

Primer on the Philippine Minerals Industry

2015



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The law is stated as of January 2015.

The Philippines

The Philippine economy is again expected to be the fastest growing within the Southeast Asian region, with its gross domestic product growth forecast to hit 6.4 percent in 2015.¹

According to the World Economic Forum's Global Competitiveness Report 2014-15, competitiveness dynamics in the region is considered to be truly remarkable.

In 2014, the Philippines maintained its rapid economic progress, gaining confidence from the influx of foreign investors and global institutions flocking to the country. The Philippine economy grew by 6.9 percent in the last quarter of the year, pushing the average full-year growth to 6.1 percent². The fourth quarter and full-year growth is above the market expectation of 6.0 percent and 5.8 percent, respectively³. Net foreign investments increased by 61.3 percent within the first nine months of the year⁴.

Philippine credit ratings were significantly elevated by the world's major credit rating agencies in the past two years. In 2014, Standard & Poor's Financial Services (S&P) upgraded the Philippines' long-term sovereign credit rating from BBB- Stable to BBB Stable, the highest rating ever recorded in the country's history. This set the country's credit rating a notch higher than the minimum investment grade status granted to it by S&P on 2 May 2013, making the Philippines more internationally competitive and attractive to investors.⁵ Likewise, Fitch Ratings (Fitch) and Moody's Investors Service (Moody's) have granted the country with an Investment Grade, reaffirming the country's strong economic fundamentals and its positive growth prospects.

As the country enters a demographic sweet spot, where the majority of Filipinos would be within the working-age group, the nation's attractiveness as a global investment destination is further strengthened. The Philippines is currently estimated to have a population of over 100 million, with the median age of 23 years and a growth rate of 1.82 percent.⁶

The mining industry has great potential to be a key growth sector in the Philippines given the country's vast and rich mineral resource deposits. According to the Mines and Geosciences Bureau (MGB), the Philippine's mining potential is ranked fifth largest in the world. Thirty percent of the country's land area, or about 9 million hectares, is identified as having high mineral potential.⁷ Driven by the country's primary mineral commodities (gold, nickel and copper), the industry accounted for 0.8 percent of the Philippine GDP by the third quarter of 2014.

¹ <http://www.adb.org/news/adb-sees-robust-growth-philippines-2014-and-2015>. Accessed 9 December 2014.

² <http://www.neda.gov.ph/?p=4767>. Accessed 30 January 2015.

³ Ibid.

⁴ <http://president.gov.ph/news/2014-year-ender-5-signs-progressive-philippines/>. Accessed 5 January 2015.

⁵ <http://www.gov.ph/report/credit-ratings/>. Accessed 5 January 2015.

⁶ http://www.nscb.gov.ph/secstat/d_popnProj.asp. Accessed 5 January 2015.

⁷ <http://www.mgb.gov.ph/Files/ItemLinks/ThePhilippineMineralsIndustryAtAGlance.jpg>. Accessed 8 January 2015.

I. Introduction

State ownership of natural resources is the foundation of the Philippine mineral tenure system. The state can undertake the exploration, development and utilization of natural resources or it can enter into agreements with private parties or contractors under revenue-sharing or production-sharing arrangements. This principle is based on Article XII, Section 2 of the 1987 Philippine Constitution, which provides:

SECTION 2. 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. With the exception of agricultural lands, all other natural resources shall not be alienated. 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. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law.

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The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

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.

The general rule, as stated in the Philippine Constitution, is that contractors, with whom the state can enter into agreements for the exploration, development, and utilization of natural resources, must be Filipino citizens or corporations whose capital is at least 60% Filipino-owned.

The foreign equity limitation is removed for large-scale exploration, development, and utilization of minerals and petroleum, and other mineral oils. This exception is implemented through the Financial or Technical Assistance Agreement (“**FTAA**”) in the minerals sector. Furthermore, an Exploration Permit (“**EP**”) in the minerals sector can be obtained by a corporation that is up to 100% foreign-owned.¹

Minerals

In the minerals sector, the types of tenurial permit/agreements entered into by the Philippine government through the Department of Environment and Natural Resources (“**DENR**”) are the (i) EP, (ii) Mineral Agreements, and (iii) FTAA.

Under Republic Act No. 7942 or the Philippine Mining Act (“Mining Act”), there are three types of mineral agreements, i.e., the Mineral Production Sharing Agreement (“**MPSA**”), the Co-Production Agreement, and the Joint Venture Agreement.

Under the Implementing Rules and Regulations of the Mining Act (“**IRR**”), an applicant planning to conduct exploration activities in a specific area needs to apply for and obtain an EP. Depending on the exploration results, the EP can be converted into an MPSA or an FTAA.

The IRR also allows an applicant to apply for an FTAA, instead of an EP. An FTAA entered into in this manner would contain its own exploration period. However, the applicant would need to justify to the DENR that the project can qualify as a large-scale mining project that would require an investment commitment of at least USD50 million for development and construction.

EPs are issued by the (i) Mines and Geosciences Bureau (“**MGB**”) Director in case of exploration areas inside mineral reservations, or (ii) MGB Regional Director for exploration areas outside such reservations. The MGB is the agency under the DENR in charge of the administration and disposition of the country’s mineral lands and mineral resources.

MPSAs are executed by the DENR Secretary, on behalf of the government, and the contractor.

FTAAs are executed by the contractor and the Philippine President upon the recommendation of the DENR Secretary.

Regulatory Authorities

The DENR is the primary government agency responsible for the conservation, management, development, and proper use of the country’s environment and natural resources, including mineral resources, as well as the licensing and regulation of all natural resources.² The DENR is the agency that issues EPs (through the MGB, an agency also under the DENR), enters into MPSAs, and recommends to the President the entry of the government into FTAAs.

The MGB is the agency under the DENR directly in charge of the administration and disposition of mineral lands and mineral resources.³

II. Mineral Tenure System

Mining Act

The Mining Act governs the exploration, development, processing and utilization of mineral resources in the Philippines. The Mining Act and its IRR define these agreements, delineate the various mining rights recognized in the Philippines and provide the requirements to acquire these mining rights.

Tenurial Permit and Agreements

1. Exploration Permit

Legal Nature

The acquisition of mineral rights is a process that begins with the acquisition of an EP. An EP is a grant from the Philippine government that gives the permit holder the right to conduct exploration of all minerals within a specified area. An EP allows the holder to conduct “exploration,” which is defined under the Mining Act as “searching or prospecting for mineral resources by geological, geochemical and/or geophysical surveys, remote sensing, test pitting, trenching, drilling, shaft sinking, tunneling or any other means for the purpose of determining their existence, extent, quality and quantity and the feasibility of mining them for profit.”⁴

Financial and Technical Qualifications

An EP applicant must show its financial capability by having a minimum authorized capital stock of PHP100 million and a minimum paid-up capital of PHP6.25 million.⁵ It must further show its financial and technical qualification by submitting to the MGB the following:⁶

1. two-year Exploration Work Program (“**EWP**”) duly prepared, signed and sealed by a licensed mining engineer or geologist;

A Work Program is a document which presents the plan of major mining operations and the corresponding expenditures of the contractor in its contract area during a given period of time, including the plan and expenditures for development of host and neighboring communities and of local geoscience and mining technology, as submitted and approved in accordance with the implementing rules and regulations of the Mining Act.

2. proof of technical competence including, among others, curricula vitae and track record in exploration and environmental management of the technical personnel who will undertake the activities in accordance with the submitted EWP;
3. proof of financial capability to undertake the Exploration Program, such as bank deposit or credit line bank guarantee(s) and/or similar instruments; and
4. Environmental Work Program (“**EnWP**”).

EnWP refers to the comprehensive and strategic environmental management plan to achieve the environmental management objectives, criteria and commitments including protection and rehabilitation of the disturbed environment during the exploration periods.

Key EP Terms and Conditions

The terms and conditions discussed below are based on the Mining Act, the IRR and the model EP.

Term

The term of an EP is two years from date of issuance. It can be renewed for two-year periods. It cannot exceed a total term of four years for nonmetallic mineral exploration or six years for metallic mineral exploration. The MGB will grant a renewal of the exploration period provided that the MGB has not found the EP holder to have violated (i) the terms and conditions of the EP, and (ii) any provision of the Mining Act and IRR.

If the EP holder determines that mining operations are feasible within the EP area, the EP holder will submit a Declaration of Mining Project Feasibility (“**DMF**”) during the exploration period and apply for either an MPSA or an FTAA. The DMF will be the DENR’s basis in determining whether to grant the EP holder an MPSA or an FTAA.

The DMF is a document proclaiming the presence of minerals in a specific site, which are recoverable by socially acceptable, environmentally safe and economically sound methods specified in the mine development plan, and supported by a mining project feasibility study.

In case the EP holder fails to file the DMF during the approved term of the exploration period, including any renewal of the term, the EP holder may apply for further renewal of the EP for another two years to enable the EP holder to prepare or complete the feasibility studies, and to file the DMF and the MPSA or FTAA application.

In case the term of the EP expires prior to the approval of (i) the DMF that has been filed with the MGB, and/or (ii) an MPSA or FTAA application, the EP will be deemed automatically extended until such time that the MPSA or FTAA application is approved.⁷

*DMF*⁸

If results of exploration reveal the presence of mineral deposits economically and technically feasible for mining operations, the EP holder will, within the term of the EP, file a DMF. The MGB Director’s approval of the DMF will grant the EP holder the right to an MPSA or FTAA over the permit area.

Hectarage

The maximum areas that an Exploration Permit can cover are as follows:⁹

- Onshore, in any one province:
 - for individuals, 20 blocks or 1,620 hectares; and
 - for partnerships, corporations, cooperatives or associations, 200 blocks or 16,200 hectares.
- Onshore, in the entire Philippines:
 - for individuals, 40 blocks or 3,240 hectares; and
 - for partnerships, corporations, cooperatives or associations, 400 blocks or 32,400 hectares.
- Offshore, beyond 500 meters from the mean low tide level:
 - for individuals, 100 blocks or 8,100 hectares; and
 - for partnerships, corporations, cooperatives or associations, 1,000 blocks or 81,000 hectares.

2. Mineral Production Sharing Agreement

Legal Nature

An MPSA is one of the three types of Mineral Agreements under the Mining Act that the government can enter into with a contractor.¹⁰ These three types of mineral agreements are:

1. MPSA, under which the government grants to the MPSA holder the exclusive right to conduct mining operations within a contract area. The share of the government is in the form of excise tax

equivalent to a percentage of the gross output. The MPSA holder will provide the financing, technology, management and personnel necessary for the implementation of the MPSA.

2. Co-production Agreement, under which the government will provide inputs to the mining operations other than the mineral resource.
3. Joint Venture Agreement, under which a joint venture company is organized by the government and the contractor with both parties holding equity shares. In addition to earnings from the equity, the government will be entitled to a share in the gross output.

To date, the DENR has not entered into a Joint Venture Agreement and Co-Production Agreement. These types of Mineral Agreements require the government to contribute inputs other than mineral resource or equity.

Key MPSA Terms and Conditions

The discussion that follows is based on the provisions of the Mining Act, the IRR, and model MPSA.

