

A Vehicle in Administrative Justice Reform

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A. Overview

In a study conducted by the Asian Development Bank (ADB) on the investment climates in East and Southeast Asia, the Philippines ranked 65th of 66 countries in terms of business cost corruption. It described the Philippines as a soft state, meaning it has all the pertinent laws but does not have the political will to enforce them. In terms of foreign direct investments, the Philippines is one of the lowest in the region, only slightly better than Sri Lanka, Bangladesh, India and Indonesia. The only saving grace of the country is that it ranked high along with China and Thailand in terms of fixed communication line and mobile phones.¹ Cited as causes of this negative image of the country are:

- enforceability of legal rights
- quality of economic management, level of corruption
- independence of the judiciary and quality of legal system, and
- quality of accounting standards.

ADB's observations of the Philippine economy are not isolated. Other studies, e.g., the 2003 IMD World Competitiveness Yearbook, demonstrated the seriousness of the problems noting that the Philippines slipped by four points in world ranking from number 18 last year to number 22 while apparently Malaysia and Thailand went up. Cited as the cause thereof is regulatory instability or regulatory inconsistency.²

Early this year, CalPERS (California Public Employees Retirement Services) de-listed the Philippines from its list of its potential stock investment venues.³ Cited as grounds for the de-listing were those

¹ "RP investment climate 1 of worst in SEA - ADB" The Philippine Daily Star, 11 August 2003, p. B-1

² "Soft state dims investment climate" The Philippine Daily Star, 11 August 2003, pp. B-1, B-4

³ "SEC protest removal of RP from CalPERS' list", The Philippine Daily Star, 17 February 2003, p. B-4);

contained in the report of CalPERS' investment advisor, Wilshire Consulting, that the Philippines failed to get a passing score because of:

- political instability
- poor liquidity and volatility of its stock market, and
- poor pace of reforms in four market areas: openness in capital markets, market regulation, legal protection and investment protection.

While the investments of CalPERS in the Philippines run to US\$15.7 million out of its US\$1 billion investment portfolio for the emerging markets, the Department of Finance noted that the issue is not a matter of actual dollars per se, but the signal that the de-listing of the Philippines would send to the rest of the investment community. Understandably, other investors look to CalPERS' investment decisions for cues on how to move in the market.⁴

This negative investment climate may be understood in a number of major infrastructure projects in the Philippines which generated mixed signals in the international investment market. Among these projects are the Philippine International Airport Terminal 3 and the power projects with the independent power producers.

B. Philippine International Airport Terminal 3 Project

The cases that involved the Ninoy Aquino International Airport 3 (NAIA 3)⁵ could very well demonstrate the factors ascribing weaknesses in the Philippine economy, more specifically on: enforceability of legal rights, quality of economic management, level of corruption, independence of the judiciary, and quality of legal system. While recognizing that one of the main impetus for the enactment of the BOT Law is the lack of government funds to construct the infrastructure and development projects necessary for economic growth and development, and that private sector resources are being tapped in order to finance these

⁴ "CalPERS pulls out of Asean; RP fate hangs" The Philippine Star, 3 April 2003, p. B-6.

⁵ Demostheness P. agan, et.al. vs. Philippine International Air Terminals Co., Inc, et., G.R. No. 155001, 5 May 2003; Salacnib F. Bateria, et. al. vs. Philippine International Air Terminals Co., Inc., G.R. No. 155661, 5 May 2003; Ceferino C. Lopez, et. al., vs. Philippine International Air Terminals Co., Inc., G.R. G.R. No. 155661. May 5, 2003

projects⁶, the Supreme Court nevertheless struck down the contract for NAIA 3 as null and void; thus -

"In sum, this Court rules that in view of the absence of the requisite financial capacity of the Paircargo Consortium, predecessor of respondent PIATCO, the award by the PBAC of the contract for the construction, operation and maintenance of the NAIA IPT III is null and void. Further, considering that the 1997 Concession Agreement contains material and substantial amendments, which amendments had the effect of converting the 1997 Concession Agreement into an entirely different agreement from the contract bidden upon, the 1997 Concession Agreement is similarly null and void for being contrary to public policy. The provisions under Sections 4.04(b) and (c) in relation to Section 1.06 of the 1997 Concession Agreement and Section 4.04(c) in relation to Section 1.06 of the ARCA, which constitute a direct government guarantee expressly prohibited by, among others, the BOT Law and its Implementing Rules and Regulations are also null and void. The Supplements, being accessory contracts to the ARCA, are likewise null and void.

WHEREFORE, the 1997 Concession Agreement, the Amended and Restated Concession Agreement and the Supplements thereto are set aside for being null and void."

A reading of the Supreme Court's discussion will show that the embarrassment that the Philippines is now facing before the international investment market could have been avoided had the pertinent law been observed. As stated, the NAIA 3 project was pursued as an unsolicited

⁶ Section 1 of the BOT Law, as amended, provides:

"SEC. 1. *Declaration of Policy.* It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government. Such incentives, aside from climate of minimum government regulations and procedures and specific government undertakings in support of the private sector."

proposal.⁷ One of the requirements of the law in the pursuit of an infrastructure project, via the unsolicited proposal route, is that the same should involve a new concept or technology and/or not part of the list of priority projects of Government. However, as noted in the Court's discussion, the NAIA 3 project had been in the drawing board of Government as early as 1989; thus -

"In August 1989, the DOTC engaged the services of Aeroport de Paris (ADP) to conduct a comprehensive study of the Ninoy Aquino International Airport (NAIA) and determine whether the present airport can cope with the traffic development up to the year 2010. The study consisted of two parts: first, traffic forecasts, capacity of existing facilities, NAIA future requirements, proposed master plans and development plans; and second, presentation of the preliminary design of the passenger terminal building. The ADP submitted a Draft Final Report to the DOTC in December 1989."

In December 1989, the DOTC had already the final report for the NAIA 3 project. It stands to reason that in the context of the Build-Operate-Law (R.A. No. 6957, as amended, the BOT Law) was a priority project of Government.⁸ Being included in the Government's priority

⁷ Section 4-A of the BOT Law, as amended, provides

"SEC. 4-A. *Unsolicited Proposals.* - Unsolicited proposals for projects may be accepted by any government agency or local government unit on a negotiated basis: *Provided,* That, all the following conditions are met: (1) such projects involve a new concept or technology and/or not part of the list of priority projects, (2) no direct government guarantee, subsidy or equity required, and (3) the government agency or local government unit has invited by publication, for three consecutive weeks, in a newspaper of general application, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days; *Provided, further,* That in the event another proponent submits a lower price proposal, the original proponent shall have the right to match that price within thirty (30) working days.

