the entire operation."[84] The following safeguards were installed by the Constitution in order to set the 1987 service contract apart from the 1973 species:

> (1) The service contract shall be crafted in accordance with a general law that will set standard or uniform terms, conditions and requirements, presumably to attain a certain uniformity in

83. *La Bugal B'laan Tribal Association, Inc.*, 445 SCRA at 123-24.

84. *Id.*

provisions and avoid the possible insertion of terms disadvantageous to the country.

(2) The President shall be the signatory for the government because, supposedly before an agreement is presented to the President for signature, it will have been vetted several times over at different levels to ensure that it conforms to law and can withstand public scrutiny.

(3) Within thirty days of the executed agreement, the President shall report it to Congress to give that branch of government an opportunity to look over the agreement and interpose timely objections, if any.[85]

To complete the interpretation of the subject Section, the Supreme Court determined the amount of control that the State must exercise for the FTAA to be constitutionally-sound. The Court said:

> The concept of *control* adopted in Section 2 of Article XII must be taken to mean less than dictatorial, all-encompassing control; but nevertheless sufficient to give the State the *power to direct, restrain, regulate and govern the affairs of the extractive enterprises.* Control by the State may be on a *macro level, through the establishment of policies, guidelines, regulations, industry standards and similar measures* that would enable the government to control the conduct of affairs in various enterprises and restrain activities deemed not desirable or beneficial.
>
> The end in view is ensuring that these enterprises contribute to the economic development and general welfare of the country, conserve the environment, and uplift the well-being of the affected local communities. Such a concept of control would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise it invested in, in order to ensure that it is operating efficiently and profitably, to protect its investments and to enable it to succeed.[86]

In the end, the control envisioned by the Court that would still uphold the primacy of the State's sovereign ownership of all mineral resources and its full control and supervision over all aspects of EDU is one that is not micro-managing the mining operations and the day-to-day affairs of the enterprise. Micromanagement would render impossible the legitimate exercise by the contractor of a reasonable degree of management prerogative and authority, indispensable to the proper functioning of the mining enterprise.[87]

85. *Id.* at 125.

86. *Id.* at 130-31 (emphasis supplied).

87. *Id.* at 223.

H. Reconciling P.D. No. 87 with the La Bugal B'laan Decision and the 1987 Constitution

There is a considerable gap between R.A. No. 7942, P.D. No. 87, and the 1987 Constitution. While both laws involve exploration, development, and utilization of the Philippines' natural resources, there are two considerable differences between P.D. No. 87 and R.A. No. 7942. The first divergence has to do with the scope of the two laws: on the one hand, P.D. No. 87 covers oil and petroleum resources; on the other hand, R.A. No. 7942 governs mineral resources only. The second divergence has to do with the timing of both laws: P.D. No. 87 was promulgated under the 1973 Constitution, while R.A. No. 7942 was enacted under the 1987 Constitution. While R.A. No. 7942 had already been upheld by the Supreme Court as being constitutionally sound under the 1987 Constitution, no such pronouncement has been made regarding P.D. No. 87. Consequently, current oil and petroleum agreements still follow the terms and conditions of a vintage Decree because there is still no law that neither repeals nor improves P.D. No. 87. Thus, the question arises: Does P.D. No. 87 conform to the new standards and guidelines set forth by Section 2, Article XII of the 1987 Constitution?

To reiterate, the standards imposed by the 1987 Constitution, as affirmed by the Supreme Court, for a valid FTAA or service contract are the following:

(1) The FTAA may be entered into only with respect to minerals, petroleum, and other mineral oils.

(2) It must be crafted in accordance with a general law setting standard or uniform terms, conditions, and requirements.

(3) The President must be the signatory for the government.

(4) The President must report the executed agreement to Congress within 30 days.

(5) Full control by the State over the operation, such that the State is able to direct, restrain, regulate, and govern the affairs of the contractors. This control may be on the macro level, through the establishment of policies, guidelines, regulations, industry standards and similar measures to regulate and restrain the activities of the contractor. This would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise to ensure efficient and profitable operation.

The provisions of P.D. No. 87 must be scrutinized using these standards in order to ascertain whether it conforms to the current Constitutional and jurisprudential guidelines.

1. First Standard: Only with respect to minerals, petroleum, and other mineral oils

P.D. No. 87 is applicable only to oil and petroleum discovery, production, and utilization. It also sets the general terms and conditions which must be followed by both the government and the contractor. This is seen from the title of the law and the policy that it upholds in its Section 2.

2. Second Standard: Crafted in accordance with a general law setting standard or uniform terms

Measuring P.D. No. 87 under this standard is quite tricky, as the framers of the 1987 Constitution seem to be speaking of a future general law that will govern the terms and conditions of the new species of service contracts. The following exchanges during the debates are illuminating:

> MR. SUAREZ. This particular portion of the section has reference to what was popularly known before as service contracts, among other things, is that correct?
>
> MR. JAMIR. Yes, Madam President.
>
> MR. SUAREZ. As it is formulated, the President may enter into service contracts but subject to *the guidelines that may be promulgated by Congress?*
>
> MR. JAMIR. That is correct.
>
> MR. SUAREZ. Therefore, that aspect of negotiation and consummation will fall on the President, not upon Congress?
>
> MR. JAMIR. That is also correct, Madam President.
>
> MR. SUAREZ. Except that all of these contracts, service or otherwise, must be made strictly in accordance with guidelines prescribed by Congress?
>
> MR. JAMIR. That is also correct.
>
> MR. SUAREZ. And the Gentleman is *thinking in terms of a law that uniformly covers situations of the same nature?*
>
> MR. JAMIR. That is 100 percent correct.[88]

The aforementioned exchange shows Commissioner Jamir, the sponsor of Section 2, Article XII, was clearly thinking that a law governing this subject must still be enacted. No mention of P.D. No. 87 was found during

88. 3 Record, *supra* note 82, at 348 (emphasis supplied).

the debates about this particular Section of the Constitution. The comments of Commissioner Gascon are also helpful, *viz*:

MR. GASCON. As it is proposed now, such service contracts will be entered into by the President with the guidelines of a *general law on service contract to be enacted by Congress*. Is that correct?

MR. VILLEGAS. The Commissioner is right, Madam President.

MR. GASCON. According to the original proposal, if the President were to enter into a particular agreement, he would need the concurrence of Congress. Now that it has been changed by the proposal of Commissioner Jamir in that *Congress will set the general law to which the President shall comply*, the President will, therefore, not need the concurrence of Congress every time he enters into service contracts. Is that correct?

MR. VILLEGAS. That is right.

MR. GASCON. The proposed amendment of Commissioner Jamir is in indirect contrast to my proposed amendment, so I would like to object and present my proposed amendment to the body.

...

I feel that the general law to be set by Congress as regard service contract agreements which the President will enter into might be too general or *since we do not know the content yet of such a law,* it might be that certain agreements will be detrimental to the interest of the Filipinos. This is in direct contrast to my proposal which provides that there be effective constraints in the implementation of service contracts.

So instead of a *general law to be passed by Congress to serve as a guideline to the President when entering into service contract agreements,* I propose that every service contract entered into by the President would need the concurrence of Congress, so as to assure the Filipinos of their interests with regard to the issue in Section 3 on all lands of the public domain.[89]

...

MR. BENGZON. Now, to answer the Commissioner's apprehension, by "general law," we do not mean statements of motherhood. *Congress can build all the restrictions that it wishes into that general law so that every contract entered into by the President under that specific area will have to be uniform. The President has no choice but to follow all the guidelines that will be provided by law.*

MR. GASCON. But my basic problem is that *we do not know as of yet the contents of such a general law as to how much constraints there will be in it.*[90]

89. *Id.* at 349 (emphasis supplied).

90. *Id.* at 350 (emphasis supplied).

Finally, the clarification of Commissioner Tan underlines the notion that there has not yet been any law which governs service contracts as of the enactment of the 1987 Constitution:

> SR. TAN. Madam President, may I ask a question?
>
> THE PRESIDENT. Commissioner Tan is recognized.
>
> SR. TAN. Am I correct in thinking that the only difference between these future service contracts and the past service contracts under Mr. Marcos is the *general law to be enacted by the legislature and the notification of Congress by the President?* That is the only difference, is it not?
>
> MR. VILLEGAS. That is right.
>
> SR. TAN. So those are the safeguards.
>
> MR. VILLEGAS. Yes. *There was no law at all governing service contracts before.*[91]

Justice Carpio-Morales, however, in her dissent in *La Bugal*, states that Commissioner Villegas' response

> [that] there was no requirement in the 1973 Constitution for a law to govern service contracts and that, in fact, there were then no such laws *is inaccurate.* The 1973 Charter required similar legislative approval, although it did not specify the form it should take .... [A]s previously noted in this Court's Decision of January 27, 2004, however, laws authorizing service contracts were actually enacted by presidential decrees.[92]

A perusal of the original January 2004 decision of the *La Bugal B'laan* case will show that the Supreme Court included P.D. No. 87 in the list of decrees which allowed the government to explore the country's resources through service contracts. After going through the nature and history of the

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91. *Id.* at 351-52 (emphasis supplied).

92. *La Bugal B'laan Tribal Association, Inc.*, 445 SCRA at 375, n. 79. (emphasis supplied). These Presidential Decrees are P.D. No. 87, P.D. No. 151, P.D. No. 463, and P.D. No. 1442. The text of the January 27, 2004 decision stated:

> Thus, virtually the entire range of the country's natural resources — from petroleum and minerals to geothermal energy, from public lands and forest resources to fishery products — was well covered by apparent legal authority to engage in the direct participation or involvement of foreign persons or corporations (otherwise disqualified) in the exploration and utilization of natural resources through service contracts.

Id. at 205.

In addition to the P.D.s mentioned in the December 2004 Resolution, the January 2004 Decision also included P.D. 704 and 705 to the list of Decrees authorizing service contracts in the Philippines. *See La Bugal B'laan Tribal Association, Inc.*, 421 SCRA at 203-04.

service contract regime,[93] the Court declared such regime as unconstitutional, and struck down R.A. No. 7942 as violative of the 1987 Constitution.[94] Despite this, however, the Court did not make any proclamation regarding the constitutionality of the Decrees allowing service contracts. Its *fallo* only concerned R.A. No. 7942, DAO 96-40, and the challenged FTAA.[95]

The December 2004 resolution reversing the original January 2004 decision of the Court also did not mention the validity or constitutionality of P.D. No. 87. Nowhere in the decision did the Court make any pronouncement as to the validity or invalidity of said Decree. In fact, P.D. No. 87 was only mentioned in a footnote in the main decision, and in another footnote in Justice Carpio-Morales' separate opinion. Nevertheless, since the December 2004 resolution upheld the service contract regime, albeit with Constitutional safeguards, it can be safely assumed that P.D. No. 87, which is the law that governs service contracts with regard to petroleum agreements, was also upheld or recognized by the Supreme Court. Besides, the constitutionality of P.D. No. 87 was not put in issue by the petitioners in the said case; as such, the Court did not have the occasion to rule upon the validity of the same.

It is the position of the proponent that the recognition by the Supreme Court of the existence of P.D. No. 87, notwithstanding the fact that such was made in the reversed decision and in a footnote of the final resolution, is more binding than the discussions on the floor of the ConCom. After all, the Civil Code provides that case law is part of the law of the land,[96] and it is well-settled principle that the Supreme Court, by constitutional fiat, is the tribunal with the final word on the interpretation of a statute or a constitutional provision.[97] Despite the fact that the Court barely mentioned the Decree in both decisions concerning *La Bugal B'laan*, the fact of the matter is that they did; this shows that the Court is aware of the existence of such a Decree which governs service contracts for oil and petroleum exploration. In contrast, the deliberations of the framers are not necessarily

93. *See La Bugal B'laan Tribal Association, Inc.*, 421 SCRA at 199-205.

94. *Id.* at 238.

95. *Id.* at 247-48.

96. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 8 (1950) ("Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines.").

97. RUBEN AGPALO, STATUTORY CONSTRUCTION 139-40 (6th ed. 2009) (citing Miranda v. Imperial, 77 Phil. 1066 (1947); Endencia v. David, 93 Phil. 696 (1953)).

decisive[98] or binding upon the Court, they being resorted to only when other guides fail as said proceedings are powerless to vary the terms of the Constitution when the meaning is clear.[99] Thus, while the framers spoke of a general law that will be enacted by Congress to govern the terms and conditions of the 1987 version of service contracts, it is submitted that such a law already exists, in the form of P.D. No. 87. This Decree, however, should now be read in light of the new guidelines prescribed by the 1987 Constitution, and the standards installed in Section 2, Article XII, should be added as a requirement for the service contracts executed thereunder to be constitutionally sound.

