Surrendering Autonomy

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1. Introduction

On February 2015 Marikina Representative Romero "Miro" Quimbo filed House Bill No. 5367 to be known as the "Philippine Fiscal Regime and Revenue Sharing Arrangement for Large-scale Metallic Mining Act of 2014." The bill was drafted by the Malacañang-created Mining Industry Coordinating Council (MICC)[1] and is being presented as a measure to rationalize the existing sharing schemes on mining revenues. This is only one facet of the bill. Parts of it are poised to inflict the greatest setback to local autonomy since Ferdinand Marcos concentrated power under his martial law regime. This bill will also erase all the rights recognized by the Indigenous Peoples' Rights Act for those communities whose ancestral domains contain mineral resources.

As this Note will show, the bill cuts local governments' powers and financial base. It also unconstitutionally protects existing mining contracts by making them impervious to amendment. The bill is a crass approach to raising revenues which basically promises a quick financial payoff at the expense of local government autonomy and community rights.

This Note will discuss three specific provisions of the bill - the establishment and administration of Mining Industry Zones under Sections 5 and 6, the fiscal regime and revenue sharing under Section 7, and vested rights under Section 21.

2. Establishment of Mining Industry Zones

a. Impairment of Police Powers

At its core, the bill establishes Mining Industry Zones (MIZ) across the country. The idea behind the creation of the MIZ is to identify mining areas and for the concerned local government units to waive their powers and jurisdiction over such areas. It promotes a return to a highly centralized form of government.

1 Melissa Luz T. Lopez, *Mining revenue scheme filed in House*, Businessworld, February 4, 2015.

Section 5 of the bill provides that "all mining areas governed by this Act shall be declared by the President as Mining Industry Zones." Only the mining areas approved and certified by the Mining and Geosciences Bureau (MGB) may be endorsed by the DENR Secretary to the President.

The MGB approval and certification process shall pass through consultation with the concerned local government units and the indigenous cultural communities if the mining area is within an ancestral domain.

The consultation process shall include an endorsement from the LGU for the establishment of the mining area as MIZ. The section further states that "In consideration of the payment to LGU of 40% of the total government share referred to in Section 12 of this Act,[2] the LGU endorsement shall include a waiver of its power to regulate the mining business operations through issuance of business permits and other license requirements imposed by the LGU pursuant to the Local Government Code of 1991, as amended."

Section 6 of the bill reads in part:

> Any local issuances and/or directions that may be issued by the host LGU, which may affect or relate to mining operations and other incidental activities thereto, shall be consistent with and shall conform to the provisions of this Act and to the laws, regulations, policies and decisions taken by the national government.

Stripped of all its pretences, the bill attempts to divest local government units of its regulatory functions. The significant portion of the bill provides that "the LGU endorsement shall include a waiver of its power to regulate the mining business operations through issuance of business permits and other license requirements imposed by the LGU pursuant to the Local Government Code of 1991…."

In short, local governments are required to endorse the establishment of the MIZ and then surrender their powers to regulate mining activities. Local governments cannot have any role in the MIZ. Section 6 of the bill provides that "Any local issuances and/or directions that may be issued by the host LGU, which may affect or relate to mining operations and other incidental activities thereto, shall be consistent with and shall conform to the provisions of this Act and to the laws, regulations, policies and decisions taken by the national government."

The bill will not tolerate any opposition to mining. The phrase "other incidental activities" could cover a wide range of concerns, such as pollution, waste disposal, or other public health issue. If this bill were passed into law, local governments will be prohibited from addressing health concerns or other emergencies which they could under present laws.

This drastic measure is a clear attempt to circumvent the prevailing legal regime that grants local governments a higher degree of regulatory jurisdiction over mining companies operating within their respective territories. This would in effect take away the police power accorded to LGUs the general welfare clause of the LGC, to wit:

> SECTION 16. *General Welfare*. — Every local government unit shall exercise the powers expressly granted, those necessarily implied therefrom, as well as powers necessary, appropriate, or incidental for its efficient and effective governance, and those which are essential to the promotion of the general welfare. Within their respective territorial jurisdictions, local government units shall ensure and support, among other things, the preservation and enrichment of culture, promote health and safety, enhance the right of the people to a balanced ecology, encourage and support the development of appropriate and self-reliant scientific and technological capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of their inhabitants.