⁸ Section 4 of the BOT Law provides:

"SEC. 4. - *Priority Projects.* - All concerned government agencies, including government-owned and -controlled corporations and local government units, shall include in their development programs those priority projects that may be financed, constructed, operated and maintained by the private sector, under the provisions of this Act. It shall be the duty of all concerned government agencies to give wide publicity to all projects eligible for financing under this Act, including publication in national and,

projects, the NAIA 3 could have been pursued through the regular bidding process, that is, issuance of invitation through publication in newspapers of general circulation, conduct of pre-qualification, issuance of tender documents, evaluation of technical proposals, evaluation of financial proposal, award of contract, and governmental approvals, all upon such terms that the Government may impose or require.⁹ On the other hand, under the unsolicited proposal route the terms of reference for purposes of the comparative/competitive proposals are to a greater extent based on the proposal of the original proponent.¹⁰

Be that as it may, the lack of financial qualification of the Paircargo Consortium (composed of People's Air Cargo and Warehousing Co., Inc., Phil. Air and Grounds Services, Inc., and Security Bank Corp. could have been threshed during the pre-qualification stage. Three items are to be evaluated during the pre-qualification stage, namely - legal requirements, experience or track record, and financial requirements.¹¹ On the matter of the evaluation of Paircargo's pre-qualifications submission, the Supreme Court observed the process therefor, thus -

"On September 20, 1996, the consortium composed of People's Air Cargo and Warehousing Co., Inc. (Paircargo), Phil. Air and Grounds Services, Inc. (PAGS) and Security Bank Corp. (Security Bank) (collectively, Paircargo Consortium) submitted their competitive proposal to the PBAC. On September 23, 1996, the PBAC opened the first envelope containing the prequalification documents of the Paircargo Consortium. On the following day, September 24, 1996, the PBAC prequalified the Paircargo Consortium."

Considering the peculiarities of infrastructure projects, the BOT Law IRR allocates 30 days at most for purposes of the evaluation of the

where applicable, international newspapers of general circulation once every six (6) months and official notification of project proponents registered with them.

⁹ The processing time would be approximately 326 days, 30 days of which for evaluation of the pre-qualification requirements

¹⁰ Section 10.9, BOT Law Implementing Rules and Regulations, as amended.

¹¹ Section 5.4, *ibid*

pre-qualification requirements. In the case of the evaluation of Paircargo's pre-qualification submissions, it took only a day with 23 September 1996 as the opening of its first envelope and the decision for Paircargo's pre-qualification made on 24 September 1996.

More importantly, confidentiality is a norm in bid evaluation. The spontaneity of the subsequent actions of AEDC would suggest a breach in confidentiality as shown by the particulars of its protest/reservation of 26 September 1996 containing specifics that only the PBAC would supposedly have access to; thus -

"On September 26, 1996, AEDC informed the PBAC in writing of its reservations as regards the Paircargo Consortium, which include:

- a. The lack of corporate approvals and financial capability of PAIRCARGO;
- b. The lack of corporate approvals and financial capability of PAGS;
- c. The prohibition imposed by RA 337, as amended (the General Banking Act) on the amount that Security Bank could legally invest in the project;
- d. The inclusion of Siemens as a contractor of the PAIRCARGO Joint Venture, for prequalification purposes; and
- e. The appointment of Lufthansa as the facility operator, in view of the Philippine requirement in the operation of a public utility."

The assignment of defects in Paircargo's pre-qualification requirements notwithstanding the PBAC dismissed AEDC's protests and ruled on Paircargo's meeting the criteria; thus -

The PBAC gave its reply on October 2, 1996, informing AEDC that it had considered the issues raised by

the latter, and that based on the documents submitted by Paircargo and the established prequalification criteria, the PBAC had found that the challenger, Paircargo, had prequalified to undertake the project. The Secretary of the DOTC approved the finding of the PBAC.

The PBAC then proceeded with the opening of the second envelope of the Paircargo Consortium which contained its Technical Proposal.

On October 3, 1996, AEDC reiterated its objections, particularly with respect to Paircargo's financial capability, in view of the restrictions imposed by Section 21-B of the General Banking Act and Sections 1380 and 1381 of the Manual Regulations for Banks and Other Financial Intermediaries. On October 7, 1996, AEDC again manifested its objections and requested that it be furnished with excerpts of the PBAC meeting and the accompanying technical evaluation report where each of the issues they raised were addressed."

Hindsight may say that the breach of confidentiality was destined to happen; for its absence may have perpetuated an anomaly, to say the least. But from the perspective of foreign investors, such pernicious practice does not provide a level playing field.

On the other hand, could it be said that Asia's Emerging Dragon Corp. (AEDC) came with clean hands? The Supreme Court observed; thus -

"Some time in 1993, six business leaders consisting of John Gokongwei, Andrew Gotianun, Henry Sy, Sr., Lucio Tan, George Ty and Alfonso Yuchengco met with then President Fidel V. Ramos to explore the possibility of investing in the construction and operation of a new international airport terminal. To signify their commitment to pursue the project, they formed the Asia's Emerging Dragon Corp. (AEDC) which was registered with the Securities and Exchange Commission (SEC) on September 15, 1993.

On October 5, 1994, AEDC submitted an unsolicited proposal to the Government through the DOTC/MIAA for the development of NAIA International Passenger Terminal III (NAIA IPT III) under a build-operate-and-transfer arrangement pursuant to RA 6957 as amended by RA 7718 (BOT Law)"

Recalling that as early as 1989 the Government had already conceived an additional international airport terminal by commissioning Aeroport de Paris to conduct a comprehensive study of the Ninoy Aquino International Airport and determine whether the present airport can cope with the traffic development up to the year 2010. Thus, when AEDC signified their intention for the NAIA 3 project the literature on the subject was already in the market place. Moreover, considering the intricacy of the law on unsolicited proposal, one may say that AEDC would have an edge over other proponents because the terms of reference for of the Swiss challenge would be based on its original proposal. AEDC should have all the reasons to bag NAIA 3. But, the Paircargo Consortium succeeded in pulling off the rug from under its feet.

The victory of Paircargo was pyrrhic - so costly for all parties. In a move to avert an impending embarrassment the Supreme Court directed the parties to exhaust avenues for negotiation and arbitration. PIATCO hailed the Government to arbitrate the matter before the International Court of Arbitration - a proposition which the Government opposed by raising the issue on jurisdiction.¹² It appears that this stance of the Government was consistent with a pronouncement of President Arroyo. The observation of the Supreme Court that -

"During the pendency of the case before this Court, President Gloria Macapagal Arroyo, on November 29, 2002, in her speech at the 2002 Golden Shell Export Awards at Malacañang Palace, stated that she will not "honor (PIATCO) contracts which the Executive Branch's legal offices have concluded (as) null and void."

¹² "Cheng Family not selling its controlling PIATCO shares" Manila Bulletin, 30 March 2003, p. B-6.

is quite disturbing vis-à-vis the doctrine of separation of powers. Such statement could make foreign investors uncomfortable. Apparently, this executive pronouncement could give a semblance of credence to the observation on the lack of independence of the judiciary.

It has been argued by some quarters that the fact that PIATCO was able to undertake and almost complete the work should be a reason enough to dispel the findings of its being financially not qualified to undertake the NAIA 3 project. Would it be a case of *fait accompli* such that PIATCO's lack of financial qualification should be put to rest? The Supreme Court observed; thus -

6. Basis of Pre-qualification

The basis for the pre-qualification shall be on the compliance of the proponent to the minimum technical and financial requirements provided in the Bid Documents and in the IRR of the BOT Law, R.A. No. 6957, as amended by R.A. 7718.

