No. 8353. The second is in the nature of a legislative review that gauges the efficacy and repercussions of the Anti-Trafficking in Persons Act of 2003.

Very engaging case comments also form part of this issue including a (1) critique the case of *Mike Velarde v. Social Justice Society*, and proposes to have a judicial definition of religion, to answer the question of whether the act of a religious leader in endorsing the candidacy or urging or requiring the members of his flock to vote for a specified candidate, violates the Constitution?" (2) re-evaluation of the concepts of administrative exhaustion of remedies and independence of the COMELEC, as re-defined by the concept of transcendental cause in the nullification of the Automated Election Contract awarded by the Commission on Elections to the Mega-Pacific Consortium; (3) analysis of the implications of the ruling on the citizenship of Fernando Poe, Jr. on paternity and filiation and the quantum of evidence necessary to prove the same; (4) examination of the freedom of a contracting party to stipulate interest rates in relation to the power granted to the courts by the Civil Code to reduce the same as a means of ensuring equity (5) proposal that the theory behind the Battered Woman Syndrome, as exhaustively discussed in *People v. Genosa* should expand the meaning of unlawful aggression in self-defense; and the observation of the legislative trend that seems to support such argument; (6) closer analysis of *Commissioner of Internal Revenue v. General Foods Corporation* as it clarifies the terms "ordinary and necessary expenses" in Income Taxation; and (7) discussion of the theory of money perspective as an alternative framework to complete the legal definition of the term "negotiability" under the Negotiable Instruments Law.

The wide-ranging topics and their scholarly in-depth discussion makes this issue a must read for all lawyers and students of the law. Once again, the Ateneo Law Journal has come out with a worthy contribution to the growing collection of legal literature in the country.

City of Manila, 22 September 2004.

HON. MA. ALICIA AUSTRIA-MARTINEZ
Associate Justice
Supreme Court of the Philippines

Gravely Abusive Contracts: The Role of the Supreme Court in Promoting Judicial Statesmanship *

Justice Artemio V. Panganiban

I. INTRODUCTION 4
II. GRAVELY ABUSIVE CONTRACTS 4
A. Grave Abuse of Discretion
B. The Contracts Tainted with Grave Abuse
III. THE AMARI CONTRACT 6
A. The Facts of the Case
B. The Issues Raised
C. The Ruling of the Court
D. The Reasoning of the Court
E. Disposing Subsequent Resolutions
IV. THE PIATCO CONTRACT 15
A. The Facts of the Case
B. The Issues Raised
C. The Ruling of the Court
D. The Reasoning of the Court
E. Disposing Subsequent Resolutions
V. THE MEGA-PACIFIC CONTRACT 23
A. The Facts of the Case
B. The Issues Raised
C. The Ruling of the Court
D. The Reasoning of the Court
E. Epilogue
VI. CONCLUSION 28

* This article is an abridged and edited version of the Keynote address delivered by Supreme Court Justice Artemio V. Panganiban during the 25th National Conference of Employers sponsored by the Employers' Confederation of the Philippines (ECOP). The conference was held on Apr. 21, 2004, at the Westin Philippine Plaza, Pasay City.

Cite as 49 ATENEO L.J. 3 (2004).

I. INTRODUCTION

The Supreme Court has recently been on the receiving end of criticisms from some members of the business community for interfering inordinately in economic matters, specifically in nullifying billion-peso contracts entered into by the government. The question often arises as to the role of the Court in the promotion of judicial statesmanship, especially on political and economic issues that impact on national development and competitiveness.[1]

This question can be quite tricky to address, considering the nature of judicial power.[2] Judicial power is the authority to settle justiciable controversies or disputes involving rights that are enforceable and demandable before the courts of justice or the redress of wrongs for violation of such rights. Courts are given "judicial power," nothing more. Hence, by the principle of separation of powers, courts may neither attempt to assume nor be compelled to exercise non-judicial powers.[3]

Under the adversarial system of dispensing justice prevailing in the Philippines – and in many other countries including the United States – judges are considered as passive participants in a controversy. They speak mainly through their decisions that are rendered only after meticulously hearing the parties. They recite the precise facts in litigations and the specific law applied to them. Hence, these decisions must always be understood in the context of their peculiar facts.

This article discusses the role of the Supreme Court in promoting judicial statesmanship. As the Supreme Court speaks mainly through its decisions, the discussion will be limited to recently decided landmark cases concerning contracts entered into by the government with private entities.

II. GRAVELY ABUSIVE CONTRACTS

A. *Grave Abuse of Discretion*

The Constitution of the Philippines has given the judicial branch of government the *duty*, not just the power or authority, to strike down any act

1. Through ECOP's letter of invitation, the author of this article was asked, *inter alia*, "to highlight the role of the Supreme Court in the promotion of judicial statesmanship especially on political and economic issues that impact on national development and competitiveness."
2. Muskrat v. United States, 219 U.S. 346, 362 (1911). Judicial power is the "right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."
3. Manila Electric Co. v. Pasay Transportation Co., 57 Phil. 600, 605 (1932).

of any agency or instrumentality of government, including the Presidency and Congress, if such act is tainted with grave abuse of discretion.[4] Once a government action – be it an order, a directive, or a contract – is shown to have been abused gravely, the courts have no choice but to invalidate them as a matter of constitutional duty.

In its simplest terms, "there is grave abuse of discretion (1) when an act is done contrary to the Constitution, the law, or jurisprudence; or (2) when it is executed whimsically, capriciously, or arbitrarily out of malice, ill-will, or personal bias."[5]

B. *The Contracts Tainted with Grave Abuse of Discretion*

Focus will be given to a number of recent landmark Decisions, in which the Supreme Court voided the contracts entered into by the government and the following companies:

1. The Amari Coastal Bay and Development Corporation (AMARI), for the reclamation, development and purchase of a portion of Manila Bay;[6]
2. The Philippine International Air Terminals Company, Inc. (PIATCO), for the construction and operation of the Ninoy Aquino Airport Terminal III (NAIA Terminal III);[7]

4. PHIL. CONST. art. XIII, §1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

   Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been grave abuse of discretion amounting to a lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.
5. Information Technology Foundation of the Philippines (ITFP) v. Commission on Elections (Comelec), G.R. No. 159139, January 13, 2004, 18 THE LAWYERS REVIEW 36 (January 31, 2004), citing Republic v. Cocofed, 372 SCRA 462, 493 (2001), and Tañada v. Angara, 272 SCRA 18, 79 (1997). *See also* Simon v. Civil Service Commission, 215 SCRA 410, 416-17 (1992).
6. Chavez v. Public Estates Authority (PEA), 384 SCRA 152 (2002); 403 SCRA 1 (2003); 415 SCRA 403 (2003). The Decision was penned by Justice Antonio T. Carpio.
7. Agan v. Phil. International Air Terminals Co. Inc. (PIATCO), 402 SCRA 612 (2003); G.R. No. 155001, Jan. 21, 2004. The Decision was penned by Justice Reynato S. Puno.

3. The Mega Pacific eSolutions, Inc. (MEGA PACIFIC), for the supply of computer hardware and software for automating the counting and the canvassing of votes for the 2004 elections.[8]

These landmark Decisions are popularly known as the AMARI, the PIATCO and the MEGA PACIFIC cases. These three litigations, which were brought directly before the Supreme Court, invoked its extraordinary or certiorari power to void the contracts that had allegedly been entered into by the government with grave abuse of discretion. After hearing the parties and after meticulous deliberation, the Supreme Court concluded that these three gargantuan contracts had all been entered into with grave abuse of discretion by the government agencies and officials concerned, and were thus void and deemed nonexistent in law.

