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In fine, both the penalty and the civil liability imposed on the petitioner by the CA are in order.

WHEREFORE, the appealed decision is *AFFIRMED* in full.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Nachura, JJ.,* concur.

EN BANC

[G.R. No. 169914. April 18, 2008]

ASIA'S EMERGING DRAGON CORPORATION, *petitioner, vs.* **DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS, SECRETARY LEANDRO R. MENDOZA and MANILA INTERNATIONAL AIRPORT AUTHORITY,** *respondents.*

[G.R. No. 174166. April 18, 2008]

REPUBLIC OF THE PHILIPPINES, represented by the DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS and MANILA INTERNATIONAL AIRPORT AUTHORITY, *petitioners, vs.* **HON. COURT OF APPEALS and SALACNIB BATERINA,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *MANDAMUS*; NEVER ISSUES IN DOUBTFUL CASES; REQUIRES A SHOWING OF COMPLETE AND CLEAR LEGAL RIGHT IN

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THE PETITIONER TO THE PERFORMANCE OF MINISTERIAL ACTS. — It is well-established in our jurisprudence that only specific legal rights are enforceable by *mandamus*, that the right sought to be enforced must be certain and clear, and that the writ will not issue in cases where the right is doubtful. Just as fundamental is the principle governing the issuance of *mandamus* that the duties to be performed must be such as are clearly and peremptorily enjoined by law or by reason of official station. A rule long familiar is that *mandamus* never issues in doubtful cases. It requires a showing of a complete and clear legal right in the petitioner to the performance of ministerial acts. In varying language, the principle echoed and reechoed is that legal rights may be enforced by *mandamus* only if those rights are well-defined, clear and certain. Otherwise, the *mandamus* petition must be dismissed.

2. ID.; ID.; ID.; NONE OF THE RIGHTS OR PRIVILEGES ACCORDED BY SECTION 4-A OF REPUBLIC ACT NO. 6957, AS AMENDED BY REPUBLIC ACT NO. 7718 AND SECTION 10 OF ITS IMPLEMENTING RULES AND REGULATIONS WOULD JUSTIFY THE AUTOMATIC AWARD OF THE NINOY AQUINO INTERNATIONAL AIRPORT INTERNATIONAL PASSENGER TERMINAL III (NAIA IPT III) TO PETITIONER AFTER ITS PREVIOUS AWARD TO PHILIPPINE INTERNATIONAL AIR TERMINALS CO., INC. WAS DECLARED NULL AND VOID BY THE COURT. — It is irrefragable that Section 4-A of Republic Act No. 6957, as amended by Republic Act No. 7718, and Section 10 of its IRR, accord certain rights or privileges to the original proponent of an unsolicited proposal for an infrastructure project. They are meant to encourage private sector initiative in conceptualizing infrastructure projects that would benefit the public. Nevertheless, none of these rights or privileges would justify the automatic award of the NAIA IPT III Project to AEDC after its previous award to PIATCO was declared null and void by this Court in *Agan*.

3. ID.; ID.; ID.; THE RIGHTS OR PRIVILEGES OF AN ORIGINAL PROPONENT OF AN UNSOLICITED PROPOSAL FOR AN INFRASTRUCTURE PROJECT ARE NEVER MEANT TO BE ABSOLUTE; AN UNSOLICITED PROPOSAL IS SUBJECT TO EVALUATION, AFTER WHICH, THE GOVERNMENT AGENCY OR LOCAL GOVERNMENT (LGU) CONCERNED

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MAY ACCEPT OR REJECT THE PROPOSAL OUTRIGHT.— The rights or privileges of an original proponent of an unsolicited proposal for an infrastructure project are never meant to be absolute. Otherwise, the original proponent can hold the Government hostage and secure the award of the infrastructure project based solely on the fact that it was the first to submit a proposal. The absurdity of such a situation becomes even more apparent when considering that the proposal is unsolicited by the Government. The rights or privileges of an original proponent depends on compliance with the procedure and conditions explicitly provided by the statutes and their IRR. An unsolicited proposal is subject to evaluation, after which, the government agency or local government unit (LGU) concerned may accept or reject the proposal outright.