The minimum amount of equity to which the proponent's financial capability will be based shall be thirty percent (30%) of the project cost instead of the twenty percent (20%) specified in Section 3.6.4 of the Bid Documents. This is to correlate with the required debt-to-equity ratio of 70:30 in Section 2.01a of the draft concession agreement. The debt portion of the project financing should not exceed 70% of the actual project cost.

Accordingly, based on the above provisions of law, the Paircargo Consortium or any challenger to the unsolicited proposal of AEDC has to show that it possesses the requisite financial capability to undertake the project in the minimum amount of 30% of the project cost through (i) proof of the ability to provide a minimum amount of equity to the project, and (ii) a letter testimonial from reputable banks attesting that the project proponent or members of the consortium are banking with them, that they are in good financial standing, and that they have adequate resources.

As the minimum project cost was estimated to be US\$350,000,000.00 or roughly P9,183,650,000.00,[25] the Paircargo Consortium had to show to the satisfaction of the PBAC that it had the ability to provide the minimum equity for the project in the amount of at least P2,755,095,000.00.

Paircargo's Audited Financial Statements as of 1993 and 1994 indicated that it had a net worth of P2,783,592.00 and P3,123,515.00 respectively.[26] PAGS' Audited Financial Statements as of 1995 indicate that it has approximately P26,735,700.00 to invest as its equity for the project.[27] Security Bank's Audited Financial Statements as of 1995 show that it has a net worth equivalent to its capital funds in the amount of P3,523,504,377.00.[28]

We agree with public respondents that with respect to Security Bank, the entire amount of its net worth could not be invested in a single undertaking or enterprise, whether allied or non-allied in accordance with the provisions of R.A. No. 337, as amended or the General Banking Act:

Sec. 21-B. The provisions in this or in any other Act to the contrary notwithstanding, the Monetary Board, whenever it shall deem appropriate and necessary to further national development objectives or support national priority projects, may authorize a commercial bank, a bank authorized to provide commercial banking services, as well as a government-owned and controlled bank, to operate under an expanded commercial banking authority and by virtue thereof exercise, in addition to powers authorized for commercial banks, the powers of an Investment House as provided in Presidential Decree No. 129, invest in the equity of a non-allied undertaking, or own a majority or all of the equity in a financial intermediary other than a commercial bank or a bank authorized to provide commercial banking services: Provided, That (a) the total investment in equities shall not exceed fifty percent (50%) of the

net worth of the bank; (b) the equity investment in any one enterprise whether allied or non-allied shall not exceed fifteen percent (15%) of the net worth of the bank; (c) the equity investment of the bank, or of its wholly or majority-owned subsidiary, in a single non-allied undertaking shall not exceed thirty-five percent (35%) of the total equity in the enterprise nor shall it exceed thirty-five percent (35%) of the voting stock in that enterprise; and (d) the equity investment in other banks shall be deducted from the investing bank's net worth for purposes of computing the prescribed ratio of net worth to risk assets.

Further, the 1993 Manual of Regulations for Banks provides:

SECTION X383. Other Limitations and Restrictions. — The following limitations and restrictions shall also apply regarding equity investments of banks.

- a. In any single enterprise. — The equity investments of banks in any single enterprise shall not exceed at any time fifteen percent (15%) of the net worth of the investing bank as defined in Sec. X106 and Subsec. X121.5.

Thus, the maximum amount that Security Bank could validly invest in the Paircargo Consortium is only P528,525,656.55, representing 15% of its entire net worth. The total net worth therefore of the Paircargo Consortium, after considering the maximum amounts that may be validly invested by each of its members is P558,384,871.55 or only 6.08% of the project cost,[29] an amount substantially less than the prescribed minimum equity investment required for the project in the amount of P2,755,095,000.00 or 30% of the project cost.

The purpose of pre-qualification in any public bidding is to determine, at the earliest opportunity, the ability of the bidder to undertake the project. Thus, with respect to the bidder's financial capacity at the pre-qualification stage, the law requires the government agency to examine and determine the ability of the bidder to fund the entire cost of the project by considering the maximum amounts that each bidder may invest in the project at the time of pre-qualification."

Apparently, it was a lapse on the part of the PBAC to miss the significance of Section 21-B of the General Banking Act - an oversight that could have been avoided had the PBAC not rushed the evaluation of PIATCO's prequalification submissions vis-à-vis the legal, technical and financial requirements of NAIA 3 project all in a period one day. This lapse approximates the issue raised by ADB on the quality of economic management, level of corruption, and quality of the legal system.

Are there winners in the PIATCO fiasco? Section 12.19 of the BOT Law IRR provides:

"c. In the event that the project/contract is revoked, cancelled, or terminated by the Government through no fault of the project proponent or by mutual agreement, in which case the Government shall compensate the said project proponent for its actual expenses incurred in the project plus a reasonable rate of return thereon not exceeding that stated in the contract as of the date of termination, x x x."

The significance of Section 12.18 (c) of the BOT Law IRR is that what the Government would have paid to PIATCO over 25 years will be accelerated, and the measure therefor will be the "actual expenses" plus "reasonable rate of return" it incurred for NAIA 3. The "actual expenses" could be easily resolved in the pending arbitration before the International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC). It is the determination of "reasonable rate of return" that could raise some points of difference in arriving at a figure of what that "reasonable rate of return" overtime be. The more serious question is - does the Government have the money to pay for the "actual expenses" estimated at

a minimum cost of US\$350,000,000.00 or roughly P9,183,650,000.00 and "reasonable rate of return" now?

The Supreme Court's decision nullifying the 1997 Concession Agreement, the Amended and Restated Concession Agreement and the Supplements thereto raised more questions than answers. Foremost of which is the capability of the Government to pay the "actual expenses" and "reasonable rate of return" to PIATCO now. Even assuming that the Government has the financial resources for that purpose, its assumption thereof will not be in keeping with the objective of the BOT Law. Another question is - could AEDC takeover NAIA 3? The BOT Law prescribes public bidding. Can it be negotiated with AEDC? The BOT Law allows negotiation after failure of public bidding.¹³ But more than these financial repercussions to the Government is the perception that the Philippines is ranked 65th of 66 countries in terms of business cost corruption.

Such perception is magnified by the latest development in the NAIA 3 project that as of 17 September 2003 Fraport AG Frankfurt Airport Services Worldwide lodged a complaint against the Republic of the Philippines in the International Center for Settlement of Investment Dispute (ICSID)¹⁴ alleging extortion by a GMA government official and a

¹³ Section 9.1, BOT Law IRR.

¹⁴ The International Centre for Settlement of International Dispute was established by the World Bank under the 1965 Convention for the Settlement of Investment Disputes between States and nationals of other States. Its main purpose is to facilitate the settlement of investment disputes between governments and foreign investors. Under the terms of the ICSID Convention the dispute must arise directly out of an investment. ICSID may acquire jurisdiction by consent, that is, by agreement of the parties, by a provision in the national legislation of the host State, or by treaty between the host State and the investor's State. The Convention stipulates "exclusive remedy rule", meaning, once consent to ICSID arbitration was given, a party may no longer resort to another remedy.

