

THIRD DIVISION

**PLARIDEL M. ABAYA,
COMMODORE PLARIDEL
C. GARCIA (retired) and PMA
'59 FOUNDATION, INC., rep.
by its President, COMMODORE
CARLOS L. AGUSTIN
(retired),**

Petitioners,

G.R. No. 167919

Present:

**YNARES-SANTIAGO, J.
Chairperson,
AUSTRIA-MARTINEZ,
CALLEJO, SR., and
CHICO-NAZARIO, JJ.**

- versus -

**HON. SECRETARY
HERMOGENES E. EBDANE,
JR., in his capacity as Secretary
of the DEPARTMENT OF PUBLIC
WORKS and HIGHWAYS, HON.
SECRETARY EMILIA T. BONCODIN,
in her capacity as Secretary of the
DEPARTMENT OF BUDGET and
MANAGEMENT, HON. SECRETARY
CESAR V. PURISIMA, in his capacity
as Secretary of the DEPARTMENT OF
FINANCE, HON. TREASURER NORMA
L. LASALA, in her capacity as Treasurer
of the Bureau of Treasury, and CHINA ROAD
and BRIDGE CORPORATION,
Respondents.**

Promulgated:

February 14, 2007

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DECISION

CALLEJO, SR., J.:

Before the Court is the petition for *certiorari* and prohibition under Rule 65 of the Rules of Court seeking to set aside and nullify Resolution No. PJHL-A-04-012 dated May 7, 2004 issued by the Bids and Awards Committee (BAC) of the Department of Public Works and Highways (DPWH) and approved by then DPWH Acting Secretary Florante Soriquez. The assailed resolution recommended the award to private respondent China Road & Bridge Corporation of the contract for the implementation of civil works for Contract Package No. I (CP I), which consists of the improvement/rehabilitation of the San Andres (Codon)-Virac-Jct. Bago-Viga road, with the length of 79.818 kilometers, in the island province of Catanduanes.

The CP I project is one of the four packages comprising the project for the improvement/rehabilitation of the Catanduanes Circumferential Road, covering a total length of about 204.515 kilometers, which is the main highway in Catanduanes Province. The road section (Catanduanes Circumferential Road) is part of the Arterial Road Links Development Project (Phase IV) funded under Loan Agreement No. PH-P204 dated December 28, 1999 between the Japan Bank for International Cooperation (JBIC) and the Government of the Republic of the Philippines.

Background

Based on the Exchange of Notes dated December 27, 1999,^{[11](#)} the Government of Japan and the Government of the Philippines, through their respective representatives, namely, Mr. Yoshihisa Ara, Ambassador Extraordinary and Plenipotentiary of Japan to the Republic of the Philippines, and then Secretary of Foreign Affairs Domingo L. Siazon, have reached an understanding concerning Japanese loans to be extended to the

Philippines. These loans were aimed at promoting our country's economic stabilization and development efforts.

The Exchange of Notes consisted of two documents: (1) a Letter from the Government of Japan, signed by Ambassador Ara, addressed to then Secretary of Foreign Affairs Siazon, confirming the understanding reached between the two governments concerning the loans to be extended by the Government of Japan to the Philippines; and (2) a document denominated as Records of Discussion where the salient terms of the loans as set forth by the Government of Japan, through the Japanese delegation, were reiterated and the said terms were accepted by the Philippine delegation. Both Ambassador Ara and then Secretary Siazon signed the Records of Discussion as representatives of the Government of Japan and Philippine Government, respectively.

The Exchange of Notes provided that the loans to be extended by the Government of Japan to the Philippines consisted of two loans: Loan I and Loan II. The Exchange of Notes stated in part:

I

1. A loan in Japanese yen up to the amount of seventy-nine billion eight hundred and sixty-one million yen (Y79,861,000,000) (hereinafter referred to as "the Loan I") will be extended, in accordance with the relevant laws and regulations of Japan, to the Government of the Republic of the Philippines (hereinafter referred to as "the Borrower I") by the Japan Bank for International Cooperation (hereinafter referred to as "the Bank") to implement the projects enumerated in the List A attached hereto (hereinafter referred to as "the List A") according to the allocation for each project as specified in the List A.

2. (1) The Loan I will be made available by loan agreements to be concluded between the Borrower I and the Bank. The terms and conditions of the Loan I as well as the procedure for its utilization will be governed by said loan agreements which will contain, inter alia, the following principles:

...

(2) Each of the loan agreements mentioned in sub-paragraph (1) above will be concluded after the Bank is satisfied of the feasibility, including environmental consideration, of the project to which such loan agreement relates.

3. (1) The Loan I will be made available to cover payments to be made by the Philippine executing agencies to suppliers, contractors and/or consultants of eligible source countries under such contracts as may be entered into between them for purchases of products and/or services required for the implementation of the projects enumerated in the List A, provided that such purchases are made in such eligible source countries for products produced in and/or services supplied from those countries.

(2) The scope of eligible source countries mentioned in sub-paragraph (1) above will be agreed upon between the authorities concerned of the two Governments.

(3) A part of the Loan I may be used to cover eligible local currency requirements for the implementation of the projects enumerated in the List A.

4. With regard to the shipping and marine insurance of the products purchased under the Loan I, the Government of the Republic of the Philippines will refrain from imposing any restrictions that may hinder fair and free competition among the shipping and marine insurance companies.

x x x x^[2]

Pertinently, List A, which specified the projects to be financed under the Loan I, includes the Arterial Road Links Development Project (Phase IV), to wit:

LIST A

	Maximum amount in million yen)
1. Secondary Education Development and Improvement Project	7,210
2. Rural Water Supply Project (Phase V)	951

3. Bohol Irrigation Project (Phase II)	6,078
4. Agrarian Reform Infrastructure Support Project (Phase II)	16,990
5. Arterial Road Links Development Project (Phase IV)	15,384
6. Cordillera Road Improvement Project	5,852
7. Philippines-Japan Friendship Highway Mindanao Section Rehabilitation Project (Phase II)	7,434
8. Rehabilitation and Maintenance of Bridges Along Arterial Roads Project (Phase IV)	5,068
9. Maritime Safety Improvement Project (Phase C)	4,714
10. Pinatubo Hazard Urgent Mitigation Project (Phase II)	9,013

11. Pasig-Marikina River Channel Improvement Project (Phase I)	1,167
Total	79,861 ^[3]

The Exchange of Notes further provided that:

III

x x x x

3. The Government of the Republic of the Philippines will ensure that the products and/or services mentioned in sub-paragraph (1) of paragraph 3 of Part I and sub-paragraph (1) of paragraph 4 of Part II are procured in accordance with the guidelines for procurement of the Bank, which set forth, inter alia, the procedures of international tendering to be followed except where such procedures are inapplicable or inappropriate.

x x x x^[4]

The Records of Discussion, which formed part of the Exchange of Notes, also stated in part, thus:

x x x x

1. With reference to sub-paragraph (3) of paragraph 3 of Part I of the Exchange of Notes concerning the financing of eligible local currency requirements for the implementation of the projects mentioned in the said sub-paragraph, the representative of the Japanese delegation stated that:

(1) such requirement of local currency as general administrative expenses, interest during construction, taxes and duties, expenses concerning office, remuneration to employees of the executing agencies and housing, not directly related to the implementation of the said projects, as well as purchase of land properties, compensation and the like, however, will not be considered as eligible for financing under the Loan I; and

(2) the procurement of products and/or services will be made in accordance with the procedures of international competitive tendering except where such procedures are inapplicable and inappropriate.

x x x x^[5]

Thus, in accordance with the agreement reached by the Government of Japan and the Philippine Government, as expressed in the Exchange of Notes between the representatives of the two governments, the Philippines obtained from and was granted a loan by the JBIC. Loan Agreement No. PH-P204 dated December 28, 1999, in particular, stated as follows:

Loan Agreement No. PH-P204, dated December 28, 1999, between JAPAN BANK FOR INTERNATIONAL COOPERATION and the GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES.

In the light of the contents of the Exchange of Notes between the Government of Japan and the Government of the Republic of the Philippines dated December 27, 1999, concerning Japanese loans to be extended with a view to promoting the economic stabilization and development efforts of the Republic of the Philippines.