3. Third Standard: The President must be the signatory for the government

For P.D. No. 87 to be compliant with the 1987 Constitution, it must provide that the President should be the signatory for the government. As earlier discussed, Section 5 of P.D. No 87 provides:

> SEC. 5. Execution of contract authorized in this Act. Every contract here in authorized shall, *subject to the approval of the Presidenl*, be executed by the Petroleum Board [now Department of Energy] created in this Act, after due public notice, pre-qualification and public bidding or concluded through negotiations. If cash bids are requested or if no bid is submitted or the bids submitted are rejected by the Petroleum Board for being disadvantageous to the Government, the contract may be concluded through negotiations.[100]

It is submitted that this provision complies with the third standard, despite the fact that it authorizes the DOE to execute the contract in behalf of the President. This is in line with the doctrine of qualified political agency, and it is recognized by the Supreme Court as a well-settled principle.[101] Time and again, the Supreme Court has reaffirmed the doctrine that "each head of a department is, and must be, the President's alter ego in the matters of that department where President is required by law to exercise

98. *Id.* at 449 (citing J.M. Tuason & Co., Inc. v. Land Tenure Administration, 31 SCRA 413 (1970)).

99. *Id.*

100. P.D. No. 87, § 5 (emphasis supplied).

101. For a more comprehensive discussion of the doctrine, *see* Villena v. Secretary of Interior, 67 Phil. 451 (1939). *See also* Santos v. Secretary of Public Works and Communications, 19 SCRA 637, 641 (1967). ("It is now settled that Department Secretaries are the alter ego of the President so that the decision of Secretary of Public Works and Communications is presumed to be that of the President, unless disapproved.").

authority."[102] In *Carpio v. Executive Secretary*,[103] the Supreme Court emphatically stated:

> Under this doctrine, which recognizes the establishment of a single executive, all executive and administrative organizations are adjuncts of the Executive Department, the heads of the various executive departments are assistants and agents of the Chief Executive, and, except in cases where the Chief Executive is required by the Constitution or law to act in person or the exigencies of the situation demand that he act personally, the multifarious executive and administrative functions of the Chief Executive are performed by and through the executive departments, and the acts of the Secretaries of such departments, performed and promulgated in the regular course of business, are, unless disapproved or reprobated by the Chief Executive presumptively the acts of the Chief Executive.[104]

Ruben Agpalo reiterates, "[t]he Executive Secretary or his Deputy or Assistant Executive Secretary or any cabinet secretary, who acts and signs 'By Authority of the President' acts not for himself but for the President .... [These] acts or contracts ... are presumed valid and performed in behalf of the President and should thus be accorded due respect."[105] Fr. Joaquin Bernas also states that "the Executive Secretary, or even an Assistant Executive Secretary, when acting 'by authority of the President,' may reverse the decision of a department head."[106]

While it may be argued that since Section 2, Article XII mentions that it is the President specifically who may enter into such agreements, making it fall within the exception of the doctrine of qualified political agency, it is submitted that since P.D. No. 87 requires that the contracts entered into by the Department Secretary be approved by the President, then the Chief Executive is still involved in the execution of the contract; consequently, he is still acting "in person," fulfilling the requirement of the said Section. Nevertheless, to ensure full compliance with the 1987 Constitution, it is recommended that P.D. No. 87 follow the path forged by R.A. No. 7942 with regard to negotiating FTAAs. Section 36 of R.A. No. 7942 provides that the FTAA shall be "negotiated by the Department and executed and approved by the President." This must be incorporated in the Decree in order to make the law more constitutionally sound.

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102. Philippine American Management Co., Inc., et al. v. Philippine American Management Employees Association, et al., 51 SCRA 98, 104 (1973).

103. Carpio v. Executive Secretary 206 SCRA 290, 295-96 (1992).

104. *Id.*

105. RUBEN AGPALO, PHILIPPINE POLITICAL LAW 362 (2005).

106. BERNAS, S.J., *supra* note 25, at 889 (citing Lacson-Magallanes v. Paño, 21 SCRA 895 (1967)).

4. Fourth Standard: The President must report the executed agreement to Congress within 30 days

A reading of P.D. No. 87 will reveal that the President (or the Department Secretary) has no obligation to report or inform the Congress of any form of service contract that it has entered into with any party. Nevertheless, since this requirement is one mandated in no uncertain terms by the Constitution, it is submitted that no enabling legislation is needed for this standard to be fulfilled. Even if there is no notification requirement set by P.D. No. 87, the President still has the obligation to report to Congress within 30 days.

5. Fifth Standard: Full State control over the operation

According to the December 2004 resolution of *La Bugal B'laan*, full control by the State "would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise to ensure efficient and profitable operation." It upheld R.A. No. 7942 because it "establishe[d] the mechanism of inspection and visitorial rights over mining operations and institute[d] reportorial requirements,"[107] specifically in the form of, among others, "DENR's power of over-all supervision and periodic review for the conservation, management, development and proper use of the State's mineral resources" under Section 8; "the authority of the Mines and Geosciences Bureau under the DENR to exercise 'direct charge in the administration and disposition of mineral resources ... and to monitor the compliance by the contractor of the terms and conditions of the mineral agreements" under Section 9; and Sections 66, 35, 56, 7, 40, 24, 53, 69, 70, 16, 57, 19, and Chapters XI, XVII. Accordingly,

> the setup under [R.A. No.] 7942 ... hardly relegates the State to the role of a 'passive regulator' dependent on submitted plans and reports. On the contrary, the government agencies concerned are empowered to approve or disapprove — hence, to influence, direct and change — the various work programs ... of the mining enterprise.[108]

The Court goes on to say that the "contractor is bound to comply with its commitments therein ... [it] is mandated to open its books of account and records for scrutiny, so as to enable the State to determine if the government share has been fully paid."[109] Further, the "State may likewise compel the contractor's compliance with mandatory requirements on mine safety, health and environmental protection, and the use of anti-pollution technology and facilities."[110] The State may also cancel the FTAA "for violation of any of its terms and conditions and/or noncompliance with statutes or regulations."

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107. *La Bugal B'laan Tribal Association, Inc.*, 445 SCRA at 132.

108. *Id.* at 136.

109. *Id.*

110. *Id.* at 137.

These provisions, the Court deemed, are sufficient to vest the State with full control over the mining operation, consistent with the provisions of the 1987 Constitution.

Similarly, Section 8 of P.D. No. 87 outlines the obligations of the contractor once the service contract has been executed. Section 8 commands the contractor to:

> (3) ...
>
> Perform the exploration work obligations and program prescribed in the agreement between the Government and the Contractor, which *may be* more but shall not be less than the obligations prescribed in this Act;
>
> Once petroleum in commercial quantity is discovered, operate the field on behalf of the Government in accordance with accepted good oil field practices using modern and scientific methods to enable maximum economic production of petroleum; avoiding hazards to life, health and property; avoiding pollution of air, land and waters; and pursuant to an efficient and economic program of operation.
>
> ...
>
> Furnish the Petroleum Board promptly with geological and other information, data and reports which it may require;
>
> Maintain detailed technical records and accounts of its operations;
>
> Conform to regulations regarding, among others, safety, demarcation of agreement acreage and work areas, non-interference with the rights of other petroleum, mineral and natural resources operations;
>
> Maintain all meters and measuring equipment in good order and allow access to these as well as to the exploration and production sites and operations to inspectors authorized by the Petroleum Board;
>
> Allow examiners of the Bureau of Internal Revenue and other representatives authorized by the Petroleum Board full access to their accounts, books and records for tax and other fiscal purposes.[111]

Section 9 also provides that the contractor shall be subject to all general laws relating to labor, healthy, safety and ecology.

It is the position of the proponent that these provisions, while less comprehensive than that contained in R.A. No. 7942, fulfills the standard that the State should be able to exercise full control through the "establishment of policies, guidelines, regulations, industry standards and

111. P.D. No. 87, § 8 (emphasis supplied).

similar measures to regulate and restrain the activities of the contractor." While P.D. No. 87 states that the contractor shall "undertake, manage and execute" petroleum operations, this is not antithetical to the management of the contractor of the day-to-day affairs of the business, leaving only the macro-management to the State. The contractor is still subject to inspection and regulation of the Department, and the service contract is still subject to the laws to be enacted by the Philippine Government. This is not to say, however, that P.D. No. 87 outlines an exhaustive list of measures for full State control of the operation. The law may be seen as too general, especially compared to the broad requirements set forth by R.A. No. 7942. Nevertheless, the provisions of P.D. No. 87, while Spartan in nature, still allow the State to oversee the petroleum operations by giving government agencies visitorial and inspection rights over the contract area.

I. A Questionable Provision

Section 10 of P.D. No. 87 provides:

> SEC. 10. Contract Areas. Subject to Section eighteen hereof, a contractor or its affiliate may enter into one or more contracts with the GOVERNMENT. Contracts for offshore areas may cover any portion beneath the Philippine territorial waters or its continental shelf, or portion of continental slope, terrace or areas which are or may be subject to Philippine jurisdiction: Provided, That for offshore areas beyond water depths of 200 meters, the Petroleum Board may provide for *more liberal terms* that provided for herein with respect to contract area, exploration period and relinquishment.[112]

The proviso in this Section presents a dangerous loophole which the DOE can take advantage of to give oil companies terms more favorable than that allowed by law. This portion allows the DOE to have almost unfettered authority to provide stipulations in the contract not screened by Congress, and will pave the way for some to bypass the legal requirements installed by the legislation. This proviso should not be present in the amending law.

J. Constitutionality of P.D. No. 87

When P.D. No. 87 is scrutinized in light of the five standards enumerated above, it is apparent that most of its provisions concerning EDU may be read consistently with the 1987 safeguards. Nevertheless, the regulations installed by P.D. No. 87, especially when compared to R.A. No. 7942, leave much to be desired; this, however, does not make the Decree unconstitutional. Its gaps may be filled by subsequent legislation, especially with regard to the third, fourth, and fifth standards enumerated above. Service contracts were not deconstitutionalized by the 1987 Constitution, and more significantly,

112. P.D. No. 87, § 10 (emphasis supplied).

there has been no emphatic declaration as to the Decree's unconstitutionality. Thus, P.D. No. 87 stands and continues to govern contracts which concern oil and petroleum. The next step is to fill in its holes and to make its terms stricter and more in line with the strengthened policy of State control, ownership, and regulation over its natural resources.

III. THE JOINT MARINE SEISMIC UNDERTAKING (JMSU)

The JMSU is one of the most controversial contracts in recent memory. There were many speculations over its true nature, from a contract which would open President Arroyo to the charge of treason to an agreement entered into in exchange for the ZTE-NBN deal with China. Because of the political noise surrounding it, the terms of the JMSU have remained mysterious and misunderstood; thus, its true nature remains, like many of the political uproars of the country, unanswered. What follows is an attempt to understand the provisions and stipulations of the JMSU, from the parties involved in it down to the activities that are to be done thereunder.

A. Parties to the Contract

1. China National Offshore Oil Corporation (CNOOC)

The contract describes CNOOC as China's "state-owned oil company"[113] and is "organized and existing under the laws of People's Republic of China, having its headquarters domiciled in Beijing."[114] The sixth "Whereas" clause declares that CNOOC is authorized by the Chinese Government and has the exclusive right to sign the JMSU in its behalf.[115] The signatory of CNOOC is Fu Chengyu, its President.

2. Vietnam Oil and Gas Corporation (PetroVietnam)

As with CNOOC, the JMSU describes PetroVietnam as "a company organized and existing under the laws of the Socialist Republic of Vietnam, having its headquarters domiciled in Hanoi."[116] Likewise, it is the national oil company of Vietnam and is authorized by the country and has the exclusive right to sign the JMSU.[117] PetroVietnam's President and CEO, Tran Ngoc Canh, signed the contract.

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113. *Id.*, First Whereas Clause.

114. JMSU, *supra* note 18, ¶ 1.

115. *See* JMSU, *supra* note 18, 6th Whereas Clause.

116. *Id.* ¶ 1.

117. *See* JMSU, *supra* note 18, 2d & 7th Whereas Clauses.

3. Philippine National Oil Corporation (PNOC)

Similar to CNOOC and PetroVietnam, the contract says that PNOC is a "company organized and existing under the laws of the Republic of the Philippines, having its headquarters domiciled at Fort Bonifacio, Taguig, Metro Manila."[118] It is also recognized as the national oil company of the Philippines, and it is authorized by the Philippine Government and holds the exclusive right to sign the JMSU in its behalf.[119] Eduardo V. Mañalac, PNOC's President and CEO at the time of the JMSU's perfection, was the signatory.

Created through Presidential Decree[120] by then President Marcos in 1973, PNOC was created in line with the state policy to "promote the industrial and over-all economic development ... of energy sources."[121] This entity is authorized to "undertake and transact the corporate business relative primarily to oil or petroleum operations and other energy resources exploitation."[122] Energy Resources Exploitation includes "exploration, discovery, development, extraction, utilization, refining, processing, transport, and marketing of all forms of energy resources."[123] PNOC is further authorized to engage in the "exploration, exploitation and development of local oil, petroleum and other energy resources,"[124] which includes, under Section 5 of the same law, surveys and activities related thereto. Also relevant is paragraph (e) of Section 5, which gives PNOC the power to "enter into contracts ... with any person or entity, domestic or foreign, and with governments for the undertaking of the varied aspects of oil or petroleum operation, and energy resources exploitation ... including the acquisition ... of equipment and/or raw materials and supplies ... [and] for services connected therewith."[125]

Since the JMSU is transferable to PNOC-Exploration Corporation (PNOC-EC), it is also necessary to know the nature of this judicial entity. PNOC-EC was created in 1976, and is a subsidiary of PNOC.[126] As of late,

118. *Id.* ¶ 1.