ICSID arbitration is also insulated from interference by domestic courts as it is insulated from political interference, that is, once consent to jurisdiction was given, the Investor's State of nationality loses its right to diplomatic protection against the host State.

An award is final and binding and not subject to any review extraneous to the Convention. Compliance with ICSID awards is facilitated by the strong institutional link of ICSID with the World Bank. Most States would find it unwise to jeopardize their good standing with Bank through compliance with an ICSID award. Awards are to be recognized and enforced in all States parties like final judgments of the local domestic courts.

private counsel of the President who allegedly demanded millions of dollars from Fraport AG.¹⁵ The complaint came at a time when the Philippines is subject of negative findings. It could once more make the Philippines be a whipping post and her economy pilloried before the international community.¹⁶

What can possibly happen in the ICSID? What is the effect of the arbitration that PIATCO lodged with the International Court of Arbitration? Two scenarios may be considered - firstly, the issue of ICSID jurisdiction could be raised, and secondly the ICA arbitration may continue. In whichever scenario, the fact remains that PIATCO incurred costs in undertaking the works for the NAIA-3; and that under the BOT

Settlement of disputes under the Convention offers a high degree of effectiveness and security to foreign investors.

¹⁵ Max V. Soliven "Get Terminal-3 going by resolving the Piatco 'payment' mess" *The Philippine Star*, 16 October 2003, pp. 10, 11.

¹⁶ "Come clean on NAIA-3, editorial *the Philippine Star*, 16 October 2003, p. 10:

"Unless the government comes clean on the controversy over the Ninoy Aquino International Airport's Terminal 3, the issue will hound President Arroyo until the elections in 2004.

There are allegations of corruption that have been floating, for several months, now bolstered by a document submitted by the German investor in NAIA-3, Fraport AG, to World Bank, which is arbitrating the dispute. Fraport official claimed the President's personal lawyer, Arthur "Pancho" Villaraza, had demanded millions of dollars so the company could dump its Philippine partner in favor of groups close to Malacanang.

The story is not new; Villaraza and his law firm have previously denied similar allegations. This time they said it was Fraport that had sought the law firm's help but got turned down. The government did not seem too worried; officials said yesterday negotiations with Fraport for the operation of NAIA-3 would continue.

In this town where people tend to believe the worst accusations, however, Malacanang should get this controversy out of the way quickly and decisively. Anyone guilty of wrongdoing should be punished. Perceptions of corruption have hounded President Arroyo's husband and her administration in recent months, and now there is a foreign party tending to corroborate the allegations. The President should expect her political enemies to jump on this case.

This mess will also have to be cleared up as soon as possible because the flap over NAIA-3 has dampened the investment climate in this country. Sure, flawed contracts have to be nullified or corrected. But Fraport had bypassed other countries and put its faith and money in the Philippines, only to find itself with a lemon of an investment, the rules changing from one administration to the next, unable to extricate itself from the mess. Unless the government plays its cards right, this case can put a chill for years to come.

Law the Government is under obligation to compensate PIATCO for its actual expenses incurred in the project plus a reasonable rate of return thereon.

There are a lot more of questions than answers to the fiasco. One thing seems to be certain though - that ADB's study ranking the Philippines at the lower rung in terms of foreign investment seems to be unfolding anew. May the decision of the Supreme Court be held in a state of suspended animation such that the parties may revisit their respective interests and hopefully resolve their differences by negotiation or in other friendly fashion so as prevent further erosion of foreign investors' confidence to the country? The question calls for legal proposition that legal practitioners may venture into.

C. Independent Power Producers

Another set of infrastructure contracts that have far-reaching effects to many sectors in the country are the contracts with the independent power producers (IPPs).¹⁷ Many sectors, including the Government, characterized these contracts as onerous or disadvantageous. Often times, these IPP contracts are associated with the purchased power adjustments, now given a new nomenclature as generation rate adjustment mechanism. For its part, Congress entertained the *vox populi* with a provision in the Electric Power Industry Reform Act of 2001, (R.A. No. 9136, the EPIRA) the necessity of review of said contracts to determine whether or not such were onerous and disadvantageous.¹⁸

¹⁷ "Gov't may scrap most IPP deals due to onerous terms". The Philippine Star, 24 March 2003, p. B-2.

¹⁸ Section 68 of R.A. No. 9136 provides:

"Sec. 68. *Review of IPP Contracts.* - An inter-agency committee chaired by the Secretary of Finance, with the Secretary of the Department of Justice and the Director General of National Economic and Development Authority as members thereof is hereby created upon the effectivity of this Act. The Committee shall immediately undertake a thorough review of all IPP contracts. In cases where such contracts are found to have provisions which are grossly disadvantageous, or onerous to the Government, the Committee shall cause the appropriate government agency to file an action under the arbitration clauses provided in said contracts or initiate any appropriate action under Philippine laws. The PSALM Corporation shall diligently seek to reduce stranded costs, if any.

But first, an understanding of the setting may be well. The IPPs represent a new corps of investors in the electric industry - emerging at the time when the economy needed power the most. Their entry into the Philippine economy was by virtue of law - initially under Executive No. 215 and subsequently under R.A. No. 6957, as amended by R.A. No. 7718 - under various contractual schemes with the build-operate-transfer as most favored scheme on the part of the IPPs. The much maligned accusations against the proliferation of the IPPs should be understood in the context of times, that is, the period of their emergence in the early 1990s was in crisis situation wherein the Government practically sounded all sectors just so the crisis could be abated.¹⁹

It may be recalled as well that the early 1990s was characterized with economic activities geared to enable the Philippines attain the status of a tiger economy. The economic planners saw the need for additional capacity in the grid. To encourage foreign investors incentives were made available to them, and the Government assumed greater risk such as the take-or-pay or minimum off-take arrangement. The bubble burst in 1997 with the Asian financial crisis. The anticipated industries for the economy did not materialize, and the Government is now saddled with payment of obligations as a consequence of the take-or-pay arrangement among others. But obligations with the investors must be honored, the source was through adjustment in the tariff - the purchased power adjustments which in turn were passed on to the consumers.

To address the situation the EPIRA came about. Earlier, the Interagency Committee created pursuant to Section 68 of the EPIRA indicated in a report to the President that five (5) IPP contracts had legal and financial issues, eleven (11) with financial issues, two (2) with remedial policy issues, eleven (11) with remedial financial issues, and six (6) without issues. Whether or not the IPP contracts are onerous or disadvantageous to the Government may be gauged by the circumstance

¹⁹ On 2 April 1993, Congress enacted R.A. No. 7648, the Electric Power Crisis Act of 1993. Section 2 thereof reads -

"SEC. 2. *Declaration of Policy.* It is hereby declared the policy of the State to adopt adequate and effective measures to address the electric power crisis that has disrupted the country's economic and social life and assumed the nature and magnitude of a public calamity.

prevailing on the execution of those contracts. But the position taken that the IPP contracts are onerous or disadvantageous to the Government created negative impacts to foreign investors. Complicating this negative image is a perception that there were attempts in Congress to write off appropriation intended for payment to a certain IPP whose contract was found to be onerous or disadvantageous to the Government.