JAPAN BANK FOR INTERNATIONAL COOPERATION (hereinafter referred to as “the BANK”) and THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES (hereinafter referred to as “the Borrower”) herewith conclude the following Loan Agreement (hereinafter referred to as “the Loan Agreement”, which includes all agreements supplemental hereto).

x x x x^[6]

Under the terms and conditions of Loan Agreement No. PH-P204, JBIC agreed to lend the Philippine Government an amount not exceeding FIFTEEN BILLION THREE HUNDRED EIGHTY-FOUR MILLION Japanese Yen (¥ 15,384,000,000) as principal for the implementation of the Arterial Road Links Development Project (Phase IV) on the terms and conditions set forth in the Loan Agreement and in accordance with the relevant laws and regulations of Japan.^[7] The said amount shall be used for

the purchase of eligible goods and services necessary for the implementation of the above-mentioned project from suppliers, contractors or consultants.^[8]

Further, it was provided under the said loan agreement that other terms and conditions generally applicable thereto shall be set forth in the General Terms and Conditions, dated November 1987, issued by the Overseas Economic Cooperation Fund (OECF) and for the purpose, reference to “the OECF” and “Fund” therein (General Terms and Conditions) shall be substituted by “the JBIC” and “Bank,” respectively.^[9] Specifically, the guidelines for procurement of all goods and services to be financed out of the proceeds of the said loan shall be as stipulated in the Guidelines for Procurement under OECF Loans dated December 1997 (herein referred to as JBIC Procurement Guidelines).^[10]

As mentioned earlier, the proceeds of Loan Agreement No. PH-P204 was to be used to finance the Arterial Road Links Development Project (Phase IV), of which the Catanduanes Circumferential Road was a part. This road section, in turn, was divided into four contract packages (CP):

CP I: San Andres (Codon)-Virac-Jct. Bato- Viga Road	- 79.818
kms	
CP II: Viga-Bagamanoc Road	- 10.40 kms.
CP III: Bagamanoc-Pandan Road	- 47.50 kms.
CP IV: Pandan-Caramoran-Codon Road	- 66.40
kms. ^[11]	

Subsequently, the DPWH, as the government agency tasked to implement the project, caused the publication of the “Invitation to Prequalify and to Bid” for the implementation of the CP I project in two leading national newspapers, namely, the Manila Times and Manila Standard on November 22 and 29, and December 5, 2002.

A total of twenty-three (23) foreign and local contractors responded to the invitation by submitting their accomplished prequalification documents on January 23, 2003. In accordance with the established prequalification criteria, eight contractors were evaluated or considered eligible to bid as concurred by the JBIC. One of them, however, withdrew; thus, only seven contractors submitted their bid proposals.

The bid documents submitted by the prequalified contractors/bidders were examined to determine their compliance with the requirements as

stipulated in Article 6 of the Instruction to Bidders.^[12] After the lapse of the deadline for the submission of bid proposals, the opening of the bids commenced immediately. Prior to the opening of the respective bid proposals, it was announced that the Approved Budget for the Contract (ABC) was in the amount of P738,710,563.67.

The result of the bidding revealed the following three lowest bidders and their respective bids vis-à-vis the ABC:^[13]

Name of Bidder	Original Bid As Read (Pesos)	As-Corrected Bid Amount (Pesos)	Variance
1) China Road And Bridge Corporation	P 993,183,904.98	P952,564,821.71	28.95%
2) Cavite Ideal Int'l Const. Devt. Corp.	P1,099,926,598.11	P1,099,926,598.11	48.90%
3) Italian Thai Dev't. Public Company, Ltd.	P1,125,022,075.34	P1,125,392,475.36	52.35%

The bid of private respondent China Road & Bridge Corporation was corrected from the original P993,183,904.98 (with variance of 34.45% from the ABC) to P952,564,821.71 (with variance of 28.95% from the ABC) based on their letter clarification dated April 21, 2004.^[14]

After further evaluation of the bids, particularly those of the lowest three bidders, Mr. Hedifume Ezawa, Project Manager of the Catanduanes Circumferential Road Improvement Project (CCRIP), in his Contractor's Bid Evaluation Report dated April 2004, recommended the award of the contract to private respondent China Road & Bridge Corporation:

In accordance with the Guidelines for the Procurements under ODA [Official Development Assistance] Loans, the Consultant hereby recommends the award of the contract for the construction of *CP I, San*

Andres (Codon) – Virac – Jct. Bato – Viga Section under the Arterial Road Links Development Projects, Phase IV, JBIC Loan No. PH-P204 to the Lowest Complying Bidder, *China Road and Bridge Corporation*, at its total corrected bid amount of *Nine Hundred Fifty-Two Million Five Hundred Sixty-Four Thousand Eight Hundred Twenty-One & 71/100 Pesos.*^[15]

The BAC of the DPWH, with the approval of then Acting Secretary Soriquez, issued the assailed Resolution No. PJHL-A-04-012 dated May 7, 2004 recommending the award in favor of private respondent China Road & Bridge Corporation of the contract for the implementation of civil works for CP I, San Andres (Codon) – Virac – Jct. Bato – Viga Road (Catanduanes Circumferential Road Improvement Project) of the Arterial Roads Links Development Project, Phase IV, located in Catanduanes Province, under JBIC Loan Agreement No. PH-P204.^[16] On September 29, 2004, a Contract of Agreement was entered into by and between the DPWH and private respondent China Road & Bridge Corporation for the implementation of the CP I project.

The Parties

Petitioner Plaridel M. Abaya claims that he filed the instant petition as a taxpayer, former lawmaker, and a Filipino citizen. Petitioner Plaridel C. Garcia likewise claims that he filed the suit as a taxpayer, former military officer, and a Filipino citizen. Petitioner PMA '59 Foundation, Inc., on the other hand, is a non-stock, non-profit corporation organized under the existing Philippine laws. It claims that its members are all taxpayers and alumni of the Philippine Military Academy. It is represented by its President, Carlos L. Agustin.

Named as public respondents are the DPWH, as the government agency tasked with the implementation of government infrastructure projects; the Department of Budget and Management (DBM) as the government agency that authorizes the release and disbursement of public funds for the implementation of government infrastructure projects; and the Department of Finance (DOF) as the government agency that acts as the custodian and manager of all financial resources of the government. Also named as individual public respondents are Hermogenes E. Ebdane, Jr., Emilia T. Boncodin and Cesar V. Purisima in their capacities as former Secretaries of the DPWH, DBM and DOF, respectively. On the other hand, public respondent Norma L. Lasala was impleaded in her capacity as Treasurer of the Bureau of Treasury.

Private respondent China Road & Bridge Corporation is a duly organized corporation engaged in the business of construction.

The Petitioners' Case

The petitioners mainly seek to nullify DPWH Resolution No. PJHL-A-04-012 dated May 7, 2004, which recommended the award to private respondent China Road & Bridge Corporation of the contract for the implementation of the civil works of CP I. They also seek to annul the contract of agreement subsequently entered into by and between the DPWH and private respondent China Road & Bridge Corporation pursuant to the said resolution.

They pose the following issues for the Court's resolution:

I. Whether or not Petitioners have standing to file the instant Petition.

II. Whether or not Petitioners are entitled to the issuance of a Writ of Certiorari reversing and setting aside DPWH Resolution No. PJHL-A-04-012, recommending the award of the Contract Agreement for the implementation of civil works for CPI, San Andres (CODON)-VIRAC-JCT BATO-VIGA ROAD (CATANDUANES CIRCUMFERENTIAL ROAD IMPROVEMENT PROJECT) of the Arterial Road Links Development Project, Phase IV, located in Catanduanes Province, under JBIC L/A No. PH-P204, to China Road & Bridge Corporation.

III. Whether or not the Contract Agreement executed by and between the Republic of the Philippines, through the Department of Public Works and Highways, and the China Road & Bridge Corporation, for the implementation of civil works for CPI, San Andres (CODON)-VIRAC-JCT BATO-VIGA ROAD (CATANDUANES CIRCUMFERENTIAL ROAD IMPROVEMENT PROJECT) of the Arterial Road Links Development Project, Phase IV, located in Catanduanes Province, under JBIC L/A No. PH-P204, is void *ab initio*.

IV. Whether or not Petitioners are entitled to the issuance of a Writ of Prohibition permanently prohibiting the implementation of DPWH Resolution No. PJHL-A-04-012 and the Contract Agreement executed by and between the Republic of the Philippines (through the Department of Public Works and Highways) and the China Road & Bridge Corporation, and the disbursement of public funds by the [D]epartment of [B]udget and [M]anagement for such purpose.

V. Whether or not Petitioners are entitled to a Preliminary Injunction and/or a Temporary Restraining Order immediately enjoining the implementation of DPWH Resolution No. PJHL-A-04-012 and the Contract Agreement executed by and between the Republic of

the Philippines (through the Department of Public Works and Highways) and the China Road & Bridge Corporation, and the disbursement of public funds by the Department of Budget and Management for such purpose, during the pendency of this case.^[17]

Preliminarily, the petitioners assert that they have standing or *locus standi* to file the instant petition. They claim that as taxpayers and concerned citizens, they have the right and duty to question the expenditure of public funds on illegal acts. They point out that the Philippine Government allocates a peso-counterpart for CP I, which amount is appropriated by Congress in the General Appropriations Act; hence, funds that are being utilized in the implementation of the questioned project also partake of taxpayers' money. The present action, as a taxpayers' suit, is thus allegedly proper.

They likewise characterize the instant petition as one of transcendental importance that warrants the Court's adoption of a liberal stance on the issue of standing. It cited several cases where the Court brushed aside procedural technicalities in order to resolve issues involving paramount public interest and transcendental importance.^[18] Further, petitioner Abaya asserts that he possesses the requisite standing as a former member of the House of Representatives and one of the principal authors of Republic Act No. 9184 (RA 9184)^[19] known as the Government Procurement Reform Act, the law allegedly violated by the public respondents.