There are two types of MPSAs. The first type is an MPSA called an “Integrated MPSA” executed between the government and the contractor prior to the effectivity of DENR Administrative Order (“**DAO**”) 2005-15 amending the IRR, which has both an exploration phase and a development phase. The second type is an MPSA entered into after the effectivity of DAO 2005-15, which started from an EP and converted into an MPSA after DMF submission.

Integrated MPSA

The exploration period for a typical Integrated MPSA is two years renewable for similar periods. The total term cannot exceed six years for nonmetallic and eight years for metallic mineral exploration.

If exploration is warranted beyond the six- or eight-year period and provided the MPSA holder has substantially implemented the Exploration Work Program and Environmental Work Program, the MGB may further grant the renewal of the exploration period.

Within the term of the exploration period, the MPSA holder must, among others, file with the MGB Regional Office concerned, the DMF, Three-year Development and Construction or Commercial Operation Work Program, complete a geologic report, an application for survey and the pertinent Environmental Compliance Certificate (“**ECC**”).

The MPSA holder must complete the development of the mine including the construction of production facilities within 36 months from the submission and approval of the DMF, subject to such extension based on justifiable reasons as the MGB Director may approve, upon recommendation of the MGB Regional Director concerned.

The MPSA holder must submit, within 30 days prior to completion of mine development and construction of production facilities to the MGB Director, through the MGB Regional Director concerned, a Three-Year Commercial Operation Work Program. The MPSA holder is required to commence commercial utilization immediately upon approval of the aforementioned Work Program.

During the operating period, the MPSA holder must submit to the MGB Director, through the MGB Regional Director concerned, Work Programs and Budgets covering a period of three years each, which must be submitted not later than 30 days before the expiration of the period covered by the previous Work Program.

MPSA Issued Post DAO 2005-15

This type of MPSA originated from an EP that has been converted into an MPSA, following the filing of a DMF.

Upon approval of the DMF filed under the EP, the MPSA to be granted will have a term of 25 years.

Renewal of Term

The MPSA is renewable for another 25 years upon mutual agreement between the government and contractor. The renewal of the MPSA is upon mutual consent by the parties. In the event the government decides to permit mining operations to be conducted in the MPSA area by another party, the MPSA stipulates that competitive public bidding must be conducted. The original MPSA holder will have the right to match the highest bid subject to reimbursement of all reasonable expenses of the highest bidder.

Conversion into an FTAA

The MPSA holder may convert its MPSA into an FTAA, subject to the approval of the DENR Secretary.

Hectarage

The maximum areas that an MPSA can cover are as follows:

- Onshore, in any one province:
 - for individuals, 10 blocks or 810 hectares; and
 - for partnerships, cooperatives, associations or corporations, 100 blocks or 8,100 hectares.
- Onshore, in the entire Philippines:
 - for individuals, 20 blocks or 1,620 hectares; and
 - for partnerships, cooperatives, associations or corporations, 200 blocks or 16,200 hectares.
- Offshore, in the entire Philippines:
 - for individuals, 50 blocks or 4,050 hectares; and
 - for partnerships, cooperatives, associations or corporations, 500 blocks or 40,500 hectares.

Fiscal Regime

As of the time of this writing, a bill has been filed seeking to amend the mining revenue sharing scheme between the contractor and the government.

Under current laws, the government share in an MPSA is the excise tax on mineral products at the time of removal.

The Philippine government is entitled to a share in the gross production of the mining operation. The Philippine government's share is taken in the form of an excise tax on the mineral products extracted under the MPSA. The excise tax is computed as follows:

- on metallic minerals, the excise tax based on the actual market value of the gross output at the time of removal will be as follows:

- for copper and other metallic minerals except gold and chromite – 2%
- for gold and chromite – 2%
- on nonmetallic minerals and quarry resources – 2% based on the actual market value of the annual gross output thereof at the time of removal.

“Gross output” means the actual market value of the minerals or mineral products from each mine or mineral land operated as a separate entity, without any deduction for mining, processing, refining, transporting, handling, marketing or any other expenses. If the minerals or mineral products are sold or consigned abroad by the MPSA holder under Cost, Insurance, and Freight terms, the actual cost of ocean freight and insurance will be deducted. In the case of mineral concentrates which are not traded in commodity exchanges in the Philippines or abroad such as copper concentrate, the actual market value will be the world price quotation of the refined mineral products prevailing in the said commodity exchanges, after deducting the smelting, refining, treatment, insurance transportation and other charges incurred in the process of converting mineral concentrates into refined metal traded in those commodity exchanges.

The MPSA requires that the contractor must dispose of the minerals and by-products produced at the highest market price prevailing in the locality. The MPSA shall also pay the lowest achievable marketing commissions and related fees and shall negotiate for more advantageous terms and conditions subject to the right to enter into long-term sales or marketing contracts or foreign exchange and commodity hedging contracts, which the government acknowledges to be acceptable notwithstanding that the sale price of the minerals and by-products may from time to time be lower, or the terms and conditions of sales are less favorable, than that available elsewhere. The MPSA holder must seek to strike a balance between long-term sales or marketing contracts or foreign exchange and commodity hedging contracts comparable to policies followed by independent producers in the international mining industry.

With respect to sales to the MPSA holder’s affiliate or affiliates, the MPSA requires that prices be on an arm’s-length basis and that competing offers for large-scale and long-term contracts be obtained. Before any sale or shipment of mineral product is made, existing and future marketing contracts/sales agreements must be submitted to the MGB Director and the MGB Regional Director for registration. The MPSA holder is required to regularly inform the MGB Director in writing of any revisions, changes or additions thereto.

Easement/Access Rights

The MPSA holder enjoys easement rights and use of timber, water and other natural resources for mining operations. An MPSA holder, being already at least 60% Filipino-owned, can acquire land necessary for mining operations. Under Philippine law, land ownership is limited to Filipinos or corporations with at least 60% Filipino-owned capital.

Employment of Foreign Technical Personnel

Under the Commonwealth Act No. 108 or the Philippine Anti-Dummy Law, non-Filipinos are prohibited, in companies holding MPSAs, from intervening in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of the Department of Justice.¹¹

Under the model MPSA, the Contractor has the right to employ or bring into the Philippines foreign technical and specialized personnel subject to MGB endorsement. Every time foreign technologies are utilized and where alien executives are employed, an effective program of training understudies

should be undertaken. The alien employment is limited to technologies requiring highly specialized training and experience.

Suspension of Obligations on Account of Force Majeure

Any failure or delay on the part of either the government or the MPSA holder in the performance of their respective obligations or duties are excused to the extent attributable to and during the period of force majeure, provided that the suspension of mining operations due to force majeure is subject to the MGB Director's approval.

Under the model MPSA, "force majeure" means acts or circumstances beyond the reasonable control of the party affected thereby, including, but not limited to:

1. wars (whether declared or not), revolutions, public disorder, rebellions, insurrections, riots, civil disturbance, blockades, sabotage, embargoes, and strikes, lockouts, and any other labor disputes;
2. any disputes with persons or entities who claim they may be significantly affected by mining operations, such as but not limited to, other holders of mining rights or mining applications (including claim owners), members of the local community, industry, local government units ("LGUs"), nongovernmental organizations, people's organizations, surface owners and occupants, and indigenous peoples or indigenous cultural communities;
3. epidemics, earthquakes, storms, flood, volcanic eruptions, tidal waves or other adverse or severe weather conditions, explosions, fire, failure or delay in transportation;
4. adverse action or lack of action by the government, including, but not limited to, any denial of or failure to confirm any necessary approval, permit, license or consent for which the MPSA holder has duly submitted all applicable requirements;
5. expropriation, government requisition, or nationalization;
6. any act of God or of a public enemy; and
7. any other causes as herein described over which the affected party has no reasonable control:

The government is not entitled to invoke force majeure with respect to item (2), (4) or (5).

Grounds for Suspension of MPSA by the Government

The government may suspend the MPSA if the MPSA holder fails: (i) to comply with any provision or requirement of the Mining Act and/or the IRR; (ii) to pay on time and in full the taxes, fees, and/or other charges owed to the government.

Grounds for Termination of MPSA

The MPSA will terminate or may be terminated for the following reasons:

1. expiration of its term, whether the original term or its renewal;
2. withdrawal from the MPSA by the MPSA holder;
3. violation by the MPSA holder of the MPSA's terms and conditions;
4. the MPSA holder's failure to pay taxes, fees/charges or financial obligations for two consecutive years;
5. false statements or omission of facts by the MPSA holder; and

6. any other causes or reasons provided under the Mining Act, IRR, and any other relevant laws and regulations.

All representations and statements in the MPSA are deemed conditions and essential parts thereof. Any falsehood in said statements or omission of facts which may alter, change or affect substantially the facts set forth in said representations or statements are grounds for the MPSA's revocation and termination.

In case of termination, the MPSA holder must pay all fees and other liabilities due up to the end of the year in which the termination becomes effective. The MPSA holder is also required to immediately carry out the restoration of the MPSA area in accordance with good mining industry practice.

Breaches on the Part of the MPSA Holder that Entitle the Government to Terminate the MPSA

The following acts or omissions of the MPSA holder are deemed breaches of contract, upon which the government may exercise its right to terminate the MPSA:

1. failure of the MPSA holder without valid reason to commence commercial production within the period prescribed; and/or
2. failure of the MPSA holder to conduct mining operations and other activities in accordance with the approved Work Programs and/or any modification thereof as approved by the MGB Director.

Grounds for MPSA Cancellation by MPSA Holder

The MPSA holder may, by giving due notice at any time during the term of the MPSA, apply for its cancellation for causes which, in the opinion of the MPSA holder, render continued mining operation no longer feasible or viable. In this case, the DENR Secretary will decide on the application within 30 days from notice given by the MPSA holder. The DENR Secretary's approval of the cancellation is subject to the condition that the MPSA holder has met all the accrued financial, fiscal and legal obligations under the MPSA.

3. Financial or Technical Assistance Agreement

Legal Nature

The Philippine Constitution provides that the President may, on behalf of the government, enter into agreements involving either technical or financial assistance for large-scale exploration, development and utilization of minerals according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the Philippines.

To implement this Constitutional provision and to promote investments from both domestic and international sources, the Mining Act authorizes the President to execute and approve on behalf of the government FTAA's to be entered into with qualified entities for large-scale exploration, development and commercial utilization of mineral resources.

The FTAA holder is granted the exclusive right to explore, mine, utilize, process, refine, market, transport, export and dispose of minerals and mineral products and by-products that may be derived or produced from the FTAA area, subject to such permit requirements that may be applicable under pertinent laws, rules and regulations.

Supreme Court Ruling

In a December 2004 landmark ruling ("**Ruling**"), the Philippine Supreme Court ("**Court**") upheld the constitutionality of the Philippine Mining Act and the FTAA entered into between the government

and Western Mining Company (Philippines), Inc. (“**WMCP**”). This FTAA is now currently held by Sagittarius Mines, Inc.