119. *See* JMSU, *supra* note 18, 3d & 8th Whereas Clauses.

120. Creating the Philippine National Oil Company, Defining Its Powers and Functions, Providing Funds Therefor, and for Other Purposes, [Charter of the Philippine National Oil Company], Presidential Decree No. 334 (1973).

121. *Id.* § 2.

122. *Id.* § 3.

123. *Id.*

124. *Id.* § 4 (b).

125. *Id.* § 5.

126. About PNOC Exploration Corporation, *available at* http://www.pnoc-ec.com.ph/index.html (last accessed May 22, 2010).

the Government holds plans to privatize the company in the first half of the year 2009, a plan which has been deferred several times for a number of reasons.[127] This is a major shift from the current ownership of PNOC-EC, whose shares of stock are 99.78% owned by the government. The remaining 0.22% is owned by public shareholders.[128]

Curiously, the proponents of the JMSU stress that the agreement was not signed by the President or the Secretary of the DOE because the agreement is not a treaty but a mere commercial agreement. Despite the non-involvement of the President and the DOE, both former Energy Secretary Vince Perez and Mañalac reiterate that PNOC closely coordinated with government agencies such as the Departments of Foreign Affairs and Justice "to ensure complete staff work."[129] This close coordination was perhaps part of PNOC's efforts to be "extremely careful and consistent in ensuring the constitutionality of the JMSU."[130]

B. Terms of the Contract and Obligations Contained Therein

1. Agreement Term

Article 1 of the JMSU specifically states that the Agreement Term shall be three years "starting from the date of commencement of implementation of the Agreement." The Agreement Term may be changed if the Parties agree to do so.[131]

2. Activities Involved

The Agreement dubs the activities under the JMSU as "Seismic Work" under Article 4. Specifically, the contract states that a "certain amount of 2D and/or 3D seismic lines shall be collected and processed and [a] certain amount of existing 2D seismic lines shall be reprocessed." The seismic program is not specified in the contract, but it shall be "unanimously approved by the Parties to ensure safety, stability and protection of the environment." In Article 4.2, the contract mandates that the work program

127. Abigail L. Ho, Government to Privatize PNOC-EC in the 1st half, *available at* http://business.inquirer.net/money/breakingnews/view/20090115183423/Govt-to-privatize-PNOC-EC-in-1st-half (last accessed May 22, 2010).

128. PNOC-EC Company Profile, *available at* http://www.pnoc-ec.com/aboutus.php?id=1 (last accessed May 22, 2010).

129. JMSU not a treaty; does not violate RP's Constitution — Perez, Mañalac, *available at* http://www.pia.gov.ph/?m=12&fi=p080309.htm&no=13 (last accessed May 22, 2010) [hereinafter JMSU not a treaty].

130. *Id.*

131. JMSU, *supra* note 18, art. 1. ("Unless otherwise agreed upon by the Parties, the term of this Agreement shall be three (3) years ... ").

and budget shall be approved by the Joint Operating Committee, whose duties and composition will be later discussed. The interpretation and evaluation of the data "should be done by a joint team created by the Parties."

3. The Joint Operating Committee

Created 30 days from the date of commencement of the implementation of the Agreement,[132] the Joint Operating Committee (JOC) shall be composed of representatives appointed by each Party — each Party shall appoint three representatives to create a nine-member JOC. Each party shall designate a chief representative who shall act as a spokesman on behalf of such party.[133] The JOC shall make its decisions unanimously through consultation,[134] and shall, according to Article 5.4, be empowered to:

(1) Propose to the Parties a Joint Operating Agreement (JOA) which will provide the terms of reference for the conduct of the joint activity;

(2) Formulate the annual work program and budget;

(3) Discuss and determine the manner of data exchange;

(4) Arrange further joint studies;

(5) Formulate the actual plan for seismic line acquisition;

(6) Sign subcontracts and service contracts for seismic line acquisition and processing; and

(7) Interpret and evaluate the relevant date and submit final evaluation report to the Parties.[135]

In addition, job descriptions, work procedures, the establishment of subordinate bodies, methods of cash calls, accounting methods, and other necessary rules and regulations may be determined by the JOC.[136] Further, part of the JOC's responsibilities is to report to the Parties "on a timely basis the progress of the joint activity and shall be subject to the directions given"[137] by them.

In accordance with the general rule laid out by the JMSU that the Parties shall have an "effective and equal participation" in all relevant

132. *Id.* art. 5.1.

133. *Id.* art. 5.2.

134. *Id.* art. 5.3.

135. *Id.* art. 5.4.

136. *Id.* art. 5.5.

137. JMSU, *supra* note 18, art. 5.6.

activities in the implementation of the Agreement,[138] the vessels used shall belong to any of the Parties, and the Parties shall exert best efforts to allow these vessels to use the ports of the countries involved, namely, the Philippines, Vietnam, or China, to get necessary supplies. As an exception to the general rule, however, the vessels of other parties may be used to conduct the seismic line acquisition "provided that the costs are competitive and reasonable."[139] These vessels shall also be granted the privilege to access ports of the countries involved, as if they were owned by the Parties.

The Parties' affiliates or other parties are allowed to process the relevant seismic data.[140]

4. Mutual Assistance

Article 7 of the JMSU provides for the mutual assistance that each Party is required to give the other. "Reasonable efforts" shall be exerted by each to obtain all the necessary approvals from their respective governments for the implementation of the Agreement[141] and to contract and coordinate with the relevant governmental departments.[142] Also, the Parties must facilitate entry of the other's personnel and vessels into relevant areas for the conduct of the seismic undertaking and to get necessary supplies and permits on a timely basis.[143]

5. Negotiation Period, Assignment

It has been argued that the JMSU is a limited contract preparatory to an exploration agreement,[144] as shown by Article 8 of the agreement. The

138. *Id.* art. 6.1.

139. *Id.* art. 6.2.

140. *Id.* art. 6.3.

141. *Id.* art. 7.1.

142. *Id.* art. 7.3.

143. JMSU, *supra* note 18, art. 7.2.

144. *See* DOJ: Drilon Backed JMSU Deal; Senators May Ask To Grill Drilon, *available at* http://www.newsflash.org/2004/02/hl/hl107200.htm (last accessed May 22, 2010). Secretary Raul Gonzales is quoted here saying: "On the contrary, the provisions of the JMSU agreement mirror the true nature of the agreement as seismic work or pre-exploration activities are not prohibited in the Constitution." *See also* Abigail L. Ho, JMSU Area all in RP, Philippine Daily Inquirer, Mar. 19, 2008, *available at* http://newsinfo. inquirer.net/breaking news/nation/view/20080319-125595/PNOC-JMSU-area-all-in-RP (last accessed May 22, 2010) [hereinafter Ho, PNOC]. The article states: "[PNOC President] Cailao said the JMSU, which he said was pre-exploratory in nature and could best be described as a scientific study, mentioned nothing about actual exploration in the covered area."

article outlines a Negotiation Period of 90 days where the Parties will be allowed to enter into negotiations for "a more definitive agreement for further cooperation covering all or part of the Agreement Area."[145] This Negotiation Period shall be "reserved for the *sole purpose* of negotiations among CNOOC, PetroVietnam and PNOC."[146] Further, the same Article stipulates that the Parties cannot negotiate any other agreement with any other party within the Agreement Area. Article 8 also provides that "[a]fter the Parties have decided to pursue a definitive agreement, the Parties will consult with their appropriate authorities on the terms for allowing the participation of other national and international oil companies, including specific arrangements for their participation."[147]

The rights and obligations under the JMSU are unassignable, except to affiliates specified in Article 9.1.[148] Particularly, CNOOC shall assign all its rights and obligations to CNOOC China Limited, PetroVietnam to an unnamed affiliate, and PNOC to PNOC-EC.

6. Confidentiality and Ownership of Information

Article 10 of the JMSU stipulates that:

> [T]his Agreement and all relevant documents, information, data and reports with respect to the joint marine seismic undertaking shall be kept confidential during the Agreement Term and within five (5) years after its expiration and shall not be disclosed by a Party to any third party without the written consent of the other Party. However, no consent shall be required when said documents, information, data and reports are disclosed, for the purpose of implementation of this Agreement, to the Parties' respective governments, affiliates, stock exchanges on which a Party's shares are registered.[149]

Further, Article 11 states that the data and information acquire through seismic work and their interpretation shall be jointly owned by the Parties. The prior written consent of the other Parties are required when one wishes to sell or disclose the data and information after the expiration of the confidentiality term.[150]

145. JMSU, *supra* note 18, art. 8.

146. *Id.* (emphasis supplied).

147. *Id.* art. 8.

148. *Id.* art. 9.2.

149. *Id.* art. 10.

150. *Id.* art. 11.2.

7. Miscellaneous Provisions

Article 11.5 commands the Parties to observe and follow all "laws and regulations, as well as any international obligation ... that may have a bearing on this Agreement."[151] However, the JMSU, according to Article 11.6, is still subject to approval by the Parties' respective governments. More, a joint press release[152] must be issued by the Parties to explain the purpose, scope, and area of the contract.

C. Area Covered by the Contract

Article 2 of the contract states that the Agreement covers a "total area of 142,886 square kilometers, as defined and marked out by the geographic location and the coordinates of the connecting points of the boundary lines in the Annex 'A' attached hereto." According to an article in Malaya News, of the total area targeted for seismic study, "around 24,000 square kilometers belongs to the Philippines and falls outside the areas in the Spratlys"[153] which are being claimed by other Southeast Asian countries. 80% of the KIG is also included in the JMSU.[154] The Malaya article states that "[a]t its farthermost eastern edge, the survey area is around 25 kilometers from the southern tip of Palawan while the northern boundary is alongside the Malampaya oil field." A study of Annex A of the JMSU shows that the JMSU covers an area that laps the western shores of the Philippines.[155]

Before the passage of the new Baselines Law, experts could not agree on whether the area covered by the JMSU was within Philippine territory. Mañalac has refused to acknowledge the claims of some critics that the area involved was within the 200-mile EEZ of the Philippines.[156] With the passage of R.A. No. 9522, however, the entire area covered by the JMSU is indisputably Philippine territory, as the law declares that KIG is a regime of islands with its own contiguous zone.[157] Specifically, the JMSU stands not only in the EEZ of the Philippines, but also in the contiguous zone of the KIG. Thus, the provisions of the 1987 Constitution, specifically Article XII,

151. JMSU, *supra* note 18, art. 11.5.

152. *Id.* art. 11.7.

153. Regina Bengco, Palace eyes U-turn on Spratly Deal 2, Malaya News, Mar. 11, 2009, *available at* http://www.malaya.com.ph/mar11/news1.htm (last accessed May 22, 2010).

154. *Id.*

155. *See* Sold: 24,000 sq. km.: RP territory in GMA deal delineated, Malaya News, Mar. 8, 2009, *available at* http://www.malaya.com.ph/mar08/news1.htm (last accessed May 22, 2010).

156. Go, Betrayal, Part 2, *supra* note 39.

157. R.A. No. 9522, § 2.

come into play when the EDU of the area is spoken of, as R.A. No. 9522 subjects all the resources found within the Agreement Area to the constitutionally enshrined Regalian Doctrine.

D. Execution of the JMSU

During the three-year Agreement Term, the seismic acquisition, which is the initial work to detect geological structures of the seabed in one part of the South China Sea, was conducted by China Oilfield Services Limited (COSL) with its exploration ship Nanhai 502.[158] The parent company of COSL is CNOOC, and the Nanhai 502 finished the acquisition just after 75 days, much faster than the projected eight-month data acquisition. PetroVietnam was responsible for the processing of the collected data, while PNOC-EC was charged with the interpretation of the information.[159] Mañalac, however, in an interview dated 13 July 2006, said that the interpretation was being done by the same team of the companies in the PNOC offices.[160] These three stages are subject to "mutual supervision and consultation," as declared by the JMSU.[161]

On 1 July 2008, the JMSU lapsed, and Energy Secretary Angelo Reyes said that "the government had decided to let the pact expire."[162] The issue has since remained underground.

E. Exploration or Pre-exploration?

One of the controversies surrounding the JMSU is the true nature of the seismic activity to be done within the Agreement Area. Proponents of the contract argue that it is not an exploration contract, and maintain that it is only a pre-exploration activity and could be "best described as a scientific study,"[163] as the contract mentioned nothing about actual exploration in the covered area. This makes it fall outside of the purview of Article XII of the Constitution. According to the Office of the President, there is no exploration going on as it is only a scientific data gathering process to test a

158. China, Philippines and Vietnam conclude seismic data acquisition of South China Sea, People's Daily, Nov. 11, 2005, *available at* http://english.people.com.cn/200511/20/eng20051120_222698.html (last accessed May 22, 2010).

159. *Id.*

160. Interview by Ellen Tordesillas with Eduardo V. Mañalac, PNOC President and CEO, July 12, 2006, *available at* http://www.ellentordesillas.com/?p=2273:int (last accessed May 22, 2010).