III. THE AMARI CONTRACT[9]

A. The Facts

In 1973, the government, through the Commissioner of Public Highways, signed the Manila-Cavite Coastal Road and Reclamation Project (MCCRRP) with the Construction and Development Corporation of the Philippines (CDCP), to reclaim certain foreshore and offshore areas of the Manila Bay and to construct Phases I and II of the Manila-Cavite Coastal Road. CDCP obligated itself to carry out the works in consideration of fifty percent of the total reclaimed land.

In 1977, then President Ferdinand E. Marcos issued decrees creating the Public Estates Authority (PEA),[10] and transferring to PEA all lands reclaimed in the foreshore and offshore of the Manila Bay.[11] President Marcos later

8. ITFP v. Commission on Elections, G.R. No. 159139, Jan. 13, 2004, 18 THE LAWYERS REVIEW 36 (Jan. 31, 2004). The Decision was penned by the Author.

9. Chavez v. PEA, 384 SCRA 152 (2002), 403 SCRA 1 (2003), 415 SCRA 403 (2003).

10. Presidential Decree No. 1084, Creating the Public Estates Authority, Defining its Powers and Functions, Providing Funds Therefore and for Other Purposes (Feb. 4, 1977). This law tasked PEA "to reclaim land, including foreshore and submerged areas," and "to develop, improve, acquire...lease and sell any and all kinds of lands."

11. Presidential Decree No. 1085, Conveying the Land Reclaimed in the Foreshore and Offshore of the Manila Bay (The Manila-Cavite Coastal Road Project) as Property of the Public Estates Authority as Well as Rights and Interest with Assumption of Obligations in the Reclamation Contract Covering Areas of the Manila Bay Between the Republic of the Philippines and the Construction and Development Corporation of the Philippines, (Feb. 4, 1977). This law transferred to PEA the "lands reclaimed in the foreshore and offshore of the Manila Bay" under the MCCRRP.

issued a memorandum directing PEA to amend its contract with CDCP, so that "all future works in MCCRRP...shall be funded and owned by PEA."[12] A Memorandum of Agreement was executed accordingly. In 1988, then President Corazon C. Aquino issued a special patent granting and transferring to PEA the parcels of land so reclaimed. Subsequently, transfer certificates of title covering three reclaimed islands, which were known as the Freedom Islands, were issued in the name of PEA.[13]

In 1995, PEA entered into a Joint Venture Agreement (JVA) with AMARI, a private corporation, to develop the Freedom Islands. The JVA also required the reclamation of an additional 250 hectares of submerged areas surrounding these islands to complete the configuration in the Master Development Plan of the MCCRRP. This was done through negotiation *without public bidding*. The JVA was approved by then President Fidel V. Ramos through then Executive Secretary Ruben Torres.

In 1996, then Senate President Ernesto Maceda, in a privilege speech before the Senate, denounced the JVA as the "grandmother of all scams."[14] As a result, a joint investigation was conducted by two Senate Committees, which reported their findings as follows: firstly, the reclaimed lands PEA sought to transfer to AMARI under the JVA were lands of the public domain which the government had not classified as alienable lands, and therefore PEA could not alienate these lands; secondly, the certificates of title covering the Freedom Islands were void; and finally, the JVA itself was illegal.[15] In 1997, a Legal Task Force[16] was created to conduct a study on the legality of the JVA. Contrary to the conclusions reached by the two Senate Committees, the Legal Task Force upheld the legality of the JVA.

In 1998, former Solicitor General Francisco I. Chavez brought suit before the Supreme Court to nullify the JVA. He alleged that the government stood to lose billions of pesos in the sale of the reclaimed lands

12. *Chavez*, 384 SCRA at 171.

13. *Id.* at 172. The Freedom Islands have a total land area of 1,578,441 square meters or 157.841 hectares.

14. *Id.* at 171, 173.

15. The Senate Committee on Government Corporations and Public Enterprises, and the Committee on Accountability of Public Officers and Investigations reported the results of their investigation in Senate Committee Report No. 560, dated Sept. 16, 1997.

16. Constituting a Legal Task Force to Study and Submit Recommendations on the Senate Committee Report Concerning the PEA-AMARI Contract, Administrative Order No. 364 (Oct. 9, 1997). (The members of the Legal Task Force were the Secretary of Justice, the Chief Presidential Legal Counsel, and the Government Corporate Counsel.)

by PEA to AMARI. Invoking certain provisions of the Constitution,[17] Petitioner Chavez prayed that PEA publicly disclose the terms of any renegotiation of the JVA. He assailed the sale to AMARI of lands of the public domain as a blatant violation of the 1987 Constitution.[18]

Thereafter, in 1999, PEA and AMARI signed the Amended Joint Venture Agreement (Amended JVA). The Amended JVA was approved by the Office of the President under the administration of then President Joseph E. Estrada.

B. *The Issues*

Petitioner raised the following procedural issues: (1) whether the petition became moot and academic due to subsequent events; (2) whether the petition should be dismissed for failure to observe the hierarchy of courts and non-exhaustion of administrative remedies; and (3) whether petitioner had *locus standi* to bring the suit. He also raised the issue of whether the

17. PHIL. CONST. art. II, § 28.

> Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.

PHIL. CONST. art. III, § 7.

> Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

18. PHIL. CONST. art. XII, § 3.

> Sec. 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural lands of the public domain may be further classified by law according to the uses which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. *Private corporations or associations may not hold such alienable lands of the public domain except by lease*, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than twelve hectares thereof by purchase, homestead, or grant.
>
> Taking into account the requirements of conservation, ecology, development, and subject to the requirements of agrarian reform, the Congress shall determine, by law, the size of lands of the public domain which may be acquired, developed, held, or leased and the conditions therefor. (*emphasis supplied*)

constitutional right to information included official information on *on-going negotiations* before a final agreement.

The threshold issue, however, was whether AMARI, a private corporation, could acquire and own *reclaimed* and *submerged* foreshore land in Manila Bay. The corollary issue was whether or not the government exercised grave abuse of discretion when it entered into contract with AMARI.

C. *The Court's Ruling*

In a unanimous 13-0 vote,[19] the Court, speaking through Justice Antonio T. Carpio, answered the question on the validity of the JVA with a resounding "No." Reclaimed lands are alienable lands of the public domain which, under the Constitution, may be *leased* – but *not sold* – to private corporations.

1. Procedural Issues

In disposing the procedural issues, the Court held that since the petition was one for *mandamus*, it could exercise primary jurisdiction over the case.[20] The petition was not moot and academic, as the prayer to enjoin the signing of the Amended JVA on constitutional grounds necessarily included preventing its implementation, if in the meantime PEA and AMARI had signed one in violation of the Constitution. If the Amended JVA indeed violated the Constitution, it was the duty of the Court to enjoin its implementation; and if already implemented, to annul the effects of such unconstitutional contract.[21] The Court likewise held that the principle of exhaustion of administrative remedies did not apply to this case,[22] and that petitioner did possess the requisite standing to bring the taxpayer's suit. Since the instant

19. Voting affirmatively were Chief Justice Davide; and Justices Bellosillo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Santiago, Gutierrez, Carpio, Martinez and Corona.

20. PHIL. CONST. art. VIII, § 5. A petition for *mandamus* falls under the original jurisdiction of the Court.

21. Chavez v. PEA, 384 SCRA 152, 177 (2002). In the instant case, if the Amended JVA ran counter to the Constitution, the Court could still prevent the transfer of title and ownership of alienable lands of the public domain in the name of AMARI.