Earlier, in January 2004, the Court struck down provisions of the Mining Act and declared the WMCP FTAA null and void. After Motions for Reconsideration were filed, the Court reversed its January 2004 decision. The Court decided the case en banc by a margin of 10 to 4 with one justice abstaining. Had the January 2004 decision not been reversed, wholly foreign-owned companies would be barred from:

- obtaining Exploration Permits;
- entering into FTAA’s; and
- obtaining Mineral Processing Permits.

Under the Mining Act, Mineral Processing Permits¹² can be held by corporations up to 100% foreign-owned. The IRR defines “Mineral Processing” as the milling, beneficiation, leaching, smelting, cyanidation, or upgrading of ores, minerals, rocks, mill tailing, mine waste and/or other metallurgical by-products or by similar means to convert the same into marketable products.

Also, the January 2004 decision rendered vulnerable to attack in a separate case the oil and gas Service Contracts entered into between the Philippine government and foreign-owned companies. The January 2004 decision drew a parallel between the oil and gas service contracts and the FTAA’s, saying that both agreements had granted management rights to foreign-owned companies in petroleum/mining operations giving the foreign-owned companies “beneficial ownership” over the country’s natural resources. The Court reasoned that the transfer of beneficial ownership had left the State with bare title over the natural resources, violating the Constitutional principle that all natural resources are owned by the State.

In the Ruling, the Court affirmed the principles enshrined in the Philippine Constitution that (i) all mineral resources are owned by the State and that (ii) the exploration, development and utilization of natural resources must always be subject to the full control and supervision by the State. The Court also recognized that given the inadequacy of Filipino capital and technology in large-scale exploration, development and utilization activities, the State may secure the help of foreign companies in all relevant matters – especially financial and technical assistance – provided that, at all times, the State maintains its right of full control. The foreign assistor or contractor assumes all financial, technical and entrepreneurial risks in the exploration, development and utilization activities. Hence, it may be given reasonable management, operational, marketing, audit and other prerogatives to protect its investments and to enable the business to succeed.

The Ruling stated that “[f]ull control is not anathematic to day-to-day management by the contractor, provided that the State retains the power to direct overall strategy; and to set aside, reserve or modify plans and actions of the contractor. The idea of full control is similar to that which is exercised by the board of directors of a private corporation: the performance of managerial, operational, financial, marketing and other functions may be delegated to subordinate officers or given to contractual entities, but the board retains full residual control of the business.”

In the Ruling, the Court noted that the Philippine Constitution granted the President the mandate to enter into FTAA’s with foreign-owned companies with the obligation to report to Congress any FTAA entered into within 30 days from its execution. The Court acknowledged that the Constitution should be construed to grant the President and Congress sufficient discretion and reasonable leeway to enable them to attract foreign investments and expertise. Based on this control standard, the Court upheld the constitutionality of the Philippine Mining Act and the WMCP FTAA. The Court also stated in the

Ruling that the judiciary should not inordinately interfere in the exercise of this presidential power of control over the exploration, development and utilization of the country's natural resources.

The other highlights of the Ruling are as follows:

- The State's full control and supervision over all aspects of exploration, development and utilization of natural resources must be taken to mean a degree of control sufficient to enable the State to direct, restrain, regulate, and govern the affairs of the extractive enterprises. For the State to exercise this full control and supervision, it needs to micro-manage mining operations and the day-to-day affairs of the enterprise. The Mining Act and IRR empower the government agencies concerned to approve or disapprove the various work programs and corresponding minimum expenditures commitments of the mining enterprise. The State can enforce compliance and impose sanctions if necessary.
- The fiscal regime of the FTAA does not cause the government to surrender financial benefits from an FTAA to the contractor. The share of the government consists not only of the basic government share in the form of direct taxes, fees, and royalties. It also includes a share in the earnings or cash flows of the mining enterprise so as to achieve a 50-50 sharing of net benefits from mining between the government and the contractor.
- Under the doctrine of separation of powers and due respect for co-equal and coordinate branches of government, the Court has acknowledged that it must restrain itself from intruding into policy matters and must allow the President and Congress maximum discretion in using the resources of our country and in securing the assistance of foreign groups to eradicate the grinding poverty of the people and answer their cry for viable employment opportunities in the Philippines.

Key FTAA Terms and Conditions

It should be noted that the terms and conditions of the most recent model FTAA are regarded as guidelines and the final terms and conditions are subject to the Mining Act, the IRR, DENR/MGB regulations and negotiation between the government and the contractor.

FTAA Term and Phases

The Term of the FTAA is 25 years from the Effective Date (i.e., the date on which the FTAA is registered).¹³ The FTAA may be renewed upon mutual agreement between the FTAA holder and the government, for a period not exceeding 25 years. The FTAA holder must notify the government of the request for renewal not less than one year prior to the expiration of the original FTAA term. The basis of the FTAA holder's request for renewal is the identification of a mineral resource that, based on its pre-feasibility studies or feasibility studies, will require a period for utilization longer than the remaining period of the original term.

The government and the FTAA holder must use their best efforts to mutually agree on the terms and conditions for renewal. If the terms of renewal differ from the terms and conditions of the original FTAA, the FTAA provides that the parties agree that any amendments negotiated or imposed through arbitration will result in both parties receiving benefits from the renewed FTAA that are no less favorable to each party had the terms and conditions of the renewed FTAA been the same as those of the original FTAA.

The periods of an FTAA are as follows:

1. Exploration Period

This covers a period not exceeding two years starting on the Effective Date, or if applicable, the date of grant to the FTAA holder over the contract area of a Temporary Exploration Permit (“TEP”).¹⁴ Any period between the expiration of the TEP and the Effective Date is excluded.

The exploration period can be extended for another period not exceeding two years if the FTAA holder is able to justify to the MGB the need for an extension.

2. Pre-Feasibility Study Period

This phase consists of the period not exceeding two years commencing from the expiration or termination of the exploration period.

“Pre-Feasibility studies” means preliminary studies, prior to the conduct of feasibility studies or further exploration of the FTAA area, which are designed to evaluate and assess the potential economic value of identified mineral resources.

3. Feasibility Study Period

This phase consists of two years commencing from the expiration or termination of the exploration or pre-feasibility study period.

The DMF should be submitted during the Feasibility Study Period. The DMF must be accompanied by the Mining Project Feasibility Study and contain, among others, a quantification of the government share and the benefits to be derived from the operation of the mine. The MGB Director will take into consideration in the approval of the DMF the expected life of the mine for a minimum of 15 years, proposed mining sequence, grade management, and the project’s capability to contribute the government share and to absorb the environmental and social costs.

In addition to the Mining Project Feasibility Study, the DMF must be accompanied by the following:

- a. Development and Construction Work Program;
- b. an application for Order of Survey or an approved Survey Plan of the mining area;
- c. an ECC (or, if this certificate has not been granted, reasonable evidence that the FTAA holder has applied for the certificate); and
- d. an Environmental Protection and Enhancement Program (“EPEP”) for the Development and Construction Period.

4. Development and Construction Period

This phase consists of the period commencing on the date of the approval of the DMF and ending on the day before the Date of Commencement of Commercial Production.

Development refers to work undertaken to prepare an ore body or a mineral deposit for mining, including the construction of necessary infrastructure and related facilities.

“Date of Commencement of Commercial Production” or “Commencement of Commercial Production” refers to the date of written declaration by the FTAA holder to start commercial operations after the conduct of a test run, including debugging, and its approval by the Regional Office concerned.

5. Operating Period

This phase consists of the period commencing on the Date of Commencement of Commercial Production in any mining area and ending on the termination of the term of the FTAA.

At least 30 days before the expiration of the Development and Construction Period, the FTAA holder is required to submit to the MGB Regional Director, for approval by the MGB Director, an initial Work Program covering the first three years of the Operating Period. The FTAA holder must, at least 30 days before the expiration of each consecutive three-year period of the Operating Period, submit to the MGB Regional Director, for approval by the MGB Director, a Work Program covering the next three-year period. The FTAA holder will have the right to continue mining operations while approval of any Work Program is pending. During the Operating Period, the FTAA holder will have the right to continue exploration activities.

Surface Areas Necessary to the Mining Operations

Surface areas which are necessary and vital to the mining operations of the FTAA holder may be acquired by the government at the expense of the FTAA holder.

Mandatory Relinquishment of Portions of the FTAA Area

During the Exploration Period and Pre-Feasibility Study Period, the FTAA holder is required to relinquish part or parts of the FTAA Area as follows:

1. on or before the end of the first two years of the exploration period, the Contractor must relinquish at least 25% of the FTAA Area existing on the Effective Date; and
2. during each year of the second two-year period of the exploration period and each year of the Pre-Feasibility Study Period, the FTAA holder must relinquish at least 10% of the FTAA Area existing at the beginning of each such year.

Each FTAA Area after final relinquishment must not exceed 5,000 hectares. The MGB Director may, subject to technical verification by the MGB and with the approval of the DENR Secretary, permit the FTAA holder to hold a larger mining area if it is reasonably required by the FTAA holder due to the nature and size of the relevant mineral deposit or the anticipated surface or subsurface activities of the proposed mining operations. The FTAA holder can select the mining area at its discretion and the same need not be one contiguous block.

Suspension of FTAA by Government Due to the Fault of FTAA Holder

The FTAA may be suspended by the DENR Secretary upon recommendation by the MGB Director for:

1. failure of the FTAA holder to comply with any provision or requirement of the FTAA, Mining Act, and IRR; or
2. failure of the FTAA holder to pay taxes and fees due the government.

The government must give prior written notice to the FTAA holder of its intention to suspend the FTAA. The suspension will be effective if the FTAA holder does not remedy (i) the failure to make any required payment within 30 days, or (ii) any nonmonetary cause for suspension within six months from receipt of notice.

Suspension of Obligations under the FTAA Due to Force Majeure

Any failure or delay on the part of either the government or the FTAA holder in the performance of its obligations or duties will be excused to the extent attributable to force majeure, subject to the MGB's verification.

Matters on the suspension of the FTAA due to force majeure are not subject to consultation and arbitration. This means that the declaration of force majeure will depend on the MGB's determination of the existence of force majeure.

Suspension of Mining Operations Due to Temporary Non-Feasibility

The FTAA holder may notify the MGB Director and MGB Regional Director to suspend mining operations in the FTAA area due to temporary non-feasibility.

Temporary Non-Feasibility means that the continuation of mining operations is not viable for the time being due to one or more of the following circumstances:

1. the FTAA holder's costs of production exceed the realization of income from the minerals or mineral products, determined using spot market prices;
2. the identified mineral resource is uneconomic at current spot market prices, although the mineral resource may reasonably be expected to become economic in the future based on market prices prevailing at other times during the term of the FTAA;
3. the development or continued utilization of the mineral resource is prevented or made uneconomic by technical problems that cannot be overcome with generally available technology, including but not limited to difficult metallurgy, lack of proven mineral processing technology necessary to beneficiate the identified mineral resources, or lack of appropriate antipollution technology and facilities necessary to adequately protect, restore or rehabilitate the environment to the degree required by applicable environmental laws or the EPEP;
4. the development or continued utilization of the mineral resources is prevented or made uneconomic by unanticipated marketing problems that are not within the FTAA holder's control, such as distance of the identified mineral resource from an existing market or marketing problems caused by a third party, including bankruptcy of any purchaser of minerals or mineral products or failure or refusal of any purchaser to honor existing marketing arrangements; or
5. the FTAA holder is unable to obtain debt or equity financing for mining operations on reasonable terms, under conditions then prevailing in the international financial markets, including specific requirements of international financing sources for financing of mining operations in the Philippines.