161. *Id.*

162. Ho, Spratlys Lapses, *supra* note 14.

163. Ho, PNOC, *supra* note 144.

portion of the Spratly island group for possible oil reserves.[164] If and when the companies find that a more definitive agreement to explore would be profitable, only then would an "exploration contract" be entered into, and this would be subject to the terms of the 1987 Constitution. This is indicated by Article 8 of the JMSU, which provides for a Negotiation Period within which the Parties may agree to enter into a more "definitive agreement for further cooperation"[165] within the Agreement Area. It is only after such agreement has been reached will the parties consult their authorities for the proper terms for "allowing the participation of other national and international oil companies, including the specific arrangements for their participation."[166] In fact, a joint statement released by former Energy Secretary Perez and Mañalac declares that the Agreement only entails seismic acquisition, processing, and interpretation. No actual exploration is involved in the JMSU, *viz*:

> The JMSU is a commercial agreement between three national oil companies to jointly acquire seismic data. No exploration, drilling, and production activities were covered by the agreement. The JMSU is simply a data gathering effort among the three oil companies.
>
> The JMSU is not a treaty. If at the end of the three-year term of the JMSU no new definitive agreements are agreed on, then the JMSU expires by June 2008.[167]

On the other end of the spectrum lie the critics of the JMSU, who claim that the seismic activity involved in the agreement is exploration, since exploration begins not with drilling for oil, but with sounding for oil. It has been argued that:

> [E]xploring for oil always begins with seismic studies of the submarine, subterranean geology. Using computer-based data acquisition systems and sophisticated image reconstruction algorithms and pattern recognition systems, geologists can make highly detailed pictures of the undersea,

164. Palace reiterates: JMSU does not undermine Philippine sovereignty, *available at* http://www.op.gov.ph/index.php?option=com_content&task=view&id=5797&Itemid=9 (last accessed May 22, 2010).

165. JMSU, *supra* note 18, art. 8.

166. *Id.*

167. Abigail L. Ho., No sell-out in Spratly deal — energy execs, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20080308123555/No-sell-out-in-Spratly-deal--energy-execs (last accessed May 22, 2010) [hereinafter Ho, No sell-out in Spratly deal].

> underground geology of an area and then to identify the most likely place to then begin test drilling to find out for sure.[168]

Former University of the Philippines Law School Dean Raul Pangalanan has been quoted saying that the "pre-exploration" phrase was "concocted after the fact" to hopefully lessen the objectionability of the agreement.[169]

The controversial exploratory or pre-exploratory activity authorized by the JMSU is described in Article 4.1, which provides that 2D and 3D seismic lines shall be collected and processed and a certain amount of 2D seismic lines shall be reprocessed within the Agreement Term. To get to the bottom of the nature of this seismic activity, it is necessary to understand what exactly oil exploration entails and what seismic activity is.

To begin looking for oil, areas thought to contain oil are initially subjected to any one of the surveys developed by science to detect large scale features of the sub-surface geology. The entity involved in the venture may opt to conduct a gravity survey, magnetic survey, passive seismic or regional seismic reflection surveys.[170] Seismic surveys work on the principle "of the time it takes for reflected sound waves to travel through matter (rock) of varying densities and using the process of depth conversion to create a profile of the substructure."[171] Basically, in order for seismic data to be gathered, shockwaves are sent to the ground. The amount of time it takes for these shockwaves to be reflected back to the surfaces paints a picture of what the subsurface rocks look like, and the data is processed and converted into two-dimensional seismic lines. These 2D seismic lines are simply two-dimensional displays that resemble cross-sections. 3D seismic lines are created by an intersecting grid of seismic lines.[172]

When a prospect has been identified and evaluated, and it passes the oil company's selection criteria, an exploration well is drilled in an attempt to conclusively determine the presence or absence of oil or gas.[173] Thus, an exploration well, which is a boring through the earth's surface designed to

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168. Exploring for Oil Starts with Sounding for Oil, not Drilling for Oil, *available at* http://philippinecommentary.blogspot.com/2008/03/exploring-for-oil-starts-with-sounding.html (last accessed May 22, 2010).

169. Go, Betrayal, Part 2, *supra* note 39.

170. Oil Exploration Multimedia Information, *available at* http://www.sandiegoaccountantsguide.com/library/Oil-exploration.php (last accessed May 22, 2010).

171. *Id.*

172. *See* How to Find Oil and Gas, *available at* http://www.sjgs.com/exploration.html (last accessed May 22, 2010).

173. Investor Education: Oil and Gas Exploration, *available at* http://www.diversifiedmetroplexinvestors.com/index.php?option=com_content&view=section&layout=blog&id=4&Itemid=7&limitstart=10 (last accessed May 22, 2010).

find and produce oil,[174] is only created if and when the seismic activity produces positive results such that a corporation or government would be willing to invest large amounts of money to ultimately drill for oil.

The opinions of experts in the field of oil are instructive in the query of whether seismic activity is exploratory or not. For one, the DOE, in its official website, created a listing of the contracts in 2006 which involved "Exploration." These were the activities undertaken pursuant to such exploratory contracts:

> As of end 2006, Nido Petroleum, under SC 54, acquired a total of 581 square kilometers of *3D seismic data* over the SC area. The survey is still being carried out until the target of 824 square kilometers is achieved.
>
> Meanwhile, 2D *seismic acquisition* for 2006 totaled [sic] to 11,168 line kilometers. SPEX (SC60) acquired 1,034 line kilometers, CNOOC (SC57) 2,269 line kilometers, Nido Petroleum (SC58) 3,083 line kilometers, Nido Petroleum (SC54) 70 line kilometers, NorAsian (SC55) 455 line kilometers, PNOC-EC (SC59) 2,057 line kilometers, and Mitra Energy (SC56) 2,200 line kilometers, in their respective contract areas.[175]

Further, according to a report by the Philippine Daily Inquirer, the seismic survey is actually the first phase of oil exploration, and there are already a number of oil exploration contracts covering the Tañon Strait and Cebu-Bohol Strait which involve seismic surveys.[176] These activities will determine the profile of the seabed for possible oil and gas and are unhesitatingly being called "exploration activities."[177] What's more, Shell Oil Company classifies seismic surveys as part of their exploratory activities to know where to look for oil in the first place.[178] In fact, according to Shell, the geologists and geophysicists, also called explorationists, study the seismic

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174. Oil Rigs — Oil Rig Suppliers, *available at* http://www.articlealley.com/article_1050242_15.html (last accessed May 22, 2010).

175. Petroleum Exploration History, *supra* note 11 (emphasis supplied).

176. *See* Jhunex Napallacan, Oil exploration worries environmentalists, Philippine Daily Inquirer, June 9, 2007, *available at* http://newsinfo.inquirer.net/inquirerheadlines/regions/view/20070609703 80/Oil_exploration_worries_environmentalists (last accessed May 22, 2010).

177. *Id. See also* Gerry A. Corpus, Cebu, Bohol Fishers Protest vs Oil Exploration, *available at* http://www.bulatlat.com/news/5-50/5-50-oil.htm (last accessed May 22, 2010); Team monitors oil search, effects of exploration in Tañon Strait, *available at* http://www.sunstar.com.ph/static/ceb/2007/11/29/news/team.monitors.oil.search.effects.of.exploration.in.ta.on.strait.html (last accessed May 22, 2010).

178. *See* Adventures in Energy, *available at* http://www.adventuresinenergy.org/main.swf (last accessed May 22, 2010); *see also* Locating, *available at* http://www.shell.us/home/content/usa/responsible_energy/education/energize_your_future/student/cool_tools/locating (last accessed May 22, 2010).

lines to look for accumulations of oil and natural gas that have not been developed. The data gathered is used to plan the safest and most cost-efficient way to target the oil found beneath the surface.

American courts have also recognized geophysical surveys as a mode of exploring and prospecting for oil.[179] Despite the fact that jurisprudence involving technology for oil exploration is still in its formative stage, it is clear that U.S. courts consider seismic surveys as a method of exploration, and not a form of pre-exploration of any kind.[180]

Given these, it is only logical to conclude that seismic surveys are indeed part of the exploration activities necessary to locate and discover oil. Seismic surveys are part and parcel of the entire process of exploring for oil; it is indispensable in the search for areas where drills can be created and wells can be made in order for the entire venture to be commercially profitable. Calling seismic surveys "pre-exploratory" is nothing more than hairsplitting the whole exploration procedure into its individual yet inseparable parts, as conducting seismic surveys is considered, in the oil and gas industry, as a method of exploring for the presence of oil. Consequently, the activities authorized by the JMSU fall squarely within the ambit of EDU in Article XII of the 1987 Constitution, and are subject to the safeguards installed therein.

F. A Commercial Agreement or a Treaty?

A treaty is "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[181] Although treaties may be concluded between states and international organizations, they are in essence concerned with relations between states.[182] The premise of a treaty is that the parties are either sovereign or international organizations; thus, the JMSU cannot be a treaty

179. *See* R.P. Davis, *Recovery for unauthorized geophysical or seismograph exploration or survey*, 67 A.L.R. 2d 444 § 1.

180. *Id.*

181. Vienna Convention on the Law of Treaties, May 29, 1969, art. 2 (1), 1155 U.N.T.S. 331. A provisional draft of the International Law Commission adds the phrase "concluded between two or more States or other subjects of international law and governed by international law." The reference to "other subjects" of the law was designed to provide for treaties concluded by international organizations, the Holy See, and other international entities such as insurgents.

IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 608-09 (5th ed., 1998).

182. MALCOLM N. SHAW, INTERNATIONAL LAW 632-33 (4th ed., 1997).

because its parties are corporations not recognized as international organizations. Even government officials and those from PNOC deny the allegation that the JMSU is a treaty, saying that it is merely a "data gathering effort among three oil companies."[183] Since the JMSU was never considered a treaty, neither the President nor the Secretary of the DOE signed the same in behalf of the government.[184]

Neither is the JMSU an executive agreement. While the 1987 Constitution makes no mention of executive agreements, this is defined in Black's Law Dictionary as "[a] treaty-like agreement with another country in which the President may bind the country without submission to the Senate,"[185] and discussed by the Supreme Court in *Commissioner of Customs, et al., v. Eastern Sea Trading.*[186] The relevant point to consider in determining whether the JMSU is an executive agreement or not is the parties involved in the contract — did the President execute the JMSU in behalf of the government?

It is submitted that since the signatories to the JMSU are private individuals, such that even the proponents of the agreement stress that neither the President nor any of her Secretaries[187] signed the same, then the JMSU cannot be considered an executive agreement. Moreover, since the

183. JMSU not a treaty, *supra* note 128.

184. *But see* Pabico, Spratlys deal, *supra* note 19. Former UP College of Law Dean Merlin Magallona stresses that the provisions of the JMSU show that it is a framework for future cooperation over the KIG area given its "strategic importance and diplomatic sensitivity." In his words, "[t]he agreement is not only a seismic research agreement but a framework agreement within which some succeeding agreements may be done by the governments. Such succeeding agreements for further cooperation mean that the parties will conclude an agreement for exploration." Further, the provision in the agreement requiring government approval makes it an international agreement, thus subject to two-thirds ratification by the Senate.

185. BLACK'S LAW DICTIONARY 569 (6th ed. 1990).

186. Commissioner of Customs, et al. v. Eastern Sea Trading, 3 SCRA 351 (1961). The Supreme Court here recognized that executive agreements become binding without the need of a vote by the Senate or Congress, and differentiated executive agreements from treaties in this wise:

> International agreements involving political issues or changes of national policy and those involving international agreements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions, and those involving arrangements of a more or less temporary nature take the form of executive agreements.

Id. at 356-57.

187. JMSU not a treaty, *supra* note 128.

parties to the JMSU are not sovereign states nor are they individuals with international legal personality, then the agreement is not a treaty governed by international law. For an agreement to fall within the ambit of international law, the parties must be States or subjects bestowed with international legal personality. PNOC, PetroVietnam, or CNOOC are not proper subjects of international law. Thus, the JMSU is not covered by its principles.

What the proponents of the JMSU stress is that the contract is a mere commercial agreement, designed to be completely scientific in nature.[188] They argue that the JMSU is part of the government's five-point agenda for energy independence, and is an element of oil diplomacy in Southeast Asia.[189] No other characterization of the JMSU can be found; in fact, those involved in this agreement are very careful not to give it any sort of legal name that would make it fall within Section 2, Article XII of the 1987 Constitution. It seems that, for the Philippine government, it is anything but a service contract, an FTAA, or any of the forms of MPSAs.

Truth be told, there would be no major legal setbacks if the JMSU is characterized as a commercial agreement. After all, an agreement is defined not by what the parties call it, but by what the terms of the contract say.[190] A problem will surface only if the provisions of the commercial agreement do not conform to the Philippines' legal and constitutional standards.