Police power is the plenary power vested in the legislature to make statutes and ordinances to promote the health, morals, peace, education, good

2 Section 12 of the bill provides:
Section 12. Allocation. The Government Share shall be allocated as follows:
a. National Government (NG): sixty percent (60%)
b. Local Government Units (LGUs) hosting the MIZ: forty percent (40%)
If the contract area is in an ancestral land/domain, the royalty for the ICC the royalty for the ICC shall be taken from the Government share. Thereafter, the net Government Share shall be allocated to the National Government (NG) and the LGUs in the above stated ratio.

order or safety and general welfare of the people.[3] It extends "to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."[4] The police power of a municipal corporation extends to all matters affecting the peace, order, health, morals, convenience, comfort, and safety of its citizens — the security of social order — the best and highest interests of the municipality.[5]

The bill clearly impairs local governments' powers to protect their constituents. Section 6 of the bill is alarming. It defines the relationship between the LGU and the MIZ in the following manner:

> Any local issuances and/or directions that may be issued by the host LGU, which may affect or relate to mining operations and other incidental activities thereto, shall be consistent with and shall conform to the provisions of this Act and to the laws, regulations, policies and decisions taken by the national government.

The phrase "other incidental activities" could cover anything such as pollution or other public health issue. If this bill is passed into law, local governments can have no participation in the MIZ, which in essence will fall within the complete control of the national government. They cannot address health concerns of other emergencies which they otherwise could.

b. Deleting Consultations

Another issue raised by Section 5 is the effect it will have on the consultation provisions found in Sections 2(c), 26 and 27 of the Local Government Code. Do the MIZ consultations supplant the Local Government Code provisions? If so then it will weaken the autonomy guaranteed to LGUs. The Code's provisions on consultation are among the most potent tools for local governments in ensuring that the interests of their constituents are protected.

3 Fernando v. St. Scholastica's College, G.R. No. 161107, March 12, 2013. This discussion is based on Dante B. Gatmaytan, Local Government Law and Jurisprudence 94-100 (2014).

4 United States v. Salaveria, G.R. No. L-13678, November 12, 1918.

5 United States v. Salaveria, G.R. No. L-13678, November 12, 1918, *citing* Case v. Board of Health of Manila and Heiser, G.R. No. L-7595, February 4, 1913.

Under existing laws, local government approval of national government projects is actually required. Sections 26 and 27 of the Local Government Code read as follows:

> SECTION 26. *Duty of National Government Agencies in the Maintenance of Ecological Balance*. — It shall be the duty of every national agency or government-owned or -controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of cropland, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of the project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.
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> SECTION 27. *Prior Consultations Required*. — No project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the *sanggunian* concerned is obtained: Provided, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.

Section 2 (c) further reads as follows:

> (c) It is likewise the policy of the State to require all national agencies and offices to conduct periodic consultations with appropriate local government units, nongovernmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions.

Congress, by enacting the Local Government Code of 1991, gave local officials power to check the national government. The present laws no longer permit the national government to simply impose its will over local governments. Senator Aquilino Pimentel, Jr., the principal author of the Local Government Code, wrote:

> Prior to the enactment of the Local Government Code, national agencies and offices implementing projects and programs within the jurisdiction of the province, city, municipality or barangay did not have to consult with the LGUs concerned. Now, the Code requires such consultations "before any project or program is implemented in their respective jurisdictions..."
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> The prior consultation rule is salutary not only in terms of forging smoother and more harmonious relationships between the central government and the LGUs concerned but also between the government, central or local, and the people in general. The Kalinga leader Macliing Dulag would perhaps not have been killed in April 1980, had prior consultations between the Kalingas and the local government in the province on the one hand, and the central government, on the other, been made before the government started to lay down concrete plans for the development of the Chico River Dam during the martial law administration of Pres. Ferdinand E. Marcos.[6]

Section 26, Pimentel continues, makes it an obligation for agencies or government-owned-and-controlled corporations of the central government involved in the planning and implementation of projects or programs that may cause pollution, climatic change, depletion of non-renewable resources, loss of cropland, range-land, or forest cover, and extinction of animal or plant species to:

1. Consult with the LGUs, non-governmental organizations, and other sectors concerned; and

2. Explain the goals of the project or programs, its ecological and environmental impact upon the people and community, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.[7]