Suspension of mining operations on the basis of temporary non-feasibility is subject to the MGB Director's approval.

Termination of FTAA

The FTAA may be terminated, after due process, for any of the following causes:

1. a material violation by either the government or the FTAA holder of the terms and conditions of the FTAA, such as, but not limited to, failure to implement approved Work Programs, timely lodging of DMF, failure to renew exploration period, noncompliance with approved plans and designs of mine facilities, equipment and/or structures;
2. failure of the FTAA holder to pay taxes and fees due the government for two consecutive years;

3. any intentional and materially false statement or omission of facts by a party;
4. failure of the FTAA holder to establish a Mine Rehabilitation Fund; and
5. failure of the FTAA holder to cause the registration of the FTAA.

The FTAA will also terminate upon expiration of its term if not renewed.

Easement and Other Rights of FTAA Holder

The FTAA holder (subject to pertinent laws, rules and regulations and any prior valid existing rights of third parties) is granted easement rights¹⁵ and the right to use timber, water and other natural resources in the FTAA Area including, but not limited to:

1. the right to extract, use and remove from the FTAA Area sand and gravel and other loose unconsolidated materials without the need of a separate permit provided they are covered by an ECC, EPEP and the necessary Work Programs.

Such materials must be used exclusively for mining operations. The FTAA holder must make no commercial disposition of the same.

2. subject to applicable forestry laws, rules and regulations, the right to cut trees or timber within the FTAA Area as may be necessary for mining operations; and
3. water rights for mining operations upon approval of application with the appropriate government agency.

Under the FTAA, the government undertakes to use its best efforts to assist in the acquisition at the FTAA holder's expense of any rights required by the FTAA holder to conduct mining operations. However, expenses arising from or incidental to such agreements or acquisition of rights will be for the FTAA holder's account. The government also undertakes to assist the FTAA holder's right of entry¹⁶ under the Mining Act and its IRR into private lands in connection with the mining operations.

Employment of Foreign Personnel

The FTAA holder has the right to employ or bring into the Philippines foreign technical and specialized personnel as may be required in the FTAA operations.

The FTAA requires that alien employment be limited to technologies requiring highly specialized training and experience. Where foreign technologies are utilized and where alien executives are employed, an effective program of training understudies is required.

Fiscal Regime

To determine the payments that the FTAA operator must make in favor of the government from the proceeds of the FTAA operation, the "Net Mining Revenue" and "Basic Government Share" need to be computed.

Net Mining Revenue is computed as follows:

Gross revenues from sale of mineral products

Less: Deductible operating expenses

Plus: Government taxes, duties, and fees included as part of deductible expenses

Net Mining Revenue

The government share is equivalent to 50% of the Net Mining Revenue. To determine whether the FTAA holder has paid the requisite 50% of the Net Mining Revenue, the “Basic Government Share” is computed.

Basic Government Share

The Basic Government Share consists of all direct taxes, royalties, fees and related payments required by existing laws, rules and regulations to be paid by the FTAA holder. The following national and local taxes, royalties and fees paid by the FTAA holder to the government during a calendar year are deemed part of the Basic Government Share:

1. FTAA holder’s income tax;
2. customs duties and fees on imported capital equipment;
3. value-added tax on imported goods and services;
4. withholding tax on interest payments on foreign loans;
5. withholding tax on dividends to foreign stockholders;
6. documentary stamps taxes;
7. capital gains tax;
8. excise tax on minerals;
9. royalties for mineral reservations and to indigenous peoples, if applicable;
10. local business tax;
11. real property tax;
12. community tax;
13. occupation fees;
14. registration and permit fees; and
15. all other national and local government taxes, royalties and fees as of the Effective Date of the FTAA.

A “Recovery Period” is granted in favor of the FTAA holder. The Recovery Period ends five years from the Date of Commencement of Commercial Production or at a date the aggregate of the Net Cash Flows from the mining operations is equal to the aggregate of its Pre-Operating Expenses, whichever comes first.

In case the FTAA project incurs very large investments with a high production rate and an extensive mine life, the Recovery Period may be extended subject to the DENR Secretary’s approval.

Recoverable pre-operating expenses are limited to actual expenses and capital expenditures relating to the following:

1. acquisition, maintenance and administration of any mining tenements or agreements covered by the FTAA;
2. exploration, evaluation, feasibility and environmental studies, production, mining, milling, processing and rehabilitation;
3. stockpiling, handling, transport services, utilities and marketing of minerals and mineral products;
4. development within the FTAA Area relating to the mining operations;
5. infrastructure contributions and payments made to local governments except taxes, royalties and fees;
6. payments to landowners, surface rights holders, claim owners, indigenous cultural people or indigenous cultural communities, if any;
7. expenses incurred in fulfilling the FTAA holder's obligations to contribute to national development and training of Filipino personnel;
8. consulting fees incurred inside and outside the Philippines for work related directly to the mining operations and consistent with the FTAA holder's approved Work Program;
9. the establishment and administration of field and regional offices including administrative overheads incurred within the Philippines which are properly allocable to the mining operations and directly related to the performance of the FTAA holder's obligations and exercise of its rights under the FTAA;
10. financing costs provided that the interests will not be more than the prevailing international rates charged for similar types of transactions at the time the financing was arranged;

In this regard, the Mining Act provides 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 FTAA holder will not raise any form of financing from domestic sources of funds, whether in Philippine or foreign currency, for conducting its mining operations for and in the contract area."¹⁷

11. all costs of constructing and developing the mine incurred before the Date of Commencement of Commercial Production; and
12. general and administrative expenses actually incurred by the FTAA holder for the benefit of the FTAA area.

From the date of approval of the DMF up to the end of the Recovery Period, the FTAA holder is required to pay the following:

1. excise tax on minerals;
2. royalties for mineral reservations and to indigenous peoples, if applicable;
3. local business tax;
4. real property tax;

5. community tax;
6. occupation fees;
7. registration and permit fees; and
8. all other national and local government taxes, royalties and fees as of the effective date of the FTAA.

After the Recovery Period, the FTAA holder must pay all applicable taxes, fees, royalties and other related payments to the national and local governments, which comprise the Basic Government Share.

Any value-added tax on exported products refunded by or credited to the FTAA holder will not form part of the Basic Government Share.

Additional Government Share

If the Basic Government Share is less than 50% of the Net Mining Revenue, an “Additional Government Share” to increase the total government share to 50% of the Net Mining Revenue must be paid by the FTAA holder.

Deductible Expenses

The following cash expenses are allowed for deduction from the Gross Output to determine the Net Mining Revenue:

1. mining, milling, transport and handling expenses together with smelting and refining costs other than smelting and refining costs paid to third parties;
2. general and administrative expenses actually incurred by the FTAA holder in the Philippines;
3. expenses necessary to fully comply with its environmental obligations as stipulated in the environmental obligation under the FTAA, Mining Act, and IRR;
4. expenses for the development of host and neighboring communities and for the development of geosciences and mining technology including training costs and expenses;
5. royalty payments;
6. continuing mine operating development expenses within the FTAA Area after the pre-operating period; and
7. interest expenses charged on loans or such other financing-related expenses incurred by the FTAA holder, which shall not be more than the prevailing international rates charged for similar types of transactions at the time the financing was arranged, and where such loans are necessary for the operations.

The FTAA holder, through its President, must submit to the MGB a sworn semiannual summary of its actual financial records covering its gross sales, deductible expenses, recoverable expenses, basic government share paid and other related financial documents without prejudice to the submission of other reporting requirements under the Mining Act and IRR.

Sale of Minerals or Mineral Products

The FTAA holder must endeavor to dispose of the minerals and by-products produced in the FTAA Area at the highest commercially achievable market price with the lowest commercially achievable

commissions and related fees under circumstances then prevailing, and to negotiate for sales terms and conditions compatible with world market conditions.

The FTAA holder is required to inform the government when it enters into a marketing agreement or sales contract with foreign and local buyers. Marketing contracts and sales agreements involving commercial disposition of minerals and by-products are subject to the DENR Secretary's approval. The government undertakes to treat with confidentiality approved marketing contracts and sales agreements.

Under the FTAA, the government is entitled to examine all sale and exportation of minerals or mineral products including the terms and conditions of all sales commitments.

Sales commitments with affiliates, if any, shall be made only at prices based on or equivalent to arm's length sales and in accordance with such terms and conditions at which such agreement would be made if the parties had not been affiliated.

III. Environment, Social Development and Management Program, Indigenous Peoples, and Local Government Consents

The discussions under this heading apply to both MPSA and FTAA.

Environment

Environmental Compliance Certificate

An ECC is required before the contractor can commence any mine development or construction work in the mining area.

An ECC refers to the document issued by the DENR Secretary or the DENR Regional Executive Director certifying that based on the representations of the proponent and the preparers (the proponent's technical staff or the competent professional group commissioned by the proponent to prepare the environmental impact statements and other related documents):

1. the proposed project or undertaking will not cause a significant negative environmental impact;
2. that the proponent has complied with all the requirements of the Environmental Impact Assessment System; and
3. that the proponent is committed to implementing its approved environmental management plan or mitigation measures.¹⁸

The ECC contains specific measures and conditions that the project proponent has to undertake before and during the operation of a project, and during the project's abandonment phase to mitigate any identified environmental impact.

EPEP equivalent to 10% of Total Project Cost

The MPSA or FTAA holder must submit within 30 calendar days after the issuance and receipt of the ECC, an EPEP covering all areas to be affected by development, utilization and processing activities.

The EPEP must describe the expected and considered acceptable impact and shall set out the life-of-mine environmental protection and enhancement strategies, including final mine rehabilitation and/or decommissioning, based on best practices observed in environmental management in mining.

Annual Environmental Protection and Enhancement Program (“**AEPEP**”) equivalent to 3 to 5% of Direct Mining and Milling Cost

The FTAA holder must have an AEPEP based on the approved EPEP. To implement its AEPEP, the FTAA holder must allocate annually three to five percent of its direct mining and milling cost depending on the environment/geologic condition, nature and scale of operations and technology employed in the FTAA Area.

Contingent Liability and Rehabilitation Fund (“**CLRF**”)

The CLRF consists of the following:

Monitoring Trust Fund (“**MTF**”)

The MTF must be in cash and in an amount to be determined by the Mine Rehabilitation Fund (“**MRF**”) Committee which shall not be less than the amount of PHP50,000. The DENR Secretary is authorized to increase the said amount when national interest and public welfare so require and upon the recommendation of the MGB Director.

The MTF covers the maintenance of and other operating budget for transportation and travel expenses, cost of laboratory analyses, cost of supplies and materials, cost of communication services, cost of consultancy work and other reasonable expenses incurred by the Multipartite Monitoring Team (“**MMT**”) that will monitor the operations within the mining area. The MMT comprises representatives from the government, the affected community, contractors, indigenous people/indigenous cultural community, and relevant nongovernment organizations.

