EN BANC

[G.R. No. 155001. May 5, 2003]

DEMOSTHENES P. AGAN, JR., JOSEPH B. CATAHAN, JOSE MARI B. REUNILLA, MANUEL ANTONIO B. BOÑE, MAMERTO S. CLARA, REUEL E. DIMALANTA, MORY V. DOMALAON, CONRADO G. DIMAANO, LOLITA R. HIZON, REMEDIOS P. ADOLFO, BIENVENIDO C. HILARIO, MIASCOR WORKERS UNION - NATIONAL LABOR UNION (MWU-NLU), and PHILIPPINE AIRLINES EMPLOYEES ASSOCIATION (PALEA), ***petitioners, vs.*** **PHILIPPINE INTERNATIONAL AIR TERMINALS CO., INC., MANILA INTERNATIONAL AIRPORT AUTHORITY, DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS and SECRETARY LEANDRO M. MENDOZA, in his capacity as Head of the Department of Transportation and Communications,** ***respondents*****,**

MIASCOR GROUNDHANDLING CORPORATION, DNATA-WINGS AVIATION SYSTEMS CORPORATION, MACROASIA-EUREST SERVICES, INC., MACROASIA-MENZIES AIRPORT SERVICES CORPORATION, MIASCOR CATERING SERVICES CORPORATION, MIASCOR AIRCRAFT MAINTENANCE CORPORATION, and MIASCOR LOGISTICS CORPORATION, ***petitioners-in-intervention,***

[G.R. No. 155547. May 5, 2003]

SALACNIB F. BATERINA, CLAVEL A. MARTINEZ and CONSTANTINO G. JARAULA, ***petitioners, vs.*** **PHILIPPINE INTERNATIONAL AIR TERMINALS CO., INC., MANILA INTERNATIONAL AIRPORT AUTHORITY, DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS, DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS, SECRETARY LEANDRO M. MENDOZA, in his capacity as Head of the Department of Transportation and Communications, and SECRETARY SIMEON A. DATUMANONG, in his capacity as Head of the Department of Public Works and Highways,** ***respondents,***

JACINTO V. PARAS, RAFAEL P. NANTES, EDUARDO C. ZIALCITA, WILLY BUYSON VILLARAMA, PROSPERO C. NOGRALES, PROSPERO A. PICHAY, JR., HARLIN CAST ABAYON, and BENASING O. MACARANBON, ***respondents-intervenors,***

[G.R. No. 155661. May 5, 2003]

CEFERINO C. LOPEZ, RAMON M. SALES, ALFREDO B. VALENCIA, MA. TERESA V. GAERLAN, LEONARDO DE LA ROSA, DINA C. DE LEON, VIRGIE CATAMIN RONALD SCHLOBOM, ANGELITO SANTOS, MA. LUISA M. PALCON and SAMAHANG MANGGAGAWA SA PALIPARAN NG PILIPINAS (SMPP), ***petitioners, vs.*** **PHILIPPINE INTERNATIONAL AIR TERMINALS CO., INC., MANILA INTERNATIONAL AIRPORT AUTHORITY, DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS, SECRETARY LEANDRO M. MENDOZA, in his capacity as Head of the Department of Transportation and Communications,** ***respondents*****.**

D E C I S I O N

PUNO, ***J.*****:**

Petitioners and petitioners-in-intervention filed the instant petitions for prohibition under Rule 65 of the Revised Rules of Court seeking to prohibit the Manila International Airport Authority (MIAA) and the Department of Transportation and Communications (DOTC) and its Secretary from implementing the following agreements executed by the Philippine Government through the DOTC and the MIAA and the Philippine International Air Terminals Co., Inc. (PIATCO): (1) the Concession Agreement signed on July 12, 1997, (2) the Amended and Restated Concession Agreement dated November 26, 1999, (3) the First Supplement to the Amended and Restated Concession Agreement dated August 27, 1999, (4) the Second Supplement to the Amended and Restated Concession Agreement dated September 4, 2000, and (5) the Third Supplement to the Amended and Restated Concession Agreement dated June 22, 2001 (collectively, the PIATCO Contracts).

The facts are as follows:

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

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

On October 5, 1994, AEDC submitted an unsolicited proposal to the Government through the DOTC/MIAA for the development of NAIA International Passenger Terminal III (NAIA IPT III) under a build-operate-and-transfer arrangement pursuant to RA 6957 as amended by RA 7718 (BOT Law).[1]

On December 2, 1994, the DOTC issued Dept. Order No. 94-832 constituting the Prequalification Bids and Awards Committee (PBAC) for the implementation of the NAIA IPT III project.

On March 27, 1995, then DOTC Secretary Jose Garcia endorsed the proposal of AEDC to the National Economic and Development Authority (NEDA). A revised proposal, however, was forwarded by the DOTC to NEDA on December 13, 1995. On January 5, 1996, the NEDA Investment Coordinating Council (NEDA ICC) – Technical Board favorably endorsed the project to the ICC – Cabinet Committee which approved the same, subject to certain conditions, on January 19, 1996. On February 13, 1996, the NEDA passed Board Resolution No. 2 which approved the NAIA IPT III project.

On June 7, 14, and 21, 1996, DOTC/MIAA caused the publication in two daily newspapers of an invitation for competitive or comparative proposals on AEDC's unsolicited proposal, in accordance with Sec. 4-A of RA 6957, as amended. The alternative bidders were required to submit three (3) sealed envelopes on or before 5:00 p.m. of September 20, 1996. The first envelope should contain the Prequalification Documents, the second envelope the Technical Proposal, and the third envelope the Financial Proposal of the proponent.

On June 20, 1996, PBAC Bulletin No. 1 was issued, postponing the availment of the Bid Documents and the submission of the comparative bid proposals. Interested firms were permitted to obtain the Request for Proposal Documents beginning June 28, 1996, upon submission of a written application and payment of a non-refundable fee of ₱50,000.00 (US$2,000).

The Bid Documents issued by the PBAC provided among others that the proponent must have adequate capability to sustain the financing requirement for the detailed engineering, design, construction, operation, and maintenance phases of the project. The proponent would be evaluated based on its ability to provide a minimum amount of equity to the project, and its capacity to secure external financing for the project.

On July 23, 1996, the PBAC issued PBAC Bulletin No. 2 inviting all bidders to a pre-bid conference on July 29, 1996.

On August 16, 1996, the PBAC issued PBAC Bulletin No. 3 amending the Bid Documents. The following amendments were made on the Bid Documents:

a. Aside from the fixed Annual Guaranteed Payment, the proponent shall include in its financial proposal an additional percentage of gross revenue share of the Government, as follows:

i.	First 5 years	5.0%
ii.	Next 10 years	7.5%
iii.	Next 10 years	10.0%

b. The amount of the fixed Annual Guaranteed Payment shall be subject of the price challenge. Proponent may offer an Annual Guaranteed Payment which need not be of equal amount, but payment of which shall start upon site possession.

c. The project proponent must have adequate capability to sustain the financing requirement for the detailed engineering, design, construction, and/or operation and maintenance phases of the project as the case may be. For purposes of pre-qualification, this capability shall be measured in terms of:

i. Proof of the availability of the project proponent and/or the consortium to provide the minimum amount of equity for the project; and

ii. a letter testimonial from reputable banks attesting that the project proponent and/or the members of the consortium are banking with them, that the project proponent and/or the members are of good financial standing, and have adequate resources.

d. The basis for the prequalification shall be the proponent's compliance with the minimum technical and financial requirements provided in the Bid Documents and the IRR of the BOT Law. The minimum amount of equity shall be 30% of the Project Cost.

e. Amendments to the draft Concession Agreement shall be issued from time to time. Said amendments shall only cover items that would not materially affect the preparation of the proponent's proposal.

On August 29, 1996, the Second Pre-Bid Conference was held where certain clarifications were made. Upon the request of prospective bidder People's Air Cargo & Warehousing Co., Inc (Paircargo), the PBAC warranted that based on Sec. 11.6, Rule 11 of the Implementing Rules and Regulations of the BOT Law, only the proposed Annual Guaranteed Payment submitted by the challengers would be revealed to AEDC, and that the challengers' technical and financial proposals would remain confidential. The PBAC also clarified that the list of revenue sources contained in Annex 4.2a of the Bid Documents was merely indicative and that other revenue sources may be included by the proponent, subject to approval by DOTC/MIAA. Furthermore, the PBAC clarified that only those fees and charges denominated as Public Utility Fees would be subject to regulation, and those charges which would be actually deemed Public Utility Fees could still be revised, depending on the outcome of PBAC's query on the matter with the Department of Justice.

In September 1996, the PBAC issued Bid Bulletin No. 5, entitled "Answers to the Queries of PAIRCARGO as Per Letter Dated September 3 and 10, 1996." Paircargo's queries and the PBAC's responses were as follows:

1. It is difficult for Paircargo and Associates to meet the required minimum equity requirement as prescribed in Section 8.3.4 of the Bid Documents considering that the capitalization of each member company is so structured to meet the requirements and needs of their current respective business undertaking/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 execute 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 prequalification purposes.

In prequalification, the agency is interested in one's financial capability at the time of prequalification, not future or potential capability.

A commitment to put up equity once awarded the project is not enough to establish that "present" financial capability. However, total financial capability of all member companies of the Consortium, to be established by submitting the respective companies' audited financial statements, shall be acceptable.

2. At present, Paircargo is negotiating with banks and other institutions for the extension of a Performance Security to the joint venture in the event that the Concessions Agreement (sic) is awarded to them. However, Paircargo is being required to submit a copy of the draft concession as one of the documentary requirements. Therefore, Paircargo is requesting that they'd (sic) be furnished copy of the approved negotiated agreement between the PBAC and the AEDC at the soonest possible time.

A copy of the draft Concession Agreement is included in the Bid Documents. Any material changes would be made known to prospective challengers through bid bulletins. However, a final version will be issued before the award of contract.

The PBAC also stated that it would require AEDC to sign Supplement C of the Bid Documents (Acceptance of Criteria and Waiver of Rights to Enjoin Project) and to submit the same with the required Bid Security.

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

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

a. The lack of corporate approvals and financial capability of PAIRCARGO;

b. The lack of corporate approvals and financial capability of PAGS;

c. The prohibition imposed by RA 337, as amended (the General Banking Act) on the amount that Security Bank could legally invest in the project;

d. The inclusion of Siemens as a contractor of the PAIRCARGO Joint Venture, for prequalification purposes; and

e. The appointment of Lufthansa as the facility operator, in view of the Philippine requirement in the operation of a public utility.

The PBAC gave its reply on October 2, 1996, informing AEDC that it had considered the issues raised by the latter, and that based on the documents submitted by Paircargo and the established prequalification criteria, the PBAC had found that the challenger, Paircargo, had prequalified to undertake the project. The Secretary of the DOTC approved the finding of the PBAC.