4. ID.; ID.; ID.; PETITIONER FAILED TO MATCH THE MORE ADVANTAGEOUS PROPOSAL SUBMITTED BY PIATCO WITHIN THE 30-DAY PERIOD REQUIRED AND WITHOUT EXERCISING ITS RIGHT TO MATCH THE MOST ADVANTAGEOUS PROPOSAL, IT CANNOT NOW LAY CLAIM TO THE AWARD OF THE PROJECT.— As already found by this Court in the narration of facts in *Agan*, AEDC failed to match the more advantageous proposal submitted by PIATCO by the time the 30-day working period expired on 28 November 1996; and, without exercising its right to match the most advantageous proposal, it cannot now lay claim to the award of the project. The bidding process as to the NAIA IPT III Project was already over after the award thereof to PIATCO, even if eventually, the said award was nullified and voided. The nullification of the award to PIATCO did not revive the proposal nor re-open the bidding. AEDC cannot insist that this Court turn back the hands of time and award the NAIA IPT III Project to it, as if the bid of PIATCO never existed and the award of the project to PIATCO did not take place. Such is a simplistic approach to a very complex problem that is the NAIA IPT III Project.

5. ID.; ID.; ID.; THE PROJECT COULD NO LONGER BE AWARDED TO PETITIONER BASED ON THE THEORY OF LEGAL IMPOSSIBILITY OF PERFORMANCE CONSIDERING THE UNDENIABLE FACT THAT THE PHYSICAL FEATURES COMPRISING THE NAIA IPT III ARE SUBSTANTIALLY BUILT AND THERE IS ALMOST NOTHING LEFT TO

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CONSTRUCT.— In addition, PIATCO is already close to finishing the building of the structures comprising NAIA IPT III, a fact that this Court cannot simply ignore. The NAIA IPT III Project was proposed, subjected to bidding, and awarded as a build-operate-transfer (BOT) project. A BOT project is defined as — A contractual arrangement whereby the project proponent undertakes the **construction, including financing**, of a given infrastructure facility, and the **operation and maintenance** thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, and operating and maintenance expenses in the project. The project proponent **transfers** the facility to the government agency or local government unit concerned at the end of the fixed term that shall not exceed fifty (50) years. This shall include a supply-and-operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government so requires, operates the facility providing in the process technology transfer and training to Filipino nationals. The original proposal of AEDC is for a BOT project, in which it undertook to *build, operate,* and *transfer* to the Government the NAIA IPT III facilities. This is clearly no longer applicable or practicable under the existing circumstances. It is undeniable that the physical structures comprising the NAIA IPT III Project are already substantially built, and there is almost nothing left for AEDC to construct. Hence, the project could no longer be awarded to AEDC based on the theory of legal impossibility of performance.

6. ID.; ID.; ID.; AN AMENDMENT OF THE PROPOSAL OF PETITIONER TO ADDRESS THE PRESENT CIRCUMSTANCES IS OUT OF THE QUESTION SINCE SUCH AN AMENDMENT WOULD BE SUBSTANTIVE AND TANTAMOUNT TO AN ENTIRELY NEW PROPOSAL WHICH MUST AGAIN BE SUBJECTED TO COMPETITIVE BIDDING.— Neither can this Court revert to the original proposal of AEDC and award to it only the unexecuted components of the NAIA IPT III Project. Whoever shall assume the obligation to operate and maintain NAIA IPT III and to subsequently