Replenishment of this amount must be done monthly to correspond to the expenses incurred by the MMT for the month.

Rehabilitation Cash Fund (“**RCF**”)

The MPSA holder is required to establish an RCF to ensure compliance with the approved rehabilitation activities and schedules for a specific mining project phase, including research programs as defined in the EPEP and/or AEPEP.

The RCF is equivalent to 10% of the total amount needed to implement the EPEP or PHP5 million, whichever is lower. The RCF must be deposited as a Trust Fund in a mutually agreed-on government depository bank.

Environmental Trust Fund (“**ETF**”)

The ETF consists of a replenishable amount of at least PHP50,000.

Mine Waste and Tailings Fees Reserve Fund (“**MWTRF**”)

When the project reaches the stage where it will generate mine waste and mill tailings, mine waste and tailings fees must be collected semiannually from the MPSA holder based on the amounts of mine waste and mill tailings it generated for the said period. The amount of fees collected will accrue to a MWTRF and shall be deposited in a government depository bank to be used for payment of compensation for any damage caused by mining operations.

The basic fees that will accrue to the MWTRF are PHP0.05 per Metric Ton (“**MT**”) of mine waste produced and PHP0.10 per MT of mill tailings generated from the mining operations.

The DENR Secretary, upon the recommendation of the MGB Director, is authorized to increase the said fees when national interest and public welfare so require.

Final Mine Rehabilitation and Decommissioning Fund (“**FMRDF**”)

Under the IRR, the mining contractor must make annual contributions to an FMRDF in accordance with the contractor’s mandatory Final Mine Rehabilitation and Decommissioning Plan (“**FMR/DP**”).

Using risk-based methodologies/approaches, the FMR/DP must consider all mine closure scenarios. It must contain cost estimates for the implementation of the FMR/DP, taking into consideration expected inflation, technological advances, the unique circumstances faced by the mining operation, among others.

The estimates must be based on the cost of having the decommissioning and/or rehabilitation works done by third-party contractors. The estimates, on a per year basis, must cover the full extent of work necessary to achieve the objectives of mine closure such as, but must not be limited to, decommissioning, rehabilitation, maintenance and monitoring and employee and other social costs, including residual care, if necessary, over a 10-year period.

The FMRDF must be deposited as a trust fund in a government depository bank and must be used solely for the implementation of the approved FMRDP.

Annual cash provisions must be made by FTAA holder to the FMRDF, within 60 days from the date of the FMRDP’s approval and every anniversary date thereafter, based on the formula as provided in the IRR, as follows:

$$\text{Annual Provision} = \frac{\text{Cost of Implementing the Approved FMRDP}}{\text{Percentage Required (in accordance with the IRR)}}$$

Social Development and Management Program (“**SDMP**”), Advancement of Mining Technology and Geosciences, and Information, Education, and Communication Program

The MPSA holder will allot annually a minimum of 1.5% of the operating costs necessary to implement the foregoing, i.e., 1.125% (75% of 1.5%) will be apportioned to implement the SDMP, 0.150% (10% of 1.5%) to implement the program for the development of mining technology and geosciences, and 0.225% (15% of 1.5%) for the implementation of Information, Education, and Communication Program.

Operating cost means the specific costs of producing a saleable product on a commercial scale incurred in the calculation of the net income before tax. This includes costs and expenditures related to mining/extraction and treatment/processing (inclusive of depreciation, depletion and amortization), exploration activities during operation stage, power, maintenance, administration, excise tax, royalties, transport and marketing, and annual progressive/environmental management.

In the case of an EP, or MPSA or FTAA in the exploration stage, the permittee/contractor will develop and implement a Community Development Program (“**CDP**”) which will be supported by a fund equivalent to a minimum of 10% of the budget of the approved two-year Exploration Work Program.

A copy of the CDP is a mandatory requirement for the acceptance of the following applications:

1. EP renewal;
2. MPSA – renewal of exploration period;

3. FTAA – renewal of the exploration period or application for pre-feasibility/feasibility period

Free and Prior Consent of Indigenous Peoples/Indigenous Cultural Communities (“IP/ICC”) for Mining Operations within Ancestral Domains

Under Republic Act No. 8371 or the Indigenous Peoples’ Rights Act of 1997 (“IPRA”), no EP, MPSA, or FTAA will be approved unless there is a prior certification from the National Commission on Indigenous Peoples (“NCIP”) that the area does not overlap any ancestral domain or that written free and prior informed consent has been obtained from the IP/ICC concerned.

The NCIP is the primary government agency responsible for the formulation and implementation of policies, plans and programs to recognize, protect and promote the rights of IPs/ICCs.

The IP/ICC’s consent normally requires entering into a memorandum of agreement with the IP/ICC concerned, through their council of elders. The memorandum of agreement will govern the utilization, extraction and development of natural resources within their ancestral domain.

IPs/ICCs are given priority in the development, extraction, utilization and exploitation of natural resources within their ancestral domains.

Under the Mining Act, the MPSA holder must allocate royalty payment of not less than one percent (1%) of the value of the gross output of minerals sold in favor of indigenous peoples or indigenous cultural communities (“IPs/ICCs”) if mining operations are conducted within ancestral lands or ancestral domains.

Local Government Consents

DENR Memorandum Order No. 09-2004 (Simplification of Procedures in the Issuance of Mining Contracts and Permits) requires the following:

1. For exploration applications:

Proof of consultation and/or project presentation to the concerned local government units is required.

2. For projects in the development stage:

Prior approval or endorsement in the form of a resolution or certification by at least majority of the local government councils concerned (barangay council, municipal or city council, and provincial council) is required before the contractor can proceed to development and/or utilization activities.

IV. Investment Guarantees and Incentives

Under the Mining Act, contractors under mineral agreements are given the following investment guarantees:

- Repatriation of Investments - The right to repatriate the entire proceeds of the liquidation of the foreign investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation.

- Remittance of Earnings - The right to remit earnings from the investment in the currency in which the foreign investment was originally made and at the exchange rate prevailing at the time of remittance.
- Foreign Loans and Contracts - The right to remit at the exchange rate prevailing at the time of remittance such sums as may be necessary to meet the payments of interest and principal on foreign loans and foreign obligations arising from financial or technical assistance contracts.
- Freedom from Expropriation - The right to be free from expropriation by the Government of the property represented by investments or loans, or of the property of the enterprise except for public use or in the interest of national welfare or defense and upon payment of just compensation. In such cases, foreign investors or enterprises shall have the right to remit sums received as compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance.
- Requisition of Investment - The right to be free from requisition of the property represented by the investment or of the property of the enterprises except in case of war or national emergency and only for the duration thereof. Just compensation shall be determined and paid either at the time or immediately after cessation of the state of war or national emergency. Payments received as compensation for the requisitioned property may be remitted in the currency in which the investments were originally made and at the exchange rate prevailing at the time of remittance.
- Confidentiality - Any confidential information supplied by the contractor pursuant to the Mining Act and its Implementing Rules and Regulations shall be treated as such by the DENR and the Government during the term of the project.

The contractors in mineral agreements, and FTAAAs shall be entitled to the applicable fiscal and non-fiscal incentives as provided for under the Omnibus Investments Code (“**OIC**”). In the same manner, holders of exploration permits may be entitled to the fiscal incentives granted under the OIC for the duration of the permits or extensions thereof.

To avail of the incentives, mining companies must register with the Board of Investments (“**BOI**”). The OIC through tax exemption and other benefits, encourages investments in preferred areas of economic activity specified by the BOI in the Investment Priorities Plan (“**IPP**”). In recognition of the value of the mining industry in the economic development of the country, the Philippine Mining Act mandates that mining activities shall always be included in the annual IPP.

The incentives under the OIC are generally available only to citizens of the Philippines or to domestic corporations owned and controlled by Philippine nationals. However, the nationality requirement is waived if the applicant will either export at least 70% of its total production or engage in a pioneer project. A pioneer enterprise either manufactures goods that have not been heretofore produced in the Philippines on a commercial scale, or employs a technology, formula, process or production scheme that has not been tried in the Philippines.

However, when the BOI waives the nationality requirement, the applicant should attain the status of a Philippine national (i.e., for corporations, at least 60% of the capital stock outstanding and entitled to vote must be owned and held by Philippine citizens) within 30 years from the date of its registration or such longer periods as may be determined by the BOI. However, a registered enterprise exporting 100% of its production need not comply with this divestment requirement.

An enterprise registered with the BOI enjoys the following tax and non-tax incentives:

Tax Incentives

1. Income tax holiday consisting of income tax exemption for six years from commercial operation for pioneer firms, and for four years for non-pioneer firms. This may be extended in the following instances:
 - the project uses indigenous raw materials at rates set by the BOI; or
 - the project meets the prescribed ratio of capital-equipment-to-number-of workers set by the BOI; or
 - the net foreign exchange savings or earnings amount to at least USD500,000 annually during the first three years of operation.

Expanding firms are entitled to an exemption from income taxes proportionate to their expansion for a period of three years from commercial operation. However, they are not entitled to additional deductions for incremental labor expenses during the period they avail of this incentive. A pioneer firm cannot avail of the income tax holiday for more than eight years.

2. Exemption from taxes and duties on imported spare parts and consumable supplies for export producers with Customs Bonded Manufacturing Warehouse exporting at least 70% of its production.
3. For the first five years from registration, an additional deduction from taxable income of 50% of the wages of additional skilled and unskilled workers in the direct labor force. This incentive is granted only if the registered enterprise meets a prescribed capital to labor ratio and cannot be availed of simultaneously with the income tax holiday.
4. Exemption from taxes and duties on the importation of breeding stocks and genetic materials within 10 years from the date of registration or commercial operation.
5. Tax credit for taxes and duties on raw materials, supplies and semi-manufactured products used in the manufacture of export products and forming part thereof.
6. For registered enterprises with bonded manufacturing warehouses, exemption from taxes and duties on imported supplies and spare parts for consigned equipment.
7. Exemption from the wharfage duties and any export tax, duty, impost and fees within 10 years from date of registration.
8. Exemption from local taxes for six years from date of registration for pioneer enterprises and for four years from registration for non-pioneer enterprises.

Non-tax Incentives

1. Simplified customs procedures for the importation of equipment, spare parts, raw materials and supplies and the export of processed products.
2. No restrictions for the use of consigned equipment. A re-export bond is required.
3. Employment of foreign nationals in supervisory, technical or advisory positions for five years from registration, extendible for limited periods. The president, general manager and treasurer (or their equivalent) of foreign registered firms are not subject to the foregoing limitations.

4. The privilege to operate bonded manufacturing/trading warehouses subject to customs rules and regulations.

V. Tax Regime

The National Internal Revenue Code of the Philippines (“**Tax Code**”) provides the general framework for the corporate tax regime observed in the Philippines. Under the Tax Code, corporations created or organized under Philippine laws are classified as *domestic corporations*. The term *domestic corporations* includes partnerships, no matter how created or organized, joint-stock companies, joint accounts, associations or insurance companies, but does not include general professional partnerships and a joint venture or consortium formed for the purpose of undertaking construction projects or engaging in petroleum, coal, geothermal and other energy operations pursuant to an operating or consortium agreement under a service contract with the Philippine government.