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

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

On October 16, 1996, the PBAC opened the third envelope submitted by AEDC and the Paircargo Consortium containing their respective financial proposals. Both proponents offered to build the NAIA Passenger Terminal III for at least $350 million at no cost to the government and to pay the government: 5% share in gross revenues for the first five years of operation, 7.5% share in gross revenues for the next ten years of operation, and 10% share in gross revenues for the last ten years of operation, in accordance with the Bid Documents. However, in addition to the foregoing, AEDC offered to pay the government a total of ₱135 million as guaranteed payment for 27 years while Paircargo Consortium offered to pay the government a total of ₱17.75 billion for the same period.

Thus, the PBAC formally informed AEDC that it had accepted the price proposal submitted by the Paircargo Consortium, and gave AEDC 30 working days or until November 28, 1996 within which to match the said bid, otherwise, the project would be awarded to Paircargo.

As AEDC failed to match the proposal within the 30-day period, then DOTC Secretary Amado Lagdameo, on December 11, 1996, issued a notice to Paircargo Consortium regarding AEDC's failure to match the proposal.

On February 27, 1997, Paircargo Consortium incorporated into Philippine International Airport Terminals Co., Inc. (PIATCO).

AEDC subsequently protested the alleged undue preference given to PIATCO and reiterated its objections as regards the prequalification of PIATCO.

On April 11, 1997, the DOTC submitted the concession agreement for the second-pass approval of the NEDA-ICC.

On April 16, 1997, AEDC filed with the Regional Trial Court of Pasig a Petition for Declaration of Nullity of the Proceedings, Mandamus and Injunction against the Secretary of the DOTC, the Chairman of the PBAC, the voting members of the PBAC and Pantaleon D. Alvarez, in his capacity as Chairman of the PBAC Technical Committee.

On April 17, 1997, the NEDA-ICC conducted an *ad referendum* to facilitate the approval, on a no-objection basis, of the BOT agreement between the DOTC and PIATCO. As the *ad referendum* gathered only four (4) of the required six (6) signatures, the NEDA merely noted the agreement.

On July 9, 1997, the DOTC issued the notice of award for the project to PIATCO.

On July 12, 1997, the Government, through then DOTC Secretary Arturo T. Enrile, and PIATCO, through its President, Henry T. Go, signed the "Concession Agreement for the Build-Operate-and-Transfer Arrangement of the Ninoy Aquino International Airport Passenger Terminal III" (1997 Concession Agreement). The Government granted PIATCO the franchise to operate and maintain the said terminal during the concession period and to collect the fees, rentals and other charges in accordance with the rates or schedules stipulated in the 1997 Concession Agreement. The Agreement provided that the concession period shall be for twenty-five (25) years commencing from the in-service date, and may be renewed at the option of the Government for a period not exceeding twenty-five (25) years. At the end of the concession period, PIATCO shall transfer the development facility to MIAA.

On November 26, 1998, the Government and PIATCO signed an Amended and Restated Concession Agreement (ARCA). Among the provisions of the 1997 Concession Agreement that were amended by the ARCA were: Sec. 1.11 pertaining to the definition of "certificate of completion"; Sec. 2.05 pertaining to the Special Obligations of GRP; Sec. 3.02 (a) dealing with the exclusivity of the franchise given to the Concessionaire; Sec. 4.04 concerning the assignment by Concessionaire of its interest in the Development Facility; Sec. 5.08 (c) dealing with the proceeds of Concessionaire's insurance; Sec. 5.10 with respect to the temporary take-over of operations by GRP; Sec. 5.16 pertaining to the taxes, duties and other imposts that may be levied on the Concessionaire; Sec. 6.03 as regards the periodic adjustment of public utility fees and charges; the entire Article VIII concerning the provisions on the termination of the contract; and Sec. 10.02 providing for the venue of the arbitration proceedings in case a dispute or controversy arises between the parties to the agreement.

Subsequently, the Government and PIATCO signed three Supplements to the ARCA. The First Supplement was signed on August 27, 1999; the Second Supplement on September 4, 2000; and the Third Supplement on June 22, 2001 (collectively, Supplements).

The First Supplement to the ARCA amended Sec. 1.36 of the ARCA defining "Revenues" or "Gross Revenues"; Sec. 2.05 (d) of the ARCA referring to the obligation of MIAA to provide sufficient funds for the upkeep, maintenance, repair and/or replacement of all airport facilities and equipment which are owned or operated by MIAA; and further providing additional special obligations on the part of GRP aside from those already enumerated in Sec. 2.05 of the ARCA. The First Supplement also provided a stipulation as regards the construction of a surface road to connect NAIA Terminal II and Terminal III in lieu of the proposed access tunnel crossing

Runway 13/31; the swapping of obligations between GRP and PIATCO regarding the improvement of Sales Road; and the changes in the timetable. It also amended Sec. 6.01 (c) of the ARCA pertaining to the Disposition of Terminal Fees; Sec. 6.02 of the ARCA by inserting an introductory paragraph; and Sec. 6.02 (a) (iii) of the ARCA referring to the Payments of Percentage Share in Gross Revenues.

The Second Supplement to the ARCA contained provisions concerning the clearing, removal, demolition or disposal of subterranean structures uncovered or discovered at the site of the construction of the terminal by the Concessionaire. It defined the scope of works; it provided for the procedure for the demolition of the said structures and the consideration for the same which the GRP shall pay PIATCO; it provided for time extensions, incremental and consequential costs and losses consequent to the existence of such structures; and it provided for some additional obligations on the part of PIATCO as regards the said structures.

Finally, the Third Supplement provided for the obligations of the Concessionaire as regards the construction of the surface road connecting Terminals II and III.

Meanwhile, the MIAA which is charged with the maintenance and operation of the NAIA Terminals I and II, had existing concession contracts with various service providers to offer international airline airport services, such as in-flight catering, passenger handling, ramp and ground support, aircraft maintenance and provisions, cargo handling and warehousing, and other services, to several international airlines at the NAIA. Some of these service providers are the Miascor Group, DNATA-Wings Aviation Systems Corp., and the MacroAsia Group. Miascor, DNATA and MacroAsia, together with Philippine Airlines (PAL), are the dominant players in the industry with an aggregate market share of 70%.

On September 17, 2002, the workers of the international airline service providers, claiming that they stand to lose their employment upon the implementation of the questioned agreements, filed before this Court a petition for prohibition to enjoin the enforcement of said agreements.[2]

On October 15, 2002, the service providers, joining the cause of the petitioning workers, filed a motion for intervention and a petition-in-intervention.

On October 24, 2002, Congressmen Salacnib Baterina, Clavel Martinez and Constantino Jaraula filed a similar petition with this Court.[3]

On November 6, 2002, several employees of the MIAA likewise filed a petition assailing the legality of the various agreements.[4]

On December 11, 2002. another group of Congressmen, Hon. Jacinto V. Paras, Rafael P. Nantes, Eduardo C. Zialcita, Willie B. Villarama, Prospero C. Nograles, Prospero A. Pichay, Jr., Harlin Cast Abayon and Benasing O. Macaranbon, moved to intervene in the case as Respondents-Intervenors. They filed their Comment-In-Intervention defending the validity of the assailed agreements and praying for the dismissal of the petitions.

During the pendency of the case before this Court, President Gloria Macapagal Arroyo, on November 29, 2002, in her speech at the 2002 Golden Shell Export Awards at Malacañang

Palace, stated that she will not "honor (PIATCO) contracts which the Executive Branch's legal offices have concluded (as) null and void."[5]

Respondent PIATCO filed its Comments to the present petitions on November 7 and 27, 2002. The Office of the Solicitor General and the Office of the Government Corporate Counsel filed their respective Comments in behalf of the public respondents.

On December 10, 2002, the Court heard the case on oral argument. After the oral argument, the Court then resolved in open court to require the parties to file simultaneously their respective Memoranda in amplification of the issues heard in the oral arguments within 30 days and to explore the possibility of arbitration or mediation as provided in the challenged contracts.

In their consolidated Memorandum, the Office of the Solicitor General and the Office of the Government Corporate Counsel prayed that the present petitions be given due course and that judgment be rendered declaring the 1997 Concession Agreement, the ARCA and the Supplements thereto void for being contrary to the Constitution, the BOT Law and its Implementing Rules and Regulations.

On March 6, 2003, respondent PIATCO informed the Court that on March 4, 2003 PIATCO commenced arbitration proceedings before the International Chamber of Commerce, International Court of Arbitration (ICC) by filing a Request for Arbitration with the Secretariat of the ICC against the Government of the Republic of the Philippines acting through the DOTC and MIAA.

In the present cases, the Court is again faced with the task of resolving complicated issues made difficult by their intersecting legal and economic implications. The Court is aware of the far reaching fall out effects of the ruling which it makes today. For more than a century and whenever the exigencies of the times demand it, this Court has never shirked from its solemn duty to dispense justice and resolve "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 lack or excess of jurisdiction."[6] To be sure, this Court will not begin to do otherwise today.

We shall first dispose of the **procedural issues** raised by respondent PIATCO which they allege will bar the resolution of the instant controversy.

Petitioners' Legal Standing to File the present Petitions

a. G.R. Nos. 155001 and 155661

In G.R. No. 155001 individual petitioners are employees of various service providers[7] having separate concession contracts with MIAA and continuing service agreements with various international airlines to provide in-flight catering, passenger handling, ramp and ground support, aircraft maintenance and provisions, cargo handling and warehousing and other services. Also included as petitioners are labor unions MIASCOR Workers Union-National Labor Union and Philippine Airlines Employees Association. These petitioners filed the instant

action for prohibition as taxpayers and as parties whose rights and interests stand to be violated by the implementation of the PIATCO Contracts.

Petitioners-Intervenors in the same case are all corporations organized and existing under Philippine laws engaged in the business of providing in-flight catering, passenger handling, ramp and ground support, aircraft maintenance and provisions, cargo handling and warehousing and other services to several international airlines at the Ninoy Aquino International Airport. Petitioners-Intervenors allege that as tax-paying international airline and airport-related service operators, each one of them stands to be irreparably injured by the implementation of the PIATCO Contracts. Each of the petitioners-intervenors have separate and subsisting concession agreements with MIAA and with various international airlines which they allege are being interfered with and violated by respondent PIATCO.

In G.R. No. 155661, petitioners constitute employees of MIAA and Samahang Manggagawa sa Paliparan ng Pilipinas - a legitimate labor union and accredited as the sole and exclusive bargaining agent of all the employees in MIAA. Petitioners anchor their petition for prohibition on the nullity of the contracts entered into by the Government and PIATCO regarding the build-operate-and-transfer of the NAIA IPT III. They filed the petition as taxpayers and persons who have a legitimate interest to protect in the implementation of the PIATCO Contracts.

Petitioners in both cases raise the argument that the PIATCO Contracts contain stipulations which directly contravene numerous provisions of the Constitution, specific provisions of the BOT Law and its Implementing Rules and Regulations, and public policy. Petitioners contend that the DOTC and the MIAA, by entering into said contracts, have committed grave abuse of discretion amounting to lack or excess of jurisdiction which can be remedied only by a writ of prohibition, there being no plain, speedy or adequate remedy in the ordinary course of law.