This Section should be read in conjunction with Sections 2(c) and 27 which require prior consultations with the LGUs, non-government organizations, and peoples' organizations before programs and projects of national agencies may be implemented. Section 27 also directs that the *Sanggunian* concerned must give approval to the project and no one can be evicted unless relocation sites are provided.[8]

In *Province of Rizal v. Executive Secretary*,[9] the Supreme Court emphasized the two requirements of the consultation provisions of the Local Government Code:

> Under the Local Government Code, therefore, two requisites must be met before a national project that affects the environmental and ecological balance of local communities can be implemented: prior *consultation* with the affected local communities, and prior *approval* of the project by the appropriate *sanggunian*. Absent either of these mandatory requirements, the project's implementation is illegal.

There is a failure to comply with the consultation requirements under the Local Government Code if a project proponent conducts an information dissemination campaign months after an Environmental Compliance Certificate is issued. The Court added that:

> The lack of *prior* public consultation and approval is not corrected by the subsequent endorsement of the reclamation project by the *Sangguniang Barangay* of Caticlan on *February 13, 2012*, and the *Sangguniang Bayan* of the Municipality of Malay on *February 28, 2012*, which were both undoubtedly achieved at the urging and insistence of respondent Province.[10]

House Bill No. 5367 is designed to circumvent the laws that empower local officials. Empowered by the Local Government Code and concerned for their constituents' health, local officials have sometimes declined to grant their consent to national government projects. Unable to direct blind obedience the Aquino government now wants to rewrite the rules and to deprive these officials the power to resist national government projects.

6 Aquilino Q. Pimentel, Jr., The Local Government Code of 1991: The Key to National Development 16 (1993).

7 Id. at 124

8 Id. at 124

9 G.R. No. 129546, December 13, 2005.

10 Boracay Foundation, Inc. v. The Province of Aklan, G.R. No. 196870, June 26, 2012.

The bill would also reverse the progress the Philippines has made in recognizing the rights of indigenous peoples under the Indigenous Peoples' Rights Act.[11] Today, IPRA provides that:

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

Would the MIZ deprive the indigenous peoples of this right? House Bill No. 5367 puts into question the other rights recognized under Section 7 of IPRA which include:

> a. *Right of Ownership*. — The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains;
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> b. *Right to Develop Lands and Natural Resources.* — Subject to Section 56 hereof, right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they may sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights;
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> c. *Right to Stay in the Territories.* — The right to stay in the territory and not to be removed therefrom. No ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain. Where relocation is considered necessary as an exceptional measure, such relocation shall take place only with the free and prior informed consent of the ICCs/IPs concerned and whenever possible, they shall be guaranteed the right to return to their ancestral domains, as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or through appropriate procedures, ICCs/IPs shall be provided in all possible cases with lands of quality and legal status at least equal to that of the land previously occupied by them, suitable to provide for their present needs and future development. Persons thus relocated shall likewise be fully compensated for any resulting loss or injury;
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> d. *Right in Case of Displacement.* — In case displacement occurs as a result of natural catastrophes, the State shall endeavor to resettle the displaced ICCs/IPs in suitable areas where they can have temporary life support systems: *Provided*, That the displaced ICCs/IPs shall have the right to return to their abandoned lands until such time that the normalcy and safety of such lands shall be determined: *Provided, further,* That should their ancestral domain cease to exist and normalcy and safety of the previous settlements are not possible, displaced ICCs/IPs shall enjoy security of tenure over lands to which they have been resettled: *Provided, furthermore*, That basic services and livelihood shall be provided to them to ensure that their needs are adequately addressed;
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> e. *Right to Regulate Entry of Migrants.* — Right to regulate the entry of migrant settlers and organizations into the domains;

It will be recalled that bill reduces the indigenous peoples' role to consultations. They are deprived of any other rights over anything pertaining to the

11 Republic Act No. 8371 (1997)..

establishment of MIZs. Along these lines, these other rights would also be put into question:

> SECTION 16. *Right to Participate in Decision-Making.* — ICCs/IPs have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through procedures determined by them as well as to maintain and develop their own indigenous political structures. Consequently, the State shall ensure that the ICCs/IPs shall be given mandatory representation in policy-making bodies and other local legislative councils.
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> SECTION 17. *Right to Determine and Decide Priorities for Development.* — The ICCs/IPs shall have the right to determine and decide their own priorities for development affecting their lives, beliefs, institutions, spiritual well-being, and the lands they own, occupy or use. They shall participate in the formulation, implementation and evaluation of policies, plans and programs for national, regional and local development which may directly affect them.