On the substantive issues, the petitioners anchor the instant petition on the contention that the award of the contract to private respondent China Road & Bridge Corporation violates RA 9184, particularly Section 31 thereof which reads:

SEC. 31. *Ceiling for Bid Prices.* – The ABC shall be the upper limit or ceiling for the Bid prices. Bid prices that exceed this ceiling shall be

disqualified outright from further participating in the bidding. There shall be no lower limit to the amount of the award.

In relation thereto, the petitioners cite the definition of the ABC, thus:

SEC. 5. Definition of Terms. –

x x x

(a) *Approved Budget for the Contract (ABC).* – refers to the budget for the contract duly approved by the Head of the Procuring Entity, as provided for in the General Appropriations Act and/or continuing appropriations, in the case of National Government Agencies; the Corporate Budget for the contract approved by the governing Boards, pursuant to E.O. No. 518, series of 1979, in the case of Government-Owned and/or Controlled Corporations, Government Financial Institutions and State Universities and Colleges; and the Budget for the contract approved by the respective Sanggunian, in the case of Local Government Units.

x x x

The petitioners theorize that the foregoing provisions show the mandatory character of ceilings or upper limits of every bid. Under the above-quoted provisions of RA 9184, all bids or awards should not exceed the ceilings or upper limits; otherwise, the contract is deemed void and inexistent.

Resolution No. PJHL-A-04-012 was allegedly issued with grave abuse of discretion because it recommended the award of the contract to private respondent China Road & Bridge Corporation whose bid was more than ₱200 million overpriced based on the ABC. As such, the award is allegedly illegal and unconscionable.

In this connection, the petitioners opine that the contract subsequently entered into by and between the DPWH and private respondent China Road & Bridge Corporation is void *ab initio* for being prohibited by RA

9184. They stress that Section 31 thereof expressly provides that “bid prices that exceed this ceiling shall be disqualified outright from participating in the bidding.” The upper limit or ceiling is called the ABC and since the bid of private respondent China Road & Bridge Corporation exceeded the ABC for the CP I project, it should have been allegedly disqualified from the bidding process and should not, by law, have been awarded the said contract. They invoke Article 1409 of the Civil Code:

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

- (1) Those whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy;
- (2) Those which are absolutely simulated or fictitious;
- (3) Those whose cause or object did not exist at the time of the transaction;
- (4) Those whose object is outside the commerce of men;
- (5) Those which contemplate an impossible service;
- (6) Those where the intention of the parties relative to the principal object of the contract cannot be ascertained;
- (7) **Those expressly prohibited or declared void by law.**

For violating the above provision, the contract between the DPWH and private respondent China Road & Bridge Corporation is allegedly inexistent and void *ab initio* and can produce no effects whatsoever.

It is the contention of the petitioners that RA 9184 is applicable to both local- and foreign-funded procurement contracts. They cite the following excerpt of the deliberations of the Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2248 and House Bill No. 4809:^[20]

REP. ABAYA. Mr. Chairman, can we just propose additional amendments? Can we go back to Section 4, Mr. Chairman?

THE CHAIRMAN (SEN. ANGARA). Section? Section ano, Del, 4? Definition – definition of terms.

REP. ABAYA. Sa House bill, it is sa scope and application.

THE CHAIRMAN (SEN. ANGARA). Okay.

REP. ABAYA. It should read as follows: “This Act shall apply to the procurement of goods, supplies and materials, infrastructure projects and consulting services regardless of funding source whether local or foreign by the government.”

THE CHAIRMAN (SEN. ANGARA). Okay, accepted. We accept. The Senate accepts it. [\[21\]](#)

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THE CHAIRMAN (SEN. ANGARA). Just take note of that ano. Medyo nga problematic ‘yan eh. Now, just for the record Del, can you repeat again the justification for including foreign funded contracts within the scope para malinaw because the World Bank daw might raise some objection to it.

REP. ABAYA. Well, Mr. Chairman, we should include foreign funded projects kasi these are the big projects. To give an example, if you allow bids above government estimate, let’s say take the case of 500 million project, included in that 500 million is the 20 percent profit. If you allow them to bid above government estimate, they will add another say 28 percent of (sic) 30 percent, 30 percent of 500 million is another 150 million. Ito, this is a rich source of graft money, aregluhan na lang, 150 million, five contractors will gather, “O eto 20 million, 20 million, 20 million.” So, it is rigged. ‘Yun ang practice na nangyayari. If we eliminate that, if we have a ceiling then, it will not be very tempting kasi walang extra money na pwedeng ibigay sa ibang contractor. So this promote (sic) collusion among bidders, of course, with the cooperation of irresponsible officials of some agencies. So we should have a ceiling to include foreign funded projects. [\[22\]](#)

The petitioners insist that Loan Agreement No. PH-P204 between the JBIC and the Philippine Government is neither a treaty, an international nor an executive agreement that would bar the application of RA 9184. They point out that to be considered a treaty, an international or an executive agreement, the parties must be two sovereigns or States whereas in the case of Loan Agreement No. PH-P204, the parties are the Philippine Government

and the JBIC, a banking agency of Japan, which has a separate juridical personality from the Japanese Government.

They further insist on the applicability of RA 9184 contending that while it took effect on January 26, 2003^[23] and Loan Agreement No. PH-P204 was executed prior thereto or on December 28, 1999, the actual procurement or award of the contract to private respondent China Road & Bridge Corporation was done after the effectivity of RA 9184. The said law is allegedly specific as to its application, which is on the actual procurement of infrastructure and other projects only, and not on the loan agreements attached to such projects. Thus, the petition only prays for the annulment of Resolution No. PJHL-A-04-012 as well as the contract between the DPWH and private respondent China Road & Bridge Corporation. The petitioners clarify that they do not pray for the annulment of Loan Agreement No. PH-P204. Since the subject procurement and award of the contract were done after the effectivity of RA 9184, necessarily, the procurement rules established by that law allegedly apply, and not Presidential Decree No. 1594 (PD 1594)^[24] and Executive Order No. 40 (EO 40), series of 2001, ^[25] as contended by the respondents. The latter laws, including their implementing rules, have allegedly been repealed by RA 9184. Even RA 4860, as amended, known as the Foreign Borrowings Act, the petitioners posit, may have also been repealed or modified by RA 9184 insofar as its provisions are inconsistent with the latter.

The petitioners also argue that the “Implementing Rules and Regulations (IRR) of RA 9184, Otherwise Known as the Government Procurement Reform Act, **Part A**” (IRR-A) cited by the respondents is not applicable as these rules only govern domestically-funded procurement contracts. They aver that the implementing rules to govern foreign-funded procurement, as in the present case, have yet to be drafted and in fact, there are concurrent resolutions drafted by both houses of Congress for the

Reconvening of the Joint Congressional Oversight Committee for the formulation of the IRR for foreign-funded procurements under RA 9184.

The petitioners maintain that disbursement of public funds to implement a patently void and illegal contract is itself illegal and must be enjoined. They bring to the Court's attention the fact that the works on the CP I project have already commenced as early as October 2004. They thus urge the Court to issue a writ of *certiorari* to set aside Resolution No. PJHL-A-04-012 as well as to declare null and void the contract entered into between the DPWH and private respondent China Road & Bridge Corporation. They also pray for the issuance of a temporary restraining order and, eventually, a writ of prohibition to permanently enjoin the DPWH from implementing Resolution No. PJHL-A-04-012 and its contract with private respondent China Road & Bridge Corporation as well as the DBM from disbursing funds for the said purpose.

The Respondents' Counter-Arguments

The public respondents, namely the DPWH, DBM and DOF, and their respective named officials, through the Office of the Solicitor General, urge the Court to dismiss the petition on grounds that the petitioners have no *locus standi* and, in any case, Resolution No. PJHL-A-04-012 and the contract between the DPWH and private respondent China Road & Bridge Corporation are valid.

According to the public respondents, a taxpayer's *locus standi* was recognized in the following cases: (a) where a tax measure is assailed as unconstitutional;^[26] (b) where there is a question of validity of election laws;^[27] (c) where legislators questioned the validity of any official action upon the claim that it infringes on their prerogatives as legislators;^[28] (d) where there is a claim of illegal disbursement or wastage of public funds

through the enforcement of an invalid or unconstitutional law;^[29] (e) where it involves the right of members of the Senate or House of Representatives to question the validity of a presidential veto or condition imposed on an item in an appropriation bill,^[30] or (f) where it involves an invalid law, which when enforced will put the petitioner in imminent danger of sustaining some direct injury as a result thereof, or that he 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 complained of.^[31] None of the above considerations allegedly obtains in the present case.

It is also the view of the public respondents that the fact that petitioner Abaya was a former lawmaker would not suffice to confer *locus standi* on himself. Members of Congress may properly challenge the validity of an official act of any department of the government only upon showing that the assailed official act affects or impairs their rights and prerogatives as legislators.