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transfer the same to the Government (in case the operation is not assumed by the Government itself) shall have to do so on terms and conditions that would necessarily be different from the original proposal of AEDC. It will no longer include any undertaking to build or construct the structures. An amendment of the proposal of AEDC to address the present circumstances is out of the question since such an amendment would be substantive and tantamount to an entirely new proposal, which must again be subjected to competitive bidding. AEDC's offer to reimburse the Government the amount it shall pay to PIATCO for the NAIA IPT III Project facilities, as shall be determined in the ongoing expropriation proceedings before the RTC of Pasay City, cannot restore AEDC to its status and rights as the project proponent. It must be stressed that the law requires the project proponent to undertake the construction of the project, **including** financing; financing, thus, is but a component of the construction of the structures and not the entirety thereof.

7. ID.; ID.; ID.; THE "REIMBURSEMENT ARRANGEMENT" PROPOSAL OF PETITIONER MAY EVEN RESULT IN THE UNJUST ENRICHMENT OF PETITIONER AT THE EXPENSE OF THE GOVERNMENT.— This "reimbursement arrangement" may even result in the unjust enrichment of AEDC. In its original proposal, AEDC offered to construct the NAIA IPT III facilities for $350 million or ₱9 billion at that time. In exchange, AEDC would share a certain percentage of the gross revenues with, and pay a guaranteed annual income to the Government upon operation of the NAIA IPT III. In *Gingoyon*, the proferred value of the NAIA IPT III facilities was already determined to be ₱3 billion. It seems improbable at this point that the balance of the value of said facilities for which the Government is still obligated to pay PIATCO shall reach or exceed ₱6 billion. There is thus the possibility that the Government shall be required to pay PIATCO an amount less than ₱9 billion. If AEDC is to reimburse the Government only for the said amount, then it shall acquire the NAIA IPT III facilities for a price less than its original proposal of ₱9 billion. Yet, per the other terms of its original proposal, it may still recoup a capital investment of ₱9 billion plus a reasonable rate of return of investment. A change in the agreed value of the NAIA IPT III facilities already built cannot be done without a corresponding amendment in the other terms of the original proposal as regards profit sharing

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and length of operation; otherwise, AEDC will be unjustly enriched at the expense of the Government.

8. ID.; ID.; ID.; PETITIONER DOES NOT POSSESS ANY LEGAL PERSONALITY TO INTERFERE WITH OR RESTRAIN THE ACTIVITIES OF THE GOVERNMENT AS REGARDS NAIA IPT III; NEITHER DOES PETITIONER HAVE THE LEGAL PERSONALITY TO DEMAND THAT THE GOVERNMENT DELIVER OR SELL TO IT THE NAIA IPT III FACILITY DESPITE THE EXPRESS WILLINGNESS TO REIMBURSE THE GOVERNMENT THE PROFERRED AMOUNT IT HAD PAID PIATCO AND COMPLETE THE FACILITY AT ITS OWN COST.— The claim of AEDC to the award of the NAIA IPT III Project, after the award thereof to PIATCO was set aside for being null and void, grounded solely on its being the original proponent of the project, is specious and an apparent stretch in the interpretation of Section 4-A of Republic Act No. 6957, as amended by Republic Act No. 7718, and Rule 10 of the IRR. In all, just as AEDC has no legal right to the NAIA IPT III Project, corollarily, it has no legal right over the NAIA IPT III facility. AEDC does not own the NAIA IPT III facility, which this Court already recognized in *Gingoyon* as owned by PIATCO; nor does AEDC own the land on which NAIA IPT III stands, which is undisputedly owned by the Republic through the Bases Conversion Development Authority (BCDA). AEDC did not fund any portion of the construction of NAIA IPT III, which was entirely funded by PIATCO. AEDC also does not have any kind of lien over NAIA IPT III or any kind of legal entitlement to occupy the facility or the land on which it stands. Therefore, nothing that the Government has done or will do in relation to the project could possibly prejudice or injure AEDC. AEDC then does not possess any legal personality to interfere with or restrain the activities of the Government as regards NAIA IPT III. Neither does it have the legal personality to demand that the Government deliver or sell to it the NAIA IPT III facility despite the express willingness of AEDC to reimburse the Government the proferred amount it had paid PIATCO and complete NAIA IPT III facility at its own cost.

