Republic of the Philippines
SUPREME COURT
Manila

EN BANC

G.R. No. 112399 July 14, 1995

REPRESENTATIVE AMADO S. BAGATSING, petitioner,
vs.
COMMITTEE ON PRIVATIZATION, PHILIPPINE NATIONAL OIL COMPANY and THE HONORABLE EXECUTIVE SECRETARY, respondents**.**

G.R. No. 115994 July 14, 1995

NEPTALI A. GONZALES, ERNESTO A. MACEDA, JOHN H. OSMEÑA, WIGBERTO E. TAÑADA, JOKER O. ARROYO, AMADO D. BAGATSING, and RENE A.V. SAGUISAG, petitioners,
vs.
DELFIN LAZARO, in his capacity as Chairman of the Philippine National Oil Company, MONICO JACOB, in his capacity as President of PNOC, COMMITTEE ON PRIVATIZATION, PHILIPPINE NATIONAL OIL COMPANY, PETRON CORPORATION, and ARAMCO OVERSEAS COMPANY B.V., respondents**.**

QUIASON, ***J.:***

The petition for prohibition in G.R. No. 112399 sought: (1) to nullify the bidding conducted for the sale of a block of shares constituting 40% of the capital stock (40% block) of Petron Corporation (PETRON) and the award made to Aramco Overseas Company, B.V. (ARAMCO) as the highest bidder in the bidding conducted on December 15, 1993; and (2) to stop the sale of said block of shares to ARAMCO. The Supplemental Petition in said case sought to annul the bidding of the 40% block held on December 15, 1993 and to set aside the award given to ARAMCO (*Rollo*, pp. 94-99).

The petition for prohibition and *certiorari* in G.R. No. 115994 sought to annul the sale of the same block of Petron shares subject of the petition in G.R. No. 112399.

The petition in G.R. No. 112399 asked for the issuance of a temporary restraining order to stop respondents from selling the 40% block to a foreign buyer (*Rollo*, p. 15). The petition for a temporary restraining order was reiterated in a motion filed subsequently (*Rollo*, pp. 107-108).

The petition in G.R. No. 115994 asked for the issuance of a temporary restraining order and a writ of preliminary injunction to restrain and enjoin public respondents "from proceeding with the projected initial public offering on July 18, 1994 of the 20% of Petron" (*Rollo*, p. 33).

The Urgent Supplemental Petition in said case reiterated the prayer for the immediate issuance of a preliminary injunction to enjoin the initial public offering of the Petron shares (*Rollo*, pp. 223-225).

Actions on the petitions and motions for the issuance of a temporary restraining order and a writ of preliminary injunction were deferred.

The petition in G.R. No. 112399 was filed by Representative Amado S. Bagatsing while the petition in G.R. No. 115994 was filed by Senators Neptali A. Gonzales, Ernesto A. Maceda, John H. Osmeña and Wigberto E. Tañada, Representatives Joker Arroyo and Amado D. Bagatsing and former Senator Rene A.V. Saguisag — all in their capacity as members of Congress, taxpayers and concerned citizens, except in the case of Mr. Saguisag, who sued as a private law practitioner, member of the Integrated Bar of the Philippines, taxpayer and concerned citizen.

Respondent Monico V. Jacob was impleaded in G.R. No. 115994 in his capacity as President of respondent Philippine National Oil Company (PNOC). At the time of the filing of the petition, he had ceased to be the President of PNOC and a member of its governing board. However, he is the Chairman of the Board of Directors and Chief Executive Officer of PETRON, a respondent in both cases. He asked for the dismissal of the petition on the ground that having ceased to be PNOC President, petitioners had no more cause of action against him. We deny the motion in view of the fact that the petition questions his acts as President of PNOC.

In G.R. No. 115994, ARAMCO entered a limited appearance to question the jurisdiction over its person, alleging that it is a foreign company organized under the laws of the Netherlands, that it is not doing nor licensed to do business in the Philippines, and that it does not maintain an office or a business address in and has not appointed a resident agent for the Philippines (*Rollo*, p. 240).

I

PETRON was originally registered with the Securities and Exchange Commission (SEC) in 1966 under the corporate name "Esso Philippines, Inc." (ESSO) as a subsidiary of Esso Eastern, Inc. and Mobil Petroleum Company, Inc.

In 1973, at the height of the world-wide oil crisis brought about by the Middle East conflicts, the Philippine government acquired ESSO through the PNOC. ESSO became a wholly-owned company of the government under the corporate name PETRON and as a subsidiary of PNOC.