The public respondents further assail the standing of the petitioners to file the instant suit claiming that they failed to allege any specific injury suffered nor an interest that is direct and personal to them. If at all, the interest or injuries claimed by the petitioners are allegedly merely of a general interest common to all members of the public. Their interest is allegedly too vague, highly speculative and uncertain to satisfy the requirements of *locus standi*.

The public respondents find it noteworthy that the petitioners do not raise issues of constitutionality but only of contract law, which the petitioners not being privies to the agreement cannot raise. This is following the principle that a stranger to a contract cannot sue either or both the contracting parties to annul and set aside the same except when he is

prejudiced on his rights and can show detriment which would positively result to him from the implementation of the contract in which he has no intervention. There being no particularized interest or elemental substantial injury necessary to confer *locus standi*, the public respondents implore the Court to dismiss the petition.

On the merits, the public respondents maintain that the imposition of ceilings or upper limits on bid prices in RA 9184 does not apply because the CP I project and the entire Catanduanes Circumferential Road Improvement Project, financed by Loan Agreement No. PH-P204 executed between the Philippine Government and the JBIC, is governed by the latter's Procurement Guidelines which precludes the imposition of ceilings on bid prices. Section 5.06 of the JBIC Procurement Guidelines reads:

Section 5.06. Evaluation and Comparison of Bids.

x x x

(e) Any procedure under which bids above or below a predetermined bid value assessment are automatically disqualified is not permitted.

It was explained that other foreign banks such as the Asian Development Bank (ADB) and the World Bank (WB) similarly prohibit the bracketing or imposition of a ceiling on bid prices.

The public respondents stress that it was pursuant to Loan Agreement No. PH-P204 that the assailed Resolution No. PJHL-A-04-012 and the subsequent contract between the DPWH and private respondent China Road & Bridge Corporation materialized. They likewise aver that Loan Agreement No. PH-P204 is governed by RA 4860, as amended, or the Foreign Borrowings Act. Section 4 thereof states:

SEC. 4. In the contracting of any loan, credit or indebtedness under this Act, the President of the Philippines may, when necessary, agree to

waive or modify, the application of any law granting preferences or imposing restrictions on international competitive bidding, including among others [Act No. 4239, Commonwealth Act No. 138], the provisions of [CA 541], insofar as such provisions do not pertain to constructions primarily for national defense or security purposes, [RA 5183]; *Provided, however,* That as far as practicable, utilization of the services of qualified domestic firms in the prosecution of projects financed under this Act shall be encouraged: *Provided, further,* That in case where international competitive bidding shall be conducted preference of at least fifteen *per centum* shall be granted in favor of articles, materials or supplies of the growth, production or manufacture of the Philippines: *Provided, finally,* That the method and procedure in comparison of bids shall be the subject of agreement between the Philippine Government and the lending institution.

DOJ Opinion No. 46, Series of 1987, is relied upon by the public respondents as it opined that an agreement for the exclusion of foreign assisted projects from the coverage of local bidding regulations does not contravene existing legislations because the statutory basis for foreign loan agreements is RA 4860, as amended, and under Section 4 thereof, the President is empowered to waive the application of any law imposing restrictions on the procurement of goods and services pursuant to such loans.

Memorandum Circular Nos. 104 and 108, issued by the President, to clarify RA 4860, as amended, and PD 1594, relative to the award of foreign-assisted projects, are also invoked by the public respondents, to wit:

Memorandum Circular No. 104:

In view of the provisions of Section 4 of Republic Act No. 4860, as amended, otherwise known as the “Foreign Borrowings Act”

x x x

It is hereby clarified that foreign-assisted infrastructure projects may be exempted from the application for the pertinent provisions of the Implementing Rules and Regulations (IRR) of Presidential Decree (P.D.) No. 1594 relative to the method and procedure in the comparison of bids, which matter may be the subject of agreement between the infrastructure

agency concerned and the lending institution. It should be made clear however that public bidding is still required and can only be waived pursuant to existing laws.

Memorandum Circular No. 108:

In view of the provisions of Section 4 of Republic Act No. 4860, as amended, otherwise known as the “Foreign Borrowings Act”, it is hereby clarified that, for projects supported in whole or in part by foreign assistance awarded through international or local competitive bidding, the government agency concerned may award the contract to the lowest evaluated bidder at his bid price consistent with the provisions of the applicable loan/grant agreement.

Specifically, when the loan/grant agreement so stipulates, the government agency concerned may award the contract to the lowest bidder even if his/its bid exceeds the approved agency estimate.

It is understood that the concerned government agency shall, as far as practicable, adhere closely to the implementing rules and regulations of Presidential Decree No. 1594 during loan/grant negotiation and the implementation of the projects.^[32]

The public respondents characterize foreign loan agreements, including Loan Agreement No. PH-P204, as executive agreements and, as such, should be observed pursuant to the fundamental principle in international law of *pacta sunt servanda*.^[33] They cite Section 20 of Article VII of the Constitution as giving the President the authority to contract foreign loans:

SEC. 20. The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or Government-owned and Controlled Corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

The Constitution, the public respondents emphasize, recognizes the enforceability of executive agreements in the same way that it recognizes generally accepted principles of international law as forming part of the law of the land.^[34] This recognition allegedly buttresses the binding effect of executive agreements to which the Philippine Government is a signatory. It is pointed out by the public respondents that executive agreements are essentially contracts governing the rights and obligations of the parties. A contract, being the law between the parties, must be faithfully adhered to by them. Guided by the fundamental rule of *pacta sunt servanda*, the Philippine Government bound itself to perform in good faith its duties and obligations under Loan Agreement No. PH-P204.

The public respondents further argue against the applicability of RA 9184 stating that it was signed into law on January 10, 2003.^[35] On the other hand, Loan Agreement No. PH-P204 was executed on December 28, 1999, where the laws then in force on government procurements were PD 1594 and EO 40. The latter law (EO 40), in particular, excluded from its application “any existing and future government commitments with respect to the bidding and award of contracts financed partly or wholly with funds from international financing institutions as well as from bilateral and other similar foreign sources.”

The applicability of EO 40, not RA 9184, is allegedly bolstered by the fact that the “Invitation to Prequalify and to Bid” for the implementation of the CP I project was published in two leading national newspapers, namely, the Manila Times and Manila Standard on November 22, 29 and December 5, 2002, or before the signing into law of RA 9184 on January 10, 2003. In this connection, the public respondents point to Section 77 of IRR-A, which reads:

SEC. 77. *Transitory Clause.* –

In all procurement activities, if the advertisement or invitation for bids was issued prior to the effectivity of the Act, the provisions of EO 40 and its IRR, PD 1594 and its IRR, RA 7160 and its IRR, or other applicable laws as the case may be, shall govern.

In cases where the advertisements or invitations for bids were issued after the effectivity of the Act but before the effectivity of this IRR-A, procuring entities may continue adopting the procurement procedures, rules and regulations provided in EO 40 and its IRR, or other applicable laws, as the case may be.

Section 4 of RA 9184 is also invoked by the public respondents as it provides:

SEC. 4. *Scope and Applications.* – This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or –controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.**

It is also the position of the public respondents that even granting *arguendo* that Loan Agreement No. PH-P204 were an ordinary loan contract, still, RA 9184 is inapplicable under the non-impairment clause^[36] of the Constitution. The said loan agreement expressly provided that the procurement of goods and services for the project financed by the same shall be governed by the Guidelines for Procurement under OECF Loans dated December 1997. Further, Section 5.06 of the JBIC Procurement Guidelines categorically provides that “[a]ny procedure under which bids above or below a predetermined bid value assessment are automatically disqualified is not permitted.”

The public respondents explain that since the contract is the law between the parties and Loan Agreement No. PH-P204 states that the JBIC Procurement Guidelines shall govern the parties' relationship and further dictates that there be no ceiling price for the bidding, it naturally follows that any subsequent law passed contrary to the letters of the said contract would have no effect with respect to the parties' rights and obligations arising therefrom.

To insist on the application of RA 9184 on the bidding for the CP I project would, notwithstanding the terms and conditions of Loan Agreement No. PH-P204, allegedly violate the constitutional provision on non-impairment of obligations and contracts, and destroy vested rights duly acquired under the said loan agreement.

Lastly, the public respondents deny that there was illegal disbursement of public funds by the DBM. They asseverate that all the releases made by the DBM for the implementation of the entire Arterial Road Links Project – Phase IV, which includes the Catanduanes Circumferential Road Improvement Project, were covered by the necessary appropriations made by law, specifically the General Appropriations Act (GAA). Further, the requirements and procedures prescribed for the release of the said funds were duly complied with.

For its part, private respondent China Road & Bridge Corporation similarly assails the standing of the petitioners, either as taxpayers or, in the case of petitioner Abaya, as a former lawmaker, to file the present suit. In addition, it is also alleged that, by filing the petition directly to this Court, the petitioners failed to observe the hierarchy of courts.