The bill strips indigenous peoples of all these rights which would mean a reversion to the practice which subjected indigenous peoples to national government development policies that displaced and impoverished these communities.

3. Fiscal Regime and Revenue Sharing Agreement

Section 7 of the proposed bill provides that for every final mining area, the Government Share that shall be paid by the contractor shall be either:

a. Ten percent of gross revenue, or

b. Fifty-five percent of Adjusted Net Mining Revenue; Provided, that in the event that the ANMR margin exceeds 50% due to increase in metal prices or other factors, the Government, as owner of the mineral, shall get 55% of the threshold ANMR, as defined in this Act,[12] plus 60% of the excess ANMR.

The bill also provides that "payment of the Government share shall be in lieu of all national and local taxes including corporate income tax, royalty for the ICCs, duties on imported specialized capital mining equipment, fees for mayors and/or business permits, and other fees and charges imposed by the host LGUs pursuant to the Local Government Code of 1991, as amended."

The bill would clearly decrease the tax collection of host local governments. If passed into law in this form, this provision of the bill will be susceptible to a constitutional challenge.

The bill limits the power not only to tax but also to levy fees. Local governments will be denied the power to raise revenues related to mining. While it is true that the extent of local autonomy is ultimately determined by Congress,[13] the 1987 Constitution contains a framework that provides for the minimum powers that each local government should possess.

Section 5, Article X of the 1987 Constitution provides that "[e]ach local government unit shall have the power to create its own sources of revenues and to levy taxes, fees, and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy

12 Adjusted Net Mining Revenue is defined in Section 3(a) of the bill as gross revenues less allowable costs that include production costs and the actual general administrative cost, but not to exceed ten percent of the direct mining, milling and processing costs. Other allowable costs may be determined by the implementing rules of the Act. Pre-operating expenses may be allowed as deductions provided that the amount shall be determined within a five-year period from the start of commercial operations. Excess ANMR is in turn defined in 3(i) of the bill as the adjusted net mining revenue that is in excess of the threshold adjusted net mining revenue or the difference between the total adjusted net mining revenue and the threshold adjusted net mining revenue.

13 Before the enactment of the Local Government Code of 1991, courts were quick to put local governments in their place. It was not uncommon for courts to say that municipal corporations have no inherent right to impose taxes and that their "power to tax" must always yield to a legislative act which is superior having been passed upon by the state. *See* Basco v. PAGCOR, G.R. No. 91649, May 14, 1991. The Court itself explained that *Basco* was decided prior to the effectivity of the LGC, when no law empowering the local government units to tax instrumentalities of the National Government was in effect. *See* National Power Corporation v. City of Cabanatuan, G.R. No. 149110, April 9, 2003.

of local autonomy."[14] The power to tax may be exercised by local legislative bodies, "no longer merely by virtue of a valid delegation as before, but pursuant to direct authority conferred by ... the Constitution." What is the extent of the national government's role in local taxation? The important legal effect of Section 5 is that henceforth, in interpreting statutory provisions on municipal fiscal powers, doubts will have to resolved in favor of municipal corporations.[15]

In another case, the Supreme Court held that the right of local government units to collect taxes due must always be upheld to avoid severe tax erosion. This is consistent with the State policy to guarantee the autonomy of local governments and the objective of the Local Government Code "that they enjoy genuine and meaningful local autonomy to empower them to achieve their fullest development as self-reliant communities and make them effective partners in the attainment of national goals." [16] **The power to tax, it added**, "is the most potent instrument to raise the needed revenues to finance and support myriad activities of the local government units for the delivery of basic services essential to the promotion of the general welfare and the enhancement of peace, progress, and prosperity of the people." [17] As the Court explained in another case:

> …Local government units were faced with the same problems that hamper their capabilities to participate effectively in the national development efforts, among which are: (a) inadequate tax base, (b) lack of fiscal control over external sources of income, (c) limited authority to prioritize and approve development projects, (d) heavy dependence on external sources of income, and (e) limited supervisory control over personnel of national line agencies.
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> Considered as the most revolutionary piece of legislation on local autonomy, the LGC effectively deals with the fiscal constraints faced by LGUs. It widens the tax base of LGUs to include taxes which were prohibited by previous laws such as the imposition of taxes on forest products, forest concessionaires, mineral products, mining operations, and the like. The LGC likewise provides enough flexibility to impose tax rates in accordance with their needs and capabilities. It does not prescribe graduated fixed rates but merely specifies the minimum and maximum tax rates and leaves the determination of the actual rates to the respective *sanggunian*.[18]