Income Tax

Domestic corporations are generally subject to Philippine income tax at the rate of 30% on their *taxable income* derived during the tax year from *all* sources within the Philippines and abroad. *Taxable income* refers to the pertinent items of gross income specified in the Tax Code, less the deductions authorized by the Tax Code for such types of income. Gross income includes income derived from the conduct of trade or business, gains derived from dealings in property, interests, rents, royalties, dividends, among others. On the other hand, allowable deductions include ordinary and necessary business expenses, interest, taxes, losses, bad debts, depreciation, charitable and other contributions.

The Tax Code also imposes a Minimum Corporate Income Tax (“**MCIT**”) of 2% of the gross income as of the end of the taxable year, on domestic and resident foreign corporations subject to normal income tax rates. A corporation is liable to pay the MCIT only when:

- the corporation has zero or negative taxable income; or
- the amount of MCIT is greater than the normal income tax due from such corporation.

The Tax Code allows any excess of the MCIT over the normal income tax to be carried forward on an annual basis and credited against the normal income tax for three immediately succeeding taxable years.

For purposes of computing the tax base for the MCIT, the Tax Code defines *gross income* as gross receipts less sales returns, discounts and allowances, and cost of goods or services sold, as the case may be. *Cost of goods* sold includes all business expenses directly incurred to produce the merchandise and to bring such merchandise to their present location or use.

The MCIT will be imposed beginning the 4th taxable year immediately following the taxable year in which the corporation commenced its business operations. For purposes of the MCIT, the taxable year in which business operations commenced shall be the year in which the corporation registered with the Bureau of Internal Revenue (“**BIR**”).

Allowable Deductions for Mining Companies

Aside from business expenses and similar deductions from gross income, the Tax Code allows mining contractors to claim as a tax deduction an allowance for depreciation in respect of all properties used in mining operations, computed as follows:

- at the normal rate of depreciation if the expected life is 10 years or less; or
- depreciated over any number of years between five years and the expected life if the latter is more than 10 years, and the depreciation thereon allowed as deduction from taxable income; *provided*, that the contractor notifies the BIR at the beginning of the depreciation period which depreciation rate will be used.

The Tax Code also permits mining companies to claim as a tax deduction a reasonable allowance for depletion or amortization computed in accordance with the cost-depletion method in accordance with rules and regulations prescribed by the Department of Finance, upon recommendation of the Commissioner of the BIR, and which should not exceed the capital invested. After production in commercial quantities has commenced, certain intangible exploration and development drilling costs shall be:

- deductible in the year incurred if such expenditures are incurred for non-producing wells and/or mines; or
- deductible in full in the year paid or incurred or, at the election of the taxpayer, may be capitalized or amortized if such expenditures incurred are for producing wells and/or mines in the same contract area.

Any intangible exploration, drilling and development expenses allowed as a deduction in computing taxable income during the year shall not be taken into consideration in computing the adjusted cost basis for the purpose of computing allowable cost depletion.

In computing taxable income from mining operations, the Tax Code gives the taxpayer the option to deduct exploration and development expenditures accumulated as cost or adjusted basis for cost depletion as of the date of prospecting, as well as exploration and development expenditures paid or incurred during the taxable year. However, the total amount deductible for exploration and development expenditures cannot exceed 25% of the net income from mining operations computed without the benefit of any tax incentives. The actual exploration and development expenditures minus 25% of the net income from mining can be carried forward to the succeeding years until fully deducted. The election of the taxpayer to deduct the exploration and development expenditures is irrevocable and binding in succeeding taxable years.

For purposes of the foregoing, the term “net income from mining operations” refers to gross income from operations less allowable deductions that are necessary or related to mining operations such as mining, milling and marketing expenses, and depreciation of properties used directly in mining operations. The term “exploration expenditures” means expenditures paid or incurred for the purpose of ascertaining the existence, location, extent, or quality of any deposit of ore or other mineral, and paid or incurred before the beginning of the development stage of the mine or deposit. On the other hand, the term “development expenditures” refers to expenditures paid or incurred during the development stage of the mine or other natural deposits.

Tax on Dividends

Distributions made by a domestic corporation out of its earnings or profits, whether in money or other property, which are payable to its shareholders are classified as *dividends*. Dividends received by a domestic corporation or a resident foreign corporation (i.e., a foreign corporation engaged in trade or business in the Philippines) from another domestic corporation are not subject to Philippine income tax. On the other hand, dividends received by a non-resident foreign corporation not engaged in trade or business in the Philippines are generally subject to Philippine income tax at the rate of 30% of the gross amount of the dividends. The 30% tax on dividends is a final withholding tax, i.e., the

Philippine corporation has the obligation to withhold the amount of the tax from the gross amount of the dividends and to remit such tax to the BIR on behalf of the non-resident foreign corporation.

Under the Tax Code, the income withholding tax rate on dividends may be reduced to 15% if either of the following conditions is present:

- The country in which the non-resident foreign corporation is domiciled allows a credit against the tax due from the non-resident foreign corporation's taxes deemed to have been paid in the Philippines, equivalent to at least 15%; or
- The country in which the non-resident foreign corporation is domiciled does not impose any income tax on dividends received from the Philippine corporation.

The income withholding tax rate on dividends may also be reduced under Philippine tax treaties with countries where the non-resident foreign corporation is domiciled. To confirm the application of the reduced withholding tax rate on Philippine dividends, an application for relief from double taxation must be filed with the BIR.

Excise Tax

The Tax Code also imposes an excise tax on minerals, mineral products and quarry resources, as follows:

- On coal and coke, a tax of PHP10.00 per metric ton;
- On all non-metallic minerals and quarry resources, a tax of 2% based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; or the value used by the Bureau of Customs (“BOC”) in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation;
- On all metallic minerals, a tax of 2% based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced; or the value used by the BOC in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation;
- On indigenous petroleum, a tax of 3% of the fair international market price thereof, on the first taxable sale, barter, exchange or such similar transaction, such tax to be paid by the buyer or purchaser before removal from the place of production.

Value-Added Tax

The Tax Code also imposes value-added tax (“VAT”) on any person (whether individual or corporate) who, in the course of trade or business, sells, barter, exchanges, leases goods or properties and renders services, and any person who imports goods into the Philippines.

The VAT is generally imposed on the sale of goods, properties and services at the standard rate of 12%. For sales of goods subject to VAT, the 12% rate is imposed on the “gross selling price” or the total amount of money or its equivalent, which the purchaser pays or is obligated to pay to the seller in consideration of the sale, barter or exchange of the goods or properties.

The Tax Code also imposes 12% VAT on *every* importation of goods based on the total value used by the BOC in determining tariff and customs duties, plus customs duties, excise taxes, if any, and other charges. The importer has the obligation to pay VAT on its importation. The 12% VAT must be paid,

along with the other import duties and charges, before the imported goods may be released from customs custody.

VAT is in the nature of an indirect tax, i.e., the amount of the VAT payable by the seller may be shifted or passed on to the buyer or importer of goods as an increment to the price of the goods. The buyer may then apply the VAT passed on to it by the seller as an input tax credit. In other words, the buyer or lessee may deduct the VAT passed on to it against its own VAT liabilities, if any.

For every sale of goods or services, VAT-registered persons are also required to issue receipts or sales/commercial invoices duly registered with the BIR. The issuance of duly registered receipts and invoices is necessary for a VAT taxpayer to validly claim tax credits to lessen its VAT liabilities.

In certain transactions by VAT-registered persons, VAT at the rate of zero percent (0%) is imposed as a form of tax incentive. The so-called “zero-rated sales” generally refer to export sales of raw materials, foreign currency denominated sales, sale of gold to the *Bangko Sentral ng Pilipinas*, and sales to entities enjoying exemptions under special laws and international agreements. Tax credits arising from purchases connected with such zero-rated sales may be claimed as refunds from the BIR if the tax credits are unutilized by the seller.

The Tax Code also enumerates transactions, which are exempt from VAT. Unlike taxpayers whose sales are subject to 0% VAT, sellers of goods, properties and services who engage in VAT-exempt sales cannot claim tax credits on purchases connected with such sales.

VI. Environmental Laws

The Philippines adheres to a policy of protecting and advancing the right of its people to a balanced and healthful ecology. The DENR is the lead agency in environmental protection and administration. The DENR’s Environmental Management Bureau (“**EMB**”), local government units and other agencies also assist in the formulation and implementation of environmental policies.

The relevant environmental laws and regulations are as follows:

Environmental Impact Statement (“EIS”) System

The EMB is the lead agency that implements the EIS System and handles the review and evaluation of the environmental impact of development projects. Under the EIS System, a project proponent of environmentally critical projects and projects within environmentally critical areas must obtain an environmental compliance certificate prior to the commencement of the project. Under DENR regulations, resource-extractive industries, including mining, are considered environmentally critical projects.

An ECC certifies that a proposed project or undertaking will not cause significant negative environmental impact. The ECC also certifies that the proponent has complied with all the requirements of the EIS System and has committed to implement its approved Environmental Management Plan. The ECC contains specific measures and conditions that the project proponent has to undertake before and during the operation of a project, and in some cases, during the project’s abandonment phase to mitigate identified environmental impacts.

Ecological Solid Waste Management Act

The Ecological Solid Waste Management Act (“**Solid Waste Act**”) provides for a national program that will manage the control, transfer, transport, processing and disposal of solid waste in the country. Certain acts are prohibited under the Solid Waste Act, as follows:

- Dumping waste matters in public places such as roads, canals or sidewalks;
- Open burning of solid waste;
- Permitting the collection of non-segregated waste;
- Squatting in open dumps and landfills;
- Open dumping in flood-prone areas;
- Mixing of source-separated recyclable material with other solid waste in any container for solid waste collection;
- Operating of open dumps, outside the provisions of the law;
- Manufacturing or distributing non-environmentally acceptable packaging materials;
- Importing consumer products in non-environmentally acceptable packaging materials;
- Importing toxic wastes misrepresented as recyclable;
- Transporting and dumping in bulk of collected domestic, commercial, industrial and institutional wastes outside of designated centers or facilities;
- Preparing, expanding, constructing or operating waste management facilities without an Environmental Compliance Certificate and without conforming to the land use plan of the LGU;
- Constructing any establishment within 200 meters from open or controlled dumpsites or sanitary landfills; and
- Constructing or operating any landfills or waste disposal facility on any area or portion of an aquifer, water reservoir or watershed.

Violation of the provisions of the Solid Waste Act is punishable by a fine and/or imprisonment.

Toxic Substances and Hazardous and Nuclear Wastes Control Act

The Toxic Substances and Hazardous and Nuclear Wastes Control Act (“**The Hazardous Waste Act**”) provides the legal framework for the country’s program to control and manage the importation, manufacture, processing, distribution, use, transport, treatment, and disposal of toxic substances and hazardous and nuclear wastes.