Apparently, the negotiations with the IPPs yielded positive results bringing the costs of electricity down at same time preserving the sanctity of contracts. Reportedly, the Government realized substantial net savings of \$832 in net present value²⁰. It is also hoped that further trimming of the costs of IPPs will reduce the stranded costs.²¹

Another area that seems to deliver an ambivalent message to foreign investors is the matter of treatment of taxes. Most of the IPP contracts contained a provision for the enjoyment of certain tax incentives. Most of the projects covered by the IPP contracts were classified as pioneering industries, and thus entitled to certain tax incentives, such as, a six-year income tax holiday. Apparently, under a ruling of Bureau of Internal Revenue the IPPs were made to pay taxes from income generated by them during the rehabilitation of the power plants or still in their pre-operation testing - a ruling that reportedly netted Php 500 million back taxes. In the midst of this climate of uncertainty, there is a proposal in Congress for a 12-year income tax holiday.²²

²⁰ "Napocor to wrap up new deals with IPPs", The Philippine Star, 1 October 2003, p. B-8.

²¹ Section 51 of the EPIRA empowers the Power Sector Assets and Liabilities management Corporation (PSALM) to:

- " (d) To calculate the amount of the stranded debts and stranded contract costs of NPC which shall form the basis for ERC in the determination of the universal charge;
- (e) To liquidate the NPC stranded costs, utilizing the proceeds from the sales and other property contributed to it, including the proceeds from the universal charge;"

"Stranded contract costs of NPC or distribution utility" refer to the excess of the contracted cost of electricity under eligible contracts over the actual selling price of the contracted energy output of such contracts in the market.

"Stranded debts of NPC" refer to any unpaid financial obligations of NPC which have not been liquidated by the proceeds from the sales and privatization of NPC assets."

"Universal Charge" refers to the charge, if any, imposed for the recovery of the stranded cost and other purposes pursuant to Section 34 hereof."

²² "12-year tax holiday perk dangled", Manila Bulletin, p. B-2.

Another issue that will have an impact on the projected reforms in the electric power industry is MERALCO's termination of the ten-year NPC-MERALCO contract for the supply of electricity. The contract called for MERALCO drawing a minimum of 3,600 MW from NPC over a ten-year period. This contract was an off-shoot of a conditionality in a loan which NPC obtained from the World Bank for the Leyte-Luzon interconnection project. The purpose of the condition was for NPC to have adequate revenue to, among others, service the loan. For a number of years NPC and MERALCO were drawn to the negotiating table to address their differences.

With the passage of the EPIRA, MERALCO read Section 67 thereof in its favor by terminating the contract.²³ In accordance with the dispute resolution clause thereof, NPC notified MERALCO for its intent to resort to arbitration.²⁴ NPC and MERALCO proceeded to resolve their differences through mediation which resulted into a settlement agreement between them with the following terms (a) MERALCO agreed to pay to NPC PhP27,515,000,000.00, and (b) NPC agreed to give credit to MERALCO PhP7,465,000,000.00 for the former's delay in the completion

²³ Section 67 of the EPIRA Reads:

"SEC. 67. *NPC Offer of Transition Supply Contracts.* - Within six (6) months from the effectivity of this Act, NPC shall file with the ERC for its approval a transition contract duly negotiated with the distribution utilities containing the terms and conditions of supply and a corresponding schedule of rates, consistent with the provisions hereof, including adjustments and/or indexation formulas which shall apply to the term of such contracts. x x x."

²⁴ "Napocor eyes arbitration". The Philippine Star, p. B-3

"The National Power Corp. (Napocor) is considering going into arbitration if the Manila Electric Co. (Meralco) will insist on its counterclaim amounting to P8.5 billion.

"We may consider going into arbitration and forego the ongoing mediation," a Napocor official, who requested anonymity, said. Meralco and Napocor are in the middle of mediation process. The mediators selected by both firms are former Ambassador Sedfrey Ordonez and Phinma Group's Antonio del Rosario.

The official said that the Napocor's move is an offshoot of Meralco's decision to collect some P8.5 billion as payment for alleged violations in their 10-year power supply agreement.

The state-owned power firm was irked by Meralco's move saying the demand letter sent by country's largest power distribution firm is baseless

of the transmission facilities as well as for energy corresponding to NPC's sales to directly connected customers located in the latter's franchise area. This settlement agreement is now pending consideration by the Energy Regulatory Commission. And why would MERALCO want to terminate its NPC's supply contract. The answer is - it has supply contracts with "sister" companies engaged in power generation. And another question is - must the public pay for the breach that MERALCO did on its contract with NPC? And still another question - must Government give credit to MERALCO for the sale of energy to the directly-connected customers of NPC?

D. Reforms in Government Procurement

Addressing the problems on the perceived corruption in government, on 10 January 2004 the Government Procurement Act (R.A. No. 9184) was approved. Its governing principles are:

- Transparency in the procurement process and in the implementation of procurement contracts,
- Competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in public bidding,
- Streamlined procurement process which shall be uniformly applied to all government procurement, simple and adaptable to advances in modern technology,
- System of accountability of government officials who are directly or indirectly involved in the procurement and contract implementation processes, and
- Public monitoring of the procurement process, award of contract, and contract implementation to comply strictly with the specifications.

The reforms also instituted the principles of the Lowest Calculated Responsive Bid with respect to procurement contracts, and to the Highest Rated Responsive Bid with respect to consultancy contracts as the bases for contract award.

Article XVIII thereof provides the mechanics for dispute resolution.²⁵ The advertence to the Construction Industry Arbitration (CIAC) in Section 59 thereof is anchored on Section 4 of Executive Order No. 1008.²⁶ The guiding principle for purposes of the CIAC acquiring jurisdiction over the dispute is the voluntary submission by the parties in an infrastructure contract.

Moreover, under Section 76 thereof earlier laws bearing on government procurement of goods, services, civil works, and the like were repealed. Among these repealed laws was P.D. No. 1594 - the principal law for government-funded infrastructure projects. Not included in the enumeration of repealed laws is R.A. No. 6957, as amended by R.A. No. 7718 (the Build-Operate-and-Transfer (BOT) Law).

E. Private Sector Participation in Infrastructure Industry

Echoing a policy pronouncement in early statutes on partnership between the Government and the private sector in national development, the 1987 Constitution emphasized such partnership.²⁷ Starting with the

²⁵ Article XVIII (SETTLEMENT OF DISPUTES) provides:

"SEC. 59. *Arbitration.* Any and all disputes arising from the implementation of a contract covered by this Act shall be submitted to arbitration according to the provisions of the Republic Act No. 876, otherwise known as the "Arbitration Law": *Provided, however,* That, disputes that are within the competence of the Construction Industry Arbitration Commission to resolve shall be referred thereto. The process of arbitration shall be incorporated as a provision in the contract that will be executed pursuant to the provisions of this Act: *Provided,* That by mutual agreement, the parties may agree in writing to resort to alternative modes of dispute resolution.