9. ID.; ID.; ID.; THE COURT DID NOT GIVE MUCH WEIGHT ON THE MEMORANDUM OF AGREEMENT EXECUTED BETWEEN THE DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS (DOTC) AND PETITIONER ON 26

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FEBRUARY 1996 CONSIDERING THAT ITS EXISTENCE AND DUE EXECUTION HAS NOT BEEN ESTABLISHED; THE DOCUMENT IS NOT NOTARIZED SO IT DOES NOT ENJOY PRESUMPTION OF REGULARITY OF A PUBLIC DOCUMENT.— AEDC invokes the Memorandum of Agreement, purportedly executed between the DOTC and AEDC on 26 February 1996, following the approval of the NAIA IPT III Project by the National Economic Development Authority Board in a Resolution dated 13 February 1996. It is important to note, however, that the document attached as Annex "E" to the Petition of AEDC is a "certified photocopy of records on file." This Court cannot give much weight to said document considering that its existence and due execution have not been established. It is not notarized, so it does not enjoy the presumption of regularity of a public document. It is not even witnessed by anyone. It is not certified true by its supposed signatories, Secretary Jesus B. Garcia, Jr. for DOTC and Chairman Henry Sy, Sr. for AEDC, or by any government agency having its custody. It is certified as a photocopy of records on file by an Atty. Cecilia L. Pesayco, the Corporate Secretary, of an unidentified corporation.

10. ID.; ID.; ID.; THE COMMITMENTS UNDERTAKEN BY THE DOTC AND PETITIONER IN THE MEMORANDUM OF AGREEMENT MAY BE SIMPLY SUMMARIZED AS A COMMITMENT TO COMPLY WITH THE PROCEDURE AND REQUIREMENTS PROVIDED IN RULES 10 AND 11 OF THE IMPLEMENTING RULES AND REGULATIONS.— Even assuming for the sake of argument, that the said Memorandum of Agreement, is in existence and duly executed, it does little to support the claim of AEDC to the award of the NAIA IPT III Project. The commitments undertaken by the DOTC and AEDC in the Memorandum of Agreement may be simply summarized as a commitment to comply with the procedure and requirements provided in Rules 10 and 11 of the IRR. It bears no commitment on the part of the DOTC to award the NAIA IPT III Project to AEDC. On the contrary, the document includes express stipulations that negate any such government obligation. Thus, in the first clause, the DOTC affirmed its commitment to pursue, implement and complete the NAIA IPT III Project on or before 1998, noticeably without mentioning that such commitment was to pursue the project specifically with AEDC. Likewise, in the second clause, it was emphasized that the DOTC shall pursue

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the project under Rules 10 and 11 of the IRR of Republic Act No. 6957, as amended by Republic Act No. 7718. And most significantly, the tenth clause of the same document provided: 10. Nothing in this Memorandum of Understanding shall be understood, interpreted or construed as permitting, allowing or authorizing the circumvention of, or non-compliance with, or as waiving, the provisions of, and requirements and procedures under, existing laws, rules and regulations.

11. ID.; ID.; ID.; THE MERE FACT THAT PETITIONER, AS THE ORIGINAL PROPONENT, ALREADY EXPENDED RESOURCES IN ITS PREPARATION AND NEGOTIATION OF ITS UNSOLICITED PROPOSAL DOES NOT ENTITLE IT TO THE INSTANT AWARD OF THE NAIA IPT III PROJECT.— While the Court may concede that AEDC, as the original proponent, already expended resources in its preparation and negotiation of its unsolicited proposal, the mere fact thereof does not entitle it to the instant award of the NAIA IPT III Project. AEDC was aware that the said project would have to undergo public bidding, and there existed the possibility that another proponent may submit a more advantageous bid which it cannot match; in which case, the project shall be awarded to the other proponent and AEDC would then have no means to recover the costs and expenses it already incurred on its unsolicited proposal. It was a given business risk that AEDC knowingly undertook.