After scrutinizing the JMSU, its questionable provisions quickly become apparent. The seismic activity undertaken is legally and constitutionally sound, but the procedure through which the JMSU was negotiated, perfected, and executed leave much to be desired.[191] Both the Constitution and P.D. No. 87 approve of seismic activities as a method of exploration, but the parties involved therein do not have authority to enter into contracts of this nature. Moreover, some safeguards that were established in the new Constitution, such as the notification requirement and full State control over

188. *Id.*

189. Joint Statement of former Energy Secretary Vince Perez and former PNOC President Eduardo V. Mañalac, *available at* http://www.news.ops.gov.ph/archives2008/mar09.htm (last accessed May 22, 2010).

190. *See* CESAR L. VILLANUEVA, LAW ON SALES 9 (2004) (citing Romero v. Court of Appeals, 250 SCRA 223 (1995)). ("The Supreme Court has held that in determining the real character of the contract, the title given to it by the parties is not as significant as its substance.").

191. Go, Betrayal, Part 2, *supra* note 39. Dean Raul Pangalanan here is quoted saying: "What passes for a legitimate agreement suddenly becomes suspect because of constitutional shortcuts taken. It was not submitted to Congress [for approval], and it violated the provision that explorations should be under the sole control of Philippine state."

the operation, were not observed. These, as well as the other pitfalls of the JMSU, will be explained further in the next section of this Note.

IV. CHARACTERIZATION OF THE JMSU: THE JMSU UNDER PHILIPPINE LAWS AND JURISPRUDENCE

Regardless of the designation of the JMSU, its legality must still be studied under the law which regulates oil exploration — P.D. No. 87. The JMSU is not outside the legal framework of the Philippines, and its stipulations must still conform to the realities of the law as enacted by the Congress and interpreted by the Supreme Court. Thus, P.D. No. 87 and the *La Bugal B'laan* case will be used in order to determine the legality and constitutionality of this controversial contract.

A. Under P.D. No. 87

1. Is the JMSU a Service Contract?

As earlier discussed, the nature of service contracts is such that service and technology are furnished by the contractor, while financing is provided by the government. In exchange for the services and technology, the contractor is entitled to a service fee. In the event that the government cannot fund the project, the financing can also be provided by the contractor, who shall be reimbursed from the money earned from the sale of the petroleum produced under the contract. P.D. No. 87 also mandates that it is the DOE who is authorized to enter into service contracts on behalf of the government.

Considering the entire breadth of obligations that the service contract under P.D. No. 87 covers and the limited coverage of the JMSU, it can be said that the JMSU is not a service contract compliant with the requirements of the said Decree. While the JMSU only covers seismic activity, the contract contemplated in P.D. No. 87 contemplates that the entity involved will take charge of the entire process of oil exploration, from the discovery all the way up to production. Further, P.D. No. 87 creates specific guidelines for financing in Section 8, which states that the DOE must:

> (1) On behalf of the Government, reimburse the Contractor for all operating expenses not exceeding seventy per cent of the gross proceeds from production in any year: *Provided,* That if in any year the operating expenses exceeds seventy per cent of gross proceeds from production, then the unrecorded expenses shall be recovered from the operations of succeeding years.
>
> (2) Pay the Contractor a service fee the net amount of which shall not exceed forty per cent of the balance of the gross income after deducting the Filipino participation incentive, if any, and all operating expenses recovered pursuant to Section 8 (1) above.

(3) Reimbursement of operating expenses and payment of the service fee shall be in such form and manner as provided for in the contract.[192]

Aside from reimbursement, P.D. No. 87 also provides for the specific amount that the contractor must spend in the entire operation in relation to the area awarded to it for exploration and exploitation. The JMSU only has one provision on financing, particularly Article 3, which states that the parties to the agreement shall bear its own costs, but shall share the expenses incurred for seismic work and other operations as agreed upon by the JOC on equal basis.[193]

In addition, service contracts under P.D. No. 87 must have a compulsory relinquishment provision, depending on the amount of oil found, *viz*:

> Every contract shall provide for the compulsory relinquishment of at least twenty-five per cent of the initial area at the end of five years from its effective date and in the event of an extension of the contract from seven to ten years, an additional relinquishment of at least twenty-five per cent of the initial area at the end of seven years from its effective date.[194]

No such provision is found in the JMSU, the area involved in said agreement being the 142,886 km^2 mentioned in Article 2. Incentives are also given to the contractor involved in a service contract — the contractor is given privileges such as:

(1) Service fee of up to 40% of net production.

(2) Cost reimbursement of up to 70% gross production with carry-forward of unrecovered costs.

(3) FPIA grants of up to 7.5% of the gross proceeds for service contract with minimum Filipino company participation of 15%.

(4) Exemption from all taxes except income tax.

(5) Income tax obligation paid out of government's share.

(6) Exemption from all taxes and duties for importation of materials and equipment for petroleum operations.

(7) Easy repatriation of investments and profits.

(8) Free market determination of crude oil prices, i.e., prices realized in a transaction between independent persons dealing at arms-length.

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192. P.D. No. 87, § 8.

193. *See* JMSU, *supra* note 18, art. 3.

194. P.D. No. 87, § 9 (c).

(9) Special income tax of 8% of gross Philippine income for subcontractors.

(10) Special income tax of 15% of Philippine income for foreign employees of service contractors and subcontractors.[195]

The JMSU is silent with regard to incentives given to PNOC, CNOOC, and PetroVietnam. Moreover, P.D. No. 87 provides that it is the DOE who is authorized to enter into service contracts. The JMSU was entered into by the PNOC and was signed by a private citizen.

Finally, when the terms and provisions of the JMSU are compared with the model service contract[196] provided by the DOE, the comprehensive 48-page agreement perfected under P.D. No. 87 covers a more particular and extensive contract than the 17-page JMSU, whose terms and conditions are hazy at best. Thus, considering the foregoing, it can be safely assumed that the JMSU is not a service contract under P.D. No. 87 and is a different type of agreement altogether. For a clearer comparison between the terms of the JMSU and the provisions of P.D. No. 87, a table is included in the following section.

B. Under Section 2, Article XII of the 1987 Constitution and the La Bugal B'laan Case

Considering that the JMSU involves foreign persons and the only way through which foreign entities can participate in the EDU of the country's mineral resources is through the FTAA, the JMSU must be measured against the standards imposed by the Supreme Court in the *La Bugal B'laan* case. For easy reference, these are reproduced below:

(1) The FTAA may be entered into only with respect to minerals, petroleum, and other mineral oils.

(2) It must be crafted in accordance with a general law setting standard or uniform terms, conditions, and requirements.

(3) The President must be the signatory for the government.

(4) The President must report the executed agreement to Congress within 30 days.

(5) Full control by the State over the operation, such that the State is able to direct, restrain, regulate, and govern the affairs of the contractors. This control may be on the macro

195. Oil: Governing Laws and Issuances, *available at* http://www.doe.gov.ph/ER/oilL&I.htm (last accessed May 22, 2010).

196. Model Service Contract, *available at* http://www.doe.gov.ph/PECR2006/Petroleum%20PECR%202007/Model%20contracts.htm (last accessed May 22, 2010).

> level, through the establishment of policies, guidelines, regulations, industry standards and similar measures to regulate and restrain the activities of the contractor. This would be compatible with permitting the foreign contractor sufficient and reasonable management authority over the enterprise to ensure efficient and profitable operation.

1. First Standard: Only with respect to minerals, petroleum, and other mineral oils

The JMSU involves exploring for oil in certain areas of the Philippines through seismic activity. It is easy to see that the JMSU fulfills this first standard, in that foreign entities were allowed to participate in the EDU only with regard to petroleum, among others.

2. Second Standard: Crafted in accordance with a general law setting standard or uniform terms, conditions, and requirements

Since P.D. No. 87 is considered as the general law setting the terms and conditions for FTAAs, then the JMSU must be measured in light of the provisions of this Decree. As discussed in the previous section, however, it can be seen that the JMSU falls short of the requirements of P.D. No. 87, not only in terms of the activities involved in the agreement, but more relevantly because the JMSU does not pose requirements as stringent as those demanded by P.D. No. 87. The following table outlines the requirements that P.D. No. 87 expects of its service contractors juxtaposed with the requirements set forth in the JMSU:

	P.D. No. 87	JMSU
Parties	Executed by the Department of Energy, subject to the approval of the President (Sec. 5)	Executed by PNOC, signed by its President Eduardo Mañalac
Financing	May be provided by the government (Sec. 6) May be provided by the contractor (Sec. 7)	Each Party is responsible for the costs of its own personnel for the implementation of the Agreement, but the expenses for the seismic activity, as well as other activities agreed upon by the JOC, shall be shared on equal basis. (Art. 3)
Reimbursement of Finances	The Department shall reimburse the contractor	No provision on reimbursement of expenses

	all operating expenses not exceeding 70% of the gross proceeds from production in any year. The Department shall also pay the contractor a stipulated service fee in a form and manner agreed upon in the contract. (Sec. 8)	
Obligations of the contractor	Perform the work agreed upon between the Government and the contractor, including exploration and operation of the field if oil in commercial quantity is found. Risks shall be borne by the contractor. The contractor is also obliged to maintain detailed technical records and accounts and to furnish the Department with information and data as the latter may require. (Sec. 8)	Seismic work shall be performed under the contract in accordance with a program to be approved by the Parties. (Art. 4) A Joint Operating Committee (JOC) shall be formed that will create the program and the budget of the JMSU. The JOC will be created for the "proper performance of the joint activity." (Art. 5) Equal participation in all the activities is the general rule. (Art. 6)
Inspection by the Government	The contractor must also allow inspectors from the Department to inspect its premises and equipment, as well as allow BIR representatives access to their fiscal records. (Sec. 8)	No provision on inspection by the government. The JOC, however, shall report to the Parties the progress of the activities and shall be subject to their direction. (Art. 5)
Amount Spent in the Area	The contractor is required to spend a specific amount on each	No provision on amount required to be spent.

	hectare granted to it for exploration. (Sec. 9)	
Compulsory Relinquishment	The contractor must relinquish at least 25% of the initial area at the end of five years from its effective date. (Sec. 9)	No provision on compulsory relinquishment of the Agreement Area.
Subject to Laws	The contractor is subject to labor, health, safety, and ecology laws insofar as they do not conflict with P.D. No. 87. (Sec. 9)	The Parties shall exert reasonable efforts to obtain the necessary approvals from their respective governments for the implementation of the JMSU, as well as to contact and coordinate with its relevant governmental departments. (Art. 7) Laws, regulations, and international obligations which have any bearing on the Agreement must be observed. (Art. 11)
Performance Guarantee	A bond must be posted by the contractor to guarantee faithful performance with all its obligations. (Sec. 16)	No such provision for a bond.

3. Third Standard: The President must be the signatory for the government

The JMSU was signed by Mañalac, the President of PNOC. He is not a Department Secretary, the Executive Secretary, or any of the persons recognized by law to be the alter-ego of the President, in line with the doctrine of qualified political agency. He is, in no uncertain terms, a private citizen who heads a government-owned corporation and he holds no authority under the Constitution to execute and sign agreements of this magnitude.

4. Fourth Standard: The President must report the executed agreement to Congress within 30 days

The JMSU was not reported to Congress by the President or by any other person within 30 days from its execution. In fact, Article 10 of the JMSU provides that "[t]his Agreement ... shall be kept confidential within the Agreement Term and within five years after its expiration," which is a clear circumvention of the Constitutional requirement of notification. No explanation was given for why the full text of the agreement was not released,[197] and critics have said that the exploration agreement violated the Constitution since it did not pass through Congress for approval.[198]

5. Fifth Standard: Full State control over the operation

The JMSU bestows the operation of the activities undertaken pursuant to the JMSU to a Joint Operating Committee (JOC). Article 5 outlines the composition, the powers and the responsibilities of the JOC. The annual work program and budget, as well as the Joint Operating Agreement (JOA), will be decided by the JOC unanimously. The JOA will be the terms of reference for the conduct of the joint activity. In addition to these, the JOC is empowered to sign subcontracts and service contracts for seismic line acquisition and processing, discuss and determine the manner of data exchange, arrange further joint studies, and formulate the actual plan for seismic line acquisition. Other rules and regulations required by the joint activity will also be decided on by the JOC.

Given the broad powers of the JOC, its composition must be scrutinized in order to determine upon whom the JMSU bestows the reins of control over the joint activity. Article 5 provides that the JOC is composed of nine members to be appointed by the Parties to the JMSU. CNOOC, PetroVietnam, and PNOC shall appoint three representatives each to the JOC, and one representative from each Party shall be named as chief representative. Despite extensive research, however, membership of the JOC still remains undisclosed.

The state control envisioned in *La Bugal B'laan* is largely different from the control given to the state in the JMSU. The Supreme Court said that the form of control necessary that would make an FTAA constitutionally sound is one that allows the State to direct, restrain, regulate, and govern the affairs of the contractors. The JMSU, however, does not allow the State to do so, as the entity charged with the operation and management of the seismic activity is a committee composed of private individuals, and foreign ones at

197. *See* Ho, No sell-out in Spratly deal, *supra* note 167.

198. JMSU should involve all claimants, says US, *available at* http://www.dpinoyweb.com/2008/04/01/jmsu-should-involve-all-claimants-says-us (last accessed May 22, 2010).

that, without constitutional or legal authority to conduct a venture of this scale. The general rule under the JMSU is that "effective and equal participation"[199] in all activities shall be had by all the Parties; thus, the JMSU actually gives the Chinese and the Vietnamese equal opportunity to explore the resources of the country, since the decisions of the JOC are made unanimously. PNOC does not even have a greater say or a weightier vote in the JMSU — all three national oil companies stand on equal footing and can uniformly influence the direction of the exploration of the area involved.