On the merits, private respondent China Road & Bridge Corporation asserts that the applicable law to govern the bidding of the CP I project was

EO 40, not RA 9184, because the former was the law governing the procurement of government projects at the time that it was bidded out. EO 40 was issued by the Office of the President on October 8, 2001 and Section 1 thereof states that:

SEC. 1. *Scope and Application.* This Executive Order shall apply to the procurement of: (a) goods, supplies, materials and related services; (b) civil works; and (c) consulting services, by all National Government agencies, including State Universities and Colleges (SUCs), Government-Owned or Controlled Corporations (GOCCs) and Government Financial Institutions (GFIs), hereby referred to as the 'Agencies.' **This Executive Order shall cover the procurement process from the pre-procurement conference up to the award of contract.**

x x x

The Invitation to Prequalify and to Bid was first published on November 22, 2002. On the other hand, RA 9184 was signed into law only on January 10, 2003. Since the law in effect at the time the procurement process was initiated was EO 40, private respondent China Road & Bridge Corporation submits that it should be the said law which should govern the entire procurement process relative to the CP I project.

EO 40 expressly recognizes as an exception from the application of the provisions thereof on approved budget ceilings, those projects financed by international financing institutions (IFIs) and foreign bilateral sources. Section 1 thereof, quoted in part earlier, further states:

SEC. 1. *Scope and Application.* x x x

Nothing in this Order shall negate any existing and future government commitments with respect to the bidding and award of contracts financed partly or wholly with funds from international financing institutions as well as from bilateral and other similar foreign sources.

Section 1.2 of the Implementing Rules and Regulations of EO 40 is likewise invoked as it provides:

For procurement financed wholly or partly from Official Development Assistance (ODA) funds from International Financing Institutions (IFIs), as well as from bilateral and other similar foreign sources, the corresponding loan/grant agreement governing said funds as negotiated and agreed upon by and between the Government and the concerned IFI shall be observed.

Private respondent China Road & Bridge Corporation thus postulates that following EO 40, the procurement of goods and services for the CP I project should be governed by the terms and conditions of Loan Agreement No. PH-P204 entered into between the JBIC and the Philippine Government. Pertinently, Section 5.06 of the JBIC Procurement Guidelines prohibits the setting of ceilings on bid prices.

Private respondent China Road & Bridge Corporation claims that when it submitted its bid for the CP I project, it relied in good faith on the provisions of EO 40. It was allegedly on the basis of the said law that the DPWH awarded the project to private respondent China Road & Bridge Corporation even if its bid was higher than the ABC. Under the circumstances, RA 9184 could not be applied retroactively for to do so would allegedly impair the vested rights of private respondent China Road & Bridge Corporation arising from its contract with the DPWH.

It is also contended by private respondent China Road & Bridge Corporation that even assuming *arguendo* that RA 9184 could be applied retroactively, it is still the terms of Loan Agreement No. PH-P204 which should govern the procurement of goods and services for the CP I project. It supports its theory by characterizing the said loan agreement, executed pursuant to the Exchange of Notes between the Government of Japan and the Philippine Government, as an executive agreement.

Private respondent China Road & Bridge Corporation, like the public respondents, cites RA 4860 as the basis for the Exchange of Notes and Loan Agreement No. PH-P204. As an international or executive agreement, the Exchange of Notes and Loan Agreement No. PH-P204 allegedly created a legally binding obligation on the parties.

The following excerpt of the deliberations of the Bicameral Conference Committee on the Disagreeing Provision of Senate Bill No. 2248 and House Bill No. 4809 is cited by private respondent China Road & Bridge Corporation to support its contention that it is the intent of the lawmakers to exclude from the application of RA 9184 those foreign-funded projects:

x x x

REP. MARCOS. Yes, Mr. Chairman, to respond and to put into the record, a justification for the inclusion of foreign contracts, may we just state that foreign contracts have, of course, been brought into the ambit of the law because of the Filipino counterpart for this foreign projects, they are no longer strictly foreign in nature but fall under the laws of the Philippine government.

THE CHAIRMAN (SEN. ANGARA). Okay. I think that's pretty clear. I think the possible concern is that some ODA are with strings attached especially the Japanese. The Japanese are quite strict about that, that they are (sic) even provide the architect and the design, etcetera, plus, of course, the goods that will be supplied.

Now, I think we've already provided that this is open to all and we will recognize our international agreements so that this bill will not also restrict the flow of foreign funding, because some countries now make it a condition that they supply both services and goods especially the Japanese.

So I think we can put a sentence that we continue to honor our international obligations, di ba Laura?

MR. ENCARNACION. Actually, subject to any treaty.

THE CHAIRMAN (SEN. ANGARA). 'Yun pala eh. That should allay their anxiety and concern. Okay, buti na lang for the record para malaman nila na we are conscious sa ODA.^[37]

Private respondent China Road & Bridge Corporation submits that based on the provisions of the Exchange of Notes and Loan Agreement No. PH-P204, it was rightfully and legally awarded the CP I project. It urges the Court to dismiss the petition for lack of merit.

The Court's Rulings

Petitioners, as taxpayers, possess locus standi to file the present suit

Briefly stated, *locus standi* is “a right of appearance in a court of justice on a given question.”^[38] More particularly, it is a party’s personal and substantial interest in a case such that he has sustained or will sustain direct injury as a result of the governmental act being challenged. It calls for more than just a generalized grievance. The term “interest” means a material interest, an interest in issue affected by the decree, as distinguished from mere interest in the question involved, or a mere incidental interest.^[39] Standing or *locus standi* is a peculiar concept in constitutional law^[40] and the rationale for requiring a party who challenges the constitutionality of a statute to allege such a personal stake in the outcome of the controversy is “to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”^[41]

Locus standi, however, is merely a matter of procedure^[42] and it has been recognized that 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.^[43] Consequently, the Court, in a *catena* of

cases,^[44] has invariably adopted a liberal stance on *locus standi*, including those cases involving taxpayers.

The prevailing doctrine in taxpayer's suits is to allow taxpayers to question contracts entered into by the national government or government-owned or controlled corporations allegedly in contravention of law.^[45] A taxpayer is allowed to sue where there is a claim that public funds are illegally disbursed, or that public money is being deflected to any improper purpose, or that there is a wastage of public funds through the enforcement of an invalid or unconstitutional law.^[46] Significantly, a taxpayer need not be a party to the contract to challenge its validity.^[47]

In the present case, the petitioners are suing as taxpayers. They have sufficiently demonstrated that, notwithstanding the fact that the CP I project is primarily financed from loans obtained by the government from the JBIC, nonetheless, taxpayers' money would be or is being spent on the project considering that the Philippine Government is required to allocate a peso-counterpart therefor. The public respondents themselves admit that appropriations for these foreign-assisted projects in the GAA are composed of the loan proceeds and the peso-counterpart. The counterpart funds, the Solicitor General explains, refer to the component of the project cost to be financed from government-appropriated funds, as part of the government's commitment in the implementation of the project.^[48] Hence, the petitioners correctly asserted their standing since a part of the funds being utilized in the implementation of the CP I project partakes of taxpayers' money.

Further, the serious legal questions raised by the petitioners, *e.g.*, whether RA 9184 applies to the CP I project, in particular, and to foreign-funded government projects, in general, and the fact that public interest is indubitably involved considering the public expenditure of millions of pesos,

warrant the Court to adopt in the present case its liberal policy on *locus standi*.

In any case, for reasons which will be discussed shortly, the substantive arguments raised by the petitioners fail to persuade the Court as it holds that Resolution No. PJHL-A-04-012 is valid. As a corollary, the subsequent contract entered into by and between the DPWH and private respondent China Road & Bridge Corporation is likewise valid.

History of Philippine Procurement Laws

It is necessary, at this point, to give a brief history of Philippine laws pertaining to procurement through public bidding. The United States Philippine Commission introduced the American practice of public bidding through Act No. 22, enacted on October 15, 1900, by requiring the Chief Engineer, United States Army for the Division of the Philippine Islands, acting as purchasing agent under the control of the then Military Governor, to advertise and call for a competitive bidding for the purchase of the necessary materials and lands to be used for the construction of highways and bridges in the Philippine Islands.^[49] Act No. 74, enacted on January 21, 1901 by the Philippine Commission, required the General Superintendent of Public Instruction to purchase office supplies through competitive public bidding.^[50] Act No. 82, approved on January 31, 1901, and Act No. 83, approved on February 6, 1901, required the municipal and provincial governments, respectively, to hold competitive public biddings in the making of contracts for public works and the purchase of office supplies.^[51]

On June 21, 1901, the Philippine Commission, through Act No. 146, created the Bureau of Supply and with its creation, public bidding became a popular policy in the purchase of supplies, materials and equipment for the use of the national government, its subdivisions and instrumentalities.^[52] On February 3, 1936, then President Manuel L. Quezon issued Executive Order No. 16 declaring as a matter of general policy that government contracts for public service or for furnishing supplies, materials and equipment to the government should be subjected to public bidding.^[53] The requirement of public bidding was likewise imposed for public works of construction or repair pursuant to the Revised Administrative Code of 1917.