In particular, petitioners assail the provisions in the 1997 Concession Agreement and the ARCA which grant PIATCO the exclusive right to operate a commercial international passenger terminal within the Island of Luzon, except those international airports already existing at the time of the execution of the agreement. The contracts further provide that upon the commencement of operations at the NAIA IPT III, the Government shall cause the closure of Ninoy Aquino International Airport Passenger Terminals I and II as international passenger terminals. With respect to existing concession agreements between MIAA and international airport service providers regarding certain services or operations, the 1997 Concession Agreement and the ARCA uniformly provide that such services or operations will not be carried over to the NAIA IPT III and PIATCO is under no obligation to permit such carry over except through a separate agreement duly entered into with PIATCO.[8]

With respect to the petitioning service providers and their employees, upon the commencement of operations of the NAIA IPT III, they allege that they will be effectively barred from providing international airline airport services at the NAIA Terminals I and II as all international airlines and passengers will be diverted to the NAIA IPT III. The petitioning service providers will thus be compelled to contract with PIATCO alone for such services, with no assurance that subsisting contracts with MIAA and other international airlines will be respected. Petitioning service providers stress that despite the very competitive market, the substantial

capital investments required and the high rate of fees, they entered into their respective contracts with the MIAA with the understanding that the said contracts will be in force for the stipulated period, and thereafter, renewed so as to allow each of the petitioning service providers to recoup their investments and obtain a reasonable return thereon.

Petitioning employees of various service providers at the NAIA Terminals I and II and of MIAA on the other hand allege that with the closure of the NAIA Terminals I and II as international passenger terminals under the PIATCO Contracts, they stand to lose employment.

The question on legal standing is whether such 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."[9] Accordingly, it has been held that the interest of a person assailing the constitutionality of a statute must be direct and personal. He must be able to show, not only that the law or any government act is invalid, but also that he sustained or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that 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.[10]

We hold that petitioners have the requisite standing. In the above-mentioned cases, petitioners have a direct and substantial interest to protect by reason of the implementation of the PIATCO Contracts. They stand to lose their source of livelihood, a property right which is zealously protected by the Constitution. Moreover, subsisting concession agreements between MIAA and petitioners-intervenors and service contracts between international airlines and petitioners-intervenors stand to be nullified or terminated by the operation of the NAIA IPT III under the PIATCO Contracts. The financial prejudice brought about by the PIATCO Contracts on petitioners and petitioners-intervenors in these cases are legitimate interests sufficient to confer on them the requisite standing to file the instant petitions.

b. G.R. No. 155547

In G.R. No. 155547, petitioners filed the petition for prohibition as members of the House of Representatives, citizens and taxpayers. They allege that as members of the House of Representatives, they are especially interested in the PIATCO Contracts, because the contracts compel the Government and/or the House of Representatives to appropriate funds necessary to comply with the provisions therein.[11] They cite provisions of the PIATCO Contracts which require disbursement of unappropriated amounts in compliance with the contractual obligations of the Government. They allege that the Government obligations in the PIATCO Contracts which compel government expenditure without appropriation is a curtailment of their prerogatives as legislators, contrary to the mandate of the Constitution that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation made by law."[12]

Standing is a peculiar concept in constitutional law because in some cases, suits are not brought by parties who have been personally injured by the operation of a law or any other government act but by concerned citizens, taxpayers or voters who actually sue in the public interest. Although we are not unmindful of the cases of **Imus Electric Co. v. Municipality of**

Imus[13] and **Gonzales v. Raquiza**[14] wherein this Court held that appropriation must be made only on amounts immediately demandable, **public interest demands that we take a more liberal view in determining whether the petitioners suing as legislators, taxpayers and citizens have *locus standi* to file the instant petition.** In **Kilosbayan, Inc. v. Guingona,**[15] this Court held "[i]n line with the liberal policy of this Court on *locus standi*, ordinary taxpayers, members of Congress, and even association of planters, and non-profit civic organizations were allowed to initiate and prosecute actions before this Court to question the constitutionality or validity of laws, acts, decisions, rulings, or orders of various government agencies or instrumentalities."[16] Further, "insofar as taxpayers' suits are concerned . . . (this Court) is **not devoid of discretion**as to whether or not it should be entertained."[17] As such ". . . even if, strictly speaking, they [the petitioners] are not covered by the definition, it is still within the wide discretion of the Court to waive the requirement and so remove the impediment to its addressing and resolving the serious constitutional questions raised."[18] In view of the serious legal questions involved and their impact on public interest, we resolve to grant standing to the petitioners.

Other Procedural Matters

Respondent PIATCO further alleges that this Court is without jurisdiction to review the instant cases as factual issues are involved which this Court is ill-equipped to resolve. Moreover, PIATCO alleges that submission of this controversy to this Court at the first instance is a violation of the rule on hierarchy of courts. They contend that trial courts have concurrent jurisdiction with this Court with respect to a special civil action for prohibition and hence, following the rule on hierarchy of courts, resort must first be had before the trial courts.

After a thorough study and careful evaluation of the issues involved, this Court is of the view that the crux of the instant controversy involves significant **legal questions**. The facts necessary to resolve these legal questions are well established and, hence, need not be determined by a trial court.

The rule on hierarchy of courts will not also prevent this Court from assuming jurisdiction over the cases at bar. The said rule may be relaxed **when the redress desired cannot be obtained in the appropriate courts or where exceptional and compelling circumstances justify availment of a remedy within and calling for the exercise of this Court's primary jurisdiction**.[19]

It is easy to discern that **exceptional circumstances** exist in the cases at bar that call for the relaxation of the rule. Both petitioners and respondents agree that these cases are of **transcendental importance** as they involve the construction and operation of the country's premier international airport. Moreover, the crucial issues submitted for resolution are of first impression and they entail the proper legal interpretation of key provisions of the Constitution, the BOT Law and its Implementing Rules and Regulations. Thus, considering the nature of the controversy before the Court, procedural bars may be lowered to give way for the speedy disposition of the instant cases.

Legal Effect of the Commencement
of Arbitration Proceedings by

PIATCO

There is one more procedural obstacle which must be overcome. The Court is aware that arbitration proceedings pursuant to Section 10.02 of the ARCA have been filed at the instance of respondent PIATCO. Again, we hold that the arbitration step taken by PIATCO will not oust this Court of its jurisdiction over the cases at bar.

In **Del Monte Corporation-USA v. Court of Appeals,**[20] even after finding that the arbitration clause in the Distributorship Agreement in question is valid and the dispute between the parties is arbitrable, this Court affirmed the trial court's decision denying petitioner's Motion to Suspend Proceedings pursuant to the arbitration clause under the contract. In so ruling, this Court held that as contracts produce legal effect between the parties, their assigns and heirs, only the parties to the Distributorship Agreement are bound by its terms, including the arbitration clause stipulated therein. This Court ruled that arbitration proceedings could be called for but **only** with respect to the parties to the contract in question. Considering that there are parties to the case who are neither parties to the Distributorship Agreement nor heirs or assigns of the parties thereto, this Court, citing its previous ruling in **Salas, Jr. v. Laperal Realty Corporation,**[21] held that to tolerate the **splitting of proceedings** by allowing arbitration as to some of the parties on the one hand and trial for the others on the other hand would, in effect, result in **multiplicity of suits, duplicitous procedure and unnecessary delay**.[22] Thus, we ruled that the **interest of justice** would best be served if the trial court hears and adjudicates the case in a **single and complete proceeding**.

It is established that **petitioners in the present cases** who have presented legitimate interests in the resolution of the controversy are **not parties to the PIATCO Contracts**. Accordingly, they cannot be bound by the arbitration clause provided for in the ARCA and hence, cannot be compelled to submit to arbitration proceedings. **A speedy and decisive resolution of all the critical issues in the present controversy, including those raised by petitioners, cannot be made before an arbitral tribunal.** The object of arbitration is precisely to allow an expeditious determination of a dispute. This objective would not be met if this Court were to allow the parties to settle the cases by arbitration as there are certain issues involving non-parties to the PIATCO Contracts which the arbitral tribunal will not be equipped to resolve.

Now, to the merits of the instant controversy.

I

Is PIATCO a qualified bidder?

Public respondents argue that the Paircargo Consortium, PIATCO's predecessor, was not a duly pre-qualified bidder on the unsolicited proposal submitted by AEDC as the Paircargo Consortium failed to meet the financial capability required under the BOT Law and the Bid Documents. They allege that in computing the ability of the Paircargo Consortium to meet the minimum equity requirements for the project, the **entire net worth of Security Bank, a member of the consortium, should not be considered.**

PIATCO relies, on the other hand, on the strength of the Memorandum dated October 14, 1996 issued by the DOTC Undersecretary Primitivo C. Cal stating that the Paircargo Consortium

is found to have a combined net worth of ₱3,900,000,000.00, sufficient to meet the equity requirements of the project. The said Memorandum was in response to a letter from Mr. Antonio Henson of AEDC to President Fidel V. Ramos questioning the financial capability of the Paircargo Consortium on the ground that it does not have the financial resources to put up the required minimum equity of ₱2,700,000,000.00. This contention is based on the restriction under R.A. No. 337, as amended or the General Banking Act that a commercial bank cannot invest in any single enterprise in an amount more than 15% of its net worth. In the said Memorandum, Undersecretary Cal opined:

The Bid Documents, as clarified through Bid Bulletin Nos. 3 and 5, require that financial capability will be evaluated based on total financial capability of all the member companies of the [Paircargo] Consortium. In this connection, the Challenger was found to have a combined net worth of ₱3,926,421,242.00 that could support a project costing approximately ₱13 Billion.

It is not a requirement that the net worth must be "unrestricted." To impose that as a requirement now will be nothing less than unfair.

The financial statement or the net worth is not the sole basis in establishing financial capability. As stated in Bid Bulletin No. 3, financial capability may also be established by testimonial letters issued by reputable banks. The Challenger has complied with this requirement.

To recap, net worth reflected in the Financial Statement should not be taken as the amount of the money to be used to answer the required thirty percent (30%) equity of the challenger but rather to be used in establishing if there is enough basis to believe that the challenger can comply with the required 30% equity. In fact, proof of sufficient equity is required as one of the conditions for award of contract (Section 12.1 IRR of the BOT Law) but not for pre-qualification (Section 5.4 of the same document).[23]

Under the BOT Law, in case of a build-operate-and-transfer arrangement, the contract shall be awarded to the bidder "who, having satisfied the **minimum financial, technical, organizational and legal standards**" required by the law, has submitted the lowest bid and most favorable terms of the project.[24] Further, the 1994 Implementing Rules and Regulations of the BOT Law provide:

Section 5.4 Pre-qualification Requirements.

….

c. Financial Capability: The project proponent must have adequate capability to sustain the financing requirements for the detailed engineering design, construction and/or operation and maintenance phases of the project, as the case may be. For purposes of pre-qualification, this capability shall be measured in terms of **(i) proof of the ability of the project proponent and/or the consortium to provide a minimum amount of equity to the project, and (ii) a letter testimonial from reputable banks attesting that the project proponent and/or members of**

the consortium are banking with them, that they are in good financial standing, and that they have adequate resources. The government agency/LGU concerned shall determine on a project-to-project basis and before pre-qualification, the minimum amount of equity needed. (*emphasis supplied*)

Pursuant to this provision, the PBAC issued PBAC Bulletin No. 3 dated August 16, 1996 amending the financial capability requirements for pre-qualification of the project proponent as follows:

6. Basis of Pre-qualification

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

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

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

As the minimum project cost was estimated to be US$350,000,000.00 or roughly ₱9,183,650,000.00,[25] the Paircargo Consortium had to show to the satisfaction of the PBAC that it had the ability to provide the minimum equity for the project in the amount of at least **₱2,755,095,000.00**.