22. *Id.* at 181. PEA was under a positive legal duty to disclose to the public the terms and conditions for the sale of its lands. It failed to make this public disclosure because the original JVA, like the Amended JVA, was the result of a *negotiated contract, not of a public bidding*. Considering that PEA had an affirmative statutory duty to make the public disclosure, and was even in breach of this legal duty, petitioner had the right to seek direct judicial intervention.

petition, brought by a citizen, involved matters of transcendental public importance,[23] petitioner had the requisite *locus standi*.[24]

2. The Issue on the Right to Information

The Court held that the constitutional right to information[25] includes official information on *on-going negotiations* before a final contract. The State policy of full transparency in all transactions involving public interest[26] reinforces the people's right to information on matters of public concern. The information, however, must constitute definite propositions by the government, and should not cover recognized exceptions like privileged information, military and diplomatic secrets, and similar matters affecting national security and public order. Neither should it cover other limitations on the right to information that Congress has prescribed in several legislations. The information that petitioner may access includes evaluation reports, recommendations, legal and expert opinions, minutes of meetings,

23. *Id.* at 183. There were two constitutional issues involved here: the first was the right to information on matters of public concern; and the second was the application of a provision intended to insure equitable distribution of alienable lands among Filipino citizens. The thrust of the first issue was to compel PEA to disclose publicly information on the sale of government lands worth billions of pesos. The thrust of the second issue was to prevent PEA from alienating hundreds of hectares of alienable lands of the public domain in violation of the Constitution.

24. *Id.*, citing Chavez v. PCGG, 299 SCRA 744, 758-59 (1998). In that case, the Court upheld the right of a citizen to bring a taxpayer's suit on matters of transcendental importance to the public. The Petitioner emphasized that the matter of recovering the ill-gotten wealth of the Marcoses was an issue of "transcendental importance to the public." He asserted that ordinary taxpayers have a right to initiate and prosecute actions questioning the validity of acts or orders of government agencies or instrumentalities, if the issues raised are of "paramount public interest," and if they "immediately affect the social, economic and moral well being of the people."

25. PHIL. CONST. art. III, § 7.

> Sec. 7. The right of the people to information on matters of public concern shall be recognized. *Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions,* as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law. *(emphasis supplied)*

26. PHIL. CONST. art. II, §28.

> Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a *policy of full public disclosure of all its transactions involving public interest.*" *(emphasis supplied)*

terms of reference and other documents attached to such reports or minutes, all relating to the JVA. However, the right to information does not compel PEA to prepare lists, abstracts, summaries and the like relating to the renegotiation of the JVA.[27]

3. Substantive Issue

The Court ruled that the Amended JVA glaringly violated the 1987 Constitution.[28] Under the Civil Code, contracts whose object or purpose is contrary to law, or whose object is outside the commerce of men, are inexistent and void from the beginning.[29] Hence, the Amended JVA was declared null and void *ab initio*.

Subject to certain constitutional limitations especially as to area, reclaimed land may also be purchased by Filipino individuals. Submerged areas, on the other hand, are inalienable natural resources and are outside the commerce of man. The government, through PEA, may reclaim these submerged areas; however, once reclaimed, the assets may be classified by the Government as alienable or disposable agricultural lands of the public domain. Thereafter, they may then be leased to private corporations. The Court thus summarized its conclusions as follows:

> 1. The 157.84 hectares of reclaimed lands comprising the Freedom Islands, now covered by certificates of title in the name of PEA, are alienable lands of the public domain. PEA may lease these lands to private corporations but may not sell or transfer ownership of these lands to them. It may only sell these lands to Philippine citizens, subject to the ownership limitations in the 1987 Constitution and existing laws.
>
> 2. The 592.15 hectares of submerged areas of Manila Bay remain inalienable natural resources of the public domain until classified as alienable or disposable lands open to disposition and declared no longer needed for public service. The government can make such classification and declaration only after PEA has reclaimed these submerged areas. Only then can these lands qualify as agricultural lands of the public domain, which are the only natural resources the government can alienate. In their

27. *Chavez*, 384 SCRA at 188. Contrary to AMARI's contention, the Commissioners of the 1986 Constitutional Commission understood that the right to information "contemplates inclusion of negotiations leading to the consummation of the transaction." Certainly, a consummated contract is not a requirement for the exercise of the right to information. Otherwise, the people can never exercise the right if no contract is consummated, and if one is consummated, it may be too late for the public to expose its defects.

28. PHIL. CONST. art. XII, § 2; 3.

29. An Act to Ordain and Institute the Civil Code of the Philippines, Republic Act No. 386, art. 1409.

present state, the 592.15 hectares of submerged areas are inalienable and outside the commerce of man.

3. Since the Amended JVA seeks to transfer to AMARI, a private corporation, ownership of 77.34 hectares of the Freedom Islands, such transfer is void for being contrary to Section 3 of Article XII of the 1987 Constitution which prohibits private corporations from acquiring any kind of alienable land of the public domain.

4. Since the Amended JVA also seeks to transfer to AMARI ownership of 290.156 hectares of still submerged areas of Manila Bay, such transfer is void for being contrary to Section 2 of Article XII of the 1987 Constitution which prohibits the alienation of natural resources other than agricultural lands of the public domain. PEA may reclaim these submerged areas. Thereafter, the government can classify the reclaimed lands as alienable or disposable, and further declare them no longer needed for public service. Still, the transfer of such reclaimed alienable lands of the public domain to AMARI will be void in view of Section 3 of Article XII of the 1987 Constitution which prohibits private corporations from acquiring any kind of alienable land of the public domain.[30]

D. The Rationale

The Amended JVA covered not only the Freedom Islands, but also an additional 592.15 hectares which were still submerged and forming part of Manila Bay. Foreshore and submerged areas[31] indisputably belong to the public domain and are inalienable unless reclaimed, classified as alienable lands open to disposition, and further declared no longer needed for public

---

Article 1409. The following contracts are inexistent and void from the beginning:

(1) *Those whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy;*

(2) Those which are absolutely simulated or fictitious;

(3) Those whose cause or object did not exist at the time of the transaction;

(4) *Those whose object is outside the commerce of men;*

(5) Those which contemplate an impossible service;

(6) Those where the intention of the parties relative to the principal object of the contract cannot be ascertained;

(7) Those expressly prohibited or declared void by law.

These contracts cannot be ratified. Neither can the right to set up the defense of illegality be waived. *(emphases supplied)*

30. *Chavez*, 384 SCRA at 241-42.

31. *Id.* at 241. Foreshore areas are those covered and uncovered by the ebb and flow of the tide. Submerged areas are those permanently under water regardless of the ebb and flow of the tide.

service. There was no legislative or presidential act classifying these submerged areas as alienable or disposable lands of the public domain open to disposition, hence, they were still considered as "waters owned by the State."[32] A reading of pertinent legislation from the past to the present[33] shows that the only way the government can sell to private parties *government reclaimed and marshy disposable lands of the public domain* is for the legislature to pass a law authorizing such sale. Furthermore, the government is mandated to put to public auction all leases or sales of alienable or disposable lands of the public domain.[34]

While in the 1973 Constitution, private corporations were banned from acquiring alienable lands of the public domain, this did not apply to PEA since it was, and still is, a fully owned government corporation that is specifically empowered to hold such lands, even in excess of the area permitted to private corporations by statute. However, in order for PEA to *sell* its reclaimed foreshore and submerged alienable lands, there must be legislative authority empowering it to sell these lands.[35] Without legislative authority, PEA could only lease these lands. Nevertheless, any legislative

---

32. PHIL. CONST. art. XII, § 2.

33. *Chavez*, 384 SCRA at 238. The Spanish Law of Waters of 1866 was the first statutory law governing the ownership and disposition of reclaimed lands in the Philippines. On May 18, 1907, Act No. 1654 was enacted, which provided for the lease, but not the sale, of reclaimed lands of the government to corporations and individuals. On Nov. 29, 1919, Act No. 2874 or the Public Land Act was approved, which authorized the lease, but not the sale, of reclaimed lands of the government to corporations and individuals. Subsequently, Commonwealth Act No. 141, also known as the Public Land Act, which authorized the lease, but not the sale, of reclaimed lands of the government to corporations and individuals was also passed into law.