Then President Diosdado Macapagal, in Executive Order No. 40 dated June 1, 1963, reiterated the directive that no government contract for public service or for furnishing supplies, materials and equipment to the government or any of its branches, agencies or instrumentalities, should be entered into without public bidding except for very extraordinary reasons to be determined by a Committee constituted thereunder. Then President Ferdinand Marcos issued PD 1594 prescribing guidelines for government infrastructure projects and Section 4^[54] thereof stated that they should generally be undertaken by contract after competitive public bidding.

Then President Corazon Aquino issued Executive Order No. 301 (1987) prescribing guidelines for government negotiated contracts. Pertinently, Section 62 of the Administrative Code of 1987 reiterated the requirement of competitive public bidding in government projects. In 1990, Congress passed RA 6957,^[55] which authorized the financing, construction, operation and maintenance of infrastructure by the private sector. RA 7160 was likewise enacted by Congress in 1991 and it contains provisions governing the procurement of goods and locally-funded civil works by the local government units.

Then President Fidel Ramos issued Executive Order No. 302 (1996), providing guidelines for the procurement of goods and supplies by the national government. Then President Joseph Ejercito Estrada issued Executive Order No. 201 (2000), providing additional guidelines in the procurement of goods and supplies by the national government. Thereafter, he issued Executive Order No. 262 (2000) amending EO 302 (1996) and EO 201 (2000).

On October 8, 2001, President Gloria Macapagal-Arroyo issued EO 40, the law mainly relied upon by the respondents, entitled Consolidating

Procurement Rules and Procedures for All National Government Agencies, Government-Owned or Controlled Corporations and Government Financial Institutions, and Requiring the Use of the Government Procurement System. It accordingly repealed, amended or modified all executive issuances, orders, rules and regulations or parts thereof inconsistent therewith.^[56]

On January 10, 2003, President Arroyo signed into law RA 9184. It took effect on January 26, 2004, or fifteen days after its publication in two newspapers of general circulation.^[57] It expressly repealed, among others, EO 40, EO 262 (2000), EO 302(1996) and PD 1594, as amended:

SEC. 76. Repealing Clause. —This law repeals Executive Order No. 40, series of 2001, entitled “Consolidating Procurement Rules and Procedures for All National Government Agencies, Government Owned or Controlled Corporations and/or Government Financial Institutions, and Requiring the Use of the Government Electronic Procurement System”; Executive Order No. 262, series of 1996, entitled “Amending Executive Order No. 302, series of 1996, entitled Providing Policies, Guidelines, Rules and Regulations for the Procurement of Goods/Supplies by the National Government” and Section 3 of Executive Order No. 201, series of 2000, entitled “Providing Additional Policies and Guidelines in the Procurement of Goods/Supplies by the National Government”; Executive Order No. 302, series of 1996, entitled “Providing Policies, Guidelines, Rules and Regulations for the Procurement of Goods/Supplies by the National Government” and Presidential Decree No. 1594 dated June 11, 1978, entitled “Prescribing Policies, Guidelines, Rules and Regulations for Government Infrastructure Contracts.” This law amends Title Six, Book Two of Republic Act No. 7160, otherwise known as the “Local Government Code of 1991”; the relevant provisions of Executive Order No. 164, series of 1987, entitled “Providing Additional Guidelines in the Processing and Approval of Contracts of the National Government”; and the relevant provisions of Republic Act No. 7898 dated February 23, 1995, entitled “An Act Providing for the Modernization of the Armed Forces of the Philippines and for Other Purposes.” Any other law, presidential decree or issuance, executive order, letter of instruction, administrative order, proclamation, charter, rule or regulation and/or parts thereof contrary to or inconsistent with the provisions of this Act is hereby repealed, modified or amended accordingly.

In addition to these laws, RA 4860, as amended, must be mentioned as Section 4 thereof provides that “[i]n the contracting of any loan, credit or indebtedness under this Act, the President of the Philippines may, when necessary, agree to waive or modify the application of any law granting preferences or imposing restrictions on international competitive bidding x x x Provided, finally, That the method and procedure in the comparison of bids shall be the subject of agreement between the Philippine Government and the lending institution.”

EO 40, not RA 9184, is applicable to the procurement process undertaken for the CP I project. RA 9184 cannot be given retroactive application.

It is not disputed that with respect to the CP I project, the Invitation to Prequalify and to Bid for its implementation was published in two leading national newspapers, namely, the Manila Times and Manila Standard on November 22, 29 and December 5, 2002. At the time, the law in effect was EO 40. On the other hand, RA 9184 took effect two months later or on January 26, 2003. Further, its full implementation was even delayed as IRR-A was only approved by President Arroyo on September 18, 2003 and subsequently published on September 23, 2003 in the Manila Times and Malaya newspapers.^[58]

The provisions of EO 40 apply to the procurement process pertaining to the CP I project as it is explicitly provided in Section 1 thereof that:

SEC. 1. Scope and Application. – This Executive Order shall apply to see procurement of (a) goods, supplies, materials and related service; (b) civil works; and (c) consulting services, by all National Government agencies, including State Universities and Colleges (SUCs), Government-Owned or –Controlled Corporations (GOCCs) and Government Financial Institutions (GFIs), hereby referred to as “Agencies.” **This Executive Order shall cover the procurement process from the pre-procurement conference up to the award of the contract.**

Nothing in this Order shall negate any existing and future government commitments with respect to the bidding and award of contracts financed partly or wholly with funds from international financing institutions as well as from bilateral and similar foreign sources.

The procurement process basically involves the following steps: (1) pre-procurement conference; (2) advertisement of the invitation to bid; (3)

pre-bid conference; (4) eligibility check of prospective bidders; (5) submission and receipt of bids; (6) modification and withdrawal of bids; (7) bid opening and examination; (8) bid evaluation; (9) post qualification; (10) award of contract and notice to proceed.^[59] Clearly then, when the Invitation to Prequalify and to Bid for the implementation of the CP I project was published on November 22, 29 and December 5, 2002, the procurement process thereof had already commenced and the application of EO 40 to the procurement process for the CP I project had already attached.

RA 9184 cannot be applied retroactively to govern the procurement process relative to the CP I project because it is well settled that a law or regulation has no retroactive application unless it expressly provides for retroactivity.^[60] Indeed, Article 4 of the Civil Code is clear on the matter: “[l]aws shall have no retroactive effect, unless the contrary is provided.” In the absence of such categorical provision, RA 9184 will not be applied retroactively to the CP I project whose procurement process commenced even before the said law took effect.

That the legislators did not intend RA 9184 to have retroactive effect could be gleaned from the IRR-A formulated by the Joint Congressional Oversight Committee (composed of the Chairman of the Senate Committee on Constitutional Amendments and Revision of Laws, and two members thereof appointed by the Senate President and the Chairman of the House Committee on Appropriations, and two members thereof appointed by the Speaker of the House of Representatives) and the Government Procurement Policy Board (GPPB). Section 77 of the IRR-A states, thus:

SEC. 77. Transitory Clause

In all procurement activities, if the advertisement or invitation for bids was issued prior to the effectivity of the Act, the provisions of E.O. 40 and its IRR, P.D. 1594 and its IRR, R.A. 7160 and its IRR, or other applicable laws, as the case may be, shall govern.

In cases where the advertisements or invitations for bids were issued after the effectivity of the Act but before the effectivity of this IRR-A, procuring entities may continue adopting the procurement procedures, rules and regulations provided in E.O. 40 and its IRR, P.D. 1594 and its IRR, R.A. 7160 and its IRR, or other applicable laws, as the case may be.

In other words, under IRR-A, if the advertisement of the invitation for bids was issued prior to the effectivity of RA 9184, such as in the case of the CP I project, the provisions of EO 40 and its IRR, and PD 1594 and its IRR in the case of national government agencies, and RA 7160 and its IRR in the case of local government units, shall govern.

Admittedly, IRR-A covers only fully domestically-funded procurement activities from procurement planning up to contract implementation and that it is expressly stated that IRR-B for foreign-funded procurement activities shall be subject of a subsequent issuance.^[61] Nonetheless, there is no reason why the policy behind Section 77 of IRR-A cannot be applied to foreign-funded procurement projects like the CP I project. Stated differently, the policy on the prospective or non-retroactive application of RA 9184 with respect to domestically-funded procurement projects cannot be any different with respect to foreign-funded procurement projects like the CP I project. It would be incongruous, even absurd, to provide for the prospective application of RA 9184 with respect to domestically-funded procurement projects and, on the other hand, as urged by the petitioners, apply RA 9184 retroactively with respect to foreign-funded procurement projects. To be sure, the lawmakers could not have intended such an absurdity.

Thus, in the light of Section 1 of EO 40, Section 77 of IRR-A, as well as the fundamental rule embodied in Article 4 of the Civil Code on prospectivity of laws, the Court holds that the procurement process for the

implementation of the CP I project is governed by EO 40 and its IRR, not RA 9184.