SEC. 60. *Appeals.* - The arbitral award and any decision rendered in accordance with the foregoing section shall be appealable by way of a petition for review to the Court of Appeals. The petition shall raise pure questions of law and shall be governed by the Rules of Court.

²⁶ Section 4 of EO No. 1008 defines the jurisdiction of the CIAC; thus-

"The CIAC shall have original and exclusive jurisdiction over disputes arising from, or connected with contracts entered into by parties involved in construction industry in the Philippines, whether the disputes arises before or after the completion of the contract, or after the abandonment or breach thereof. These disputes may involve government or private contracts. For Board to acquire jurisdiction, the parties to a dispute must agree to submit the same to voluntary arbitration.

²⁷ Section 20, Article II of the Constitution provides:

concepts of build-operate-and-transfer (BOT) and build-and-transfer (BT) under R.A. No. 6957 (the BOT Law) on the development, construction, operation and maintenance of infrastructure facilities, such partnership has broadened into varied contractual arrangements. Under the amendments to the BOT Law, R.A. No. 7718 has provided more thresholds to private sector participation in the infrastructure program of Government.²⁸ These thresholds include - build-operate-and-transfer (BOT), build-and-transfer (BT), build-own-and-operate (BOO), build-lease-and-transfer (BLT), build-transfer-and-operate (BTO), contract-add-and-operate (CAO), develop-operate-and-transfer (DOT), rehabilitate-operate-and-transfer (ROT), rehabilitate-own-and-operate (ROO), and such other variants as may be approved by the President of the Philippines.²⁹

"The state recognizes the indispensable role of the private sector, encourages private enterprises, and provides incentives to needed investments."

²⁸ Section 1 of the BOT Law, as amended, provides:

"SEC. 1. *Declaration of Policy.* It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government. Such incentives, aside from climate of minimum government regulations and procedures and specific government undertakings is support of the private sector."

²⁹ Section 1.3 (c), Rule I, BOT Law Implementing Rules and Regulations sets forth the various contractual schemes:

Build-operate-and-transfer - A contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tools, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, the operating and maintenance expenses in the project. The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term which shall not exceed fifty (50) years: *Provided*, That in case an infrastructure or development facility whose operation requires a public utility franchise, the proponent must be Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos.

The build-operate-and-transfer shall include a supply-and-operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if in the interest of the Government so requires, operates the facility providing in the process technology transfer and training to Filipino nationals.

Like turnkey contracts under P.D. No. 1594, projects under the BOT law are generally implemented through public bidding.³⁰ The bidding

Build-and-transfer - contractual arrangement whereby the project proponent undertakes the financing and construction of a given infrastructure or development facility and after its completion turns it over to the government agency or local government unit concerned, which shall pay the proponent on an agreed schedule its total investments expended on the project, plus reasonable rate of return thereon. This arrangement may be employed in the construction of any infrastructure or development project, including critical facilities, for security and strategic reasons, must be operated directly by the Government.

Build-lease-and-transfer - A contractual arrangement whereby a project proponent is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the government agency or local government unit concerned on a lease arrangement for a fixed period after which ownership of the facility is automatically transferred to the government agency or local government unit concerned.

Build-transfer-and operate - A contractual arrangement whereby the private sector contracts out the building of an infrastructure facility to a private entity such that the contractor builds the facility on a turn-key basis, assuming cost overrun, delay and performance risks.

Once the facility is commissioned satisfactorily, title is transferred to the implementing agency. The private entity however, operates the facility on behalf of the implementing agency under an agreement.

Contract-add-operate - A contractual arrangement whereby the project proponent adds to an existing infrastructure facility which it is renting from the Government and operates the expanded project over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the project proponent

Develop-operate-and-transfer - A contractual arrangement whereby favorable conditions external to a new infrastructure project to be built by a project proponent are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus enjoy the same benefits the investment creates such as higher property or rent values.

Rehabilitate-operate-and-transfer - A contractual arrangement whereby an existing facility is turned over to the private sector to refurbish, operate and maintain for a franchise period, at the expiry of which the legal title to the facility is turned over to the Government. The term facility is also used to described the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.

Rehabilitate-own-and-operate - A contractual arrangement whereby an existing facility is turned over to the private sector to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity.

³⁰ Section 5, BOT Law, as amended

documents will include, among others, a draft contract, as well as such documents defining the specific government undertakings in support of the private sector.

Most of the contracts with the IPPs were bid out pursuant to the provisions of the BOT Law. However, during the period of the electric power crisis in the early 1990s, the procurement of these contracts was done through simplified bidding pursuant to the Electric Power Crisis Act of 1993 (R.A. No. 7648).

A hybrid of a negotiated-bid transaction is recognized under Section 4-A of the BOT Law, through the "unsolicited proposal" route.³¹ The build-rehabilitate-operate-and-transfer (BROT) contract for the Caliraya-Botocan-Kalayaan Hydroelectric Power Plants and the concession contract for the Ninoy Aquino International Airport Terminal 3 followed the unsolicited proposal route.

F. Dispute Resolution Clause

A typical IPP contract contains a dispute resolution clause that address contractual problems:

- before they arise,
- avoidance of a dispute scenario after problems supervene through discussion/negotiation, and
- through arbitration.

³¹ Section 4.-A of the BOT Law reads -

"SEC. 4-A *Unsolicited Proposals*. - Unsolicited proposal for projects may be accepted by any government agency or local government unit on a negotiated basis: *Provided*, That all of the following conditions are met: (1) such projects involve a new concept or technology and/or not part of the list of priority projects, (2) no direct government guarantee, subsidy or equity is required, and (3) the government agency or local government unit has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days; *Provided, further*, That in the event another proponent submits a lower price proposal, the original proponent shall have the right to match that price within thirty (30) working days.

A sample dispute resolution clause is presented below.

REGULAR MEETINGS. Throughout the term of this Agreement representatives of the parties shall meet regularly, at least twice a year, to discuss the progress of the Project and the operation of the Power Complex to ensure that the arrangements between the parties hereto proceed on mutually satisfactory basis.

AMICABLE SETTLEMENT. The parties hereto agree that in the event that there is any dispute or difference between them arising out of this Agreement or in the interpretation of the provisions hereof, they shall endeavor to meet together in an effort to resolve such dispute by discussion between them. Failing such resolution, the Chief Executives of CONTRACTOR and OWNER shall meet to resolve such dispute or difference and joint decision of such Chief Executives shall be binding upon the parties hereto.

ARBITRATION. (a) In the event that any dispute, difference or disagreement cannot be settled by mutual agreement, all such disputes, differences, and disagreements arising out or in connection with this Agreement shall be finally settled under then current rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the said rules. Any award by the arbitration tribunal shall be final and binding upon the parties and may be enforced by judgment by a competent court having jurisdiction in the premises.

- (b) The arbitration shall take place in Switzerland or in such other place as the parties may mutually agree upon.
- (c) The costs of the arbitration shall be shared equally between the parties.