In acquiring PETRON, the government aimed to have a buffer against the vagaries of oil prices in the international market. It was felt that PETRON can serve as a counterfoil against price manipulation that might go unchecked if all the oil companies were foreign-owned. Indeed, PETRON helped alleviate the energy crises that visited the country from 1973 to 1974, 1979 to 1980, and 1990 to 1991.

PETRON owns the largest, most modern complex refinery in the Philippines with a nameplate capacity of 155,000 barrels per stream day. It is also the country's biggest combined retail and wholesale market of refined petroleum products. In 1992, it garnered a 39.8% share of all domestic products sold, and at year end its assets totalled P24.4 billion. PETRON's income as of September 1993 was P2.7 billion. It is listed as the No. 1 corporation in terms of assets and income in the Philippines.

On December 8, 1986, President Corazon C. Aquino promulgated Proclamation No. 50 in the exercise of her legislative power under the Freedom Constitution.

The Proclamation is entitled "Proclaiming and Launching a Program for the Expeditious Disposition and Privatization of Certain Government Corporations and/or the Assets thereof, and Creating the Committee on Privatization and the Asset Privatization Trust."

Implicit in the Proclamation is the need to raise revenue for the Government and the ideal of leaving business to the private sector. The Government can then concentrate on the delivery of basic services and the performance of vital public functions.

On December 2, 1991, President Fidel V. Ramos noted that "[t]he privatization program has proven successful and beneficial to the economy in terms of expanding private economic activity, improving investment climate, broadening ownership base and developing capital markets, and generating substantial revenues for priority government expenditure," but "[t]here is still much potential for harnessing private initiative to undertake in behalf of government certain activities which can be more effectively and efficiently undertaken by the private sector" (G.R. No. 112399, *Rollo*, p. 31).

In its meeting held on September 9, 1992, the PNOC Board of Directors approved Specific Thrust No. 6 and moved "to bring to the attention of the Administration the need to privatize Petron whether or not there will be deregulation [of the oil industry]" (G.R. No. 112399, *Rollo* p. 67).

In a letter dated October 21, 1992, Secretary Ramon R. Del Rosario, as Chairman of the Committee on Privatization, endorsed to President Ramos the proposal of PNOC to "privatize 65% of the stock of Petron, open to both foreign as well as domestic investors." Secretary Del Rosario added: "The entry of foreign investors in this field is expected to result in improved technology and know-how and will enable Petron to have access to international information network as well as access to external markets and refining contracts" (G.R. No. 112399, *Rollo*, p. 72).

On January 4, 1993, a follow-up letter was sent by Secretary Del Rosario informing the President that: "The privatization of Petron, recommended by both the management of Philippine National Oil Company (PNOC) and the Committee on Privatization (COP), will send the right signals that may re-ignite investor interest in the Philippines for 1993" (G.R. No. 112399, *Rollo*, p. 73).

In a letted dated January 6, 1993, Secretary designate Delfin L. Lazaro of the Department of Energy, favorably endorsed for approval the plan to sell up to 65% of the capital stock of PETRON. He also noted that the said plan was "consistent with the Energy Sector Action Plan approved by the President and the Cabinet on November 27, 1992" (G.R. No. 112399, *Rollo*, p. 74).

On January 12, 1993, the Cabinet approved the privatization of PETRON as part of the Energy Sector Action Plan.

On March 25, 1993, the Government Corporate Monitoring and Coordinating Committee (GCMCC) recommended a 100% privatization of PETRON.

On March 31, 1993, the PNOC Board of Directors passed a resolution authorizing the company to negotiate and conclude a contract with the consortium of Salomon Brothers of Hongkong Limited and PCI Capital Corporation for financial advisory services to be rendered to PETRON.

On April 1, 1993, the GCMCC recommended to COP the privatization of only 65% of the capital stock of PETRON, instead of the 100% privatization previously recommended.

On June 10, 1993, in a letter addressed to Secretary Ernesto C. Leung, the COP Chairman, President Ramos approved the privatization of PETRON up to a maximum of 65% of its capital stock.

The Petron Privatization Working Committee (PWC) was thus formed. It finalized a privatization strategy with 40% of the shares to be sold to a strategic partner and 20% to the general public through the initial public offering and employees stock option plan.

The Commission on Audit (COA) was consulted as to the valuation methodologies and privatization process. The privatization plan was also presented to the COP on July 23, 1993, and to the President on July 31, 1993 for their approval.