The Hazardous Waste Act requires all manufacturers and importers of a new chemical to submit a pre-manufacture and pre-importation notification (“**PMPIN**”) to the DENR. A “new chemical substance” is defined as any chemical that is not included in the Philippine Inventory of Chemicals and Chemical Substances (“**PICCS**”). The purpose of the PMPIN is to screen harmful substances before they enter the Philippines. The PICCS is a list of existing industrial chemicals and chemical

substances used, sold, distributed, imported, processed, manufactured, stored, exported, treated, or transported in the Philippines.

Manufacturers and importers of new chemicals are required to notify the DENR of their intent to manufacture or import the new chemical within 90-180 days before commencing the manufacture or importation of the new chemical. Together with this notification, the proponent must submit the appropriate PMPIN forms.

Once a chemical is listed in PICCS, it may be manufactured or imported with no control, provided it is not included in the Priority Chemicals List (“PCL”) or subject to a Chemical Control Order (“CCO”).

The PCL is a short list of chemicals that have been determined to potentially pose unreasonable risks to public health, workplace, and environment. Inclusion in the PCL is based on the selection criteria used by industrialized countries, such as persistence, toxicity, and bioaccumulation. Users, importers and manufactures of chemicals listed in the PCL are required to comply with various registration and reporting requirements.

A CCO prohibits, limits or regulates the use, manufacture, import, export, transport, processing, storage, possession and wholesale of priority chemicals that are determined to be regulated, phased-out, or banned because of the serious risks they pose to public health, the work place and the environment. The objective of a CCO is to ensure the proper management of the chemicals so that danger to human health and the environment is reduced. A CCO specifies requirements for the importation, manufacturing, use, transport and disposal of these chemicals. A CCO also requires the subsequent phase-out of the chemical and its substitution with less harmful chemicals.

Violation of the provisions of the Hazardous Waste Act is punishable by a fine and/or imprisonment as well as administrative fines.

Clean Air Act

The Clean Air Act provides for a comprehensive management program for air pollution. Under the implementing rules and regulations of the Clean Air Act, all stationary sources of air pollution must have a valid permit to operate issued by a DENR Regional Director. New or modified sources must obtain an authority to construct from the Director. However, the DENR may reduce penalties or fines to be imposed on stationary sources provided the latter execute a consent agreement with the EMB and implement an environmental management plan with a timetable specified.

The following acts are prohibited under the Clean Air Act and its implementing rules and regulations:

- Causing or allowing the emission of particulate matter from any source whatsoever without taking reasonable precautions to prevent such emissions.
- Storing, pumping, handling, processing, unloading or using in any process, or installing volatile compound or organic solvents without applying known existing vapor emission control devices or systems deemed necessary and approved by the EMB.
- Discharging from any source whatsoever such quantities of air contaminants or other material that constitute nuisance as defined under the law.
- Burning any materials in any quantities which will cause the emission of toxic and poisonous fumes.

- Open burning of waste.
- Incineration, which is the burning of municipal, bio-medical and hazardous wastes, emitting toxic and poisonous flames.

Industries which will install pollution control devices or retrofit their existing facilities with mechanisms that reduce pollution, will be entitled to tax incentives such as but not limited to tax credits and/or accelerated depreciation deductions.

The violation of the Clean Air Act has a corresponding penalty of fine or imprisonment.

Clear Water Act

The Clean Water Act applies to water quality management in all water bodies. However, it applies primarily to the abatement and control of pollution from land-based sources. This notwithstanding, the water quality standards and regulations and the civil liability and penal provisions under the Clean Water Act will be enforced irrespective of sources of pollution.

The following acts, among others, are prohibited under the Clean Water Act:

- Discharging, depositing or causing to be deposited material of any kind directly or indirectly into the water bodies or along the margins of any surface water, where the same will be liable to be washed into such surface water, either by tide action or by storm, floods or otherwise, which could cause water pollution or impede natural flow in the water body;
- Discharging, injecting or allowing to seep into the soil or sub-soil any substance in any form that would pollute groundwater. In the case of geothermal projects, and subject to the approval of the DENR, regulated discharge for short-term activities (e.g., well testing, flushing, commissioning, venting, etc.) and deep re-injection of geothermal liquids may be allowed. However, safety measures should be adopted to prevent the contamination of the groundwater;
- Operating facilities that discharge regulated water pollutants without the valid required permits or after the permit was revoked for any violation of any condition therein;
- Unauthorized transport or dumping into sea waters of sewage sludge or solid waste as defined under the Solid Waste Act;
- Transport, dumping or discharge of prohibited chemicals, substances or pollutants listed under the Hazardous Waste Act;
- Operate facilities that discharge or allow to seep, willfully or through gross negligence, prohibited chemicals, substances or pollutants listed under the Hazardous Waste Act, into water bodies or wherein the same shall be liable to be washed into such surface, ground, coastal, and marine water;
- Undertaking activities or development and expansion of projects, or operating wastewater/sewage facilities in violation of Presidential Decree No. 1586 and its implementing rules and regulations;
- Discharging regulated water pollutants without the valid required discharge permit pursuant to the Clean Water Act or after the permit was revoked for any violation of any condition therein.

A violation of the Clean Water Act may be penalized by fine and/or imprisonment.

Pollution Control Law

Under the Pollution Control Law, it is unlawful for a person to dispose any organic or inorganic matter or any substance in gaseous or liquid form that may cause water pollution in any Philippine water resource.

Water Code

The Water Code prohibits any person from building any works that may produce dangerous or noxious substances, or performing any act, which may result in the introduction of sewage, industrial waste, or any pollutant into any source of water supply without prior permission from the EMB.

National Environmental User's Fee of 2002 ("NEUF")

The NEUF applies to all establishments and installations that discharge industrial and commercial wastewater into water bodies and/or land resources.

Any person who will discharge in any manner industrial or commercial wastewater into Philippine water and/or land resources must secure a wastewater discharge permit from the relevant Regional Office of the EMB. A wastewater discharge permit fee will also be assessed (fixed fee and load-based fee).

VII. Philippine Government Provides Policies and Guidelines for Reforms in the Philippine Mining Sector

On 09 July 2012, the Office of the President released EO No. 79 entitled "Institutionalizing and Implementing Reforms in the Philippine Mining Sector, Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources."

The EO provided general policies, which are subject to Implementing Rules and Regulations ("EO IRR") to be released within 60 days from the effectivity of the EO.

Notable points of the EO are as follows:

- **Areas closed to mining applications** – In addition to the areas declared as closed to mining applications under The Philippine Mining Act of 1995¹⁹ ("**Mining Act**") and the National Integrated Protected Areas Act,²⁰ the EO disallows applications for mineral contracts, concessions in:
 - (i) prime agricultural lands, in addition to lands covered by the Comprehensive Agrarian Reform Law of 1988²¹ ("**CARL**"), including plantations and areas devoted to valuable crops;
 - (ii) strategic agriculture and fisheries development zones, fish refuge and sanctuaries declared as such by the Secretary of the Department of Agriculture;
 - (iii) tourism development areas as identified in the National Tourism Development Plan²² ("**NTDP**"); and
 - (iv) other critical areas, island ecosystems, and impact areas of mining as determined by current and existing mapping technologies, that the DENR may identify pursuant to

existing laws, rules, and regulations, such as but not limited to the National Integrated Protected Areas Systems Act.²³

In the CARL, agricultural land is referred to as “land devoted to agricultural activity as defined in the Act and not classified as mineral, forest, residential, commercial or industrial land”, while the Philippine Fisheries Code of 1998²⁴ describes fishery refuge and sanctuaries as “designated areas where fishing or other forms of activities which may damage the ecosystem of the area is prohibited and human access may be restricted.”

The EO does not contain standards for defining “prime agricultural lands” and “strategic agriculture and fisheries development zones”. The determination of these zones appears to be left to the discretion of the Secretary of the Department of Agriculture. For the guidance of the industry stakeholders, the EO IRR must provide for clear standards to determine these additional areas closed to mining applications. The government has come up with a “No Go Zones” Map in 2014 indicating areas that are open or closed to mining application. Investors should determine from such map if the prospective area is open to mining application under current government policies.

The EO provides that mining contracts, agreements and concessions approved before the effectivity of the EO will continue to be valid, binding and enforceable so long as they strictly comply with existing laws, rules and regulations and the terms and conditions of the grant thereof.

This means that the tenure of existing Exploration Permits, MPSA, and FTAA will be respected. It is expected that the EO IRR will clarify how the DENR will deal with renewals of these permits/agreements in case the areas where they are situated are in the additional areas closed to mining application. The investments of permit holders or tenement contractors made in good faith on account of approved permits/tenements over areas previously declared as open to mining application must be accorded protection under the due process clause of the Philippine Constitution.²⁵

- **Full enforcement of environmental standards in mining** – The EO directs the DENR to ensure that environmental standards in mining, as prescribed by existing laws, rules and regulations, are fully and strictly enforced, and appropriate sanctions meted out against violators thereof.

The EO also states that only mining applicants who are able to strictly comply with such standards shall be eligible for the grant of mining rights. This implies that no new mining permits or tenements may be granted to applicants that have been found to have violated environmental laws in the past.

- **Review of existing mining operations** – The EO requires the DENR to conduct a review of the performance of existing mining operations, based on applicable rules and regulations such as the Mining Act and the Labor Code.
- **Moratorium on the grant of new mineral agreements pending legislation** – The EO provides that no new mineral agreements shall be entered into until legislation rationalizing existing revenue sharing schemes and mechanisms shall have taken effect. However, the EO authorizes the DENR to continue to grant and issue EPs and states that grantees of such permits shall be given the right of first option to develop and utilize the minerals in their respective exploration areas upon the approval of the declaration of mining project feasibility and the effectivity of the said legislation.

The EO also directs the DENR to undertake a review of existing mining contracts and agreements for possible renegotiation of the same, and further states that the renegotiated terms and conditions must be mutually acceptable to the government and the mining contractor.

Concerns have been raised on the validity of the moratorium on the grant of mineral agreements (i.e., MPSAs, JVAs, and CPAs) under the EO on the ground that a presidential executive order cannot suspend the provisions of an act of Congress (i.e., the Mining Act) that allows the grant of mineral agreements.

There is no moratorium on the issuance of EPs, FTAAs, and Mineral Processing Permits. Currently, the moratorium is only with respect to MPSAs.

- **Establishment of Mineral Reservations** – The EO requires potential and future mining areas with known strategic mineral reserves to be declared as Mineral Reservations.²⁶ The EO also states that this will be without prejudice to agreements, contracts, rights and obligations previously entered into between the government and mining contractors. As such, the declaration of a mining area as a Mineral Reservation is not expected to impact a contractor that obtained its mining permit or tenement prior to such declaration.

- **Imposition of competitive public bidding requirement** – The EO requires the grant of mining rights and mining tenements over areas with known or verified mineral resources and reserves, including those that the government owns (e.g., those that the government foreclosed and are being managed by the Philippine Privatization and Management Office) and all expired tenements, to be undertaken through competitive public bidding. The EO also declares that all valuable metals, mine wastes and tailings from mining operations that have ceased shall belong to the State and shall be similarly developed and utilized through competitive public bidding.

The EO does not appear to entirely abandon the first to file rule used under the Mining Act, as the EO provides that all other mining rights and tenements shall be processed and approved through existing procedures.