Paircargo's Audited Financial Statements as of 1993 and 1994 indicated that it had a net worth of ₱2,783,592.00 and ₱3,123,515.00 respectively.[26] PAGS' Audited Financial Statements as of 1995 indicate that it has approximately ₱26,735,700.00 to invest as its equity for the project.[27] Security Bank's Audited Financial Statements as of 1995 show that it has a net worth equivalent to its capital funds in the amount of ₱3,523,504,377.00.[28]

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

Sec. 21-B. The provisions in this or in any other Act to the contrary notwithstanding, the Monetary Board, whenever it shall deem appropriate and necessary to further national development objectives or support national priority projects, **may authorize a commercial bank, a bank authorized to provide commercial banking services, as well as a government-owned and controlled bank, to operate under an expanded commercial banking authority and by virtue thereof exercise, in addition to powers authorized for commercial banks, the powers of an Investment House as provided in Presidential Decree No. 129, invest in the equity of a non-allied undertaking**, or own a majority or all of the equity in a financial intermediary other than a commercial bank or a bank authorized to provide commercial banking services: **Provided, That** (a) the total investment in equities shall not exceed fifty percent (50%) of the net worth of the bank; **(b) the equity investment in any one enterprise whether allied or non-allied shall not exceed fifteen percent (15%) of the net worth of the bank;** (c) the equity investment of the bank, or of its wholly or majority-owned subsidiary, in a single non-allied undertaking shall not exceed thirty-five percent (35%) of the total equity in the enterprise nor shall it exceed thirty-five percent (35%) of the voting stock in that enterprise; and (d) the equity investment in other banks shall be deducted from the investing bank's net worth for purposes of computing the prescribed ratio of net worth to risk assets.

….

Further, the 1993 Manual of Regulations for Banks provides:

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

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

Thus, the maximum amount that Security Bank could validly invest in the Paircargo Consortium is only ₱528,525,656.55, representing 15% of its entire net worth. The total net worth therefore of the Paircargo Consortium, after considering the **maximum amounts** that may be validly invested by each of its members is **₱558,384,871.55 or only 6.08% of the project cost**,[29] an amount substantially less than the prescribed minimum equity investment required for the project in the amount of ₱2,755,095,000.00 or 30% of the project cost.

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

The PBAC has determined that any prospective bidder for the construction, operation and maintenance of the NAIA IPT III project should prove that it has the ability to provide equity in the minimum amount of 30% of the project cost, in accordance with the 70:30 debt-to-equity ratio prescribed in the Bid Documents. Thus, in the case of Paircargo Consortium, the PBAC should determine the **maximum amounts** that each member of the consortium may commit for the construction, operation and maintenance of the NAIA IPT III project **at the time of pre-qualification.** With respect to Security Bank, the **maximum amount** which may be invested by it would only be 15% of its net worth in view of the restrictions imposed by the General Banking Act. Disregarding the investment ceilings provided by applicable law would not result in a proper evaluation of whether or not a bidder is pre-qualified to undertake the project as for all intents and purposes, such ceiling or legal restriction determines the **true maximum amount** which a bidder may invest in the project.

Further, the determination of whether or not a bidder is pre-qualified to undertake the project requires an evaluation of the financial capacity of the said bidder **at the time the bid is submitted** based on the required documents presented by the bidder**.** The PBAC should not be allowed to speculate on the **future financial ability** of the bidder to undertake the project on the basis of documents submitted. This would open doors to abuse and defeat the very purpose of a public bidding. This is especially true in the case at bar which involves the investment of billions of pesos by the project proponent. The relevant government authority is duty-bound to ensure that the awardee of the contract possesses the minimum required financial capability to complete the project. To allow the PBAC to estimate the bidder's **future financial capability** would not secure the viability and integrity of the project. A restrictive and conservative application of the rules and procedures of public bidding is necessary not only to protect the impartiality and regularity of the proceedings but also to ensure the financial and technical reliability of the project. It has been held that:

> The basic rule in public bidding is that bids should be evaluated based on the required documents submitted before and not after the opening of bids. Otherwise, the foundation of a fair and competitive public bidding would be defeated. **Strict observance of the rules, regulations, and guidelines of the bidding process is the only safeguard to a fair, honest and competitive public bidding.**[30]

Thus, if the **maximum amount of equity** that a bidder may invest in the project **at the time the bids are submitted** falls short of the minimum amounts required to be put up by the bidder, said bidder should be properly disqualified. Considering that at the pre-qualification stage, the maximum amounts which the Paircargo Consortium may invest in the project fell short of the minimum amounts prescribed by the PBAC, we hold that Paircargo Consortium was not a qualified bidder. Thus the award of the contract by the PBAC to the Paircargo Consortium, a disqualified bidder, is null and void.

While it would be proper at this juncture to end the resolution of the instant controversy, as the legal effects of the disqualification of respondent PIATCO's predecessor would come into play and necessarily result in the nullity of all the subsequent contracts entered by it in

pursuance of the project, the Court feels that it is necessary to discuss in full the pressing issues of the present controversy for a complete resolution thereof.

II

Is the 1997 Concession Agreement valid?

Petitioners and public respondents contend that the 1997 Concession Agreement is invalid as it contains provisions that substantially depart from the draft Concession Agreement included in the Bid Documents. They maintain that a substantial departure from the draft Concession Agreement is a violation of public policy and renders the 1997 Concession Agreement null and void.

PIATCO maintains, however, that the Concession Agreement attached to the Bid Documents is intended to be a **draft**, i.e., subject to change, alteration or modification, and that this intention was clear to all participants, including AEDC, and DOTC/MIAA. It argued further that said intention is expressed in Part C (6) of Bid Bulletin No. 3 issued by the PBAC which states:

6. Amendments to the Draft Concessions Agreement

Amendments to the Draft Concessions Agreement shall be issued from time to time. Said amendments shall only cover items that would not materially affect the preparation of the proponent's proposal.

By its very nature, public bidding aims to protect the public interest by giving the public the best possible advantages through open competition. Thus:

Competition must be legitimate, fair and honest. In the field of government contract law, competition requires, not only `bidding upon a common standard, a common basis, upon the same thing, the same subject matter, the same undertaking,' but also that it be legitimate, fair and honest; and not designed to injure or defraud the government.[31]

An essential element of a publicly bidded contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, **but more importantly, on the contract bidded upon**. **Each bidder must be able to bid on the same thing**. The rationale is obvious. If the winning bidder is allowed to later include or modify certain provisions in the contract awarded such that the contract is altered in any material respect, then the essence of fair competition in the public bidding is destroyed. A public bidding would indeed be a farce if after the contract is awarded, the winning bidder may modify the contract and include provisions which are favorable to it that were not previously made available to the other bidders. Thus:

It is inherent in public biddings that there shall be a fair competition among the bidders. The specifications in such biddings provide the common ground or basis for the bidders. The specifications should, accordingly, operate equally or indiscriminately upon all bidders.[32]

The same rule was restated by Chief Justice Stuart of the Supreme Court of Minnesota:

The law is well settled that where, as in this case, municipal authorities can only let a contract for public work to the lowest responsible bidder, the proposals and specifications therefore must be so framed as to permit free and full competition. **Nor can they enter into a contract with the best bidder containing substantial provisions beneficial to him, not included or contemplated in the terms and specifications upon which the bids were invited.**[33]

In fact, in the PBAC Bid Bulletin No. 3 cited by PIATCO to support its argument that the draft concession agreement is subject to amendment, the pertinent portion of which was quoted above, the PBAC also clarified that "**[s]aid amendments shall only cover items that would not materially affect the preparation of the proponent's proposal**."

While we concede that a winning bidder is not precluded from modifying or amending certain provisions of the contract bidded upon, such changes **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.** Hence, the determination of whether or not a modification or amendment of a contract bidded out constitutes a substantial amendment rests on whether the contract, when taken as a whole, would contain substantially different terms and conditions that would have the effect of altering the technical and/or financial proposals previously submitted by other bidders. The alterations and modifications in the contract executed between the government and the winning bidder must be such as to render such executed contract to be **an entirely different contract from the one that was bidded upon.**

In the case of **Caltex (Philippines), Inc. v. Delgado Brothers, Inc.,**[34] this Court quoted with approval the ruling of the trial court that an amendment to a contract awarded through public bidding, when such subsequent amendment was made without a new public bidding, is null and void:

The Court agrees with the contention of counsel for the plaintiffs that the due execution of a contract after public bidding is a limitation upon the right of the contracting parties to alter or amend it without another public bidding, for otherwise **what would a public bidding be good for if after the execution of a contract after public bidding, the contracting parties may alter or amend the contract, or even cancel it, at their will?** Public biddings are held for the protection of the public, and to give the public the best possible advantages by means of open competition between the bidders. **He who bids or offers the best terms is awarded the contract subject of the bid, and it is obvious that such protection and best possible advantages to the public will disappear if the parties to a contract executed after public bidding may alter or amend it without another previous public bidding.**[35]

Hence, the question that comes to fore is this: **is the 1997 Concession Agreement the same agreement that was offered for public bidding,** i.e., the draft Concession Agreement attached to the Bid Documents? A close comparison of the draft Concession Agreement

attached to the Bid Documents and the 1997 Concession Agreement reveals that the documents differ in at least two material respects:

a. Modification on the Public Utility Revenues and Non-Public Utility Revenues that may be collected by PIATCO

The fees that may be imposed and collected by PIATCO under the draft Concession Agreement and the 1997 Concession Agreement may be classified into three distinct categories: (1) fees which are subject to periodic adjustment of once every two years in accordance with a prescribed parametric formula and adjustments are made effective only upon written approval by MIAA; (2) fees other than those included in the first category which maybe adjusted by PIATCO whenever it deems necessary without need for consent of DOTC/MIAA; and (3) new fees and charges that may be imposed by PIATCO which have not been previously imposed or collected at the Ninoy Aquino International Airport Passenger Terminal I, pursuant to Administrative Order No. 1, Series of 1993, as amended. The glaring distinctions between the draft Concession Agreement and the 1997 Concession Agreement lie in the types of fees included in each category and the extent of the supervision and regulation which MIAA is allowed to exercise in relation thereto.

For fees under the **first category**, i.e., those which are subject to periodic adjustment in accordance with a prescribed parametric formula and effective only upon written approval by MIAA, **the draft Concession Agreement** includes the following:[36]

(1) aircraft parking fees;

(2) aircraft tacking fees;

(3) groundhandling fees;

(4) rentals and airline offices;

(5) check-in counter rentals; and

(6) porterage fees.

Under the **1997 Concession Agreement**, fees which are subject to adjustment and effective upon MIAA approval are classified as “Public Utility Revenues” and include:[37]

(1) aircraft parking fees;

(2) aircraft tacking fees;

(3) check-in counter fees; and

(4) Terminal Fees.