The role of the DOE, the President, or any of the government agencies is not outlined in the Agreement. The only manner through which the JMSU involves the government is in a provision which states that the Parties shall exert reasonable efforts to get the approval of the necessary governmental agencies for the implementation of the Agreement and any further contracts that may be entered into. The parties shall also only consult and coordinate with the appropriate government agencies in order to achieve the objectives of the JMSU. There are no provisos for inspection or any form of checks and balances from any of the agencies or departments of the Philippine government. The government is not given any visitorial or inquisitorial powers regarding the operations of the JMSU. Approval, consultation, and coordination hardly seem to fulfill the "full control" standard of the Supreme Court.

C. Exit Strategy and Ownership over Information

The JMSU does not provide for an exit strategy for the Philippine government. There is no provision in the Agreement which authorizes the Philippines or PNOC to terminate the contract in the event that any of the stipulations in the JMSU are violated. In fact, there is no arbitration clause present in the contract — the only provision which specifies how conflicts will be resolved is Article 11.1, which states that "best efforts shall be exerted to settle amicably through consultation" disputes which may arise because of a difference in interpretation or performance of the JMSU. This vaguely-worded Article does not specify which court will have jurisdiction over the dispute, or if the parties can opt to sever the contract in cases of breach or any other condition. The role of the parties' respective governments, in the event of a violation of the terms of the JMSU, is also not specified.

It is important to note that the JMSU provides that the information and data gathered in the seismic activity shall be jointly owned by the parties, and prior written consent must be obtained from the others if one of the Parties wishes to sell or disclose the data. This is contrary to the essence of the Regalian Doctrine, which states that all lands and resources within the

199. JMSU, *supra* note 18, art. 6.

territory belong to and are owned by the State. Ownership over the information regarding the presence and amount of oil within Philippine territory is relinquished by the contract to foreign companies, who have equal rights over the same as with the PNOC. Further, since the country is bound to negotiate only with CNOOC or PetroVietnam as provided for in Article 8 of the JMSU, the discretion of the government as to what to do with the information is largely restricted — whatever will be done to the results of the JMSU activities will be subject to the approval of the foreign entities.

Ownership over the information is crucial in determining who actually benefits from the exploration conducted within the Philippine territory, as even American courts have put a high price on the information gathered in such surveys:

> While geophysical data may not be legal facts and are 'susceptible of multiple and diverse interpretations even by the experts,' 'if the information thus obtained be favorable, it can be used and is used in dealing with the landowner for his valuable mineral rights. If the information be unfavorable, the fact quickly becomes publicly known and thus impairs the power of the landowner to deal advantageously with his valuable mineral rights,' and ... a wrongful disclosure of data deemed unfavorable has a deleterious effect upon the mineral owner's estate has been recognized.[200]

Giving China and Vietnam equal access to the value of the petroleum resources within Philippine territory gives these two sovereigns almost unfettered access to local wealth. With the data gathered from seismic surveys, China and Vietnam will be able to strategize over the quantity and quality of the oil discovered underneath Philippine waters. Requiring the consent of these states before the Philippines can disclose or sell the research information means that the country is not given full control over how the data will be utilized, as the government's decision-making process with regard to the new data will be put on a tight leash, and its actions in the area will be severely limited by the interests of China and Vietnam.

The right to explore for oil and gas is a valuable property right which can be legally protected,[201] and the Philippines has properly created guidelines to be followed before exploration of any kind or through any method can be undertaken in its territory. The provisions of the JMSU are in stark contrast to the more stringent requirements for "full State control" approved by the Supreme Court in *La Bugal B'laan*. The JMSU severely lacks safeguards for the protection of Filipino interests over the petroleum

200. Davis, *supra* note 179 (citing Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014 (1946)).

201. Robert J. Rice, *Damages for Unauthorized Geophysical Exploration*, 48 Am. Jur. POF 2d 153 § 2.

resources in its territory, and it seems to have abrogated the constitutionally-mandated control and ownership that the State has over its resources to foreigners and private individuals. For failing to fulfill this standard as well as all the others stated in the *La Bugal B'laan* case, the JMSU is constitutionally defective.

V. FITTING THE PNOC INTO THE OIL EXPLORATION PUZZLE

In the public debates which ensued about the legality or illegality of the JMSU, the role of the PNOC was never brought up or questioned. It seems that people assumed that PNOC, as the State's national oil company, has the authority to enter into oil and petroleum contracts on behalf of the government.

This may have been the case under the 1973 Constitution. When P.D. No. 334 was enacted creating the PNOC, the 1973 Constitution did not specify that service contracts involving foreign corporations should be entered into by the President. All Section 9, Article XIV provided was that "[t]he National Assembly, in the national interest, may allow such citizens, corporations or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, or utilization of any of the natural resources." As such, President Marcos was authorized to create any entity he saw fit to negotiate and execute contracts with foreign persons.

Currently, however, the Constitutional landscape has evolved. The 1987 Constitution specifically provides that it is the President who has the power to enter into agreements with foreign corporations. In light of this change, what now is the role of PNOC? There has been no law amending the charter of PNOC to change any of their powers. In fact, PNOC has continued to grow throughout the years, with subsidiaries being created to manage oil exploration, alternative fuels, and shipping and transport, among others.[202] It was, however, placed under the supervision of the DOE with the passing of R.A. No. 7638.[203] Other than this, the powers of the PNOC remain untouched.

It is submitted that given the standards set forth in the 1987 Constitution, the powers of the PNOC must be limited to negotiating, executing, and perfecting contracts which are either joint ventures, production sharing agreement, or co-productions. No longer may they enter into service contracts; such power is now reserved for the President only, or

202. *See generally* Profile, PNOC, *available at* http://www.pnoc.com.ph/about/profile.php (last accessed May 22, 2010).

203. An Act Creating The Department Of Energy Rationalizing The Organization And Functions Of Government Agencies Related To Energy And For Other Purposes, Republic Act No. 7638 (1992).

the DOE Secretary as his or her alter-ego. Thus, while the powers of PNOC as enumerated in Section 5[204] of P.D. No. 334 may remain, the law must be amended to limit the same to domestic contracts not involving FTAAs. References to being empowered to enter into contracts with foreign entities, such as paragraph (e), should be repealed. That authority should remain only with the President or the DOE, in line with the safeguards of the 1987 Constitution.

VI. CONCLUSION

There is no doubt that the Philippines is in dire need of some assistance in the exploration and exploitation of its natural resources, especially for its petroleum deposits. The economic status of the country prevents it from fully capitalizing the potentials of its marine and oil reserves. In response to this dilemma, the Constitution has provided for some methods through which the Philippines can receive some foreign aid in Section 2, Article XII, and the Supreme Court has properly and extensively interpreted this provision for the guidance of both the legislative and executive branches of the government.

Despite the guidance given by the Court, however, an ambiguous contract in the form of the JMSU has been executed, and its provisions do not fully conform to the safeguards installed by both the framers and the justices of the Highest Court of the land. Because of this, the JMSU, despite its possible advantages to the country, has drowned in political controversy, and its benefits have not trickled down to the Filipino people. All the efforts poured into the negotiation, perfection, and execution of the contract have

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204. P.D. No. 334, § 5. The relevant paragraphs of Section 5 are: The Company shall have the following powers and functions:

(1) To undertake, by itself or otherwise, exploration, exploitation and development of all areas of oil or petroleum deposits in the country, including surveys and activities related thereto;

(2) ...

(3) ...

(4) To undertake all other forms of petroleum or oil operations;

(5) *To enter into contracts*, with or without public bidding, with any person or entity, *domestic or foreign* and with governments *for the undertaking of the varied aspects of oil or petroleum operation, and energy resources exploitation*, including the acquisition, by way of purchase, lease or rent or other deferred payment arrangements of equipment and/or raw materials and supplies, as well as for services connected therewith under such terms and conditions as it may deem proper and reasonable; (emphasis supplied).

...

been for naught because of the legal and constitutional blunders of government officials.

This Note has aimed to clear the air regarding the JMSU, highlighting the inadequacies of the legal framework regarding oil and petroleum exploration. After a long exposition on the issues involved, the following are the conclusions found by the proponent:

A. The Agreement Area of the JMSU falls within Philippine territory

Much ruckus was made over the allegation that the JMSU covered disputed areas of the Spratlys, thus weakening the Philippines' claim to these territories. With the passage of R.A. No. 9522, however, the question of what area the JMSU covers is now moot; it has been answered definitively by this law, and the Agreement Area of some 140,000 km^2 falls squarely within the contiguous zone and the exclusive economic zone (EEZ) of the country, and thus directly under the sovereignty and jurisdiction of the Philippines and its laws.

B. P.D. No. 87, though insufficient, complies with the 1987 Constitution

P.D. No. 87, though spartan when compared to the comprehensive R.A. No. 7942, complies with the standards enumerated in the 1987 Constitution as interpreted by the Supreme Court in *La Bugal B'laan*. Moreover, considering that there is no definite declaration from the Court that P.D. No. 87 is unconstitutional, it must, despite its imperfect provisions, stand as valid law.

C. The JMSU is both legally and constitutionally defective

It must be made clear that the activities authorized by the JMSU — specifically, the seismic activity for the discovery of oil beneath the Agreement Area — is not, by any chance, unconstitutional or illegal. It is, in fact, a proper subject of an FTAA, and foreign entities can rightfully participate in this undertaking.

The JMSU, however, does not fulfill the requirements set forth in P.D. No. 87 for service contracts. The bare provisions of the JMSU regarding the breadth of the activities to be undertaken, the obligations of the contracting parties, and the conditions embodied therein fall outstandingly short of the standards of P.D. No. 87. Consequently, the JMSU cannot be considered a service contract under this Decree.

Further, the following, among others, are the glaringly suspect provisions of the JMSU:

(1) Its Filipino signatory, the PNOC;

(2) The creation of the Joint Operating Committee;

(3) The ownership over the information and data gathered pursuant to the seismic survey; and

(4) The confidentiality of the Agreement.

These aspects of the JMSU take full and effective control over the country's natural resources away from the State, in violation of the Regalian Doctrine and Article XII, Section 2, of the 1987 Constitution, and put the JMSU in constitutional jeopardy. The stipulations of the Agreement do not allow the State to control, direct, or manage the venture at hand, as private individuals are placed at the helm of the entire operation. State ownership is set aside and the interests of PNOC, CNOOC, and PetroVietnam come to fore, and the interests of the Filipino people are not represented. The standards set forth by the Supreme Court in *La Bugal B'laan* for a valid FTAA are, as previously and extensively discussed, evidently unsatisfied.

D. P.D. No. 87 must be reconciled with the 1987 Constitution and must reflect scientific advancements in terms of oil exploration, development, and utilization.

The stark nature of the provisions of P.D. No. 87 compared to R.A. No. 7942 is no reason to strike the former as unconstitutional. Instead, the holes in P.D. No. 87 must be filled with subsequent legislation in order for it to perfectly conform to the standards of the 1987 Constitution.

VII. RECOMMENDATION

To plug the hole that exists in the legal framework that governs oil exploration, the provisions of Section 2, Article XII, as interpreted by the Supreme Court in the *La Bugal B'laan* case and P.D. No. 87 have to be reconsidered and ultimately reconciled. Doing so will prevent contracts like the JMSU from appearing, and the existence of a stable law will encourage foreign investments to pour into the country. The proposed law is an overhaul of the relevant provisions of P.D. No. 87 that will cover exploration methods similar to that done in the JMSU and will incorporate the safeguards installed by the 1987 Constitution as interpreted in *La Bugal B'laan*, and will contain the following new features:

(1) Definitions of the contiguous zone and exclusive economic zones of the Philippines, measured from the baselines defined by R.A. No. 9522;

(2) An expanded definition of "exploration," flexible enough to meet scientific innovations and advancements in the field of oil and petroleum prospecting. This includes an expanded definition of "Petroleum operations" to cover exploring or prospecting for oil, including geological or seismic surveys. Thus, the amendatory law will be applicable even if the contract only involves exploration or prospecting for oil;

(3) The definitions and incorporation of joint venture, co-production, and production sharing agreements, collectively called "petroleum agreements" for the EDU of oil, similar to "mineral agreements" in R.A. No. 7942. The safeguards provided in R.A. No. 7942 are also integrated;

(4) The incorporation and definition of the term "Financial or Technical Assistance Agreement" as a service contract for large-scale EDU of petroleum, including the guidelines for State control and supervision embodied in R.A. No. 7942 and approved by the Supreme Court in La Bugal B'laan;

(5) The limitation of the definition of a "qualified person" to enter into agreements, specifically limiting the participation of foreign corporations to FTAAs;

(6) The Department's exclusive power to negotiate and execute an FTAA. It is, however, authorized, along with the PNOC, to enter into petroleum agreements. The charter of PNOC is repealed insofar as it empowers PNOC to enter into service contracts;

(7) The President's obligation to sign each FTAA entered into by the Secretary of the DOE. Further, the President must notify the Congress of every FTAA within 30 days of its execution;

(8) The Government's share in petroleum agreements and FTAAs, as adopted from R.A. No. 7942. This includes ownership over the information acquired during an exploration contract; and finally,

(9) Grounds for cancellation, revocation, and termination of the petroleum agreement or the FTAA.