In accordance with Section 1 of the BOT Law, as amended, the IPP contracts came up with a supplemental agreement, the Performance Undertaking, which defined government undertakings in support of the project. A sample stipulation in the Performance Undertaking reads-

"In order to facilitate these investment arrangements, we hereby confirm that the obligations of NAPOCOR under the AGREEMENT carry the full faith and credit of the Republic of the Philippines, and that the Republic of the Philippines will see to it that NAPOCOR will be able to discharge, at all times, such obligations as they fall due. Such obligations are hereby affirmed and guaranteed by the Republic of the Philippines."

And it contains an ADR mechanism; thus -

"Any dispute, controversy or claim arising out of or relating to this undertaking, or the breach of termination thereof or the failure to pay or the late payment of any sum due shall be settled by Arbitration in Sydney, Australia in accordance with the UNCITRAL Arbitration Rules in force at the date of this undertaking. The appointing authority shall be The Australian Commercial Disputes Centre, Sydney, the number of arbitrators shall be three and the language to be used in the arbitral proceedings shall be English. The parties exclude any right of application or appeal to any courts in connection with any question of law arising in the course of arbitration or with respect to any award made."

Among the issues that was raised with the respect to the Caliraya-Botocan-Kalayaan BROT contract is its eligibility for a government undertaking considering that the contract was awarded via the unsolicited proposal. This issue was resolved by an affirmative opinion of the Department of Justice.

Thus far, two IPP contracts have successfully undergone an ADR process. The 700 MW BOT contract for the Pagbilao Coal-fired Thermal Power Station, and the 18.25 MW BOO contract for the Ampohaw Mini Hydro Plant. The issue on the Pagbilao contract was the delay on the part of NPC to make available the transmission lines in time for the completion of the power station. For having completed the power station per agreed contractual milestone, Hopewell Energy International Ltd. would have been entitled to payment of fees by NPC, the absence of energy delivery notwithstanding. The amount involved was substantial and payable in US dollars. As the NPC did not have funds for the penalty, the 25-year cooperation period was extended by four years thereby enabling the ECA to have a 29-year term. The fees which the contractor will be receiving for the 4-year extended period will represent the penalty that NPC would have paid up front to Hopewell for NPC's delay in the construction of the transmission lines of the project. The issue was settled through negotiation.

On the other hand, the issue in the Ampohaw contract revolved on contract interpretation on the reckoning of the 88% of the effective grid rate. Per stipulation in the contract, the payment by NPC to Hydro Electric Development Corporation (HEDCOR) for energy delivered is 12% below the Luzon grid rate. As the contract was not precise on the measure of the Luzon grid rate, HEDCOR claimed that the 88% should be based on the basic rate plus the adjustments. On the other hand, NPC claimed that it should be based on the basic Luzon grid rate. After more than five years of failed negotiation, NPC and HEDCOR agreed to refer the dispute to the Energy Regulatory Board (ERB) for mediation. The ERB considered the definition of the Luzon grid rate as inclusive of the adjustments. The parties subsequently agreed to amend the power sale agreement in accordance with the findings of the ERB.

G. Civil Liability

The stipulation by parties for a settlement of disputes through arbitration or any alternative modes of dispute resolution notwithstanding, should there be a violation of the provisions of R.A. No. 9184 or R.A. No. 3019 a party to such violation will be liable for civil liability in case

of conviction.³² Below is a typical warranty against corruption clause in IPP contracts.

CONTRACTOR hereby warrants that neither it nor its representative has offered any government officer or EMPLOYER's official or employee any consideration or commission for this Agreement nor has it or its representative exerted or utilized any corrupt or unlawful influence to ensure or solicit this Agreement for any consideration or commission; that CONTRACTOR shall not subcontract any portion or portions of the scope of the works or services in this Agreement to any official or employee of EMPLOYER or to relatives within the third degree of consanguinity or affinity of EMPLOYER's officials who are directly or indirectly involved in contract award or project execution and that if any commission is being paid to a private person, CONTRACTOR shall disclose the name of the person and the amount being paid; and, that any violation of this warranty shall constitute a sufficient ground for the rescission or cancellation of this Agreement without prejudice to the filing of civil or criminal action under the Anti-Graft and Corrupt Practices Act and other applicable laws against CONTRACTOR or its representatives and EMPLOYER's officials and employees.

H. Proposed Administrative Justice Reform

³² Section 67 of R.A. No. 9184 provides:

"SEC. 67. *Civil Liability in Case of Conviction.* Without prejudice to administrative sanctions that may be imposed in proper cases, a conviction under this Act or Republic Act No. 3019 shall carry with it civil liability, which may either consist of restitution for the damage done or the forfeiture in favor of the government of any unwarranted benefit derived from the act or acts in question or both, at the discretion of the courts.

As observed above, one area that needs to be addressed in order to attract, maintain and sustain investors interest in the Philippines is the matter of settlement proficiency of claims/disputes in cross border transactions. For its part, the Department of Justice is presently soliciting comments from the various agencies of the Government on a proposed executive order on administrative justice reform.³³ Its essence focuses on the just and efficient resolution of civil claims, and its salient features include:

1. Adoption of guidelines to promote just and efficient government civil litigation which includes:
 - Pre-filing notice of a complaint
 - Settlement conferences
 - Exhaustion of the alternative dispute resolution methods, e.g., informal discussions, negotiations, mediation, and settlements
 - Streamlining and expediting the methods of discovery
 - Imposition of sanctions against the opposing counsel where appropriate
 - Improvement in the use of litigation resources
2. Creation of an ADR working group to be comprised of Cabinet Departments and other agencies with sufficient interest in ADR
3. Government pro bono and volunteer service
4. Adoption of principles in the enactment of legislation and formulation of regulations as well as system of agency review
5. Promotion of just and efficient administrative adjudication
 - Improvement of administrative adjudication to reduce delay in decision-making as well as the institutionalization of the use of ADR process prior to litigation

³³ See Attachment 1 for the text of the proposed Executive Order on Administrative Justice Reform.

- Review of administrative adjudicatory process to identify any type of bias on the part of decision makers
6. Disclaimer on non-creation of private rights
 7. Privileged information

It is ironical that despite the laws which prescribe ways and means of speedy resolution of disputes in government contracts, the decision-makers are somehow hesitant to decide on contractor's claims, the existence of merits notwithstanding. Almost always, they express apprehension of contrary views that the Office of Ombudsman or the Commission on Audit may take. Most of them would prefer a judicial action in the resolution of civil claims. Should such attitude persist then the reforms intended by R.A. No. 9184 or the proposed executive order will be defeated. Its consequence is that the Philippines will be less competitive in attracting foreign investments for its infrastructure projects.

It therefore behooves upon all concerned, including the legal practitioners, to make sure that the reforms intended to improve the image of the Philippines and to enable it to attract foreign investments into the country are observed and implemented. What is needed is the political will to implement the reforms.