The implication of the reduced number of fees that are subject to MIAA approval is best appreciated in relation to fees included in the **second category** identified above. Under the **1997 Concession Agreement**, fees which PIATCO may adjust whenever it deems necessary without need for consent of DOTC/MIAA are "Non-Public Utility Revenues" and is defined as "all other income not classified as Public Utility Revenues derived from operations of the Terminal and the Terminal Complex."[38] Thus, under the 1997 Concession Agreement, groundhandling fees, rentals from airline offices and porterage fees are no longer subject to MIAA regulation.

Further, under Section 6.03 of the **draft Concession Agreement**, MIAA reserves the right to regulate (1) lobby and vehicular parking fees and (2) other new fees and charges that may be imposed by PIATCO. Such regulation may be made by periodic adjustment and is effective only upon written approval of MIAA. The full text of said provision is quoted below:

Section 6.03. *Periodic Adjustment in Fees and Charges*. Adjustments in the aircraft parking fees, aircraft tacking fees, groundhandling fees, rentals and airline offices, check-in-counter rentals and porterage fees shall be allowed only once every two years and in accordance with the Parametric Formula attached hereto as Annex F. Provided that adjustments shall be made effective only after the written express approval of the MIAA. Provided, further, that such approval of the MIAA, shall be contingent only on the conformity of the adjustments with the above said parametric formula. The first adjustment shall be made prior to the In-Service Date of the Terminal.

The MIAA reserves the right to regulate under the foregoing terms and conditions the lobby and vehicular parking fees and other new fees and charges as contemplated in paragraph 2 of Section 6.01 if in its judgment the users of the airport shall be deprived of a free option for the services they cover.[39]

On the other hand, the equivalent provision under the **1997 Concession Agreement** reads:

Section 6.03 Periodic Adjustment in Fees and Charges.

….

(c) Concessionaire shall at all times be judicious in fixing fees and charges constituting Non-Public Utility Revenues in order to ensure that End Users are not unreasonably deprived of services. **While the vehicular parking fee, porterage fee and greeter/well wisher fee constitute Non-Public Utility Revenues of Concessionaire, GRP may intervene and require Concessionaire to explain and justify the fee it may set from time to time**, if in the reasonable opinion of GRP the said fees have become exorbitant resulting in the unreasonable deprivation of End Users of such services.[40]

Thus, under the **1997 Concession Agreement**, with respect to (1) vehicular parking fee, (2) porterage fee and (3) greeter/well wisher fee, all that MIAA can do is to require PIATCO

to **explain and justify** the fees set by PIATCO. In the **draft Concession Agreement**, vehicular parking fee is subject to MIAA regulation and approval under the second paragraph of Section 6.03 thereof while porterage fee is covered by the first paragraph of the same provision. There is an obvious relaxation of the extent of control and regulation by MIAA with respect to the particular fees that may be charged by PIATCO.

Moreover, with respect to the **third category** of fees that may be imposed and collected by PIATCO, i.e., new fees and charges that may be imposed by PIATCO which have not been previously imposed or collected at the Ninoy Aquino International Airport Passenger Terminal I, under Section 6.03 of the **draft Concession Agreement** MIAA has reserved the right to regulate the same under the same conditions that MIAA may regulate fees under the first category, i.e., periodic adjustment of once every two years in accordance with a prescribed parametric formula and effective only upon written approval by MIAA. However, under the **1997 Concession Agreement,** adjustment of fees under the third category is not subject to MIAA regulation.

With respect to **terminal fees** that may be charged by PIATCO,[41] as shown earlier, this was included within the category of "Public Utility Revenues" under the **1997 Concession Agreement**. This classification is significant because under the 1997 Concession Agreement, "Public Utility Revenues" are subject to an "Interim Adjustment" of fees upon the occurrence of certain extraordinary events specified in the agreement.[42] However, under the **draft Concession Agreement**, terminal fees are not included in the types of fees that may be subject to "Interim Adjustment."[43]

Finally, under the **1997 Concession Agreement**, "Public Utility Revenues," except terminal fees, are denominated in US Dollars[44] while payments to the Government are in Philippine Pesos. In the **draft Concession Agreement**, no such stipulation was included. By stipulating that "Public Utility Revenues" will be paid to PIATCO in US Dollars while payments by PIATCO to the Government are in Philippine currency under the 1997 Concession Agreement, PIATCO is able to enjoy the benefits of depreciations of the Philippine Peso, while being effectively insulated from the detrimental effects of exchange rate fluctuations.

When taken as a whole, the changes under the 1997 Concession Agreement with respect to reduction in the types of fees that are subject to MIAA regulation and the relaxation of such regulation with respect to other fees are significant amendments that substantially distinguish the draft Concession Agreement from the 1997 Concession Agreement. **The 1997 Concession Agreement, in this respect, clearly gives PIATCO more favorable terms than what was available to other bidders at the time the contract was bidded out.** It is not very difficult to see that the changes in the 1997 Concession Agreement translate to **direct and concrete financial advantages for PIATCO** which were not available at the time the contract was offered for bidding. It cannot be denied that under the 1997 Concession Agreement **only "Public Utility Revenues" are subject to MIAA regulation. Adjustments of all other fees imposed and collected by PIATCO are entirely within its control**. Moreover, with respect to terminal fees, under the 1997 Concession Agreement, the same is further subject to "Interim Adjustments" not previously stipulated in the draft Concession Agreement. Finally, the change in the currency

stipulated for "Public Utility Revenues" under the 1997 Concession Agreement, except terminal fees, gives PIATCO an added benefit which was not available at the time of bidding.

b. Assumption by the Government of the liabilities of PIATCO in the event of the latter's default thereof

Under the **draft Concession Agreement**, default by PIATCO of any of its obligations to creditors who have provided, loaned or advanced funds for the NAIA IPT III project does not result in the assumption by the Government of these liabilities. In fact, nowhere in the said contract does default of PIATCO's loans figure in the agreement. Such default does not directly result in any concomitant right or obligation in favor of the Government.

However, the **1997 Concession Agreement** provides:

Section 4.04 Assignment.

….

(b) In the event Concessionaire should default in the payment of an Attendant Liability, and the default has resulted in the acceleration of the payment due date of the Attendant Liability prior to its stated date of maturity, the Unpaid Creditors and Concessionaire shall immediately inform GRP in writing of such default. GRP shall, within one hundred eighty (180) Days from receipt of the joint written notice of the Unpaid Creditors and Concessionaire, either (i) take over the Development Facility and assume the Attendant Liabilities, or (ii) allow the Unpaid Creditors, if qualified, to be substituted as concessionaire and operator of the Development Facility in accordance with the terms and conditions hereof, or designate a qualified operator acceptable to GRP to operate the Development Facility, likewise under the terms and conditions of this Agreement; Provided that if at the end of the 180-day period GRP shall not have served the Unpaid Creditors and Concessionaire written notice of its choice, GRP shall be deemed to have elected to take over the Development Facility with the concomitant assumption of Attendant Liabilities.

(c) If GRP should, by written notice, allow the Unpaid Creditors to be substituted as concessionaire, the latter shall form and organize a concession company qualified to take over the operation of the Development Facility. If the concession company should elect to designate an operator for the Development Facility, the concession company shall in good faith identify and designate a qualified operator acceptable to GRP within one hundred eighty (180) days from receipt of GRP's written notice. If the concession company, acting in good faith and with due diligence, is unable to designate a qualified operator within the aforesaid period, then GRP shall at the end of the 180-day period take over the Development Facility and assume Attendant Liabilities.

The term "Attendant Liabilities" under the **1997 Concession Agreement** is defined as:

Attendant Liabilities refer to all amounts recorded and from time to time outstanding in the books of the Concessionaire **as owing to Unpaid Creditors who have provided, loaned or advanced funds actually used for the Project**, including all interests, penalties, associated fees, charges, surcharges, indemnities, reimbursements and other related expenses, and further including amounts owed by Concessionaire to its suppliers, contractors and sub-contractors.

Under the above quoted portions of Section 4.04 in relation to the definition of "Attendant Liabilities," **default by PIATCO of its loans used to finance the NAIA IPT III project triggers the occurrence of certain events that leads to the assumption by the Government of the liability for the loans**. Only in one instance may the Government escape the assumption of PIATCO's liabilities, i.e., when the Government so elects and allows a qualified operator to take over as Concessionaire. **However, this circumstance is dependent on the existence and availability of a qualified operator who is willing to take over the rights and obligations of PIATCO under the contract, a circumstance that is not entirely within the control of the Government**.

Without going into the validity of this provision at this juncture, suffice it to state that Section 4.04 of the 1997 Concession Agreement may be considered a form of security for the loans PIATCO has obtained to finance the project, an option that was not made available in the draft Concession Agreement. Section 4.04 is an important amendment to the 1997 Concession Agreement because it grants PIATCO a **financial advantage or benefit which was not previously made available during the bidding process.** This financial advantage is a significant modification that translates to better terms and conditions for PIATCO.

PIATCO, however, argues that the parties to the bidding procedure acknowledge that the draft Concession Agreement is subject to amendment because the Bid Documents permit financing or borrowing. They claim that it was the lenders who proposed the amendments to the draft Concession Agreement which resulted in the 1997 Concession Agreement.

We agree that it is not inconsistent with the rationale and purpose of the BOT Law to allow the project proponent or the winning bidder to obtain financing for the project, especially in this case which involves the construction, operation and maintenance of the NAIA IPT III. Expectedly, compliance by the project proponent of its undertakings therein would involve a substantial amount of investment. It is therefore inevitable for the awardee of the contract to seek alternate sources of funds to support the project. Be that as it may, this Court maintains that amendments to the contract bidded upon should always conform to the general policy on public bidding if such procedure is to be faithful to its real nature and purpose. By its very nature and characteristic, competitive public bidding aims to protect the public interest by giving the public the best possible advantages through open competition.[45] It has been held that the three principles in public bidding are (1) the offer to the public; (2) opportunity for competition; and (3) a basis for the exact comparison of bids. A regulation of the matter which excludes any of these factors destroys the distinctive character of the system and thwarts the purpose of its adoption.[46] These are the basic parameters which every awardee of a contract bidded out must conform to, requirements of financing and borrowing notwithstanding. Thus, upon a concrete showing that, as in this case, the contract signed by the government and the contract-awardee is an entirely different contract from the contract bidded, courts should not

hesitate to strike down said contract in its entirety for violation of public policy on public bidding. A strict adherence on the principles, rules and regulations on public bidding must be sustained if only to preserve the integrity and the faith of the general public on the procedure.