On August 10, 1993, the President approved the 40% — 40% — 20% privatization strategy of PETRON. In the press release on the presidential approval of the said privatization, the Office of the President commented:

> For Petron, gaining a long-term strategic partner that will ensure stable crude oil supplies and/or advance its technological and financial position will be a definite advantage. In addition, its partial privatization will provide the flexibility and level playing field it needs to remain a major, and therefore influential player in the oil industry. In 1992, Petron dominated the oil industry with a commanding 40% market share (G.R. No. 112399, *Rollo*, p. 83).

The invitation to bid was published in several newspapers of general circulation, both local and foreign. The deadline for the submission of proposals was set for December 15, 1993 at 5:00 P.M.

PETRON furnished the Office of the Solicitor General (OSG) with copies of the draft of the stock purchase agreement and shareholders' agreement, with a request for the review of the same.

In a meeting of the Petron PWC held on December 15, 1993 at 12:00 noon, it decided that Westmont Holdings (WESTMONT) was disqualified from participating in the bidding for its alleged failure to comply with the technical and financial requirements for a strategic partner.

Salomon Brothers valued PETRON at US$600 million and the 40% block at US$240 million. For the entire Petron shares, respondent Secretary Lazaro proposed a valuation of US$1.4 billion; Petron management, US$857 million; and Frances Onate, a member of the Petron PWC, a valuation of US$743 million to US$1 billion.

Finally, the floor price bid for the 40% block was fixed at US$440 million.

The bids of Petroliam Nasional Berhad (PETRONAS), ARAMCO and WESTMONT were submitted while the floor price was being discussed.

At about 6:15 P.M. and before the bids were opened, WESTMONT through its representative, Manuel Estrella, submitted additional documents to prove its financial capability to carry out the purchase of the 40% block. The PNOC Board of Directors adopted Resolution No. 865, S. 1993, rejecting the bid of WESTMONT for not having met the pre-qualification criteria of financial capability, long-term crude supply availability, and technical and management expertise in the oil business. It was further resolved that the bid submitted by WESTMONT would be returned unopened.

At 6:30 P.M., the other two bids were opened. The bid of ARAMCO was for US$502 million while the bid of PETRONAS was for US$421 million. The PNOC Board of Directors then passed Resolution No. 866, S. 1993, declaring ARAMCO the winning bidder.

On December 15, 1993, the OSG informed PETRON that the drafts of the stock purchase agreement and shareholders' agreement contained no legally objectionable provisions and could be the basis for PETRON's negotiation with the winning bidder.

On December 16, 1993, respondent Monico Jacob, in his capacity as President and Chief Executive Officer of PNOC, endorsed to the COP the bid of ARAMCO for approval. The COP gave its approval on the same day. Also on the same day, Manuel Estrella filed a complaint in behalf of WESTMONT with PNOC, questioning the award of the 40% block of Petron shares to ARAMCO. The COP answered Estrella's letter on January 14, 1994, explaining why WESTMONT's bid was returned unopened.

On February 3, 1994, PNOC and ARAMCO signed the Stock Purchase Agreement and on March 4, 1994, the two companies signed the Shareholders' Agreement.

Public respondents submitted to the Securities and Exchange Commission (SEC) a proposed price for the initial public offering of the 20% block set for July 18, 1994, the second phase of PETRON's privatization. PETRON proposed a price of between P7.00 and P16.00 per share but the SEC approved a price of P9.00 per share.

II

PETRON questions the *locus standi* of petitioners to file the action (*Rollo*, pp. 479-484). Petitioners however, countered that they filed the action in their capacity as members of Congress.

In *Philippine Constitution Association v. Hon. Salvador Enriquez*, G.R. No. 113105, August 19, 1994, we held that the members of Congress have the legal standing to question the validity of acts of the Executive which injures them in their person or the institution of Congress to which they belong. In the latter case, the acts cause derivative but nonetheless substantial injury which can be questioned by members of Congress (Kennedy v. James, 412 F. Supp. 353 [1976]). In the absence of a claim that the contract in question violated the rights of petitioners or impermissibly intruded into the domain of the Legislature, petitioners have no legal standing to institute the instant action in their capacity as members of Congress.

However, petitioners can bring the action in their capacity as taxpayers under the doctrine laid down in *Kilosbayan, Inc. v. Guingona*, 232 SCRA 110 (1994). Under said ruling, taxpayers may question contracts entered into by the national government or government-owned or controlled corporations alleged to be in contravention of the law. As long as the ruling in *Kilosbayan* on *locus standi* is not reversed, we have no choice but to follow it and uphold the legal standing of petitioners as taxpayers to institute the present action.