The Supreme Court added that "Doubtless, the power to tax is the most effective instrument to raise needed revenues to finance and support myriad activities of the local government units for the delivery of basic services essential to the promotion of the general welfare and the enhancement of peace, progress, and prosperity of the people."[19]

In *Manila Electric Co. v. Province of Laguna*,[20] the Supreme Court explained that the objective of the Constitution is to ensure that, while the local government units are being strengthened and made more autonomous, the legislature must still see to it that

a. the taxpayer will not be over-burdened or saddled with multiple and unreasonable impositions;

b. each local government unit will have its fair share of available resources;

c. the resources of the national government will not be unduly disturbed; and

d. local taxation will be fair, uniform, and just.[21]

The Court's interpretation of the change in the Constitution is clear. The Constitution first of all gives local governments the power to tax. It is no longer a power delegated by Congress that can be subject to withdrawal.

14 Cagayan Electric Power and Light Co., Inc. v. City of Cagayan de Oro, G.R. No. 191761, November 14, 2012.

15 City of Government of San Pablo, Laguna v. Reyes, G.R. No. 127708, March 25, 1999.

16 NAPOCOR v. Central Board of Assessment Appeals, G.R. No. 171470, January 30, 2009.

17 NAPOCOR v. Central Board of Assessment Appeals, G.R. No. 171470, January 30, 2009.

18 National Power Corporation v. City of Cabanatuan, G.R. No. 149110, April 09, 2003.

19 National Power Corporation v. City of Cabanatuan, G.R. No. 149110, April 09, 2003.

20 Manila Electric Co. v. Province of Laguna, G.R. No. 131359, May 05, 1999.

21 Manila Electric Co. v. Province of Laguna, G.R. No. 131359, May 05, 1999.

Congress cannot deprive local governments of the power to tax without running afoul of the Constitution. The Court also interpreted "subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy" to mean that Congress can only protect the interests of the taxpayer and the national government under constitutional principles on taxation as stated in *Manila Electric Co. v. Province of Laguna*.

The bill weakens local autonomy by depriving local governments of the power to tax and levy fees over mining operations. This goes way beyond "guidelines and limitations" that Congress may set.

4. Vested right

One of the most troubling provisions of the draft bill purports to grant mining corporations a "vested right" to the original terms of their contracts when these instruments do not provide otherwise. Section 21 of the proposed Act provides:

> Section 21. *Vested Right*. Valid MAs and FTAAs existing prior to the effectivity of this Act that do not provide that any terms and conditions resulting from repeal or amendment of any existing laws or regulations or from the enactment of a law, regulation or administrative order shall be considered as part of said agreements shall continue to be governed by the terms and conditions contained in their respective mining contracts.

What this provision appears to say is that there are MAs or FTAAs that do not have a provision that states that "any terms and conditions resulting from repeal or amendment of any existing laws or regulations or from the enactment of a law, regulation or administrative order shall be considered as part of said agreements." The bill provides that these shall not be affected by subsequent laws. In effect, it preserves the original terms of these contracts and immunizes them from amendment purportedly on the theory that the mining venture acquired a vested right over the original provisions.

What is a vested right?

> A right is vested when the right to enjoyment has become the property of some particular person or persons as a present interest." It is unalterable, absolute, complete and unconditional. This right is perfect in itself; it is not dependent upon a contingency. The concept of "vested right" expresses a *"present fixed interest* which in right reason and natural justice is protected against arbitrary state action." It includes not only legal and equitable title to the enforcement of a demand but also exemptions from new obligations created after the right has become vested.[22]

House Bill No. 5367 is inconsistent with Supreme Court decisions interpreting instruments governing the exploitation of resources. MAs and FTAAs do not enjoy immunity from amendment. The Supreme Court has already discussed the nature of agreements for the exploitation of resources in *Republic v. Pagadian City Timber Co., Inc.*:[23]

> An IFMA[24] has for its precursor the Timber License Agreement (TLA), one of the tenurial instruments issued by the State to its grantees for the efficient management of the country's dwindling forest resources. Jurisprudence has been consistent in holding that license agreements are not contracts within the purview of the due process and the non-impairment of contracts clauses enshrined in the Constitution.