Public bidding is a standard practice for procuring government contracts for public service and for furnishing supplies and other materials. It aims to secure for the government the lowest possible price under the most favorable terms and conditions, to curtail favoritism in the award of government contracts and avoid suspicion of anomalies and it places all bidders in equal footing.[47] **Any government action which permits any substantial variance between the conditions under which the bids are invited and the contract executed after the award thereof is a grave abuse of discretion amounting to lack or excess of jurisdiction which warrants proper judicial action.**

In view of the above discussion, the fact that the foregoing substantial amendments were made on the **1997 Concession Agreement** renders the same null and void for being**contrary to public policy**. These amendments convert the 1997 Concession Agreement to an **entirely different agreement** from the contract bidded out or the draft Concession Agreement. It is not difficult to see that the amendments on (1) the types of fees or charges that are subject to MIAA regulation or control and the extent thereof and (2) the assumption by the Government, under certain conditions, of the liabilities of PIATCO **directly translates concrete financial advantages to PIATCO that were previously not available during the bidding process.** These amendments cannot be taken as merely supplements to or implementing provisions of those already existing in the draft Concession Agreement. The amendments discussed above present new terms and conditions which provide financial benefit to PIATCO which may have altered the technical and financial parameters of other bidders had they known that such terms were available.

III

Direct Government Guarantee

Article IV, Section 4.04(b) and (c), in relation to Article 1.06, of the 1997 Concession Agreement provides:

Section 4.04 Assignment

….

(b) In the event Concessionaire should **default in the payment of an Attendant Liability**, and the default resulted in the acceleration of the payment due date of the Attendant Liability prior to its stated date of maturity, the Unpaid Creditors and Concessionaire shall immediately inform GRP in writing of such default. GRP shall within one hundred eighty (180) days from receipt of the joint written notice of the Unpaid Creditors and Concessionaire, either (i) take over the Development Facility and **assume the Attendant Liabilities**, or (ii) allow the Unpaid Creditors, if qualified to be substituted as concessionaire and operator of the Development facility in accordance with the terms and conditions hereof, or designate a qualified operator acceptable to GRP to operate the Development Facility, likewise under the terms and

conditions of this Agreement; Provided, that if at the end of the 180-day period GRP shall not have served the Unpaid Creditors and Concessionaire written notice of its choice, **GRP shall be deemed to have elected to take over the Development Facility with the concomitant assumption of Attendant Liabilities.**

(c) If GRP, by written notice, allow the Unpaid Creditors to be substituted as concessionaire, the latter shall form and organize a concession company qualified to takeover the operation of the Development Facility. If the concession company should elect to designate an operator for the Development Facility, the concession company shall in good faith identify and designate a qualified operator acceptable to GRP within one hundred eighty (180) days from receipt of GRP's written notice. If the concession company, acting in good faith and with due diligence, is unable to designate a qualified operator within the aforesaid period, **then GRP** shall at the end of the 180-day period **take over the Development Facility and assume Attendant Liabilities.**

….

Section 1.06. Attendant Liabilities

Attendant Liabilities refer to **all amounts recorded and from time to time outstanding in the books of the Concessionaire as owing to Unpaid Creditors** who have provided, loaned or advanced funds actually used for the Project, **including all interests, penalties, associated fees, charges, surcharges, indemnities, reimbursements and other related expenses,** and further including amounts owed by Concessionaire to its suppliers, contractors and sub-contractors.[48]

It is clear from the above-quoted provisions that **Government, in the event that PIATCO defaults in its loan obligations, is obligated to pay** "all amounts recorded and from time to time outstanding from the books" of PIATCO which the latter owes to its creditors.[49] These amounts include "all interests, penalties, associated fees, charges, surcharges, indemnities, reimbursements and other related expenses."[50] This obligation of the Government to pay PIATCO's creditors upon PIATCO's default would arise if the Government opts to take over NAIA IPT III. It should be noted, however, that even if the Government chooses the second option, which is to allow PIATCO's unpaid creditors operate NAIA IPT III, the Government is still at a risk of being liable to PIATCO's creditors should the latter be unable to designate a qualified operator within the prescribed period.[51] In effect, **whatever option the Government chooses to take in the event of PIATCO's failure to fulfill its loan obligations, the Government is still at a risk of assuming PIATCO's outstanding loans.** This is due to the fact that the Government would only be free from assuming PIATCO's debts if the unpaid creditors would be able to designate a qualified operator within the period provided for in the contract. Thus, **the Government's assumption of liability is virtually out of its control.** The Government under the circumstances provided for in the 1997 Concession Agreement is at the mercy of the existence, availability and willingness of a qualified operator. The above contractual provisions constitute a direct government guarantee which is prohibited by law.

One of the main impetus for the enactment of the BOT Law is the lack of government funds to construct the infrastructure and development projects necessary for economic growth and development. This is why private sector resources are being tapped in order to finance these projects. The BOT law allows the private sector to participate, and is in fact encouraged to do so by way of incentives, such as minimizing the unstable flow of returns,[52] provided that the government would not have to unnecessarily expend scarcely available funds for the project itself. As such, direct guarantee, subsidy and equity by the government in these projects are strictly prohibited.[53] **This is but logical for if the government would in the end still be at a risk of paying the debts incurred by the private entity in the BOT projects, then the purpose of the law is subverted.**

Section 2(n) of the BOT Law defines direct guarantee as follows:

(n) Direct government guarantee — An agreement whereby the government or any of its agencies or local government units assume responsibility for the **repayment of debt directly incurred by the project proponent** in implementing the project **in case of a loan default.**

Clearly by providing that the Government "assumes" the attendant liabilities, which consists of PIATCO's unpaid debts, the 1997 Concession Agreement provided for a direct government guarantee for the debts incurred by PIATCO in the implementation of the NAIA IPT III project. It is of no moment that the relevant sections are subsumed under the title of "assignment". The provisions providing for direct government guarantee which is prohibited by law is clear from the terms thereof.

The fact that the ARCA superseded the 1997 Concession Agreement did not cure this fatal defect. Article IV, Section 4.04(c), in relation to Article I, Section 1.06, of the ARCA provides:

Section 4.04 Security

….

(c) **GRP agrees** with Concessionaire (PIATCO) that **it shall negotiate in good faith and enter into direct agreement with the Senior Lenders**, or with an agent of such Senior Lenders (which agreement shall be subject to the approval of the Bangko Sentral ng Pilipinas), in such form as may be reasonably acceptable to both GRP and Senior Lenders, with regard, inter alia, to the following parameters:

….

(iv) **If** the Concessionaire **[PIATCO] is in default under a payment obligation owed to the Senior Lenders**, and as a result thereof the Senior Lenders have become entitled to accelerate the Senior Loans, the Senior Lenders shall have the right to notify GRP of the same, and without prejudice to any other rights of the Senior Lenders or any Senior Lenders' agent may have (including without limitation under security interests granted in favor of the Senior Lenders), to either in good faith identify and designate a nominee which is qualified under sub-clause (viii)(y) below to operate the Development Facility [NAIA Terminal 3] or transfer the

Concessionaire's [PIATCO] rights and obligations under this Agreement to a transferee which is qualified under sub-clause (viii) below;

….

(vi) if the Senior Lenders, acting in good faith and using reasonable efforts, are unable to designate a nominee or effect a transfer in terms and conditions satisfactory to the Senior Lenders within one hundred eighty (180) days after giving GRP notice as referred to respectively in (iv) or (v) above, then GRP and the Senior Lenders shall endeavor in good faith to enter into any other arrangement relating to the Development Facility [NAIA Terminal 3] (other than a turnover of the Development Facility [NAIA Terminal 3] to GRP) within the following one hundred eighty (180) days. **If no agreement** relating to the Development Facility [NAIA Terminal 3] is arrived at by GRP and the Senior Lenders within the said 180-day period, then at the end thereof the **Development Facility [NAIA Terminal 3] shall be transferred by the Concessionaire [PIATCO] to GRP or its designee and GRP shall make a termination payment to Concessionaire [PIATCO] equal to the Appraised Value (as hereinafter defined) of the Development Facility [NAIA Terminal 3] or the sum of the Attendant Liabilities, if greater.** Notwithstanding Section 8.01(c) hereof, this Agreement shall be deemed terminated upon the transfer of the Development Facility [NAIA Terminal 3] to GRP pursuant hereto;

….

Section 1.06. Attendant Liabilities

Attendant Liabilities refer to all amounts in each case supported by verifiable evidence from time to time **owed or which may become owing by Concessionaire [PIATCO] to Senior Lenders or any other persons or entities who** have provided, loaned, or advanced funds or **provided financial facilities to Concessionaire [PIATCO]** for the Project [NAIA Terminal 3], **including, without limitation, all principal, interest, associated fees, charges, reimbursements, and other related expenses** (including the fees, charges and expenses of any agents or trustees of such persons or entities), whether payable at maturity, by acceleration or otherwise, and further including amounts owed by Concessionaire [PIATCO] to its professional consultants and advisers, suppliers, contractors and sub-contractors.[54]

It is clear from the foregoing contractual provisions that in the event that PIATCO fails to fulfill its loan obligations to its Senior Lenders, the Government is obligated to directly negotiate and enter into an agreement relating to NAIA IPT III with the Senior Lenders, should the latter fail to appoint a qualified nominee or transferee who will take the place of PIATCO. If the Senior Lenders and the Government are unable to enter into an agreement after the prescribed period, the Government must then pay PIATCO, upon transfer of NAIA IPT III to the Government, termination payment equal to the appraised value of the project **or the value of the attendant liabilities whichever is greater**. Attendant liabilities as defined in the ARCA includes all amounts owed or thereafter may be owed by PIATCO not only to the Senior Lenders with whom PIATCO has defaulted in its loan obligations but to all other persons who may have

loaned, advanced funds or provided any other type of financial facilities to PIATCO for NAIA IPT III. The amount of PIATCO's debt that the Government would have to pay as a result of PIATCO's default in its loan obligations -- in case no qualified nominee or transferee is appointed by the Senior Lenders and no other agreement relating to NAIA IPT III has been reached between the Government and the Senior Lenders -- includes, but is not limited to, "all principal, interest, associated fees, charges, reimbursements, and other related expenses . . . whether payable at maturity, by acceleration or otherwise."[55]

It is clear from the foregoing that the ARCA provides for a direct guarantee by the government to pay PIATCO's loans not only to its Senior Lenders but all other entities who provided PIATCO funds or services upon PIATCO's default in its loan obligation with its Senior Lenders. The fact that the Government's obligation to pay PIATCO's lenders for the latter's obligation would only arise after the Senior Lenders fail to appoint a qualified nominee or transferee does not detract from the fact that, should the conditions as stated in the contract occur, the ARCA **still** obligates the Government to pay any and all amounts owed by PIATCO to its lenders in connection with NAIA IPT III. Worse, the conditions that would make the Government liable for PIATCO's debts is triggered by PIATCO's own default of its loan obligations to its Senior Lenders to which loan contracts the Government was never a party to. The Government was not even given an option as to what course of action it should take in case PIATCO defaulted in the payment of its senior loans. The Government, upon PIATCO's default, would be merely notified by the Senior Lenders of the same and it is the Senior Lenders who are authorized to appoint a qualified nominee or transferee. Should the Senior Lenders fail to make such an appointment, the Government is then automatically obligated to "directly deal and negotiate" with the Senior Lenders regarding NAIA IPT III. The only way the Government would not be liable for PIATCO's debt is for a qualified nominee or transferee to be appointed in place of PIATCO to continue the construction, operation and maintenance of NAIA IPT III. This "pre-condition", however, will not take the contract out of the ambit of a direct guarantee by the government as the existence, availability and willingness of a qualified nominee or transferee is totally out of the government's control. As such **the Government is virtually at the mercy of PIATCO** (that it would not default on its loan obligations to its Senior Lenders), the Senior Lenders (that they would appoint a qualified nominee or transferee or agree to some other arrangement with the Government) and the existence of a qualified nominee or transferee who is able and willing to take the place of PIATCO in NAIA IPT III.