III

A. Petitioners in G.R. Nos. 112399 and 115994 claim that the inclusion of PETRON in the privatization program contravened the declared policy of the State to dispose of only non-performing assets of the government and government-owned or controlled corporations which have been found unnecessary or inappropriate for the government sector to maintain. They contend that PETRON is neither a non-performing asset nor is it unnecessary or inappropriate for the government to maintain or operate (G.R. No. 112399, *Rollo*, pp. 3-4, 8-13; G.R. No. 115994, *Rollo*, pp. 14-17, 216-217).

To say that only non-performing assets should be the subject of privatization does not conform with the realities of economic life. In the world of business and finance, it is difficult to sell a business in dire, financial distress. As entrepreneur Don Eugenio Lopez used to advert to his younger executives: "Don't buy headaches. Don't even accept them if they are offered to you on a silver platter." It is only in a fire sale that the government can expect to get rid of its non-performing assets, more so if the sequencing pattern insisted by petitioners (initial public offering of 10% block to small investors) is followed.

While Proclamation No. 50 mandates that non-performing assets should promptly be sold, it does not prohibit the disposal of the other kinds of assets, whether performing, necessary or appropriate.

Section 1 of the Proclamation reads:

> *Statement of Policy*. — It shall be the policy of the State to promote privatization through an orderly, coordinated and efficient program for the prompt disposition of the large number of non-performing assets of the government financial institutions, and certain government-owned or controlled corporations which have been found unnecessary or inappropriate for the government sector to maintain.

The said provision classifies two types of assets: (1) Non-performing assets of government financial institutions; and (2) Government-owned or controlled corporations which have been found unnecessary or inappropriate for the government sector to maintain.

Under the Proclamation, it is the COP which is tasked with the duty of identifying and arranging the sale of government assets. Section 5(1) of the Proclamation provides:

> *Powers and Functions*. — The Committee shall have the following powers and functions:
>
> (1) To identify to the President of the Philippines, and arrange for transfer to the National Government and/or to the Trust and the subsequent divestment to the private sector of (a) such non-performing assets as may be identified by the Committee, and approved by the President, for transfer from the government banks for disposal by the Trust or the government banks, and (b) such government corporations, whether parent or subsidiary, and/or such of their assets, as may have been recommended by the Committee for disposition, and *Provided*, that *no such identification, recommendation or approval shall be necessary where a parent corporation decides on its own to divest of, in whole or in part, or liquidate a subsidiary corporation organized under the Corporation Code*; *Provided further*, that any such independent disposition shall be undertaken with the prior approval of the Committee and in accordance with the general disposition guidelines as the Committee may provide; *Provided, finally*, that in every case the sale or disposition shall be approved by the Committee with respect to the buyer and price only; (Emphasis supplied).
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> xxx xxx xxx

After a long study by PNOC, PETRON was found to be "inappropriate or unnecessary" for the government to maintain because refining and marketing of petroleum is an aspect of the industry which is better left to the private sector. In making such finding, PNOC was guided by Section 4(a) of Proclamation No. 50, which provides:

> . . . (a) divesting to the private sector in the soonest possible time through the appropriate disposition entities, those assets with viable productive potential as going concerns, taking into account where appropriate the implications of such transfers on sectoral productive capacities and market limitation, ... These objectives are to be pursued within the context of furthering the national economy through strengthened and revitalized private enterprise system.

The decision of PNOC to privatize PETRON and the approval of the COP of such privatization, being made in accordance with Proclamation No. 50, cannot be reviewed by this Court. Such acts are exercises of the executive function as to which the Court will not pass judgment upon or inquire into their wisdom (Llamas v. Orbos, 202 SCRA 844 [1991]).

Such identification by the COP of the government corporations to be privatized was not even necessary in the case of PETRON. Under Section 5(1) of Proclamation No. 50 ". . . [N]o such identification, recommendation or approval shall be necessary where a parent corporation decides on its own to divest of, in whole or in part, or liquidate a subsidiary corporation organized under the Corporation Code; . . . ."

The only participation of the COP in the sale of the Petron shares by PNOC, the parent corporation, was the approval of the buyers and price. The last sentence of paragraph (1) of Section 5 provides:

> . . . *Provided, finally*, that in every case the sale or disposition shall be approved by the Committee with respect to the buyer and price only.