34. An Act to Amend and Compile the Laws Relative to Lands of the Public Domain, Commonwealth Act No. 141, § 63, 67 [THE PUBLIC LAND ACT].

Sec. 63. Whenever it is decided that lands covered by this chapter are not needed for public purposes, the Director of Lands shall ask the Secretary of Agriculture and Commerce (now the Secretary of Natural Resources) for authority to dispose of the same. Upon receipt of such authority, the Director of Lands shall give notice by public advertisement in the same manner as in the case of leases or sales of agricultural public land...

x x x

Sec. 67. *The lease or sale shall be made by oral bidding; and adjudication shall be made to the highest bidder...*" *(emphasis supplied)*

35. THE PUBLIC LAND ACT, § 60.

Sec. 60. ...but the land so granted, donated or transferred to a province, municipality, or branch or subdivision of the Government shall not be alienated, encumbered or otherwise disposed of in a manner affecting its title, *except when authorized by Congress...*" *(emphasis supplied)*

authority granted would still be subject to the constitutional ban on private corporations from acquiring alienable lands of the public domain.

The 1987 Constitution continued the state policy banning private corporations from acquiring any kind of alienable land of the public domain. At present, the general law governing the lease to private corporations of reclaimed, foreshore and marshy alienable lands of the public domain is still Commonwealth Act No. 141. Even assuming the reclaimed lands of PEA were classified as alienable or disposable lands open to disposition, and declared no longer needed for public service, PEA would still have to conduct a public bidding in selling or leasing these lands.[36] It is important to note, however, that private corporations are barred from bidding at the auction sale of any kind of alienable land of the public domain.

PEA originally scheduled a public bidding for the Freedom Islands on December 10, 1991. It imposed a condition that the winning bidder should reclaim *another 250 hectares* of submerged areas to regularize the shape of the Freedom Islands. No one, however, submitted a bid. Thereafter, the Government Corporate Counsel advised PEA that it could sell the Freedom Islands through negotiation, *without need of another public bidding*. While the original JVA covered not only the Freedom Islands and the additional 250 hectares still to be reclaimed, it also granted an option to AMARI to reclaim yet *another 350 hectares*. The original JVA, a *negotiated contract*, enlarged the reclamation area to 750 hectares. The failure of a public bidding, involving only 407.84 hectares, was not a valid justification for a negotiated sale of 750 hectares, almost double the area publicly auctioned.

E. *Subsequent Resolutions*

In a subsequent Resolution dated May 6, 2003,[37] the Court clarified that "reclaimed alienable lands of the public domain if sold or transferred to a public or municipal corporation for a monetary consideration become patrimonial property...[which] may be sold...to private parties, whether Filipino citizens or qualified corporations."[38] This clarification was welcomed by the business community, because it quieted the anxieties of

36. *Chavez*, 384 SCRA at 227. In the absence of a law exempting PEA from holding a public auction, it must observe the provisions of Commonwealth Act No. 141, which requires a public auction.

37. Chavez v. PEA, 403 SCRA 1 (2003). This Resolution denied the first Motion for Reconsideration and was approved with the full concurrence of 8 justices – Chief Justice Davide; and Justices Vitug, Panganiban, Quisumbing, Carpio, Martinez, Morales and Callejo. Justices Bellosillo and Puno wrote Separate Opinions; Justices Santiago, Gutierrez and Corona dissented; while Justice Azcuna took no part.

38. *Id.* at 32.

many companies that had bought reclaimed real estate from Pasay City, the local government that had territorial jurisdiction over the questioned Manila Bay reclamation project.[39]

In a later Resolution dated November 11, 2003,[40] the Court – citing the investigation reports of two Senate committees – said that it could not legitimize the AMARI Contract, because it had:

> conveyed to a private entity 157.84 hectares of reclaimed public lands along Roxas Boulevard in Metro Manila at a negotiated price of ₱1,200 per square meter...[considering that] the market price of land near that area at that time [was] ₱90,000 per square meter. The difference in price is a staggering ₱140.16 billion, equivalent to the budget of the entire judiciary for seventeen years and more than three times the Marcos Swiss deposits that this Court forfeited in favor of the government.[41]

With this revelation, the Court wrote *finis* to the "grandmother of all scams."[42]

IV. THE PIATCO CONTRACT[43]

A. *The Facts*

The case arose from the contract and supplemental agreements entered into by the government, through the Manila International Airport Authority (MIAA) and Department of Transportation and Communications (DOTC), with the Philippine International Air Terminals Co., Inc. (PIATCO).

Sometime in 1993, the Asia Emerging Dragon Corporation (AEDC), a corporation formed by six captains of Philippine business,[44] submitted an unsolicited proposal for the development of the NAIA International Passenger Terminal III (NAIA IPT III), under a build-operate-transfer (BOT)

39. *Id.* at 33. The Court further held that AMARI may recover from PEA "in the proper proceedings, on a quantum *meruit* basis whatever [it] may have incurred in implementing the Amended JVA prior to its declaration of nullity."

40. Chavez v. PEA, 415 SCRA 403 (2003). This Resolution denied the second Motion for Reconsideration by a vote of 7-7-1 – Chief Justice Davide and Justices Vitug, Panganiban, Carpio, Martinez, Morales, and Callejo for the affirmative; and Justices Bellosillo, Puno, Quisumbing, Santiago, Gutierrez, Corona and Tinga for the negative; Justice Azcuna took no part.

41. *Id.* at 413.

42. *Id.*

43. Agan v. PIATCO, 402 SCRA 612 (2003); G.R. No. 155001, Jan. 21, 2004.

44. The six were: John Gokongwei, Andrew Gotianun, Henry Sy, Sr., Lucio Tan, George Ty, and Alfonso Yuchengco.

arrangement with the Government.[45] This was pursuant to what was perceived as the DOTC's determination that the Ninoy Aquino International Airport (NAIA) needed to be expanded and improved, in order to accommodate an anticipated increase in aircraft traffic over the next twenty years.

The DOTC and MIAA then called, by means of publication in two daily newspapers, for a submission of competitive or comparative proposals.[46] The DOTC's Pre-qualification Bids and Awards Committee (PBAC), in response to the queries of potential bidder People's Air Cargo & Warehousing Co., Inc. (PAIRCARGO), issued a Bid Bulletin. The Bid Bulletin stated, in essence, that PAIRCARGO, being as it were a consortium of companies, would have difficulty in meeting the minimum equity requirements laid down in the bid documents.[47]

45. Pursuant to Republic Act No. 6957 (An Act Authorizing the Financing, Construction, Operation, and Maintenance of Infrastructure Projects by the Private Sector, and For Other Purposes), as amended by Republic Act No. 7718 (An Act Amending Certain Sections of Republic Act No. 6957, "Entitled An Act Authorizing The Financing, Construction, Operation and Maintenance Of Infrastructure Projects By the Private Sector, and For Other Purposes").

46. An Act Authorizing the Financing, Construction, Operation, and Maintenance of Infrastructure Projects by the Private Sector, and For Other Purposes, Republic Act No. 6957 (July 9, 1990), § 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 involved *(sic)* a new concept or technology and/or are 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 proposals is *(sic)* 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.

47. *Agan,* 402 SCRA at 634.