Attachment 1

EXECUTIVE ORDER ON ADMINISTRATIVE JUSTICE REFORM

Whereas it has been determined necessary to improve access to justice for all persons who wish to avail themselves of administrative mechanisms to resolve disputes;

Whereas the facilitation of just and efficient resolution of civil claims involving the Philippine Government involves filing only of meritorious civil claims;

Whereas it is necessary to improve legislative and regulatory measures for the reduction of needless litigation;

Whereas there is a need to promote fair and prompt adjudication before administrative tribunals, while providing a model for similar reforms of litigation practices in the private sectors;

The following is hereby ordered by virtue of the authority vested in me as President, by the Constitution and the laws of the Republic of the Philippines.

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Executive agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the Philippine Government in court shall respect and adhere to the following guidelines during the conduct of litigation:

- (a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making an exhaustive effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its mediation/conciliation processes.
- (b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make exhaustive efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to the Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.
- (c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make exhaustive attempts to resolve a dispute expeditiously and amicably before proceeding to trial.
 - (1) Whenever feasible, claims should be resolved through informal discussions, negotiations, mediation, and settlements rather than through utilization of any formal proceeding. As an important initial approach, the benefits

of Alternative Dispute Resolution ("ADR") shall be explored and, litigation counsel shall recommend the use of appropriate ADR technique to the parties.

- (2) It is appropriate to use ADR techniques or processes to resolve claims of or against the Republic of the Philippines or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.
 - (3) To facilitate broader and effective use of informal and formal ADR methods, litigation counsel shall be formally trained and certified in ADR practice.
- (d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.
- (1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.
 - (2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute,

he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanction officers, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before the Courts of the Republic of the Philippines. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the Republic of the Philippines, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

- (4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and
- (5) reviewing and revising pleadings and other filings to ensure that the unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. ADR Working Group. As part of an effort to make the Philippine Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of disputes and issues in controversy involving the Republic of the Philippines, including the prevention and avoidance of disputes, each agency of the Executive Department shall establish a Dispute Resolution Office to a) promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques, and b) promote greater use of negotiated rulemaking.

- (a) An alternative Dispute Resolution (ADR) Working Group. Comprised of the Cabinet Departments and, as determined by the Presidential Adviser on Conflict resolution, such other agencies with sufficient interest in ADR shall be convened and is designated herewith as the interagency committee to facilitate and encourage agency use of alternative means of dispute resolution. The Working Group shall consist of representatives of the heads of all participating agencies, and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas, such as disputes involving personnel, procurement, and claims. The Working Group shall be convened by the Presidential Adviser on ADR. The Working Group shall facilitate, encourage, and provide coordination for agencies in such areas as:
 - (1) development of programs that employ alternative means of dispute resolution;
 - (2) development of rules on mediation and ADR processes;
 - (3) training and certification of ADR practitioners;

- (4) installation of an effective dispute resolution unit in each agency;
- (5) training of agency personnel to recognize when and how to use alternative means of dispute resolution;
- (6) development of procedures that permit agencies to obtain the services of neutrals on an expedited basis;
- (7) keeping records to ascertain the benefits of alternative means of dispute resolution; and
- (8) education and encouragement of the public to use ADR.

The Working Group shall also periodically advise the President on its activities.

This directive is for the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable by a party against the Republic of the Philippines, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 3. Government Pro Bono and Volunteer Service. All Executive agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline.

Sec. 4. Principles to enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Court System

- (a) General Duty to Review Legislation and Regulations. Each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

- (1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity;
 - (2) The agency's proposed legislation and regulations shall be written to minimize litigation; and
 - (3) The agency's proposed legislation and regulations shall provide a clear legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.
- (b) Specific Issues for Review. In conducting the reviews required by subsection a, each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:
- (1) that the laws, as appropriate -
 - (A) specify whether all cases of action arising under the laws are subject to statutes of limitation;
 - (B) specify in clear language the preemptive effect, if any, to be given to the law;
 - (C) specify in clear language the effect of existing law, if any, including all provisions repealed, circumscribed, displaced, impaired or modified;
 - (D) provide a clear legal standard for affected conduct;
 - (E) specify whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions, subject to constitutional requirements;
 - (F) specify whether the provisions of the law are severable if one or more of them is found to be unconstitutional;
 - (G) specify in clear language the retroactive effect, if any, to be given to the law;

- (H) specify in clear language the applicable burdens of proof;
- (I) specify in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fee, if any;
- (J) specify whether courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to the court;
- (K) specify whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;
- (L) set forth the standards governing personal jurisdiction, if any;
- (M) define key statutory terms, either explicitly or by reference to other statutes that explicitly define them those terms;
- (N) specify whether the legislation applies to Executive Department or its agencies;
- (O) specify what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and
- (P) address other important issues affecting clarity and general draftsmanship of rules set forth by the Secretary of Justice, with concurrence of the Secretary of the Budget and Management and after consultation with affected agencies, that are determined to be in accordance with the purposes of this Order.

- (2) that the regulation, as appropriate -
- (A) specify in clear language the preemptive effect, if any, to be given to the regulation;
 - (B) specify in clear language the effect on existing national law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired or modified
 - (C) provide a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;
 - (D) specify in clear language the retroactive effect, if any, to be given to the regulation;
 - (E) specify whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires exhaustion of administrative remedies
 - (F) define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and
 - (G) address other important issues affecting clarity and general draftsmanship of regulations set forth by the Secretary of Justice, with the concurrence of the Secretary of DBM and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.
- (c) Agency Review. The agencies shall review draft laws or regulation to determine that either the draft laws or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards.

Sec. 5. Principles to Promote Just and Efficient Administrative Adjudications.

- (a) Improvements in Administrative Adjudication. All Executive agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to institutionalize the use of ADR processes prior to litigation, to facilitate self-representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.
- (b) Bias. All executive agencies should review their administrative adjudicatory processes to identify any type of bias on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative judges, hearing officers, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals.
- (c) Public Education. All Executive agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 6. Coordination by the Secretary of Justice

- (a) The Secretary of Justice shall coordinate efforts by Executive agencies to implement sections 1, 3 and 5 of this order.
- (b) To implement the principles and purposes announced by this order, the Secretary of Justice is authorized to issue guidelines implementing sections 1 and 5 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

Sec. 7. Definitions. For purposes of this order:

- (a) The term "agency" shall be defined as any office under the Executive Department.
- (b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the Secretary of Justice's office where litigation is pending or a litigation division of the Department of Justice. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by the any Executive agency to conduct litigation on behalf of the Agency or the Republic of the Philippines.

Sec. 8. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the Republic of the Philippines, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the Republic of the Philippines, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the Republic of the Philippines to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigation authority.

Sec. 9. Scope

- (a) No applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation by or against the Republic of the Philippines in foreign courts or tribunals.
- (b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in

any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Secretary of Justice determines that providing such notice would defeat the purpose of litigation.

- (c) Additional Guidance as to Scope. The Secretary of Justice shall have the authority to issue further guidance as to scope of this order, except section 4, consistent with the purposes of this order.

Sec. 10. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, national and local laws, other applicable rules of practice or procedure, or court order.

Sec. 11. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 12. Effective Date. This order shall become effective 30 days after the date of signature. This shall not apply to litigation commenced prior to the effective date.

GLORIA MACAPAGAL-ARROYO