12. ID.; ID.; ID.; PETITIONER IS NOT ENTITLED TO A WRIT OF *MANDAMUS*, THERE BEING NO SPECIFIC, CERTAIN AND CLEAR LEGAL RIGHT TO BE ENFORCED, NOR DUTY TO BE PERFORMED THAT IS CLEARLY AND PEREMPTORILY ENJOINED BY LAW OR BY REASON OF OFFICIAL STATION.— The very defect upon which this Court nullified the award of the NAIA IPT III Project to PIATCO similarly taints the unsolicited proposal of AEDC. This Court found Paircargo Consortium financially disqualified after striking down as incorrect the PBAC's assessment of the consortium's financial capability. Pursuant to the *Agan* ruling, AEDC, like the Paircargo Consortium, would not be financially qualified to undertake the NAIA IPT III Project. Based on AEDC's own submissions to the Government, it had then a paid-in capital of only **₱150,000,000.00,** which was less than the **₱558,384,871.55** that Paircargo Consortium was capable of

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investing in the NAIA IPT III Project, and even far less that what this Court prescribed as the minimum equity investment required for the project in the amount of **₱2,755,095,000.00** or 30% of the project cost. AEDC had not sufficiently demonstrated that it would have been financially qualified to undertake the project **at the time of submission of the bids.** Instead, AEDC took pains to present to this Court that allowing it to take over and operate NAIA IPT III at present would be beneficial to the Government. This Court must point out, however, that AEDC is precisely making a new proposal befitting the current status of the NAIA IPT III Project, contrary to its own argument that it is merely invoking its original BOT proposal. And it is not for this Court to evaluate AEDC's new proposal and assess whether it would truly be most beneficial for the Government, for the same is an executive function rather than judicial, for which the statutes and regulations have sufficiently provided standards and procedures for evaluation. It can even be said that if the award of the NAIA IPT III Project was merely a matter of choosing between PIATCO and AEDC (which it is not), there could be no doubt that PIATCO is more qualified to operate the structure that PIATCO itself built and PIATCO's offer of ₱17.75 Billion in annual guaranteed payments to the Government is far better that AEDC's offer of ₱135 Million. Hence, AEDC is not entitled to a writ of *mandamus,* there being no specific, certain, and clear legal right to be enforced, nor duty to be performed that is clearly and peremptorily enjoined by law or by reason of official station.

13. ID.; ID.; ID.; THE FILING BY PETITIONER OF ITS PETITION FOR *MANDAMUS* 20 MONTHS AFTER ITS SUPPOSED RIGHT TO THE PROJECT AROSE IS EVIDENTLY BEYOND A REASONABLE TIME AND NEGATES ANY CLAIM THAT THE PETITION FOR THE EXTRAORDINARY WRIT WAS THE MOST EXPEDITIOUS AND SPEEDY REMEDY AVAILABLE.— It must be emphasized that under Sections 2 and 3, Rule 65 of the revised Rules of Civil Procedure, petitions for prohibition and *mandamus,* such as in the instant case, can only be resorted to when there is no other plain, speedy and adequate remedy for the party in the ordinary course of law. As the revised Rules now stand, a petition for *certiorari* may be filed within 60 days from notice of the judgment, order or resolution sought to be assailed. Reasonable time for filing a petition for *mandamus* should likewise be for the same period. The filing by the AEDC