> The capitalization of each of the member companies is so structured as to meet the requirements and needs of their current respective business undertakings/activities. In order to comply with this equity requirement, PAIRCARGO is requesting PBAC to just allow each member of (sic) corporation of the Joint Venture to just exercise an agreement that embodies a commitment to infuse the required capital in case the project is awarded to the Joint Venture instead of increasing each corporation's current authorized capital stock just for pre-qualification purposes. In pre-qualification, the agency is interested in one's financial capability at the time of pre-qualification, not future or potential capability. A commitment to put up equity once awarded the project is not enough to establish that "present" financial capability.

Despite its apparent lack of financial capability, PAIRCARGO was nonetheless pre-qualified by the PBAC. Despite AEDC's objections to PAIRCARGO's pre-qualification due to its lack of equity, as well as on other grounds, the PBAC continued with the bidding process and opened the bid envelopes containing the technical and financial proposals of both AEDC and PAIRCARGO. While both bidders offered to build NAIA IPT III at the same price with no cost to the government, PAIRCARGO offered a higher amount of guaranteed payments to the government.[48] The PAIRCARGO consortium was then incorporated into the Philippine International Airport Terminals Co., Inc. (PIATCO).

AEDC protested what it alleged as the undue preference given to PIATCO, and instituted court proceedings to nullify the bidding. The records of the case failed to mention the final disposition of AEDC's suit. In the meantime, PIATCO, having been awarded the project, signed the Concession Agreement (CA) with the government governing the BOT Arrangement for the construction, operation, and maintenance of the NAIA IPT III. The government was represented by then DOTC Secretary Arturo T. Enrile.

The CA, which covered a 25-year period, renewable for another 25 years at the option of the government, granted PIATCO the franchise to operate and maintain the NAIA IPT III during the aforementioned concession period and to collect the fees, rentals, and other charges stipulated therein. Subsequent modifications to the CA were made by way of an Amended and Restated Concession Agreement (ARCA) as well as three Supplements to the ARCA signed in 1999, 2000, and 2001.[49] These subsequent modifications were all done *without any public bidding.*

A group of employees of airport services companies, which had existing concession contracts with MIAA for the supply of various international airport services (such as in-flight catering, passenger handling, ramp and

48. PAIRCARGO offered P17.75B over a period of 27 years, as opposed to AEDC's P135M over the same period.

49. The ARCA and its Supplements provided for, among others, additional special obligations on the part of the Government, swapping of obligations between the Government and PIATCO regarding the improvement of Sales Road, the construction of a surface road connecting NAIA II and III, rather than the proposed access tunnel, changes in the timetable, the disposition of terminal fees, the clearing of subterranean structures, and time extensions.

ground support, cargo-handling), filed a petition for prohibition before the Supreme Court, alleging that they stood to lose their employment upon implementation of the agreement. Some of the aforementioned service provider companies likewise filed a petition-in-intervention. Several members of the House of Representatives filed a similar petition with the Court, as did several employees of MIAA.

B. *The Issues*

The pertinent issue raised was whether or not the government exercised grave abuse of discretion in entering the said contracts. Other matters were also raised, such as petitioners' standing to bring the suit; the legal effects, if any, of the commencement of arbitration proceedings by PIATCO on the suit; and PIATCO's qualifications as a bidder.

C. *The Court's Ruling*

In a Decision written by Justice Reynato S. Puno, the Court, by a vote of 10-3-1,[50] ruled that the government, acting through the MIAA, gravely abused its discretion in entering into these PIATCO Contracts.[51]

1. Procedural Issues

The Supreme Court held that the service providers and their employees had the requisite standing,[52] as they stood to lose their source of livelihood upon implementation of the contract, since certain provisions in the CA, ARCA, and its Supplements granted PIATCO the exclusive right to operate a commercial international passenger terminal within Luzon. The service

50. Voting to void the PIATCO Agreements were Chief Justice Davide, and Justices Bellosillo, Puno (*ponente*), Panganiban (with a Separate Concurring Opinion), Santiago, Gutierrez, Martinez, Corona, Morales and Callejo (concurring with Justice Panganiban's Separate Concurring Opinion). Dissenting were Justices Vitug, Quisumbing, and Azcuna. Justice Carpio took no part.

51. For a full discussion of this Decision, *see* ARTEMIO PANGANIBAN, THE BIO AGE DAWNS ON THE JUDICIARY 164-199 (2003).

52. Kilosbayan, Inc. v. Morato, 246 SCRA 540, 562-63 (1995). There is standing when parties "have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

A personal stake is present when "the person complaining has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute or act complained of." Bayan v. Zamora, 342 SCRA 449, 478 (2000).

providers would be compelled to contract with PIATCO for new service contracts, with no guarantee that PIATCO would respect their existing contracts with MIAA. As to the members of the House, the Court, citing its liberal policy on *locus standi*[53] in relation to questions on the constitutionality of laws or acts of various government agencies or instrumentalities, resolved to grant them the requisite standing to bring the case.

On the issue of arbitration, the Court held that the pendency of arbitration proceedings would not oust it of jurisdiction. It cited the fundamental postulate that only parties to a contract, and their heirs or assigns, are bound by its provisions, including any arbitration clause contained therein.[54] As petitioners were not parties to the said contracts, they were by no means bound by them or any arbitration clause they contain.

2. Substantive Issues

The Court declared the CA, as well as the ARCA and its supplements, null and void for the following reasons:

(1) the lack of the requisite financial capacity of PAIRCARGO (the predecessor of PIATCO) to carry out the contract;[55]

(2) the inclusion in the PIATCO Contract of amendments, as contained in the supplemental agreements, which were substantially different from that which was bidded upon, in contravention of public policy; and

(3) the inclusion in the PIATCO Contract of a direct government guarantee which was prohibited by law.

53. Kilosbayan, Inc. v. Guingona, 232 SCRA 110 (1994).

54. Del Monte Corporation-USA v. Court of Appeals, 351 SCRA 373, 381 (2001).

55. *Agan*, 402 SCRA at 653. While PAIRCARGO had a combined net worth of P3.9B, which was sufficient to meet the P2.7B equity requirements of the IPT III project; however, out of its total net worth, some P3.5B consisted of the total net worth of Security Bank, one of the members of the consortium. Hence, Security Bank had invested its entire net worth in one single enterprise. Section 21 of Republic Act No. 337, or the General Banking act, limits the equity investment of a bank in any single enterprise to 15% of such bank's net worth. Security Bank not only exceeded the 15% limit, it invested its *entire net worth*. Neither did DOTC Undersecretary Primitivo Cal's Memorandum, which stated that the net worth of a bidder need not be "unrestricted," save the day for PIATCO.

D. The Rationale

The Court first restated the fundamental postulate that competition in public bidding must be fair and honest,[56] in order to ensure that the public gets the best deal possible. Hence, all bidders must be on equal footing, particularly on the contract bidded upon. The specifications in the biddings provide the common basis for the bidders; hence, they must operate indiscriminately upon all bidders.[57] Thus, the Court held that any changes after the award is made to the winning bidder must not constitute "substantial or material amendments that would alter the basic parameters of the contract and would constitute a denial to the other bidders of the opportunity to bid on the same terms."[58] Any subsequent amendments of such a nature made without a new public bidding are null and void.[59]

Thus, the question, according to the Court, was whether or not the CA between PIATCO and the government was the same Agreement bid upon by the parties. The Court answered this question in the negative due to the following differences between the Draft Agreement, *i.e.*, that which was bid upon, and the PIATCO Contract:

1. As to the Fees which PIATCO may Collect[60]

Under the Draft Agreement, there were six fees[61] that could be adjusted by the winning bidder only after written approval by the MIAA. However, under the PIATCO Contract, there were only four fees[62] whose adjustment required prior MIAA approval. The Draft Agreement gave MIAA the *right* to *regulate* the lobby and vehicular parking fees charged by the winning

56. Danville Maritime, Inc. v. Commission on Audit, 175 SCRA 701, 713 (1989).

57. A. COBACHA & D. LUCENARIO, LAW ON PUBLIC BIDDING AND GOVERNMENT CONTRACTS 13 (1960).

58. *Agan*, 402 SCRA at 655-56.