PNOC, in privatizing PETRON, was simply exercising its corporate power to dispose of all or a portion of its shares in a subsidiary. PNOC was created under P.D. No. 334, as amended by P.D. No. 927, which empowers it to acquire shares of the capital stock of any other corporation and to dispose of the same shares.

Besides, if only non-performing assets are intended to be sold, it would be unnecessary to provide in the Proclamation for the rehabilitation of government corporations to make the same more attractive to investors and potential buyers.

Section 5 (5) of Proclamation No. 50 provides:

> In its discretion, to approve or disapprove, subject to the availability of funds for such purpose, the rehabilitation of assets pending disposition by the Trust or any other government agency authorized by the Committee, or the Trust with the approval of the Committee, *Provided* that, the budget for each rehabilitation project shall be likewise subject to prior approval by the Committee.

Nowhere in the Proclamation can one infer that it prohibits a partial privatization of vital, appropriate and performing corporations owned by the government.

Proclamation No. 50 contained an Annex listing the corporations to be privatized and those to be retained. While PETRON was mentioned among the corporations to be retained, Section 6 of the Proclamation directed a continuing study on what corporations should be recommended for privatization.

It is markworthy that the said Annex did not indicate the percentage of shares that will be privatized or that will be retained. It can be interpreted to mean that all the shares of the corporations in the list to be privatized may be sold, while only some of the shares of the other corporations may be sold. It is also worthy of note that the list of corporations to be retained added the phrase "As of 31 August 1992," meaning that any of the corporations mentioned therein may be delisted after that date if a study would justify such action.

The government is not disposing of all of its shares in PETRON but is retaining a 40% block. Together with the widely-held 20% of the private sector control of PETRON by the government is assured. With such equity in PETRON, the government can also maintain a window to the oil industry and at the same time share in the profits of the company.

The privatization of PETRON could well be undertaken under laws other than Proclamation No. 50.

Of significance is Section 2(c) of R.A. No. 7181, which provides that:

> Privatization of government assets classified as a *strategic industry* by the National Economic and Development Authority shall first be approved by the President of the Philippines (Emphasis supplied).

Section 6, the repealing clause of R.A. No. 7181, expressly repealed Sections 3 and 10 of Proclamation No. 50 and all other laws, orders and rules and regulations which are inconsistent therewith.

The only requirement under R.A. No. 7181 in order to privatize a strategic industry like PETRON is the approval of the President. In the case of PETRON's privatization, the President gave his approval not only once but twice.

PETRON's privatization is also in line with and is part of the Philippine Energy Program under R.A. No. 7638. Section 5(b) of the law provides that the Philippine Energy Program shall include a policy direction towards the privatization of government agencies related to energy.

Under P.D. No. 334, the law creating PNOC, said corporation is granted the authority "[t]o establish and maintain offices, branches, agencies, subsidiaries, correspondents or other units anywhere as may be needed by the Company and reorganize or abolish the same as it may deem proper."

B. Petitioners next question the regularity and validity of the bidding (G.R. No. 112399, *Rollo*, pp. 97-99; G.R. No. 115994, *Rollo*, pp. 17-24, 221). Petitioners in G.R. No. 115994 claim that the public bidding was tainted with haste and arbitrariness and that there was a failed bidding because there was only one offeror (*Rollo*, pp. 17-24).

Taking the cudgels for WESTMONT, petitioners urge that said bidder was only given two days to conduct a review PETRON's vast business operations in order to comply with the technical and financial requirements for pre-qualification. Petitioners also complain that the pre-qualification and actual bidding were conducted on the same day, thus denying a disqualified bidder an opportunity to protest or to appeal. They question the fixing of the floor price on the same day as the public bidding and only after the bids had been submitted. Likewise, they say that the approval of the bid of ARAMCO by the Assets Privatization Trust on the same day it is submitted is anomalous (G.R. No. 115994, *Rollo*, pp. 22-24).

On the claim that there was a failed bidding, petitioners contend that there were only three bidders. One of them, PETRONAS, submitted a bid lower than the floor price while a second, failed to pre-qualify. Citing Section V-2-a of COA Circular No. 89-296 dated January 27, 1989, they argue that where only one bidder qualifies, there is a failure of public auction (G.R. No. 115994, *Rollo*, p. 22).

When a failure of bidding takes place is defined in Circular No. 89-296 of the Commission on Audit, which prescribes the "Audit Guidelines on the Divestment or Disposal of Property and other Assets of the National Government Agencies and Instrumentalities, Local Government Units and Government-Owned or Controlled Corporations and their Subsidiaries."