The Court then cited its previous decisions that explain the nature of these instruments. In *Alvarez v. PICOP Resources, Inc.*[25] the Court held that:

> In unequivocal terms, we have consistently held that such licenses concerning the harvesting of timber in the country's forests cannot be considered contracts that would bind the Government regardless of changes in policy and the demands of public interest and welfare. (citing *Oposa v. Factoran, Jr.*, G.R. No. 101083, July 30, 1993, 224 SCRA 792, 811) Such unswerving verdict is synthesized in *Oposa v. Factoran, Jr.*, (*id.*, at pp. 811, 812) where we held:

22 Lucero, Jr. v. City Government of Pasig, G.R. No. 132834, November 24, 2006.

23 G.R. No. 159308, September 16, 2008.

24 Integrated Forestry Management Agreement.

25 G.R. No. 162243, December 3, 2009.

> In the first place, the respondent Secretary did not, for obvious reasons, even invoke in his motion to dismiss the non-impairment clause. If he had done so, he would have acted with utmost infidelity to the Government by providing undue and unwarranted benefits and advantages to the timber license holders because he would have forever bound the Government to strictly respect the said licenses according to their terms and conditions regardless of changes in policy and the demands of public interest and welfare. He was aware that as correctly pointed out by petitioners, into every timber license must be read Section 20 of the Forestry Reform Code (P.D. No. 705)...
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> Needless to say, all licenses may thus be revoked or rescinded by executive action. It is not a contract, property or a property right protected by the due process clause of the constitution.

Oposa also cited previous rulings like *Tan vs. Director of Forestry*[26] where the Court held:

> . . . A timber license is an instrument by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. A timber license is not a contract within the purview of the due process clause; it is only a license or privilege, which can be validly withdrawn whenever dictated by public interest or public welfare as in this case.
>
> A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right; nor is it taxation (37 C.J. 168). Thus, this Court held that the granting of license does not create irrevocable rights, neither is it property or property rights. (*People vs. Ong Tin*, 54 O.G. 7576)....

26 G.R. No. L-24548. October 27, 1983.

In *Felipe Ysmael, Jr. & Co., Inc. v. Deputy Executive Secretary*[27] the Court held that:

> . . . Timber licenses, permits and license agreements are the principal instruments by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. And it can hardly be gainsaid that they merely evidence a privilege granted by the State to qualified entities, and do not vest in the latter a permanent or irrevocable right to the particular concession area and the forest products therein. They may be validly amended, modified, replaced or rescinded by the Chief Executive when national interests so require. Thus, they are not deemed contracts within the purview of the due process of law clause.

The Court ruled on the nature of a natural resource exploration permit in *Southeast Mindanao Gold MiningCorporation v. Balite Portal Mining Cooperative*, which held:

> . . . As correctly held by the Court of Appeals in its challenged decision, EP No. 133 merely evidences a privilege granted by the State, which may be amended, modified or rescinded when the national interest so requires. This is necessarily so since the exploration, development and utilization of the country's natural mineral resources are matters impressed with great public interest. Like timber permits, mining exploration permits do not vest in the grantee any permanent or irrevocable right within the purview of the non-impairment of contract and due process clauses of the Constitution, since the State, under its all-encompassing police power, may alter, modify or amend the same, in accordance with the demands of the general welfare. [28]

The Court held that "In line with the foregoing jurisprudence, respondents' license may be revoked or rescinded by executive action when the

27 G.R. No. 79538, October 18, 1990.

28 Republic v. Rosemoor Mining & Development Corp., G.R. No. 149927, March 30, 2004.

national interest so requires, because it is not a contract, property or a property right protected by the due process clause of the Constitution."[29]

Moreover, said the Court, "granting that respondents' license is valid, it can still be validly revoked by the State in the exercise of police power. The exercise of such power is consistent with *jura regalia*, which reserves to the State ownership of all natural resources. This Regalian doctrine is an exercise of its sovereign power as owner of lands of the public domain and of the patrimony of the nation, the mineral deposits of which are a valuable asset.[30]