The law is annexed to this Note. The underlined portions are the proponent's input and are primarily modified provisions of R.A. No. 7942 as approved by the Supreme Court; the others are carry-overs from the old Decree.

VIII. AMENDATORY LAW

AN ACT TO AMEND PRESIDENTIAL DECREE NO. 87 KNOWN AS 'THE OIL EXPLORATION AND DEVELOPMENT ACT OF 1972'

SECTION 1. *Short title.* This Act shall be known and may be cited as "The Oil Exploration and Development Act of 2009."

SECTION 2. *Declaration of policy.* All energy resources such as coal, petroleum, natural gas, radioactive materials, and geothermal energy in public and private lands within the territory and maritime zones of the Republic of the Philippines, including its exclusive economic zone, are owned by the State. The exploration, development, and utilization of these resources shall be under the full control and supervision of the State. In line with this, 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.

It is also the policy of the State to hasten the discovery and production of indigenous petroleum through the utilization of government and/or private resources under the arrangements embodied in this Act and provided for in the 1987 Constitution, which are calculated to yield the maximum benefit to the Filipino people and the revenues to the Philippine Government for use in furtherance of national economic development, and to assure just returns to participating private enterprises, particularly those that will provide the necessary services, financing and technology and fully assume all exploration risks.

SECTION 3. *Definition of Terms.* As used in this Act, the following shall have the following respective meanings:

(a) "Affiliate" means (a) a company in which a contractor holds directly or indirectly at least fifty per cent of its outstanding shares entitled to vote; (b) a company which holds directly or indirectly at least fifty per cent of the contractor's outstanding shares entitled to vote; or (c) a company in which at least fifty per cent of its share outstanding and entitled to vote are owned by a company which owns directly or indirectly at least fifty per cent of the shares outstanding and entitled to vote of the contractor.

(b) "Casinghead petroleum spirit" means any liquid hydrocarbon obtained from natural gas by separation or by any chemical or physical process.

(c) "Contiguous Zone" refers to water, sea bottom, and substratum measured twenty-four nautical miles (n.m.) seaward from the baseline of the Philippine archipelago as defined by Republic Act No. 9522, entitled "An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to Define

the Archipelagic Baselines of the Philippines, and for Other Purposes." (R.A. No. 9522)

(d) "Contractor" means the contractor in a petroleum agreement or financial or technical assistance agreement whether acting alone or in consortium with others.

(e) "Crude oil" or "crude" means oil in its natural state before the same has been refined or otherwise treated. It does not include oil produced through destructive distillation of coal, bituminous shales or other stratified deposits, either in its national state or after the extraction of water, and sand or other foreign substances therefrom.

(f) "Crude oil exported" shall include not only crude oil exported as such but also indigenous crude oil refined in the Philippines for export.

(g) "Department" means the Department of Energy.

(h) "Exclusive Economic Zone" means the water, sea bottom, and subsurface measured from the baselines of the Philippine archipelago as defined by R.A. No. 9522 up to 200 nautical miles (200 n.m.) offshore.

(i) "Exploration" means the searching or prospecting for mineral resources by geological, geochemical, or geophysical surveys, remote sensing, test pitting, trenching, drilling, shaft sinking, tunnelling, or any other means for the purpose of determining the existence, extent, quantity and quality thereto and the feasibility of mining them for profit.

(j) "Financial or Technical Assistance Agreement" refers to service contracts for large-scale exploration, development, and utilization of petroleum.

(k) "Government" means the Government of the Republic of the Philippines.

(l) "Gross income" means the gross proceeds from the sale of crude, natural gas or casinghead petroleum spirit produced under the contract and sold during the taxable year at posted or market price, as the case may be, and such other income which are incidental to and arising from any one or more of the petroleum operations of the contractor.

(m) "Market Price" shall mean the price which would be realized for petroleum produced under a contract as hereinafter defined if sold in a transaction between independent persons dealing at arm's length in a free market.

(n) "Petroleum agreements" refer to joint venture, co-production and production sharing agreements as defined hereunder.

(o) "Natural gas" means gas obtained from boreholes and wells and consisting primarily of hydrocarbons.

(p) "Onshore" means the landward side from the mean tide elevation, including submerged lands in lakes, rivers and creeks.

(q) "Offshore" means the water, sea bottom, and subsurface from the shore or coastline reckoned from the mean low tide level up to the two hundred nautical miles (200 n.m.) exclusive economic zone including the archipelagic sea and contiguous zone.

(r) "Operating Expenses" means the total expenditures for petroleum operations made by the Contractor both within and without the Philippines as provided in a service contract.

(s) "Petroleum" shall include any mineral oil hydrocarbon gas, bitumen, asphalt, mineral gas and all other similar or naturally associated substances with the exception of coal, peat, bituminous shale and/or other stratified mineral fuel deposits.

(t) "Petroleum in commercial quantity" means petroleum in such quantities which will permit its being economically developed as determined by the contractor after taking into consideration the location of the reserves, the depths and number of wells required to be drilled and the transport and terminal facilities needed to exploit the reserves which have been discovered.

(u) "Petroleum operations" means searching for, exploring, prospecting, and/or obtaining petroleum within the Philippines, including geological or seismic surveys, drilling and pressure or suction or the like, and all other operations incidental thereto. It includes the exploration, transportation, storage, handling and sale

(whether for export or for domestic consumption) of petroleum so obtained but does not include any: (1) transportation of petroleum outside the Philippines; (2) processing or refining at a refinery; or (3) any transactions in the products so refined.

(v) "Qualified person" means any citizen of the Philippines with capacity to contract, or a corporation, partnership, association, or cooperative organized or authorized for the purpose of engaging in oil exploration, development, and/or utilization, with technical and financial capability to undertake petroleum development and duly registered in accordance with law at least sixty per centum (60%) of the capital of which is owned by citizens of the Philippines; Provided, That a legally organized foreign-owned corporation shall be deemed a qualified person for the purposes of granting a financial or technical assistance agreement.

(w) "Secretary" means the Secretary of the Department of Energy.

(x) "Taxable year" means the calendar or fiscal year of the contractor.

SECTION 4. *Government may undertake petroleum exploration and production.* Subject to the existing private rights, the Government may directly explore for and produce indigenous petroleum. It may also indirectly undertake the same under financial or technical assistance agreements as hereinafter provided. These contracts may cover free areas, national reserve areas and/or petroleum reservations, whether on-shore or off-shore. In every case, however, the contractor must be technically competent and financially capable as determined by the Department to undertake the operations required in the contract.

SECTION 5. *Authority of the Department.* The Department shall be the primary government agency responsible for the conservation, management, development, and proper use of all of the State's petroleum resources. The Secretary of the Department shall have the authority to enter into petroleum agreements in behalf of the Government, and promulgate such rules and regulations as may be necessary to implement the intent and provisions of this Act. Further, the Secretary shall have the authority to enter into financial or technical assistance agreements, subject to the approval and signature of the President.

Aside from the Department, the Philippine National Oil Corporation (PNOC) shall have the authority to enter into petroleum agreements in behalf of the Government, subject to the approval of the Secretary of the Department. PNOC cannot, however, negotiate or execute FTAAs; such power shall be reserved exclusively for the Department or the President himself or herself. The relevant paragraphs of Section 5 of Presidential Decree No. 334 are hereby repealed accordingly.

The Department shall have direct charge in the administration and disposition of mineral lands and mineral resources and shall undertake geological, geophysical, chemical, and other researches as well as geological and mineral exploration surveys.

The Secretary shall monitor the compliance by the contractor of the terms and conditions of the petroleum agreements and/or the financial or technical assistance agreements. The Department may confiscate surety, performance and guaranty bonds posted through an order to be promulgated by the Director. The Director may deputize, when necessary, any member or unit of the Philippine National Police, barangay, duly registered non-governmental organization (NGO) or any qualified person to police all petroleum activities.

SECTION 6. *Execution of contracts authorized in this Act.* Every petroleum agreement and FTAA herein authorized shall be executed after due public notice pre-qualification and public bidding or concluded through negotiations. In case bids are requested or if requested no bid is submitted or the bids submitted are rejected by the Department for being disadvantageous to the Government, the contract may be concluded through negotiation.

In opening contract areas and in selecting the best offer for petroleum operations, any of the following alternative procedures may be resorted to by the Department, subject to prior approval of the President:

(a) The Department may select an area or areas and offer it for bid, specifying the minimum requirements and conditions; or

(b) The Department may open for bidding a large area wherein bidders may select integral areas not larger than the maximum provided in this Act. Only the best offer shall be accepted and the selection thereon shall be made by a weighted system of evaluating the different aspects of each bid; or

(c) An area may be selected by an interested party who shall negotiate with the Department for a contract under the terms and conditions provided in this Act.

PETROLEUM AGREEMENTS

SECTION 7. *Petroleum Agreements*. For purposes of petroleum operations, a petroleum agreement may take the following forms as herein defined:

(a) Petroleum production sharing agreement is an agreement where the Government grants to the contractor the exclusive right to conduct petroleum 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 petroleum operations other than the petroleum 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.

A petroleum agreement shall grant to the contractor the exclusive right to conduct petroleum operations and to extract all petroleum resources found in the contract area. In addition, the contractor may be allowed to convert his agreement into any of the modes of petroleum agreements or financial or technical assistance agreement covering the remaining period of the original agreement subject to the approval of the Secretary.

A qualified person may enter into any of the three (3) modes of petroleum agreement with the government for petroleum operations, except a legally organized foreign-owned corporation.

All proposed petroleum agreements shall be filed in the region where the areas of interest are located. The filing of a proposal for a petroleum agreement shall give the proponent the prior right to areas covered by the same. The proposed petroleum agreement will be approved by the Secretary and copies thereof shall be submitted to the President. Thereafter, the President shall provide a list to Congress of every approved petroleum agreement within thirty (30) days from its approval by the Secretary.

SECTION 8. *Assignment/Transfer.* Any assignment or transfer of rights and obligations under any petroleum agreement except a financial or technical assistance agreement shall be subject to the prior approval of the Secretary. Such assignment or transfer shall be deemed automatically approved if not acted upon by the Secretary within thirty (30) working days from official receipt thereof, unless patently unconstitutional or illegal.

SECTION 9. *Withdrawal from Petroleum Agreements.* The contractor may, by giving due notice at any time during the term of the agreement, apply for the cancellation of the petroleum agreement due to causes which, in the opinion of the contractor, make continued petroleum operations no longer feasible or viable. The Secretary shall consider the notice and issue its decision within a period of thirty (30) days: Provided, That the contractor has met all its financial, fiscal and legal obligations.

SECTION 10. *Terms.* Petroleum agreements shall have a term not exceeding twenty-five (25) years to start from the date of execution thereof, and renewable for another term not exceeding twenty-five (25) years under the same terms and conditions thereof, without prejudice to changes mutually agreed upon by the parties. After the renewal period, the operation of the mine may be undertaken by the Government or through a contractor.

The contract for the operation of an oil well shall be awarded to the highest bidder in a public bidding after due publication of the notice thereof: Provided, That the contractor shall have the right to equal the highest bid upon reimbursement of all reasonable expenses of the highest bidder.

FINANCIAL OR TECHNICAL ASSISTANCE AGREEMENT

SECTION 11. *Eligibility.* Any qualified person with technical and financial capability to undertake large-scale exploration, development, and utilization of mineral resources in the Philippines may enter into a financial or technical assistance agreement directly with the Government through the Department.

SECTION 12. *Contract Area.* A contractor or its affiliate may enter into one or more contracts with the Government. Contracts for off-shore areas may cover any portion beneath the Philippine territorial waters or its continental shelf, or portion of the continental slope, terrace or areas which are or may be subject to Philippine jurisdiction.