> V. MODES OR DISPOSAL/DIVESTMENT:
>
> xxx xxx xxx
>
> 2 *Sale Thru Negotiation*
>
> For justifiable reasons and as demanded by the exigencies of the service, disposal thru negotiated sale may be resorted to and undertaken by the proper committee or body in the agency or entity concerned taking into consideration the following factors:
>
> a. There was a failure of public auction. As envisioned in this Circular, there is a failure of public auction in any of the following instances:
>
>> 1 if there is only one offeror.
>>
>> In this case, the offer or bid, if sealed, shall not be opened.
>>
>> 2 if all the offers/tenders are non-complying or unacceptable.
>>
>> A tender is non-complying or unacceptable when it does not comply with the prescribed legal, technical and financial requirement for pre-qualification.

Under said COA Circular, there is a failure of bidding when: 1) there is only one offeror; or (2) when all the offers are non-complying or unacceptable.

In the case at bench, there were three offerors: SAUDI ARAMCO, PETRONAS and WESTMONT.

While two offerors were disqualified, PETRONAS for submitting a bid below the floor price and WESTMONT for technical reasons, not all the offerors were disqualified. To constitute a failed bidding under the COA Circular, all the offerors must be disqualified.

Petitioners urge that in effect there was only one bidder and that it can not be said that there was a competition on "an equal footing" (G.R. No. 112399, *Rollo*, p. 122). But the COA Circular does not speak of accepted bids but of offerors, without distinction as to whether they were disqualified.

The COA itself, the agency that adopted the rules on bidding procedure to be followed by government offices and corporations, had upheld the validity and legality of the questioned bidding. The interpretation of an agency of its own rules should be given more weight than the interpretation by that agency of the law it is merely tasked to administer.

The case of *Danville Maritime, Inc*. *v*. *Commission on Audit,* 175 SCRA 701 (1989), relied upon by petitioner, is inappropriate. In said case, there was only one offeror in the bidding. The Court said: ". . . [I]f there is only one participating bidder, the bidding is non-competitive and, hence, falls short of the requirement. There would, in fact, be no bidding at all since, obviously, the lone participant cannot compete against himself."

C. According to petitioners, the law mandates the offer for sale of 10% of the Petron shares to small investors before a sale of the 40% block of shares to ARAMCO can be made.

They theorize that the best way to determine the real market price of Petron shares was to first have a public offering as required by R.A. No. 7181. The reverse procedure followed by private respondents, according to petitioners, gave unwarranted benefits to private respondents because they bought the Petron shares at only P6.70 per share when the shares fetched as high as P16.00 per share in the stock market (G.R. No. 115994, *Rollo*, pp. 24-27).

To bolster their theory, petitioners cite Section 2(d) of R.A. No. 7181, which provides:

> A minimum of ten (10) percent of the sale of assets in corporation form shall first be offered to small local investors including Filipino Overseas Workers and where practicable also in the sale of any physical asset.

Petitioners also invoke the Implementing Guidelines promulgated to implement R.A. No. 7181, which provides:

> In the sale of assets in corporate form, at least 10% of the total shares for privatization shall first be offered to small local investors. Employees Stock Ownership Plans (ESOPS) and public offerings shall count towards compliance with these provisions . . . (Sec. 3).

We agree with PETRON that the language of Section 2(d) of R.A. No. 7181 does not mandate any sequencing for the disposition of shares in a government-owned corporation being privatized.

It is the unfortunate use of the word "first" in Section 2(d) of R.A. No. 7181 that threw petitioners off track and caused them to misread the provision as one requiring a mandatory sequencing of the sale. As a wit once said, if a centipede would be compelled to follow a prescribed sequencing of its steps, it could never move an inch.

A reasonable reading of the provision is that it merely gives a right of first refusal by the small investors *vis-a-vis* the 10% block of shares. As far as the 10% block is concerned, the small investors shall have a first chance to subscribe thereto whenever it is offered. The offer may be made before, after or simultaneous with the offer of the shares to strategic partners or major investors depending on the prevailing condition of the market. Certainly, in an initial public offering, it is good judgment and business sense that should prevail, rather than the rigid and inflexible rules of step one, step two, etc.

The Rules and Regulations issued by the COP to implement R.A. No. 7181 set aside 10% of the shares subject of the privatization to be offered first to the small local investors, and made clear that as far as said 10% block is concerned, the small investors shall have the first crack to buy the same. These Rules have been consistently applied in previous privatizations, and they constitute a contemporaneous construction and interpretation of a law by the implementing, administrative agency. Such construction is accorded great respect by the Court (Nestle Philippines, Inc. v. Court of Appeals, 203 SCRA 504 [1991]).