59. Caltex (Philippines), Inc. v. Delgado Brothers, Inc., 96 Phil. 368, 375 (1954).

60. *Agan*, 402 SCRA at 657-661. All these taken as a whole were held by the Court to constitute significant amendments that substantially distinguished the Draft Agreement from that which was entered into with PIATCO, in violation of the cardinal rule that bidders must stand on equal footing. All these made the contract with PIATCO entirely different from that which was bid upon by the parties; in utter violation of the rule of equality of bidders emphasized by the Supreme Court.

61. Aircraft parking fees, aircraft tacking fees, ground handling fees, rentals and airline offices, check-in counter rentals, and porterage fees.

62. Aircraft parking fees, aircraft tacking fees, check-in counter fees, and terminal fees.

bidder. However, the PIATCO Contract only allowed the government to require PIATCO to *explain and justify* any fee adjustments it may make. These changes constituted a relaxation of the control of MIAA over the winning bidder, which was not contemplated in the bid documents.

The Contract gave PIATCO the right to collect terminal fees in U.S. Dollars, while payments to the government would be in Philippine pesos. This would have allowed PIATCO to benefit immensely from the depreciation of the peso, while being effectively insulated from the detrimental effect of exchange rate fluctuations. There was no stipulation of this sort in the Draft CA.

2. As to Assumption of PIATCO's Liabilities[63]

The Draft Agreement did not provide for the government to assume the winning bidder's liabilities in the event of the latter's default. The PIATCO Contract, specifically the ARCA, on the other hand, called for the government, in the event of PIATCO's default, to either take over NAIA IPT III and assume PIATCO's liabilities, or allow the latter's creditors to be substituted as concessionaires, or designate an operator acceptable to the creditors. In any case, ultimate liability for PIATCO's default would have devolved upon the government. This constituted a direct government guarantee, which is prohibited by the BOT Law[64] in bids involving unsolicited projects, such as the IPT III bidding. Hence, this provision is clearly illegal.

Thus, in summary, the Court based its decision voiding the PIATCO Contract and its additional supplements on the following:

1. MIAA violated its own bidding rules when it awarded the original CA to an entity that had failed to meet the financial requirements established by the bidding rules.

2. The ARCA signed by MIAA and PIATCO substantially differed from the Agreement that the bidding rules stipulated should be awarded to the winning bidder. In other words, the CA nullified the "fair competition essence"[65] of public bidding by granting more benefits to the winner than that which had been originally offered for bidding. The benefits given to PIATCO altered the basic parameters of the contract and constituted a denial to the other bidders of the opportunity to bid under the same terms. The executed contract was entirely different from the one that was bidded upon and gave PIATCO

63. *Agan*, 402 SCRA at 661-65.

64. Republic Act No. 6957, § 4-A(2).

65. COBACHA & LUCENARIO, *supra* note 64, at 13.

more favorable terms than what was available to other bidders at the time the contract was bidded out.

3. The CA obligated the government to pay PIATCO's creditors in the event that PIATCO defaulted in its loan obligations to its creditors in violation of the BOT Law proscribing "government guarantees in any form."[66]

4. The CA likewise obligated the government – when forced by national emergencies to take over Terminal III – to pay PIATCO for such takeover, thereby contravening Section 17 of Article XII of the Constitution,[67] as interpreted by the Supreme Court, which held that in such cases, "the government is not required to compensate the private entity owner...as there is no transfer of ownership."

5. In granting PIATCO the exclusive right to operate a commercial international passenger terminal within the Island of Luzon, the CA transgressed the constitutional prohibition against monopolies, as such grant would have compelled the closure of NAIA Terminals I and II.

E. *Subsequent Resolution*

In its subsequent Resolution dated January 21, 2004,[68] the Court stressed that a public bidding is to be conducted strictly in accordance with the "prescribed terms, conditions and parameters laid down by government."[69] Once an award is made, "all that is left to be done by the parties is to execute the necessary agreements and implement them."[70] No material changes to the parameters can thereafter be allowed. Otherwise, "public bidding becomes a mockery and the modified contract must be struck down."[71]

66. *Agan*, 402 SCRA at 670.

67. *Id.* at 673.

PHIL. CONST. art. XII, § 17. In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.

68. Agan v. PIATCO, G.R. No. 155001, Jan. 21, 2004. This Resolution denied with finality PIATCO's Motion for Reconsideration. Voting affirmatively were Chief Justice Davide, and Justices Puno, Panganiban, Martinez, Corona, Morales and Callejo. Dissenting were Justices Vitug, Quisumbing, Santiago, Gutierrez and Azcuna. Justices Carpio and Tinga took no part.

69. *Id.* at 23.

70. *Id.*

V. THE MEGA-PACIFIC CONTRACT[72]

A. *The Facts*

In 1995, Congress passed Republic Act No. 8046,[73] which authorized the Commission on Elections (COMELEC) to conduct a nationwide demonstration of a computerized election system. In 1997, it enacted Republic Act No. 8436,[74] which authorized COMELEC to use an automated election system (AES) for the process of voting, counting votes and canvassing/consolidating the results of the national and local elections. This law also mandated the acquisition of automated counting machines (ACMs), computer equipment, devices and materials, and the adoption of new electoral forms and printing materials. In 2002, COMELEC adopted a modernization program for the 2004 elections, and money was subsequently allocated to fund the AES for the 2004 elections. Pursuant to this, the COMELEC conducted a bidding on January 28, 2003.

The Request for Proposal (RFP) issued by the COMELEC Bidding and Awards Comittee (BAC) provided the procedures for bidding. Basically, the public bidding was to be conducted under a two-envelope/two stage system.[75] Out of the 57 bidders, the BAC found the Mega Pacific Consortium (MPC) and the Total Information Management (TIM) Company to be eligible. For technical evaluation, they were referred to the BAC's Technical Working Group and the Department of Science and

71. *Id.*

72. ITFP v. COMELEC, G.R. No. 159139, Jan. 13, 2004 and Feb. 17, 2004, 18 THE LAWYERS REVIEW 36 (Jan. 31, 2004).

73. An Act Authorizing the Commission on Elections to Conduct a Nationwide Demonstration of a Computerized Election System and Pilot-Test it in the March 1996 Elections in the Autonomous Region of Muslim Mindanao (ARMM) and for Other Purposes, Republic Act No. 8046 (June 7, 1995).

74. An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Exercises, Providing Funds Therefore and for Other Purposes, Republic Act No. 8436 (Dec. 22, 1997).

75. ITFP v. COMELEC, 18 THE LAWYERS REVIEW 36, 44-45 (Jan. 31, 2004). The bidder's first envelope or the Eligibility Envelope should establish the bidder's eligibility to bid and its qualifications to perform the acts, if accepted. On the other hand, the second envelope would be the Bid Envelope itself. Only if the bidding party is deemed eligible will the Bid Envelope be opened, otherwise, the Second Envelope will be returned unopened.

Technology (DOST). In its Report on the Evaluation of the Technical Proposals on Phase II, DOST said that both MPC and TIMC had obtained a number of failed marks in the technical evaluation.[76] Notwithstanding these failures, the COMELEC *en banc*, promulgated Resolution No. 6074 awarding the project to MPC. The Commission subsequently publicized this Resolution and the award of the project to MPC.