- **Development of Downstream Industries** – The EO directs the DENR to submit, within a period of six months, a national program and road-map for the development of value-adding activities and downstream industries for strategic metallic ores.

The MGB Director has clarified that this does not impose any requirement for mining contractors to engage in processing or other value-adding activities.

- **Disposition of Abandoned Ores and Valuable Metals** – The EO also provides that “all valuable defunct mining operations belong to the State and shall be developed and utilized through competitive public bidding”. This appears to affect existing mining operations upon the expiration or termination of their mining permits.
- **Creation of a Mining Industry Coordinating Council (“MICC”)** – This is to be composed of the Climate Change Adaptation and Mitigation²⁷ and Economic Development²⁸ Cabinet Clusters. MICC shall also have, as additional members, the Secretary of Justice, the Chairperson of the National Commission on Indigenous Peoples, and the President of the Union of Local Authorities of the Philippines.
- **Measures on Small-Scale Mining Activities** – Under the EO, small-scale mining operations may be undertaken only within the declared People’s Small-Scale Mining Areas (*Minahang Bayan*). The use of mercury in small-scale mining is also strictly prohibited.
- **Consistency of local ordinances with national laws** – The EO mandates the Department of the Interior and Local Government (“DILG”) and LGUs to ensure that the exercise of the latter’s powers, in relation to the mineral resources, is consistent with and conforms to the regulations, decisions and policies of the National Government.

The EO requires the LGUs to confine themselves only to the imposition of “reasonable limitations on mining activities conducted within their respective territorial jurisdictions that are consistent with national laws and regulations.”

The EO also directs government agencies to ensure the timely release of the share of the LGUs, and to study the possibility of increasing the LGUs’ share as well as granting them direct access to such funds. It is hoped that these fiscal measures will enhance the acceptability of mining projects to LGUs and the communities they represent.

- **Creation of One-stop Shop for all Mining Applications** – The EO mandates the DENR to establish an inter-agency one-stop shop for all mining related applications and processes within six months.
- **Creation of a Centralized Database for the Mining Industry and Integrated Map System to Include Mining Related Maps** – The EO directs the DENR to create a centralized database for all mining-related information, which shall initially include all available data on the industry from all government agencies and instrumentalities, within six months.

The EO also requires the integrated map system to be created by the government to include all mining-related maps such as mining tenement maps, geo-hazard and multi-hazard maps, ancestral lands and domains, and protected areas.

- **Use of the Programmatic Environmental Impact Assessment (“PEIA”)** – The EO directs the DENR and the EMB to study the adoption of the PEIA in the implementation of the Philippine Environmental Impact Statement System (“PEISS”), which could expand the current Environmental Impact Assessment process.

¹ La Bugal-B’laan Tribal Association, Inc., vs. Ramos, G.R. No. 127882, 1 December 2004

² Section 4 of Executive Order No. 192 or the Reorganization Act of the Department of Environment and Natural Resources

³ Section 9 of the Mining Act

⁴ Section 3 (q) of the Mining Act

⁵ DENR Memorandum Order No. 99-10

⁶ Section 19 of the IRR

⁷ Section 22 of the IRR

⁸ Section 30 of the IRR

⁹ Section 18 of the IRR

¹⁰ Section 26 of the Mining Act

¹¹ Section 2-A of Commonwealth Act No. 108 provides:

Any person, corporation, or association which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution, or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists or abets in the planning, consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: provided, however, that the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: provided, further, that any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act: and provided, finally, that the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.

¹² Section 109 of the IRR:

The term of the Mineral Processing Permit shall be for a period of five years from date of issuance thereof, renewable for like periods but not to exceed a total term of 25 years.

¹³ Under the model FTAA, within 30 days following approval and execution of the FTAA by the President, the President must notify Congress of the execution of the FTAA and the President’s office will forward the FTAA through the DENR to the MGB Regional Office

for registration. The MGB Regional Office will notify the contractor of the approval. Upon receipt of Notice of Approval from the MGB Regional Office, the contractor must within 15 working days cause the registration of the FTAA at the MGB Regional Office by payment of the necessary registration, occupation and other fees in accordance with existing rules and regulations.

¹⁴ Section 62 of the IRR:

Temporary Exploration Permit.

While waiting for the approval of the FTAA application by the President, the Secretary may, upon the request of the FTAA applicant, issue a one-time nonrenewable Temporary Exploration Permit (TEP) with a term not exceeding one year to undertake exploration x x x.

¹⁵ Section 104 of IRR:

Easement Rights

When mining areas are so situated that for purposes of more convenient operations it is necessary to build, construct or install on the mining areas or lands owned, occupied or leased by other persons, such infrastructures as roads, railroads, mills, waste dump sites, tailings ponds, warehouses, staging or storage areas and port facilities, tramways, runways, airports, electric transmission, telephone or telegraph lines, dams and their normal flood and catchment areas, sites for waterwells, ditches, canals, new river beds, pipelines, flumes, cuts, shafts, tunnels or mills, the Permittee/Permit Holder/Contractor, upon payment of just compensation, shall be entitled to enter and occupy said mining areas or lands.

As to the payment of just compensation mentioned in the preceding paragraph, the amount thereof shall be first agreed upon by the parties and in accordance with Presidential Decree No. 512, where appropriate. In case of disagreement, the matter shall be brought before the Panel of Arbitrators for proper disposition.

¹⁶ Section 105.

Entry Into Lands

The holder(s) of mining right(s) shall not be prevented from entry into its/their contract/mining area(s) for the purpose(s) of exploration, development and/or utilization: provided, that written notice(s) at its/their registered address(es) was/were sent to and duly received by the surface owner(s) of the land(s), occupant(s) and concessionaire(s) thereof and that a bond is posted in accordance with Section 108 hereof.

If the surface owner(s) of the land, occupant(s) or concessionaire(s) thereof cannot be found, the Permittee/Permit Holder/Contractor or concessionaire shall notify the concerned Regional Director, copy furnish the concerned local officials in case of private land or the concerned government agency in case of concessionaires, attaching thereto a copy of the written notice and a sworn declaration by the holder(s) of mining right(s) that it/they had exerted all efforts to locate such surface owner(s)/occupant(s)/concessionaire(s). Such notice(s) to the concerned Regional Director shall be deemed notice(s) to the surface owner(s) and concessionaire(s).

In cases where the surface owner(s) of the land(s), occupant(s) or concessionaire(s) thereof refuse(s) to allow the Permittee/Permit Holder/Contractor entry into the land(s) despite its/their receipt(s) of the written notice(s) or refuse(s) to receive said written notice(s) or in case of disagreement over such entry, the Permittee/Permit Holder/Contractor shall bring the matter before the Panel of Arbitrators for proper disposition.

¹⁷ Section 35 (f) of the Mining Act

¹⁸ Section 5 (y) of the IRR

¹⁹ Republic Act No. 7942.

²⁰ Republic Act No. 7586.

²¹ Republic Act No. 6657.

²² A copy of the National Tourism Development Plan is available at <http://www.visitmyphilippines.com/index.php?title=NationalTourismDevelopmentPlan2011-2016&func=all&pid=3138&tbl=1>.

²³ Republic Act No. 7586.

²⁴ Republic Act No. 8550.

²⁵ Article III, Section 1 of the 1987 Philippine Constitution.

²⁶ Under the implementing rules and regulations ("IRR") of the Mining Act, mining contractors are required to pay the government an additional royalty which shall not be less than 5% of the market value of the gross output of minerals or mineral products extracted or produced from Mineral Reservations, exclusive of all other taxes.

²⁷ The Climate Change Adaptation and Mitigation Cluster is chaired by the DENR Secretary, and has as its members the Secretaries of the Department of Science and Technology, Department of the Interior and Local Government, Department of Public Works and Highways, Department of Social Welfare and Development, Department of Agriculture, Department of Agrarian Reform, Department of Energy, Department of National Defense, and the Chairs of the Housing and Urban Development Coordinating Council and Metropolitan Manila Development Authority.

²⁸ The Economic Development Cluster is chaired by the Secretary of the Department of Finance, and has as its members the Secretaries of the National Economic and Development Authority, Department of Trade and Industry, Department of Budget and Management, Department of Public Works and Highways, Department of Transportation and Communications, Department of Energy, Department of Science and Technology, Department of Tourism, Department of Agriculture, and Department of the Interior and Local Government.

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For five decades, Quisumbing Torres has been helping lead multinational and domestic organizations drive their growth in the Philippines. A consistently top-ranking law firm in the country, we provide global reach with deep local roots, enabling the Firm's lawyers to work seamlessly across borders.

In 1963, the Firm was established as Collas and Guerrero and later became known as Quisumbing Torres. As part of the Baker & McKenzie's global network with more than 11,000 people in 77 offices in 47 countries, we are able to offer market insight and international experience that few firms in the Philippines can match.

The Firm proactively addresses legal issues that affect its clients' business in the country. Toward this end, we organize our lawyers into practice groups, to deal with specific legal issues that affect its clients' commercial operations. Today, Quisumbing Torres lawyers offer seasoned and industry-specific advice in the practice areas of Banking & Finance, Corporate & Commercial (including Energy, Mining and Infrastructure), Dispute Resolution, Employment, Immigration, Intellectual Property and Tax.

Our uncompromising commitment to excellence and the fluency in how we think, work and behave are recognized by legal directories. *The Legal 500 Asia Pacific* ranked our Mining & Natural Resources/Projects & Energy and Aviation at Tier 1 from 2009 to 2015, and our Real Estate and Construction Practice Tier 1 from 2008 to 2009, and 2012 to 2015. Our Firm was also rated Tier 1 in *The Legal 500 Asia Pacific* from 2008 to 2015, in the areas of Employment, Immigration and Intellectual Property. In 2015, our Corporate and M&A was ranked Tier 1.

In *Chambers Asia Pacific*, Quisumbing Torres was ranked Band 1 from 2008 to 2014 in Natural Resources & Mining/Projects, Infrastructure, and Energy and from 2008 to 2014 in Intellectual Property. From 2008 to 2011, and 2013 to 2014, *Chambers Asia Pacific* placed our Dispute Resolution (Arbitration) practice in Band 1 and, in 2012, distinguished the practice under the category *Spotlight Table*. In 2008 and 2014, *Chambers Asia Pacific* ranked our Real Estate practice in Band 1 and our Tax practice in Band 1 in 2008. Our Firm was adjudged to belong to Band 1 in Corporate / Mergers & Acquisitions (Real Estate) areas in 2014.

Chambers Global placed Quisumbing Torres in Band 1 for its Natural Resources & Mining/Projects, Infrastructure & Energy from 2009 to 2014.

The *Asian Legal Business* distinguished us as a *Spotlight Firm* in 2012 and as a *Leading Firm* in 2014 and has consistently recognized Quisumbing Torres as a Tier 1 firm in the Philippines for M&A Rankings.

The *International Financial Law Review (IFLR) 1000*, guide to the world's leading financial law firms, has consistently recommended Quisumbing Torres' banking and capital markets, M&A, and project finance practices in its guidebooks from 2005 to 2014. IFLR 1000/*The Petroleum Economist* ranked Quisumbing Torres Tier 1 for Energy and Infrastructure as it introduced the new category in 2014.

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