What Congress clearly mandated in R.A. No. 7181 was that at least 10% of the shares of a privatized corporation must be reserved and offered for sale to the general public. In the deliberation of the Congressional Committee on Government-Owned and Controlled Corporations on December 18, 1991, the Committee spoke of having the 10% set aside without impeding the privatization process.

Note that when the bidding of the 40% block of Petron shares had been announced, the 10% block for offering to the small local investors had been identified, reserved and set aside. This is more than a substantial compliance with the mandate of law.

There is great risk in first making an initial public offering of the 10% block before bidding out the 40% block to a strategic partner. It may happen that the price of the shares offered initially to the public plunges below the offering price approved by the SEC.

The sensitive market forces involved in initial public offerings render unrealistic any legislative mandate to follow a sequencing in the sale of government-owned shares in the market. The legislators, practical men of affairs as they are, were aware of the vagaries, variables and vicissitudes of the stock market when they enacted R.A. No. 7181. It is more reasonable to read the said law as leaving to the COP and the government corporations concerned to determine the sequencing of the sale to strategic investors and the general public. To require the offer of 10% to the general public before the sale of a block to a strategic partner may delay or even impede the entire privatization program.

The clear policy behind Proclamation No. 50 is to give the COP and APT maximum flexibility in their operation to ensure the most efficient implementation of the privatization program.

Under Section 5(3) of the Proclamation, full powers are given the COP to establish "mandatory as well as indicative guidelines for . . . the disposition of . . . assets." Under Section 12(2) thereof, the APT is given the "widest latitude of flexibility . . . particularly in the areas of . . . disposition . . . ."

Petitioners can not rely on Opinion No. 126, Series of 1992 dated September 28, 1992. The query posed to the Secretary of Justice in said opinion was the legality of the plan of National Development Corporation to pass on to the prospective buyer of its shares in a local bank the responsibility of complying with the requirement prescribed in Section 2(d) of R.A. No. 7181 that a minimum of 10% of the shares of a corporation "shall first be offered to small local investors . . . ." The Secretary of Justice naturally opined that said proposal could not legally be done on the principal ground that the "observance of this legal requirement is incumbent upon the disposition entity, which in this case is NDC, but as contemplated, the sale to small investors shall be undertaken by the private buyer of the [local bank's] shares." The query posed to the Secretary of Justice was not about the sequencing of the sale of the 10% block.

We can not see how the failure to dispose the 10% block to the general public before the sale of the 40% block to ARAMCO gave the latter unwarranted benefits.

Actually ARAMCO paid a total of P14,671,985,306.00 for the acquisition of the Petron shares. This aggregate amount represents in peso terms: (1) the US$502 million winning bid paid by ARAMCO to PNOC on March 4, 1994; and (2) the additional amount of US$30,327,987.00 remitted on July 11, 1994, representing the "purchase price adjustment" stipulated in the Stock Purchase Agreement. Consequently, ARAMCO's acquisition cost was P7.336 per share.

A fair comparison between the ARAMCO price and the IPO price should take into consideration the levels of financial, legal and miscellaneous costs directly related to the ARAMCO purchase, including the consequent opportunity cost or income to PNOC and the National Government, had the proceeds been invested in Philippine Treasury Bills from March 4 and July 11, respectively, to September 7, 1994. On this basis, the effective proceeds on the ARAMCO purchase amount to P7.8559 per share, and not P6.70 as claimed by petitioners (G.R. No. 115994, *Rollo*, pp. 506-507). On the other hand, the seller's expenses incurred in connection with the IPO, including taxes and other fees paid to the National Government, reached a total of P833.081 million or P0.833 per share (G.R. No. 115944, *Rollo*, p. 507).

To make further a fair comparison between the two prices, the proceeds from the IPO should be net of PNOC's share in PETRON's net income from March to August 1994, because in effect it was giving up this amount in favor of the IPO investors. As projected, the total net income of PETRON from March to August 1994 is P1,870,500.00. Twenty percent of this is P374,100.00 which translates to a per share reduction of P0.3741 from the IPO proceeds. This would further erode the effective proceeds from the IPO sale to P7.7929 per share.

Finally, cash dividends of P2 billion and property dividends of P153 million, or a total of P2.153 billion was declared and transferred to PNOC before the ARAMCO purchase was effected. Imputing such dividends would translate the effective proceeds to PNOC from the ARAMCO sale to P8.2865 per share (P7.8559 plus P0.4306 [or 40% of P2.153 Billion]). Using this figure, the IPO proceeds of P7.7929 per share is definitely lower than the ARAMCO proceeds of P8.2865.