The proscription against government guarantee in any form is one of the policy considerations behind the BOT Law. Clearly, in the present case, the ARCA obligates the Government to pay for all loans, advances and obligations arising out of financial facilities extended to PIATCO for the implementation of the NAIA IPT III project should PIATCO default in its loan obligations to its Senior Lenders and the latter fails to appoint a qualified nominee or transferee. This in effect would make the Government liable for PIATCO's loans should the conditions as set forth in the ARCA arise. This is a form of direct government guarantee.

The BOT Law and its implementing rules provide that in order for an unsolicited proposal for a BOT project may be accepted, the following conditions must first be met: (1) the project involves a new concept in technology and/or is 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 other interested parties to a public bidding and conducted the same.[56] The failure to meet any of the above conditions will result in the denial of the proposal. It is further provided that the presence of direct government guarantee, subsidy or equity will "necessarily disqualify a proposal from being treated and accepted as an unsolicited proposal."[57] The BOT Law clearly and strictly prohibits direct government guarantee, subsidy and equity in unsolicited proposals that the mere inclusion of a provision to that effect is fatal and is sufficient to deny the proposal. It stands to reason therefore that if a proposal can be denied by reason of the existence of direct government guarantee, then its inclusion in the contract executed after the said proposal has been accepted is likewise sufficient to invalidate the contract itself. A prohibited provision, the inclusion of which would result in the denial of a proposal cannot, and should not, be allowed to later on be inserted in the contract resulting from the said proposal. The basic rules of justice and fair play alone militate against such an occurrence and must not, therefore, be countenanced particularly in this instance where the government is exposed to the risk of shouldering hundreds of million of dollars in debt.

This Court has long and consistently adhered to the legal maxim that those that cannot be done directly cannot be done indirectly.[58] **To declare the PIATCO contracts valid despite the clear statutory prohibition against a direct government guarantee would not only make a mockery of what the BOT Law seeks to prevent -- which is to expose the government to the risk of incurring a monetary obligation resulting from a contract of loan between the project proponent and its lenders and to which the Government is not a party to -- but would also render the BOT Law useless for what it seeks to achieve –- to make use of the resources of the private sector in the "financing, operation and maintenance of infrastructure and development projects"[59] which are necessary for national growth and development but which the government, unfortunately, could ill-afford to finance at this point in time.**

IV

Temporary takeover of business affected with public interest

Article XII, Section 17 of the 1987 Constitution provides:

Section 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.

The above provision pertains to the right of the State in times of national emergency, and in the exercise of its police power, to temporarily take over the operation of any business affected with public interest. In the 1986 Constitutional Commission, the term "national emergency" was defined to include threat from external aggression, calamities or national disasters, but not strikes "unless it is of such proportion that would paralyze government service."[60] The duration of the emergency itself is the determining factor as to how long the

temporary takeover by the government would last.[61] The temporary takeover by the government extends only to the operation of the business and not to the ownership thereof. As such the **government is not required to compensate the private entity-owner of the said business as there is no transfer of ownership**, whether permanent or temporary. The private entity-owner affected by the temporary takeover cannot, likewise, claim just compensation for the use of the said business and its properties as the temporary takeover by the government is in exercise of its **police power** and not of its power of eminent domain.

Article V, Section 5.10 (c) of the 1997 Concession Agreement provides:

Section 5.10 Temporary Take-over of operations by GRP.

….

(c) In the event the development Facility or any part thereof and/or the operations of Concessionaire or any part thereof, become the subject matter of or be included in any notice, notification, or declaration concerning or relating to acquisition, seizure or appropriation by GRP in times of war or national emergency, GRP shall, by written notice to Concessionaire, immediately take over the operations of the Terminal and/or the Terminal Complex. During such take over by GRP, the Concession Period shall be suspended; provided, that upon termination of war, hostilities or national emergency, the operations shall be returned to Concessionaire, at which time, the Concession period shall commence to run again. **Concessionaire shall be entitled to reasonable compensation for the duration of the temporary take over by GRP, which compensation shall take into account the reasonable cost for the use of the Terminal and/or Terminal Complex,** (**which is in the amount at least equal to the debt service requirements of Concessionaire**, if the temporary take over should occur at the time when Concessionaire is still servicing debts owed to project lenders), any loss or damage to the Development Facility, and other consequential damages. If the parties cannot agree on the reasonable compensation of Concessionaire, or on the liability of GRP as aforesaid, the matter shall be resolved in accordance with Section 10.01 [Arbitration]. Any amount determined to be payable by GRP to Concessionaire shall be offset from the amount next payable by Concessionaire to GRP.[62]

PIATCO cannot, by mere contractual stipulation, contravene the Constitutional provision on temporary government takeover and obligate the government to pay "reasonable cost for the use of the Terminal and/or Terminal Complex."[63] Article XII, section 17 of the 1987 Constitution envisions a situation wherein the exigencies of the times necessitate the government to "temporarily take over or direct the operation of any privately owned public utility or business affected with public interest." It is the welfare and interest of the public which is the paramount consideration in determining whether or not to temporarily take over a particular business. Clearly, the State in effecting the temporary takeover is exercising its police power. Police power is the "most essential, insistent, and illimitable of powers."[64] Its exercise therefore must not be unreasonably hampered nor its exercise be a source of obligation by the government in the absence of damage due to arbitrariness of its exercise.[65] Thus, requiring the

government to pay reasonable compensation for the reasonable use of the property pursuant to the operation of the business contravenes the Constitution.

V

Regulation of Monopolies

A monopoly is "a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of a particular commodity."[66] The 1987 **Constitution strictly regulates monopolies**, whether private or public, and even provides for their prohibition if public interest so requires. Article XII, Section 19 of the 1987 Constitution states:

Sec. 19. The state shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

Clearly, monopolies are not per se prohibited by the Constitution but may be permitted to exist to aid the government in carrying on an enterprise or to aid in the performance of various services and functions **in the interest of the public**.[67] Nonetheless, a determination must first be made as to whether public interest requires a monopoly. As monopolies are subject to abuses that can inflict severe prejudice to the public, they are subject to a higher level of State regulation than an ordinary business undertaking.

In the cases at bar, PIATCO, under the 1997 Concession Agreement and the ARCA, is granted the "**exclusive right** to operate a commercial international passenger terminal within the Island of Luzon" at the NAIA IPT III.[68] This is with the exception of already existing international airports in Luzon such as those located in the Subic Bay Freeport Special Economic Zone ("SBFSEZ"), Clark Special Economic Zone ("CSEZ") and in Laoag City.[69] As such, upon commencement of PIATCO's operation of NAIA IPT III, Terminals 1 and 2 of NAIA would cease to function as international passenger terminals. This, however, does not prevent MIAA to use Terminals 1 and 2 as domestic passenger terminals or in any other manner as it may deem appropriate except those activities that would compete with NAIA IPT III in the latter's operation as an international passenger terminal.[70] The right granted to PIATCO to **exclusively operate NAIA IPT III** would be for a period of twenty-five (25) years from the In-Service Date[71] and renewable for another twenty-five (25) years at the option of the government.[72] **Both the 1997 Concession Agreement and the ARCA further provide that, in view of the exclusive right granted to PIATCO, the concession contracts of the service providers currently servicing Terminals 1 and 2 would no longer be renewed and those concession contracts whose expiration are subsequent to the In-Service Date would cease to be effective on the said date.**[73]

The operation of an international passenger airport terminal is no doubt an undertaking imbued with public interest. In entering into a Build–Operate-and-Transfer contract for the construction, operation and maintenance of NAIA IPT III, the government has determined that public interest would be served better if private sector resources were used in its construction

and an exclusive right to operate be granted to the private entity undertaking the said project, in this case PIATCO. Nonetheless, the privilege given to PIATCO is subject to reasonable regulation and supervision by the Government through the MIAA, which is the government agency authorized to operate the NAIA complex, as well as DOTC, the department to which MIAA is attached.[74]

This is in accord with the Constitutional mandate that a monopoly which is not prohibited must be regulated.[75] While it is the declared policy of the BOT Law to encourage private sector participation by "providing a climate of minimum government regulations,"[76] the same does not mean that Government must completely surrender its sovereign power to protect public interest in the operation of a public utility as a monopoly. The operation of said public utility can not be done in an arbitrary manner to the detriment of the public which it seeks to serve. The right granted to the public utility may be exclusive but the exercise of the right cannot run riot. Thus, while PIATCO may be authorized to exclusively operate NAIA IPT III as an international passenger terminal, the Government, through the MIAA, has the right and the duty to ensure that it is done in accord with public interest. PIATCO's right to operate NAIA IPT III cannot also violate the rights of third parties.

Section 3.01(e) of the 1997 Concession Agreement and the ARCA provide:

3.01 Concession Period

….

(e) **GRP confirms that certain concession agreements** relative to certain services and operations currently being undertaken at the Ninoy Aquino International Airport passenger Terminal I **have a validity period extending beyond the In-Service Date**. GRP through DOTC/MIAA, **confirms** that these services and operations **shall not be carried over** to the Terminal and the Concessionaire is under **no legal obligation to permit such carry-over** except through a separate agreement duly entered into with Concessionaire. In the event Concessionaire becomes involved in any litigation initiated by any such concessionaire or operator, GRP undertakes and hereby holds Concessionaire free and harmless on full indemnity basis from and against any loss and/or any liability resulting from any such litigation, including the cost of litigation and the reasonable fees paid or payable to Concessionaire's counsel of choice, all such amounts shall be fully deductible by way of an offset from any amount which the Concessionaire is bound to pay GRP under this Agreement.

During the oral arguments on December 10, 2002, the counsel for the petitioners-in-intervention for G.R. No. 155001 stated that there are two service providers whose contracts are still existing and whose validity extends beyond the In-Service Date. One contract remains valid until 2008 and the other until 2010.[77]

We hold that while the service providers presently operating at NAIA Terminal 1 do not have an absolute right for the renewal or the extension of their respective contracts, those contracts whose duration extends beyond NAIA IPT III's In-Service-Date should not be unduly

prejudiced. These contracts must be respected not just by the parties thereto but also by third parties. PIATCO cannot, by law and certainly not by contract, render a valid and binding contract nugatory. PIATCO, by the mere expedient of claiming an exclusive right to operate, cannot require the Government to break its contractual obligations to the service providers. In contrast to the arrastre and stevedoring service providers in the case of**Anglo-Fil Trading Corporation v. Lazaro**[78] whose contracts consist of temporary hold-over permits, the affected service providers in the cases at bar, have a valid and binding contract with the Government, through MIAA, whose period of effectivity, as well as the other terms and conditions thereof, cannot be violated.