SECTION 13. *Terms and Conditions.* The following terms, conditions, and warranties shall be incorporated in the financial or technical assistance agreement, to wit:

(a) A firm commitment in the form of a sworn statement, of an amount corresponding to the expenditure

obligation that will be invested in the contract area: Provided, That such amount shall be subject to changes as may be provided for in the rules and regulations of this Act;

(b) A financial guarantee bond shall be posted in favor of the Government in an amount equivalent to the expenditure obligation of the applicant for any year;

(c) Submission of proof of technical competence, such as, but not limited to, its track record in petroleum resource exploration, development, and utilization; details of technology to be employed in the proposed operation; and details of technical personnel to undertake the operation;

(d) Representations and warranties that the applicant has all the qualifications and none of the disqualifications for entering into the agreement;

(e) Representations and warranties that the contractor has or has access to all the financing, managerial and technical expertise and, if circumstances demand, the technology required to promptly and effectively carry out the objectives of the agreement with the understanding to timely deploy these resources under its supervision pursuant to the periodic work programs and related budgets, when proper, providing an exploration period up to two (2) years, extendible for another two (2) years but subject to annual review by the Secretary in accordance with the implementing rules and regulations of this Act, and further, subject to the relinquishment obligations;

(f) Representations and warranties that, except for payments for dispositions for its equity, foreign investments in local enterprises which are qualified for repatriation, and local supplier's credits and such other generally accepted and permissible financial schemes for raising funds for valid business purposes, the contractor shall not raise any form of financing from domestic sources of funds, whether in Philippine or foreign currency, for conducting its petroleum operations for and in the contract area;

(g) The petroleum operations shall be conducted in accordance with the provisions of this Act and its implementing rules and regulations;

(h) Work programs and minimum expenditures commitments;

(i) Preferential use of local goods and services to the maximum extent practicable;

(j) A stipulation that the contractors are obligated to give preference to Filipinos in all types of employment for which they are qualified and that technology shall be transferred to the same;

(k) Requiring the proponent to effectively use appropriate anti-pollution technology and facilities to protect the environment and to restore or rehabilitate mined out areas and other areas affected by mine tailings and other forms of pollution or destruction;

(l) The contractors shall furnish the Government records of geologic, accounting, and other relevant data for its petroleum operations, and that book of accounts and records shall be open for inspection by the government;

(m) Requiring the proponent to dispose of the minerals and byproducts produced under a financial or technical assistance agreement at the highest price and more advantageous terms and conditions as provided for under the rules and regulations of this Act;

(n) Provide for consultation and arbitration with respect to the interpretation and implementation of the terms and conditions of the agreements; and

(o) Such other terms and conditions consistent with the Constitution and with this Act as the Secretary may deem to be for the best interest of the State and the welfare of the Filipino people.

(p) In addition, the following minimum terms carried over from Presidential Decree No. 87 shall be included in the financial or technical assistance agreement:

(1) Every contractor shall be obliged to spend in direct prosecution of exploration work and in delineation and development following the discovery of oil in commercial quantity not less than the amounts provided for in the contract between the Government and the

contractor and these amounts shall not be less than the total obtained by multiplying the number of hectares covered by the contract by the following amounts for hectare:

PERIOD	ON-SHORE	OFF-SHORE
Year 1	₱ 3.00	₱ 3.00
Year 2	3.00	3.00
Year 3	3.00	6.00
Year 4	3.00	6.00
Year 5	3.00	6.00
Year 6	9.00	18.00
Year 7	9.00	18.00
Year 8	9.00	18.00
Year 9	9.00	18.00
Year 10	9.00	18.00

Provided, That if during any contract year the Contractor shall spend more than the amount of money required to be spent, the excess may be credited against the money required to be spent by the Contractor during the succeeding contract years: Provided, further, That in case the same Contractor holds two or more areas under different contracts of service, the total amount of work obligations for exploration required for the initial term of all contracts may be spent within any one or more of them as if they are covered by a single contract of service: Provided, further, That should the Contractor fail to comply with the work obligations provided for in the contract, it shall pay to the Government the amount it should have spent but did not in direct prosecution of its work obligations: Provided, finally, That the Contractor shall drill a minimum footage of test wells before the end of periods of time as may be

specified in the contract with the Department in order to be entitled to the extension of the exploration period for 3 years as provided for in paragraph (5) of this section.

(2) In case the contractor renounces or abandons wholly or partly the area covered by his contract within two years from its effective date, it shall in respect of the abandoned area pay the Government the amount it should have spent, but did not, for exploration work during said two years, for which payment, among other obligations, the performance guarantee posted by the contractor shall be answerable.

(3) Every contract shall provide for the compulsory relinquishment of at least twenty-five per cent of the initial area at the end of five years from its effective date and in the event of an extension of the contract from seven to ten years, an additional relinquishment of at least twenty-five per cent of the initial area at the end of seven years from its effective date. But the portion already delineated as production area pursuant to the succeeding paragraph shall not be taken into account in ascertaining the extent of relinquishment required. Any area renounced or abandoned under paragraph (2) of this section shall be credited against the portion of the area subject to the contract which is required to be surrendered hereunder.

(4) The Contractor shall, from the discovery of petroleum in commercial quantity, delineate the production area within the period agreed upon in the contract.

(5) The exploration period under every contract shall be seven years, extendible for three years if the contractor has not been in default in its exploration work obligations and other obligations after which the

contract shall lapse unless Petroleum has been discovered by the end of the tenth year and the contractor for requests a further extension of one year to determine whether it is in commercial quantity, in which event, another extension of one year for exploration may be granted. These periods shall be subject to the maximum term provided in Section 17 hereof. If Petroleum in commercial quantity has been discovered, the Contractor may retain after the exploration period and during the effectivity of the Contract twelve and one-half per cent of the initial area in addition to the delineated production area: Provided, however, That the contractor shall pay annual rentals on such retained area which shall not be less than ten pesos per hectare or fraction thereof for on-shore areas and not less than twenty pesos as determined by Department per hectare or fraction thereof for off-shore areas: Provided, further, That such rentals can be offset against exploration expenditures actually spent on such area.

(6) Where petroleum in commercial quantity is discovered during the exploration period in any area covered by the contract, the contract with respect to said area shall remain in force for production purposes during the balance of the ten year exploration period and for an additional period of twenty-five years, thereafter renewable for a period not exceeding fifteen years under such terms and conditions as may be agreed upon by the parties at the time of renewal, subject to the provisions of Section 17 hereof.

(7) All materials, equipment, plants and other installations erected or placed on the exploration and/or production area of a movable nature by the contractor shall remain properties of the contractor unless

not removed therefrom within one year after the termination of the contract.

(8) The contractor shall be subject to the provisions of laws of general application relating to labor, health, safety, and ecology insofar as they are not in conflict with the provisions otherwise contained in this Act.

(9) Every contract executed in pursuance of this Act shall contain provisions regarding the discovery, production, sale and disposal of natural gas and casinghead petroleum spirit that shall be in line with the rules herein prescribed for crude oil except that:

i. The market price shall be the basis for tax and all other purposes;

ii. After meeting requirements in secondary recovery operations priority shall be given to supplying prospective demand in the Philippines.

SECTION 14. *Obligations of the Contractor.* The Government shall oversee the management of the operations contemplated in the contract and in this connection shall require the contractor to —

(a) Provide all necessary services and technology;

(b) Provide the requisite financing;

(c) Perform the exploration work obligations and program prescribed in the agreement between the Government and the Contractor, which may be more but shall not be less than the obligations prescribed in this Act;

(d) Once petroleum in commercial quantity is discovered, operate the field on behalf of the Government in accordance with accepted good oil field practices using modern and scientific methods to enable maximum economic production of petroleum; avoiding hazards to life, health and property; avoiding pollution of air, land and waters; and pursuant to an efficient and economic program of operation;

(e) Assume all exploration risks such that if no petroleum in commercial quantity is discovered and produced, it will not be entitled to reimbursement;

(f) Furnish the Department promptly with geological and other information, data and reports which it may require;

(g) Maintain detailed technical records and accounts of its operations;

(h) Conform to regulations regarding, among others, safety, demarcation of agreement acreage and work areas, non-interference with the rights of other petroleum, mineral and natural resources operators;

(i) Maintain all meters and measuring equipment in good order and allow access to these as well as to the exploration and production sites and operations to inspectors authorized by the Department;

(j) Allow examiners of the Bureau of Internal Revenue and other representatives authorized by the Department full access to their accounts, books and records, for tax and other fiscal purposes; and

(k) Be subject to Philippine income tax.

SECTION 15. *Negotiations*. A financial or technical assistance agreement shall be negotiated by the Department and executed, approved, and signed by the President. If the financial or technical assistance agreement is to be entered into through public bidding, the Department shall also take charge of the same. The President shall notify Congress of all financial or technical assistance agreements, regardless of whether it was entered into through negotiation or bidding, within thirty (30) days from execution thereof.

SECTION 16. *Filing and Evaluation of Financial or Technical Assistance Agreement Proposals*. All financial or technical assistance agreement proposals shall be filed with the Department after payment of the required processing fees. If the proposal is found to be sufficient and meritorious in form and substance after evaluation, it shall be recorded with the appropriate government agency to give the proponent the prior right to the area covered by such proposal: Provided, That existing petroleum agreements, financial or technical assistance agreements and other mining rights are not impaired or prejudiced thereby. The Secretary shall recommend its approval to the President.

SECTION 17. *Term of Financial or Technical Assistance Agreement.* A financial or technical assistance agreement shall have a maximum total term not exceeding twenty-five (25) years to start from the execution thereof, renewable for not more than twenty-five (25) years under such terms and conditions as may be provided by law.

SECTION 18. *Option to Convert into a Petroleum Agreement.* The contractor has the option to convert the financial or technical assistance agreement to a petroleum agreement at any time during the term of the agreement, if the economic viability of the contract area is found to be inadequate to justify large-scale petroleum operations, after proper notice to the Secretary as provided for under the implementing rules and regulations: Provided, That the petroleum agreement shall only be for the remaining period of the original agreement.

In the case of a foreign contractor, it shall reduce its equity to forty percent (40%) in the corporation, partnership, association, or cooperative. Upon compliance with this requirement by the contractor, the Secretary shall approve the conversion and execute the mineral production-sharing agreement.

SECTION 19. *Assignment/Transfer.* A financial or technical assistance agreement may be assigned or transferred, in whole or in part, to a qualified person subject to the prior approval of the President: Provided, That the President shall notify Congress of every financial or technical assistance agreement assigned or converted in accordance with this provision within thirty (30) days from the date of the approval thereof.

SECTION 20. *Withdrawal from Financial or Technical Assistance Agreement.* The contractor shall manifest in writing to the Secretary his intention to withdraw from the agreement, if in his judgment the petroleum exploration is no longer economically feasible, even after he has exerted reasonable diligence to remedy the cause or the situation. The Secretary may accept the withdrawal: Provided, That the contractor has complied or satisfied all his financial, fiscal or legal obligations.

SECTION 21. *Full disclosure of interest in contractor.* Interest held in the contractor by domestic mining and petroleum companies and/or the latter's stockholders may be allowed to any extent after full disclosure thereof to, and approved by the Department.

SECTION 22. *Arbitration.* The Department may stipulate in a contract executed under this Act that disputes in the implementation thereof between the Government and the contractor may be settled in accordance with generally accepted international arbitration practice.

GOVERNMENT SHARE

SECTION 23. *Government Share in A Production Sharing Agreement.* The total government share in a mineral production sharing agreement shall be the excise tax on petroleum products as provided in Republic Act No. 7729,

amending Section 151(a) of the National Internal Revenue Code, as amended.

SECTION 24. *Government Share in Other Petroleum Agreements*. The share of the Government in co-production and joint-venture agreements shall be negotiated by the Government and the contractor taking into consideration the:

(a) capital investment of the project;

(b) risks involved;

(c) contribution of the project to the economy; and

(d) other factors that will provide for a fair and equitable sharing between the Government and the contractor.

The Government shall also be entitled to compensations for its other contributions which shall be agreed upon by the parties, and shall consist, among other things, the contractor's income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholders, in case of a foreign national, and all such other taxes, duties and fees as provided for under existing laws.

SECTION 25. *Government Share in Financial or Technical Assistance Agreement*. The Government share in financial or technical assistance agreement shall consist of, among other things, the contractor's corporate income tax, excise tax, special allowance, withholding tax due from the contractor's foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws.

The collection of Government share in financial or technical assistance agreement shall commence after the financial or technical assistance agreement contractor has fully recovered its pre-operating expenses, exploration, and development expenditures, inclusive.

If the contract involves only exploration and prospecting for oil, the information or data received or gathered from exploration methods, including, but not limited to, geophysical and geological surveys, shall be kept within the Republic of the Philippines and shall be under the control of the Department until such time that the qualified person and the Government agree to enter into a more comprehensive contract concerning the data found.

GROUND FOR CANCELLATION, REVOCATION, AND TERMINATION

SECTION 26. *Late or Non-filing of Requirements.* Failure of the r contractor to comply with any of the requirements provided in this Act or in its implementing rules and regulations, without a valid reason, shall be sufficient ground for the suspension of any permit or agreement provided under this Act.

SECTION 27. *Violation of the Terms and Conditions of Agreements.* Violation of the terms and conditions of the permits or agreements shall be a sufficient ground for cancellation of the same.

SECTION 28. *Non-Payment of Taxes and Fees.* Failure to pay the taxes and fees due the Government for two (2) consecutive years shall cause the cancellation of the petroleum agreement or financial or technical assistance agreement and other agreements and the re-opening of the area subject thereof to new applicants.

SECTION 29. *Suspension or Cancellation of Tax Incentives and Credits.* Failure to abide by the terms and conditions of tax incentive and credits shall cause the suspension or cancellation of said incentives and credits.

SECTION 30. *Falsehood or Omission of Facts in the Statement.* All statements made in the petroleum agreement and financial or technical assistance agreement shall be considered as conditions and essential parts thereof and any falsehood in said statements or omission of facts therein which may alter, change or affect substantially the facts set forth in said statements may cause the revocation and termination of the exploration permit, petroleum agreement, and financial or technical assistance agreement.