In *Republic v. Pagadian City Timber Co., Inc.*[31] the Court held that even we assumed that an IFMA can be considered a contract or an agreement the alleged property rights that may have arisen from it are not absolute:

> All Filipino citizens are entitled, by right, to a balanced and healthful ecology as declared under Section 16, Article II of the Constitution. This right carries with it the correlative duty to refrain from impairing the environment, particularly our diminishing forest resources. To uphold and protect this right is an express policy of the State. The DENR is the instrumentality of the State mandated to actualize this policy. It is "the primary government agency responsible for the conservation, management, development and proper use of the country's environment and natural resources, including those in reservation and watershed areas, and lands of the public domain, as well as the licensing and regulation of all natural resources as may be provided for by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos".
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> Thus, private rights must yield when they come in conflict with this public policy and common interest. They must give way to the police or regulatory power of the State, in this case through the DENR, to ensure that the terms and conditions of existing laws, rules and regulations, and the IFMA itself are strictly and faithfully complied with.

In several cases, the Supreme Court upheld the superiority of police power over the non-impairment clause saying that "[t]he constitutional guaranty of non-impairment of contracts is limited by the exercise of the police power of the State, in the interest of public health, safety, morals and general welfare.[32] Mining leases or agreements granted by the State are subject to alterations through a reasonable exercise of the police power of the State.[33]

It is true that a Financial and Technical Assistance Agreement is protected by the non-impairment clause. But the protection is not as absolute. According to the Supreme Court:

> It is engrained in jurisprudence that the constitutional prohibition on the impairment of the obligation of contract does not prohibit every change in existing laws, and to fall within the prohibition, the change must not only impair the obligation of the existing contract, but the impairment must be substantial. Substantial impairment as conceived in relation to impairment of contracts has been explained in the case of *Clemons v. Nolting*, which stated that: a law which changes the terms of a legal contract between parties, either in the time or mode of performance, or imposes new conditions, or dispenses with those expressed, or authorizes for its satisfaction something different from that provided in its terms, is law which impairs the obligation of a contract and is therefore null and void.[34]

Clearly, a law cannot interpret the Constitution to apply the non-impairment clause to every change to the contract. Section 21 of House Bill No. 5367 does exactly that: it makes existing agreements and contracts immune to all change. This is inconsistent with the Supreme Court's pronouncements because for the non-impairment clause to apply, the change has to be substantial.

29 Republic v. Rosemoor Mining & Development Corp., G.R. No. 149927, March 30, 2004.

30 Republic v. Rosemoor Mining & Development Corp., G.R. No. 149927, March 30, 2004.

31 G.R. No. 159308, September 16, 2008.

32 United BF Homeowners' Ass'n, Inc. v. The (Municipal) City Mayor, Parañaque City, G.R. No. 141010, February 7, 2007.

33 Miners Ass'n. of the Phil., Inc. v. Factoran, Jr., G.R. No. 98332, January 16, 1995.

34 Lepanto Consolidated Mining Co. v. WMC Resources Int'l. Pty. Ltd., G.R. No. 162331, November 20, 2006.

In any case, as the cited cases show, a contract is always subject to the police power of the State.

5. Comments and Conclusion

Since the adoption of the 1987 Constitution, Congress has been dutifully churning out laws to strengthen local government autonomy. House Bill No. 5367 is the first measure that threatens to reverse these gains. In a single stroke this bill will expel local officials from mining activities, depriving it of both regulatory powers and the power to tax and levy fees. It seeks to protect existing mining contracts from amendment contrary to the pronouncements of the Supreme Court.

It is true that House Bill No. 5367 provides local governments hosting mining operations will have a share in the mining companies' revenues. However, the Constitution already mandates that local governments receive their shares; there is no need to chip away at the gains of local autonomy.

A few weeks ago, the Supreme Court in *Paje v. Casiño*, (G.R. No. 207257), held that there is no need for the Subic Bay Metropolitan Authority to secure the approval of the concerned *sanggunians* prior to the implementation of projects within the Subic Special Economic Zone. The Aquino Administration is taking this a step further with House Bill No. 5367 to exclude mining areas from the ambit of local autonomy.

House Bill No. 5367 poses too many risks to the environment, the health of host communities, and to the cause of local autonomy. If passed, local governments and host communities will end up where they were during the Marcos dictatorship, voiceless and helpless to raise objections to the national government's drive to extract recourses from their territories.