Unlike the ordinary buyers of shares listed in the stock exchange, ARAMCO, as a strategic investor, had to spend for the due diligence review of the business and records of PETRON.

Aside from this monetary considerations, PNOC derived the following value-added benefits:

1) PNOC is assured of an adequate supply of crude oil. The element of uncertainty on sources of crude oil supply is reduced, if not eliminated, ARAMCO being the world's largest known producer and exporter of five different types of crude oil.

2) PNOC's refinery can achieve optimum efficiency because of better crude slates.

3) ARAMCO has to hold on to the Petron shares for the next five years. Aside from its stabilizing effect on the market price of Petron shares, this holding period will prevent

ARAMCO from deriving any speculative gains. Unlike ARAMCO, the buyers of the IPO can sell their shares any time without constraints.

4) ARAMCO's presence in PETRON has a tremendous, unquantifiable influence in investor's confidence in PETRON as a publicly-listed company. This confidence could not be generated if PETRON's partner has a bad track record.

5) ARAMCO will assist PNOC in raising funds to finance the more than P12 billion in projected capital expenditures required over the next four years to make PETRON competitive.

The pricing of shares of stock is a highly specialized field that is better left to the experts. It involves an inquiry into the earning potential, dividend history, business risks, capital structure, management, asset values of the company; the prevailing business climate; the political and economic conditions; and a myriad of other factors that bear on the valuation of shares (Van Horne, Financial Management and Policy 652-653 [8th ed.]); Leffler and Farwell, The Stock Market 573-575 [3rd ed.]).

D. Finally, petitioners contend that PETRON is a public utility, in which foreign ownership of its equity shall not exceed 40% thereof and the foreign participation in the governing body shall be limited to their proportionate share in its capital. According to petitioners, ARAMCO is entitled only to a maximum of four seats in the ten-man board but was given five seats (G.R. No. 112389, *Rollo*, pp. 30-64; G.R. No. 115994, *Rollo*, pp. 30-31, 202-212).

This issue hinges on whether the business of oil refining is a "public utility" within the purview of Section 11, Article XII of the 1987 Constitution (adopted from Sec. 5, Art. XIV of the 1973 Constitution), which provides:

> No franchise, certificate, or any other form of authorization for the operation of a public *utility* shall be granted except to *citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens*, nor shall such franchise, certificate or authorization be exclusive in character for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. *The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital and all the executive and managing officers of such corporation or association must be citizens of the Philippines* (Emphasis supplied).

Implementing Section 8 of Article XIV of the 1935 Constitution, the progenitor of Section 5 of Article XIV of the 1973 Constitution, is Section 13(b) of the Public Service Act, which provides:

> The term "public service" includes every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional, or accidental and done for general business purposes, any common carrier, railroad, street railway, . . . and other similar public services: . . . .

More pertinent is Section 7 of R.A. No. 387, the Petroleum Act of 1949, which provides:

> Petroleum operation a public utility. — Everything relating to the exploration for and exploitation of petroleum which may consist naturally or below the surface of the earth, and everything relating to the manufacture, *refining*, storage, or transportation by special methods of petroleum, as provided for in this Act, is hereby declared to be of public utility (*Rollo*, p. 519; Emphasis supplied).

A "public utility" under the Constitution and the Public Service Law is one organized "for hire or compensation" to serve the public, which is given the right to demand its service. PETRON is not engaged in oil refining for hire and compensation to process the oil of other parties.

Likewise, the activities considered as "public utility" under Section 7 of R.A. No. 387 refer only to petroleum which is indigenous to the Philippines. Hence, the refining of petroleum products sourced from abroad as is done by Petron, is not within the contemplation of the law.

We agree with the opinion of the Secretary of Justice that the refining of imported crude oil is not regulated by, nor is it within the scope and purview of the Petroleum Act of 1949. He said:

> Examination of our statute books fails to reveal any law or legal provision which, in explicit terms, either permits or prohibits the establishment and operation of oil refineries that would refine only imported crude oil (Opinion, No. 267, S. 1955).

WHEREFORE, the petitions are DISMISSED.

SO ORDERED.

Padilla, Romero, Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza and Francisco, JJ., concur.

Narvasa, CJ., Feliciano and Davide, Jr., JJ., took no part.

Regalado, J., concurs in the result.