Under EO 40, the award of the contract to private respondent China Road & Bridge Corporation is valid

Section 25 of EO 40 provides that “[t]he approved budget of the contract shall be the upper limit or ceiling of the bid price. Bid prices which exceed this ceiling shall be disqualified outright from further participating in the bidding. There shall be no lower limit to the amount of the award. x x x” It should be observed that this text is almost similar to the wording of Section 31 of RA 9184, relied upon by the petitioners in contending that since the bid price of private respondent China Road & Bridge Corporation exceeded the ABC, then it should not have been awarded the contract for the CP I project.

Nonetheless, EO 40 expressly recognizes as an exception to its scope and application those government commitments with respect to bidding and award of contracts financed partly or wholly with funds from international financing institutions as well as from bilateral and other similar foreign sources. The pertinent portion of Section 1 of EO 40 is quoted anew:

SEC. 1. Scope and Application. – x x x

Nothing in this Order shall negate any existing and future government commitments with respect to the bidding and award of contracts financed partly or wholly with funds from international financing institutions as well as from bilateral and similar foreign sources.

In relation thereto, Section 4 of RA 4860, as amended, was correctly cited by the respondents as likewise authorizing the President, in the contracting of any loan, credit or indebtedness thereunder, “when necessary,

agree to waive or modify the application of any law granting preferences or imposing restrictions on international competitive bidding x x x.” The said provision of law further provides that “the method and procedure in the comparison of bids shall be the subject of agreement between the Philippine Government and the lending institution.”

Consequently, in accordance with these applicable laws, the procurement of goods and services for the CP I project is governed by the corresponding loan agreement entered into by the government and the JBIC, *i.e.*, Loan Agreement No. PH-P204. The said loan agreement stipulated that the procurement of goods and services for the Arterial Road Links Development Project (Phase IV), of which CP I is a component, is to be governed by the JBIC Procurement Guidelines. Section 5.06, Part II (International Competitive Bidding) thereof quoted earlier reads:

Section 5.06. Evaluation and Comparison of Bids

x x x

(e) Any procedure under which bids above or below a predetermined bid value assessment are automatically disqualified is not permitted.^[62]

It is clear that the JBIC Procurement Guidelines proscribe the imposition of ceilings on bid prices. On the other hand, it enjoins the award of the contract to the bidder whose bid has been determined to be the lowest evaluated bid. The pertinent provision, quoted earlier, is reiterated, thus:

Section 5.09. Award of Contract

The contract is to be awarded to the bidder whose bid has been determined to be the lowest evaluated bid and who meets the appropriate standards of capability and financial resources. A bidder shall not be required as a condition of award to undertake responsibilities or work not stipulated in the specifications or to modify the bid.^[63]

Since these terms and conditions are made part of Loan Agreement No. PH-P204, the government is obliged to observe and enforce the same in the procurement of goods and services for the CP I project. As shown earlier, private respondent China Road & Bridge Corporation's bid was the lowest evaluated bid, albeit 28.95% higher than the ABC. In accordance with the JBIC Procurement Guidelines, therefore, it was correctly awarded the contract for the CP I project.

Even if RA 9184 were to be applied retroactively, the terms of the Exchange of Notes dated December 27, 1999 and Loan Agreement No. PH-P204 would still govern the procurement for the CP I project

For clarity, Section 4 of RA 9184 is quoted anew, thus:

SEC. 4. *Scope and Applications.* – This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or –controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.**

The petitioners, in order to place the procurement process undertaken for the CP I project within the ambit of RA 9184, vigorously assert that Loan Agreement No. PH-P204 is neither a treaty, an international agreement nor an executive agreement. They cite Executive Order No. 459 dated November 25, 1997 where the three agreements are defined in this wise:

- a) International agreement – shall refer to a contract or understanding, regardless of nomenclature, entered into between the Philippines and another government in written form and governed by international law,

whether embodied in a single instrument or in two or more related instruments.

- b) Treaties – international agreements entered into by the Philippines which require legislative concurrence after executive ratification. This term may include compacts like conventions, declarations, covenants and acts.
- c) Executive agreements – similar to treaties except that they do not require legislative concurrence.^[64]

The petitioners mainly argue that Loan Agreement No. PH-P204 does not fall under any of the three categories because to be any of the three, an agreement had to be one where the parties are the Philippines as a State and another State. The JBIC, the petitioners maintain, is a Japanese banking agency, which presumably has a separate juridical personality from the Japanese Government.

The petitioners' arguments fail to persuade. The Court holds that Loan Agreement No. PH-P204 taken in conjunction with the Exchange of Notes dated December 27, 1999 between the Japanese Government and the Philippine Government is an executive agreement.

To recall, Loan Agreement No. PH-P204 was executed by and between the JBIC and the Philippine Government pursuant to the Exchange of Notes executed by and between Mr. Yoshihisa Ara, Ambassador Extraordinary and Plenipotentiary of Japan to the Philippines, and then Foreign Affairs Secretary Siazon, in behalf of their respective governments. The Exchange of Notes expressed that the two governments have reached an understanding concerning Japanese loans to be extended to the Philippines and that these loans were aimed at promoting our country's economic stabilization and development efforts.

Loan Agreement No. PH-P204 was subsequently executed and it declared that it was so entered by the parties “[i]n the light of the contents of

the Exchange of Notes between the Government of Japan and the Government of the Republic of the Philippines dated December 27, 1999, concerning Japanese loans to be extended with a view to promoting the economic stabilization and development efforts of the Republic of the Philippines.”^[65] Under the circumstances, the JBIC may well be considered an adjunct of the Japanese Government. Further, Loan Agreement No. PH-P204 is indubitably an integral part of the Exchange of Notes. It forms part

of the Exchange of Notes such that it cannot be properly taken independent thereof.

In this connection, it is well to understand the definition of an “exchange of notes” under international law. The term is defined in the United Nations Treaty Collection in this wise:

An “exchange of notes” is a record of a routine agreement that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.^[66]

It is stated that “treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, *modus vivendi* and *exchange of notes*” all refer to “international instruments binding at international law.”^[67] It is further explained that-

Although these instruments differ from each other by title, they all have common features and international law has applied basically the same rules to all these instruments. These rules are the result of long practice among the States, which have accepted them as binding norms in their mutual relations. Therefore, they are regarded as international customary law. Since there was a general desire to codify these customary rules, two international conventions were negotiated. The 1969 Vienna Convention on the Law of Treaties (“1969 Vienna Convention”), which entered into force on 27 January 1980, contains rules for treaties concluded between States. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations (“1986 Vienna Convention”), which has still not entered into force, added rules for treaties with international organizations as parties. Both the 1969 Vienna Convention and the 1986 Vienna Convention do not distinguish between the different designations of these instruments. Instead, their rules apply to all of those instruments as long as they meet the common requirements.^[68]

Significantly, an exchange of notes is considered a form of an executive agreement, which becomes binding through executive action *without* the need of a vote by the Senate or Congress. The following disquisition by Francis B. Sayre, former United States High Commissioner to the Philippines, entitled “The Constitutionality of Trade Agreement Acts,” quoted in *Commissioner of Customs v. Eastern Sea Trading*,^[69] is apropos:

Agreements concluded by the President which fall short of treaties are commonly referred to as executive agreements and are no less common in our scheme of government than are the more formal instruments – treaties and conventions. **They sometimes take the form of exchange of notes and at other times that of more formal documents denominated “agreements” or “protocols”.** The point where ordinary correspondence between this and other governments ends and agreements – whether denominated executive agreements or **exchange of notes** or otherwise – begin, may sometimes be difficult of ready ascertainment. It would be useless to undertake to discuss here the large variety of executive agreements as such, concluded from time to time. Hundreds of executive agreements, other than those entered into under the trade-agreements act, have been negotiated with foreign governments. x x x^[70]

The Exchange of Notes dated December 27, 1999, stated, *inter alia*, that the Government of Japan would extend loans to the Philippines with a view to promoting its economic stabilization and development efforts; Loan I in the amount of ¥79,8651,000,000 would be extended by the JBIC to the Philippine Government to implement the projects in the List A (including the Arterial Road Links Development Project - Phase IV); and that such loan (Loan I) would be used to cover payments to be made by the Philippine executing agencies to suppliers, contractors and/or consultants of eligible source countries under such contracts as may be entered into between them for purchases of products and/or services required for the implementation of the projects enumerated in the List A.^[71] With respect to the procurement of the goods and services for the projects, it bears reiterating that as stipulated:

3. The Government of the Republic of the Philippines will ensure that the products and/or services mentioned in sub-paragraph (1) of paragraph 3 of Part I and sub-paragraph (1) of paragraph 4 of Part II **are procured in accordance with the guidelines for procurement of the Bank**, which set forth, *inter alia*, the procedures of international tendering to be followed except where such procedures are inapplicable or inappropriate.^[72]

The JBIC Procurements Guidelines, as quoted earlier, forbids any procedure under which bids above or below a predetermined bid value assessment are automatically disqualified. Succinctly put, it absolutely prohibits the imposition of ceilings on bids.

Under the fundamental principle of international law of *pacta sunt servanda*,^[73] which is, in fact, embodied in Section 4 of RA 9184 as it provides that “[a]ny treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed,” the DPWH, as the executing agency of the projects financed by Loan Agreement No. PH-P204, rightfully awarded the contract for the implementation of civil works for the CP I project to private respondent China Road & Bridge Corporation.