Thereafter, five individuals and entities wrote a letter to the COMELEC Chairman protesting the award of the Contract to MPC. They sought a re-bidding, citing therein the non-compliance with eligibility as well as technical and procedural requirements. This, however, was rejected by the COMELEC Chairman who declared that the award would stand up to the strictest scrutiny.

B. *The Issues*

The following procedural issues were raised: the legal standing of petitioners, and the alleged prematurity of the petition for failure to observe the principle of exhaustion of administrative remedies.

The substantive issue was whether the COMELEC, the agency vested with the exclusive constitutional mandate to oversee elections, *gravely abused its discretion* when, in the exercise of its administrative functions, it awarded to MPC the contract for the second phase of the comprehensive Automated Election System.

C. *The Court's Ruling*

The Court ruled affirmatively that there was grave abuse of discretion committed by COMELEC. Voting 9-5,[77] the Court – in a Decision penned by the author of this article – invalidated the contract, because it had been awarded in violation of law and jurisprudence; in reckless disregard of COMELEC's bidding rules and procedure; and in inexplicable haste, without adequately checking and observing mandatory financial, technical and legal requirements.[78]

76. *Id.* at 51-54. The results were reported in the Test Results Matrix (Technical Evaluation of Automated Counting Machines).

77. Those voting to invalidate were Justices Puno, Panganiban (*ponente*), Quisumbing, Santiago, Gutierrez, Carpio, Martinez, Morales and Callejo. Those in favor of upholding the Contract were *CJ* Davide; and Justices Vitug, Corona, Azcuna and Tinga.

78. ITFP v. COMELEC, 18 THE LAWYERS REVIEW 36 (Jan. 31, 2004).

1. Procedural Issues

The Court ruled that petitioners had the requisite *locus standi*, as the subject matter of the petition was one that is "a matter of public concern and imbued with public interest."[79] In other words, it was of "paramount public interest"[80] and of "transcendental importance."[81] Furthermore, taxpayers are allowed to sue when there is a claim of "illegal disbursement of public funds,"[82] or if public money is being "deflected to any improper purpose."[83] Petitioners, suing as taxpayers, sought to restrain the implementation of the Contract, and necessarily, from the making of any unwarranted expenditure of public funds pursuant thereto.

The Court further ruled that the petitioners had not acted prematurely, for not first utilizing the protest mechanism available to them under the law for the settlement of disputes pertaining to procurement contracts. *To put it bluntly, the COMELEC* en banc *itself made it legally impossible for petitioners to avail themselves of the administrative remedy that the Commission was so impiously harping on.*[84]

2. Substantive Issue

The Court voided the contract entered into with MPC, ruling that it was entered into by the government with grave abuse of discretion. It held that there was a failure to establish the identity, existence and eligibility of the alleged consortium as bidder, that the DOTC technical tests were flunked by the ACMs, and that there was an inadequacy of *post facto* remedial measures.

D. *The Rationale*

The reasons why the Court ruled this way are given below.

79. Chavez v. PCGG, 299 SCRA 744, 758-59 (1998).

80. Kilosbayan, Inc. v. Morato, 246 SCRA 540, 562-63 (1995).

81. Tatad v. Secretary of the Department of Energy, 281 SCRA 330, 347-48 (1997).

82. *Kilosbayan*, 246 SCRA at 562-63.

83. Dumlao v. COMELEC, 95 SCRA 392, 400 (1980).

84. ITFP v. COMELEC, 18 THE LAWYERS REVIEW 36, 41 (Jan. 31, 2004). The Court stated, "thus, how could the petitioners have appealed the BAC's recommendation or report to the head of the procuring entity (the chairman of COMELEC), when the COMELEC *en banc* had already approved the award of the contract to MPC even before the petitioners learned of the BAC recommendation?"

1. Failure to Establish the Identity, Existence and Eligibility of the Alleged Consortium as the Bidder

By formal Resolution, COMELEC *awarded* the Contract to MPC, an entity that had not participated in the bidding. Despite this grant, the poll body *signed* the actual automation agreement with Mega Pacific eSolutions, Inc. (MPEI), a company that had joined the bidding, but had not met the eligibility requirements. The contract referred to, entitled "The Automated Counting and Canvassing Project Contract," was between the COMELEC and *MPEI*, not the alleged consortium, MPC. Nowhere in that Contract was there any mention of a consortium or joint venture, of members thereof, much less of joint and several liabilities.

There was no copy of the Joint Venture Agreement included in the First Envelope (Eligibility). The documents submitted by the alleged consortium members did not establish the existence of a consortium as they were merely financial statements and incorporation papers.[85] Respondents insisted that the bidder was actually MPC, of which MPEI was but a part. As proof thereof, they called the Court's attention to the Letter of Intent to Bid, signed by the President of MPEI.[86] However, the Letter did not show that MPEI or its president have been duly pre-authorized by the other members of the putative consortium to represent them, to bid on their collective behalf and, more importantly, to commit them jointly and severally to the bid undertakings. Furthermore, apart from this self-serving letter, there was not even any indication that MPEI was the lead company duly authorized to act on behalf of the others.

The COMELEC, therefore, had no basis at all for determining that the alleged consortium really existed and was eligible and qualified. Notwithstanding such deficiencies, the COMELEC still deemed the "consortium" eligible to participate in the bidding, proceeded to open its Second Envelope, and eventually awarded the bid to it, even though, *per* the COMELEC's own RFP, the BAC should have declared the MPC ineligible to bid and returned the Second (Bid) Envelope unopened.[87]

85. *Id.* at 45. In the instant case, there was no sign whatsoever of any joint venture agreement, consortium agreement, memorandum of agreement, or business plan executed among the members of the purported consortium. The only logical conclusion is that no such agreement was ever submitted to the COMELEC for its consideration, *as a part of the bidding process*.

86. *Id.* at 43. The Letter of Intent to Bid was signed only by Willy Yu, as President of MPEI, for and on behalf of MPC.

87. COMELEC *assumed* that such consortium existed and was eligible. It then went ahead and considered the bid of MPC, to which the contract was eventually awarded, in gross violation of its own bidding rules and procedures contained in its RFP.

The Court stated that, "to assure itself properly of the due existence (as well as eligibility and qualification) of the putative consortium, COMELEC's BAC should have examined the bidding documents submitted on behalf of MPC. They would have easily discovered the...fatal flaws."[88] Because of this grant, despite the ineligibility of MPC, the Court stated, "therein lies COMELEC's grave abuse of discretion."

2. Automated Counting Machines (ACMs) of MPC Flunked the DOST Technical Tests

It was found by the Court that the ACMs failed the following key requirements set by the DOST: failure to meet the required accuracy rating, failure of the software to detect previously downloaded data, and failure to print an audit trail.