In fine, the efficient functioning of NAIA IPT III is imbued with public interest. The provisions of the 1997 Concession Agreement and the ARCA did not strip government, thru the MIAA, of its right to supervise the operation of the whole NAIA complex, including NAIA IPT III. As the primary government agency tasked with the job,[79] it is MIAA's responsibility to ensure that whoever by contract is given the right to operate NAIA IPT III will do so within the bounds of the law and with due regard to the rights of third parties and above all, the interest of the public.

VI

CONCLUSION

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

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

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Ynares-Santiago, Sandoval-Gutierrez, Austria-Martinez, Corona, and *Carpio-Morales, JJ.,* concur.

Vitug, J., see separate (dissenting) opinion.

Panganiban, J., please see separate opinion.

Quisumbing, J., no jurisdiction, please see separate opinion of J. Vitug in which he concurs.

Carpio, J., no part.

Callejo, Sr., J., also concur in the separate opinion of J. Panganiban.

Azcuna, J., joins the separate opinion of J. Vitug.

---

[1] An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector.

[2] G.R. No. 155001.

[3] G.R. No. 155547.

[4] G.R. No. 155661.

[5] An international airport is any nation's gateway to the world, the first contact of foreigners with the Philippine Republic, especially those foreigners who have not been in contact with the wonderful exports of the Philippine economy, those foreigners who have not had the benefit of enjoying Philippine export products. Because for them, when they see your products, that is the face of the Philippines they see. But if they are not exposed to your products, then it's the airport that's the first face of the Philippines they see. Therefore, it's not only a matter of opening yet, but making sure that it is a world class airport that operates without any hitches at all and without the slightest risk to travelers. But it's also emerging as a test case of my administration's commitment to fight corruption to rid our state from the hold of any vested interest, **the Solicitor General, and the Justice Department have determined that all five agreements covering the NAIA Terminal 3, most of which were contracted in the previous administration, are null and void. I cannot honor contracts which the Executive Branch's legal offices have concluded (as) null and void.**

I am, therefore, ordering the Department of Justice and the Presidential Anti-Graft Commission to investigate any anomalies and prosecute all those found culpable in connection with the NAIA contract. But despite all of the problems involving the PIATCO contracts, I am assuring our people, our travelers, our exporters, my administration will open the terminal even if it requires invoking the whole powers of the Presidency under the Constitution and we will open a safe, secure and smoothly functioning airport, a world class airport, as world class as the exporters we are honoring today. (Speech of President Arroyo, *emphasis supplied*)

[6] Art. VIII, Sec. 1, Philippine Constitution.

[7] MIASCOR, MACROASIA-EUREST, MACROASIA OGDEN and Philippine Airlines.

[8] Sections 3.01 (a) and 3.02, 1997 Concession Agreement; Sections 3.01 (d) and (e) and 3.02, ARCA.

[9] Kilosbayan, Inc. v. Morato, G.R. No. 118910, July 17, 1995, 246 SCRA 540, 562-563, *citing* Baker v. Carr, 369 U.S. 186, 7 L. Ed. 633 (1962).

[10] *Id.*; Bayan v. Zamora, G.R. No. 138570, October 10, 2000; 342 SCRA 449, 478.

[11] Rollo, G.R. No. 155547, p.12.

[12] Article VI, Section 29 (1).

[13] G.R. No. 39842, March 28, 1934, 59 Phil 823.

[14] G.R. No. 29627, December 19, 1989; 180 SCRA 254, 260-261.

[15] G. R. No. 113375, May 5, 1994.

[16] *Id*.

[17] *Id*. *citing* Tan vs. Macapagal, 43 SCRA 677, 680 [1972].

[18] Association of Small Landowners in the Philippines, Inc. vs. Secretary of Agrarian Reform, G. R. No. 78742, July 14, 1989; 175 SCRA 343, 364-365 [1989].

[19] Santiago v. Vasquez, G.R. Nos. 99289-90, January 27, 1993; 217 SCRA 633, 652.

[20] G.R. No. 136154, February 7, 2001; 351 SCRA 373, 381.

[21] G.R. No. 135362, December 13, 1999; 320 SCRA 610.

[22] Del Monte Corporation-USA v. Court of Appeals, G.R. No. 136154, February 7, 2001; 351 SCRA 373, 382.

[23] Rollo, G.R. No.155001, pp. 2487-2488.

[24] Section 5, R.A. No. 7718.

[25] At the United States Dollar-Philippine Peso exchange rate of US$1:₱26.239 quoted by the Bangko Sentral ng Pilipinas at that time.

[26] Rollo, G.R. No.155001, pp. 2471-2474.

[27] *Id.* at 2475-2477. Derived from the figures on the authorized capital stock and the shares of stock that are subscribed and paid-up.

[28] *Id.* at 2478-2484.

[29]

Member	**Maximum Amount of Equity**
Security Bank	₱528,525,656.55
PAGS	26,735,700.00
Paircargo	3,123,515.00
TOTAL	**₱558,384,871.55**

[30] Republic of the Philippines vs. Hon. Ignacio C. Capulong, G.R. No. 93359, July 12, 1991; 199 SCRA 134, 146-147. Emphasis supplied.

[31] Danville Maritime, Inc. v. Commission on Audit, G.R. No. 85285, July 28, 1989, 175 SCRA 701, 713. Citations omitted.

[32] A. Cobacha & D. Lucenario, LAW ON PUBLIC BIDDING AND GOVERNMENT CONTRACTS 13 (1960).

[33] Diamond v. City of Mankato, et al., 93 N.W. 912.

[34] G.R. No. L-5439, December 29, 1954; 96 Phil 368.

[35] *Id.* at 375.

[36] Section 6.03, draft Concession Agreement.

[37] Sections 1.33 and 6.03(b), 1997 Concession Agreement.

[38] Sections 1.27 and 6.06, 1997 Concession Agreement.

[39] Emphasis supplied.

[40] Emphasis supplied.

[41] Referred to as "Passenger Service Fee" under the draft Concession Agreement.

[42] Section 6.05 Interim Adjustment

(a) Concessionaire may apply for and, if warranted, may be granted an interim adjustment of the fees and charges constituting Public Utility Revenues upon the occurrence of extraordinary events resulting from any of the following:

a depreciation since the last adjustment by at least fifteen percent (15%) of the value of the Philippine Peso relative to the US Dollar using the exchange rates published by the Philippine Dealing System as reference;

an increase since the last adjustment by at least fifteen percent (15%) in the Metro Manila Consumer Price Index based on National Census and Statistics Office publications;

an increase since the last adjustment in MERALCO power rates billing by at least fifteen percent (15%);

an increase since the last adjustment in the 180-day Treasury Bill interest rates by at least thirty (30%).

….

[43] Section 6.05, draft Concession Agreement.

[44] Section 1.33, 1997 Concession Agreement.

[45] *Supra* note 31.

[46] Malaga v. Penachos, Jr., G.R No. 86695, September 3, 1992; 213 SCRA 516, 526.

[47] A. Cobacha & D. Lucenario, LAW ON PUBLIC BIDDING AND GOVERNMENT CONTRACTS 6-7 (1960).

[48] Emphasis supplied.

[49] Concession Agreement, Art. 4, Sec. 4.04 (b) and (c), Art. 1, Sec. 1.06, July 12, 1997.

[50] *Ibid.*

[51] *Id.* at Art. 4, Sec. 4.04 (c).

[52] Record of the Senate Second Regular Session 1993-1994, vol. III, no. 42, p. 362.

[53] Republic Act No. 7718, Secs. 2 and 4-A, Implementing Rules and Regulations, Rule 11, Secs. 11.1 and 11.3.

[54] Emphasis and caption supplied.

[55] Sec. 1.06, ARCA.

[56] Republic Act No. 7718, as amended, Sec. 4-A, May 5, 1994; Implementing Rules and Regulations, Rule 10, Sec. 10.1.

[57] Implementing Rules and Regulations, Rule 10, Sec. 10.4.

[58] North Negros Sugar Co., Inc. v. Hidalgo, G.R. No. 42334, October 31, 1936; Intestate estate of the deceased Florentino San Gil. Josefa R. Oppus v. Bonifacio San Gil, G.R. No. 48115, October 12, 1942; San Diego v. Municipality of Naujan, G.R. No. L-9920, February 29, 1960; Favis vs. Municipality of Sabañgan, G.R. No. L-26522, 27 February 1969; City of Manila vs. Tarlac Development Corporation, L-24557, L-24469 & L-24481, 31 July 1968; In the matter of the Petition for Declaratory Judgment on Title to Real Property (Quieting of Title) Pechueco Sons Company v. Provincial Board of Antique, G.R. No. L-27038, January 30, 1970; Fornilda v. The Branch 164, Regional Trial Court IVth Judicial Region, Pasig, G.R. No. L-72306, October 5, 1988; Laurel v. Civil Service Commission, G.R. No. 71562, October 28, 1991; Davac v. Court of Appeals, G.R. No. 106105, April 21, 1994.

[59] Republic Act No. 7718, Sec. 1.

[60] III Record of the Constitutional Commission, pp. 266-267 (1986).

[61] *Id*.

[62] Except for providing for the suspension of all payments due to the Government for the duration of the takeover, Article V, Section 5.10(b) of the ARCA contains the same provision. Emphasis and caption supplied.

[63] *Id*.

[64] Bataan Shipyard and Engineering Co., Inc. v. Presidential Commission on Good Government, G.R. No. 75885, May 27, 1987 *citing* Freund, The Police Power (Chicago, 1904).

[65] Genuino v. Court of Agrarian Relations, G.R. No. L-25035, February 26, 1968.

[66] Black's Law Dictionary, 4th Ed., p. 1158.

[67] 36 Am Jur 480 *citing* Slaughter-House Cases, 16 Wall. (US) 36, 21 L ed 394.

[68] Concession Agreement ("CA") dated July 12, 1997, Art. III, Sec. 3.02(a); Amended and Restated Concession Agreement ("ARCA") dated November 26, 1998, Art. III, Sec. 3.02(a).

[69] *Ibid*.

[70] *Id*. at CA, Art. III, Sec. 3.02(b); ARCA, Art. III, Sec. 3.02(b).

[71] The day immediately following the day on which the Certificate of Completion is issued or deemed to be issued.

[72] *Id*. at CA, Art. III, Sec. 3.01(a) and (b); ARCA, Art. III, Sec. 3.01 (a) and (b).

[73] *Id*. at CA, Art. III, Sec. 3.01(d) and (e); ARCA, Art. III, Sec. 3.01(d) and (e).

[74] Executive Order No. 903, as amended, Sec. 4 (b) and (c).

[75] Art. XII, Sec. 19, Philippine Constitution.

[76] Republic Act No. 7718, Sec. 1.

[77] Transcript of Oral Arguments, p. 157, December 10, 2002.

[78] G.R. No. L-54958, September 2, 1983; 09 Phil. 400.

[79] Executive Order No. 903, July 21, 1983, provides:

Section 5. Functions, Powers, and Duties. — The Authority shall have the following functions, powers and duties:

…

(b) To control, supervise, construct, maintain, operate and provide such facilities or services as shall be necessary for the efficient functioning of the Airport;

(c) To promulgate rules and regulations governing the planning, development, maintenance, operation and improvement of the Airport and to control and/or supervise as may be necessary the construction of any structure or the rendition of any service within the Airport;

. . .