WHEREFORE, premises considered, the petition is **DISMISSED**.

SO ORDERED.

ROMEO J. CALLEJO, SR.
Associate Justice

WE CONCUR:

CONSUELO YNARES-SANTIAGO

Associate Justice

MA. ALICIA AUSTRIA-MARTINEZ MINITA V. CHICO-NAZARIO

Associate Justice

Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

CONSUELO YNARES-SANTIAGO

Associate Justice

Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

REYNATO S. PUNO
Chief Justice

^[11] Annex “2” of the Comment of Private Respondent China Road & Bridge Corporation; *rollo*, p. 242.

^[12] *Id.*; *id.* at 242-244.

^[13] *Id.*; *id.* at 249.

^[14] *Id.*; *id.* at 246.

^[15] *Id.*; *id.* at 251.

^[16] *Id.*; *id.* at 109.

^[17] *Id.*, Section 1, Article I of Loan Agreement No. PH-P204 dated December 28, 1999.

^[18] *Id.*, Section 2, Article I.

^[19] *Id.*, Section 1, Article III.

^[100] *Id.*, Section 2, Article III.

^[111] Contractor’s Bid Evaluation Report, Annex “E” to the Petition; *rollo*, p. 41.

^[121] The examination of the bid documents was based on the following items:

1st Envelope

- a) Authority of the signing official(s) in accordance with Clause 5.3
- b) Original Copy of Joint Venture Agreement in accordance with Clause 1.5.2 (if applicable)
- c) Duly signed Construction Schedule & S-Curve in accordance with Sub-Clause 5.7.8
- d) Duly signed Construction Method in Narrative form in accordance with Sub-Clause 5.7.7
- e) Duly signed Project Organization Chart in accordance with Sub-Clause 5.7.7
- f) Duly signed Manpower and Equipment Schedules in accordance with Sub-Clause 5.7.5
- g) Credit Line commitment from reputable bank equivalent to four (4) months average operating expenses or 10% of bid price or whichever is lower
- h) Bid Security furnished in accordance with Clause 5.9
- i) Compliance to Department Order No. 8 Series of 1991 & D.O.#135
- j) Certification that the Detailed Unit Price Analysis, Cash Flow and Payment Schedule are in the second envelope
- k) Authority of bidders representative to attend in public bidding (Department Order No. 176, Series of 1993)
- l) Construction Safety and health program by Contractor based on Department of Labor and Employment’s (DOLE) Occupational Safety and Health Standards

2nd Envelope

- a) Duly signed bid price in the Bill of Quantities of Section D of Proposal Book
- b) Duly signed Detailed Unit Price Analysis prepared in accordance with Clause 5.7.3
- c) Cash Flow and Payment Schedule prepared in accordance with Clause 5.7.6 (*Id.*; *rollo*, pp.

44-45.

^[131] *Supra* note 11; *rollo*, p. 47.

^[141] *Id.*

^[151] *Id.*; *id.* at 52.

^[161] Annex “H” to the Petition; *id.* at 59-62.

^[171] The petitioner’s Memorandum, p. 9; *rollo*, p. 431.

^[181] Citing, among others, *Kilosbayan v. Guingona*, G.R. No. 113375, May 5, 1994, 232 SCRA 110; *Tatad v. Secretary of the Department of Energy*, 346 Phil. 321 (1997); *Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 299 SCRA 744 (1998); and *Francisco v. House of Representatives*, 460 Phil. 830 (2003).

[19] Entitled An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and For Other Purposes.

[20] The two bills, upon their consolidation, became RA 9184.

[21] Citing Bicameral Conference Committee, December 17, 2002, 8:52 a.m., p. 21.

[22] Citing Bicameral Conference Committee Meeting, December 17, 2002, 9:12 a.m., p. 40.

[23] Per the Petitioners' Memorandum, RA 9184 was published in *Malaya* and the *Manila Times* on January 11, 2003. It took effect fifteen (15) days thereafter as provided in Section 78 thereof.

[24] Entitled Prescribing Policies, Guidelines, Rules and Regulations for Government Infrastructure Contracts.

[25] Issued by President Gloria Macapagal-Arroyo on October 8, 2001, entitled Consolidating Procurement Rules and Procedures for All National Government Agencies, Government-Owned and Controlled Corporations and Government Financial Institutions, and Requiring the Use of the Government Electronic Procurement System.

[26] Citing *Tolentino v. Secretary of Finance*, G.R. No. 115873, August 25, 1994, 235 SCRA 630.

[27] Citing *Gonzales v. COMELEC*, 129 Phil. 7 (1967).

[28] Citing *PHILCONSA v. Enriquez*, G.R. No. 113105, August 19, 1994, 235 SCRA 506.

[29] Citing *Information Technology Foundation of the Philippines v. COMELEC, et al.*, G.R. No. 159319, January 13, 2004, 419 SCRA 141.

[30] Citing *PHILCONSA v. Enriquez*, supra.

[31] Citing *Kilosbayan v. Morato*, 316 Phil. 652 (1995).

[32] Cited in the Public Respondents' Memorandum, pp. 17-18; *rollo*, pp. 581-582.

[33] Article 26 of the 1969 Vienna Convention on the Law of Treaties states:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[34] Citing Section 2, Article II (Declaration of Principles and State Policies) of the 1987 Constitution:

SEC. 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

[35] See note 23.

[36] Section 10, Article III (Bill of Rights) of the Constitution reads:

SEC. 10. No law impairing the obligation of contracts shall be passed.

[37] Citing Bicameral Conference Committee Meeting, December 17, 2002, 9:12 a.m., pp. 40-41.

[38] *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160.

[39] *Jumamil v. Café*, G.R. No. 144570, September 21, 2005, 470 SCRA 475 citing, among others, *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618, 633 (2000).

[40] *Agan v. Philippine International Air Terminals Co., Inc.*, 450 Phil. 744 (2003).

[41] *Fariñas v. Executive Secretary*, 463 Phil. 179, 195 (2003) citing *Baker v. Carr*, 369 U.S. 186 (1962).

[42] *Id.* at 195.

[43] *Agan v. Philippine International Air Terminals Co., Inc.*, supra.

[44] Among others, *Constantino, Jr. v. Cuisia*, G.R. No. 106064, October 13, 2005, 472 SCRA 515; *Francisco v. House of Representatives*, supra note 18; *Agan, Jr. v. Philippine International Terminals Co., Inc.*, *id.*; *Del Mar v. Philippine Amusement and Gaming Corporation*, 400 Phil. 307 (2000); *Tatad v. Garcia*, 313 Phil. 296 (1995); *Kilosbayan v. Guingona, Jr.*, supra note 18.

[45] *Tatad v. Garcia*, *id.*

[46] *Francisco v. House of Representatives*, supra note 18, at 896.

[47] *Jumamil v. Café*, supra note 38, at 488.

[48] The Public Respondents' Memorandum, pp. 30-31; *rollo*, pp. 594-595.

[49] Cobacha and Lucenario, *Law on Public Bidding and Government Contracts*, p. 4.

[50] *Id.* at 5.

[51] *Id.*

[52] *Id.* at 6.

[53] Cited in *Manila International Airport Authority v. Mabunay*, 379 Phil. 833, 843 (2000).

[54] The provision provided in part:

SEC. 4. *Bidding*. – Construction projects shall generally be undertaken by contract after competitive public bidding. x x x

^[55] Entitled An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and For Other Purposes.

^[56] Section 48 thereof.

^[57] Supra note 23.

^[58] Ursal, Government Procurement Tool Kit (RA 9184, Annotated), p. 336.

^[59] Sections 13 up to 30 of EO 40. See also Sections 20-37 of RA 9184.

^[60] *Home Development Mutual Fund v. Commission on Audit*, G.R. No. 157001, October 19, 2004, 440 SCRA 643, 652.

^[61] Section 1 of IRR-A reads in part:

Sec. 1. Purpose and General Coverage

This Implementing Rules and Regulations (IRR) Part A, hereinafter called “IRR-A,” is promulgated pursuant to Section 75 of Republic Act No. 9184 (R.A. 9184), otherwise known as the Government Procurement Reform Act (GPRA), for the purpose of prescribing the necessary rules and regulations for the modernization, standardization, and regulation of the procurement activities of the government. This IRR-A shall cover all fully domestically-funded procurement activities from procurement planning up to contract implementation and termination, except for the following:

x x x

The IRR-B for foreign-funded procurement activities shall be the subject of a subsequent issuance.

^[62] <http://www/jbic.go.jp/english/oec/guide/procure/section5.php>

^[63] Id.

^[64] Cited in the Petitioners’ Memorandum, p. 24; *rollo*, p. 446.

^[65] Supra note 6.

^[66] <http://untreaty.un.org/English/guide.asp>

^[67] Id.

^[68] Id.

^[69] 113 Phil. 333 (1961).

^[70] Id. at 339.

^[71] Supra note 2.

^[72] Supra note 4.

^[73] Supra note 32.