The ACMs proffered by MEGA PACIFIC flunked the technical tests; specifically, they failed to meet the accuracy requirement of 99.9995 percent set up by the COMELEC bidding rules. Acknowledging that this rating could have been too steep,[89] the Court nonetheless observed that "the essence of public bidding is violated by the practice of requiring very high standards or unrealistic specifications that cannot be met – like the 99.9995 percent accuracy rating in this case – only to water them down *after* the bid has been awarded. Such scheme, which discourages the entry of *bona fide* bidders, is in fact a sure indication of fraud in the bidding, designed to eliminate fair competition."[90]

Furthermore, the ACMs failed to meet another key requirement – "for the counting machines' software program to be able to detect previously downloaded precinct results and to prevent these from being entered again into the counting machines."[91] Had the Supreme Court ignored this failure and validated the Contract, unscrupulous persons would be able to repeatedly download and feed into the computers the results favorable to a particular candidate. Thus, in the Court's own words, "we are thus confronted with the grim prospect of election fraud on a massive scale by

88. ITF P v. COMELEC, 18 THE LAWYERS REVIEW 36, 44 (Jan. 31, 2004).

89. *Id.* at 55. When questioned on this matter during the Oral Argument, Commissioner Borra tried to wash his hands by claiming that the required accuracy rating of 99.9995 percent had been set by a private sector group in tandem with COMELEC. He added that the Commission had merely adopted the accuracy rating as part of the group's recommended bid requirements, which it had not bothered to amend even after being advised by DOST that such standard was unachievable.

90. *Id.* at 46.

91. *Id.* at 55.

means of just a few key strokes. The marvels and woes of the electronic age!"[92]

Finally, the DOST tests revealed that the machines were unable to print the audit trail without loss of data.

> This particular deficiency is significant, not only to the bidding, but to the cause of free and credible elections. The purpose of requiring audit trails is to enable COMELEC to trace and verify the identities of the ACM operators responsible for data entry and downloading, as well as the times when the various data were downloaded into the canvassing system, in order to forestall fraud and to identify the perpetrators.[93]

3. Inadequacy of Post Facto Remedial Measures

Finally, aggravating these failures to comply with bid requirements were the inability of COMELEC to explain these deficiencies, and its dismaying admission that "the software used by COMELEC was merely a 'demo' version inasmuch as the final version that would actually be used in the elections was still being developed and had not been finalized."[94]

The Court came to the conclusion that COMELEC did not care about the software, but focused only on purchasing the machines.[95] Citing an old adage, the Court explained that no matter how powerful, advanced and sophisticated the computers and the servers are, if the software being utilized is defective or has been compromised, the results will be no better than garbage.[96]

92. *Id.*

93. *Id.*

94. *Id.* at 57. Respondents tried to argue that the deficiencies relating to the detection of previously downloaded data, as well as provisions for audit trails, are mere shortcomings or minor deficiencies in software or programming, which can be rectified. However, many of the Court's questions remained unanswered to this day.

95. *Id.* Pertinently, the Court raised these questions: if that were so, why then were the ACMs brought in and paid for "when there is as yet no way of knowing if the final version of the software would be able to run them properly" and assure an orderly and accurate count? Even more clearly, "COMELEC awarded the Contract without having seen, much less evaluated, the final product being purchased." After noting these violations by COMELEC of its own bidding rules, the Court asked, "what then was the point in awarding the bid when the software that was the subject of the Contract was still to be created by the winner?"

96. *Id.* at 57. The Court cited the old adage, "Garbage in, garbage out."

E. Epilogue

As an epilogue to this Decision, the Court noted that the MEGA PACIFIC case involved not merely the invalidation of a business contract, but the ability and capacity of COMELEC to perform properly, legally and prudently its legal mandate to implement the transition from manual to automated elections;[97] and in the final analysis to conduct honest, orderly and credible elections.

In short, the Court voided the MEGA PACIFIC Contract, not merely because it restrained free trade and desecrated legal and jurisprudential norms but, even more important, because the illegal and abusive acts of COMELEC put in jeopardy the "pith and soul of democracy – credible, orderly and peaceful elections."[98] By awarding the bid and later on allowing the winner to alter substantially the latter's bid without any public bidding, COMELEC desecrated the law on public bidding.

For these reasons, the Court found it totally unacceptable and unconscionable to place its imprimatur on this void and illegal transaction that seriously endangered the breakdown of the Philippine electoral system. For this Court to cop-out and to close its eyes to these illegal transactions, while convenient, would be to abandon its constitutional duty of safeguarding public interest. As a necessary consequence of such nullity and illegality, the purchase of the machines and all appurtenances thereto including the still-to-be-produced (or in COMELEC's words, to be "reprogrammed") software, as well as all the payments made, have no basis whatsoever in law. The public funds expended pursuant to the void Resolution and Contract must therefore be recovered from the payees and/or from the persons who made possible the illegal disbursements, without prejudice to possible criminal prosecutions against them.

In a subsequent resolution to this MEGA PACIFIC case,[99] in the face of complaints from respondents, the Court further explained its ruling in MEGA PACIFIC, as distinguished from the *AMARI* and *PIATCO* cases, thus:

> Public respondents complain that while we have directed the Ombudsman and the Solicitor General to determine their criminal and civil liabilities (if any), the Court did not make the same direction in regard to the officials involved in the AMARI and PIATCO cases. Such misplaced outbursts merely show that, up to this day, the Honorable COMELEC Commissioners and the other officials concerned have not realized the gravity of their misdeeds. While the contracts in the AMARI and PIATCO

97. *Id.* at 61.

98. *Id.*

99. ITFP v. COMELEC, G.R. No. 159139, Feb. 17, 2004. The Court, by the same vote of 9-5, denied the Motion for Reconsideration.

> cases were mainly commercial in nature, here – as already explained in the Decision – the illegal, hasty and imprudent actions of the Commission have not only desecrated legal and jurisprudential norms [governing contracts and public biddings] but have also cast serious doubts upon the poll body's ability and capacity to conduct automated elections. Truly, the pith and soul of democracy – credible, orderly, and peaceful elections – have been put in jeopardy by the illegal and abusive acts of COMELEC.
>
> Also, in the AMARI and PIATCO cases, there was no irregular disbursement of public funds in the reclamation project and airport terminal construction concerned. What were used in the works involved in those cases were mostly private funds. Here, however, the government has earmarked ₱1.3 billion for the automation of the ballot counting and canvassing, of which nearly ₱850 million has already been irregularly paid to private respondents by COMELEC. Certainly, public interest requires the recovery of this enormous sum, and the punishment of those who may be criminally responsible therefor.
>
> Besides, the public officials involved in the AMARI case have already been charged criminally. In any event, even without being expressly directed by the Court, the Ombudsman, on his own, is constitutionally mandated to investigate any possible criminal liability of the officials concerned whenever and wherever it may arise.[100]

VI. CONCLUSION

By invalidating these three mega Contracts, which had been entered into with grave abuse of discretion by the government entities concerned – the PEA, the MIAA, and the COMELEC – the Supreme Court firmly upheld the rule of law, which by itself is an essential ingredient of economic governance. Equally important to the business community, the Court sent a clear and unwavering signal that government contracts must be entered into fairly and even-handedly. Far from being an unwanted interloper in economic matters, the Court in these three Decisions has steadfastly upheld one of the most revered axioms in business policy - the "leveling of the playing field."

> In common parlance, public bidding aims to "level the playing field." That means that each bidder must bid under the same conditions; and be subject to the same guidelines, requirements and limitations, so that the best offer or lowest bid may be determined, *all other things being equal.*
>
> Thus, it is contrary to the very concept of public bidding to permit a variance between the conditions under which bids are invited and those under which proposals are submitted and approved; or...the conditions under which a bid is won and those under which the awarded Contract will be complied with. The substantive amendment of the contract bidded out – *after* the bidding process had been concluded – is violative of the

100. *Id.*

> public policy on public biddings, as well as [of] the spirit and intent of RA 8436."[101]

Contrary to the claim of its critics, the Supreme Court has ruled in favor of stability, rationality and transparency in business. Some businessmen who entered into these void government contracts may have suffered some losses, but business in general has been promoted and advanced. The rule of law, fairness and integrity has been steadfastly upheld.

101. ITFP v. COMELEC, 18 THE LAWYERS REVIEW 36, 59-60 (Jan. 31, 2004).