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of its petition for *mandamus* 20 months after its supposed right to the project arose is evidently beyond reasonable time and negates any claim that the said petition for the extraordinary writ was the most expeditious and speedy remedy available to AEDC. AEDC contends that the "reasonable time" within which it should have filed its petition should be reckoned only from 21 September 2005, the date when AEDC received the letter from the Office of the Solicitor General refusing to recognize the rights of AEDC to provide the available funds for the completion of the NAIA IPT III Project and to reimburse the costs of the structures already built by PIATCO. It has been unmistakable that even long before said letter — especially when the Government instituted with the RTC of Pasay City expropriation proceedings for the NAIA IPT III on 21 December 2004 — that the Government would not recognize any right that AEDC purportedly had over the NAIA IPT III Project and that the Government is intent on taking over and operating the NAIA IPT III itself.

14. ID.; ID.; JUDGMENTS; *RES JUDICATA*; ELEMENTS.— The elements of *res judicata*, in its concept as a bar by former judgment, are as follows: (1) the former judgment or order must be final; (2) it must be a judgment or order on the merits, that is, it was rendered after a consideration of the evidence or stipulations submitted by the parties at the trial of the case; (3) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and (4) there must be, between the first and second actions, identity of parties, of subject matter and of cause of action.

15. ID.; ID.; ID.; ID.; ID.; ALL THE ELEMENTS OF *RES JUDICATA* ARE PRESENT IN CASE AT BAR.— All of the elements are present herein so as to bar the present Petition. *First*, the Order of the RTC of Pasig City, dismissing Civil Case No. 66213, was issued on 30 April 1999. The Joint Motion to Dismiss, deemed a compromise agreement, once approved by the court is immediately executory and not appealable. *Second*, the Order of the RTC of Pasig City dismissing Civil Case No. 66213 pursuant to the Joint Motion to Dismiss filed by the parties constitutes a judgment on the merits. The Joint Motion to Dismiss stated that the parties were willing to settle the case amicably and, consequently, moved for the dismissal thereof. It also contained a provision in which the parties — the AEDC,

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on one hand, and the DOTC Secretary and PBAC, on the other — released and forever discharged each other from any and all liabilities, whether criminal or civil, arising in connection with the case. It is undisputable that the parties entered into a compromise agreement, defined as "a contract whereby the parties, by making reciprocal concessions, avoid a litigation or put an end to one already commenced." Essentially, it is a contract perfected by mere consent, the latter being manifested by the meeting of the offer and the acceptance upon the thing and the cause which are to constitute the contract. Once an agreement is stamped with judicial approval, it becomes more than a mere contract binding upon the parties; having the sanction of the court and entered as its determination of the controversy, it has the force and effect of any other judgment. Article 2037 of the Civil Code explicitly provides that a compromise has upon the parties the effect and authority of *res judicata*. Because of the compromise agreement among the parties, there was accordingly a judicial settlement of the controversy, and the Order, dated 30 April 1999, of the RTC of Pasig City was no less a judgment on the merits which may be annulled only upon the ground of extrinsic fraud. Thus, the RTC of Pasig City, in the same Order, correctly granted the dismissal of Civil Case No. 66213 ***with prejudice***. A scrutiny of the Joint Motion to Dismiss submitted to the RTC of Pasig City would reveal that the parties agreed to discharge one another from any and all liabilities, whether criminal or civil, arising from the case, after AEDC was furnished with a copy of the 1997 Concession Agreement between the DOTC and PIATCO. This complete waiver was the reciprocal concession of the parties that puts to an end the present litigation, without any residual right in the parties to litigate the same in the future. Logically also, there was no more need for the parties to admit to any liability considering that they already agreed to absolutely discharge each other therefrom, without necessarily conceding to the other's position. For AEDC, it was a declaration that even if it was not conceding to the Government's position, it was nonetheless waiving any legal entitlement it might have to sue the Government on account of the NAIA IPT III Project. Conversely, for the Government, it was an avowal that even if it was not accepting AEDC's stance, it was all the same relinquishing its right to file any suit against AEDC in connection with the same project. That none of the parties

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admitted liability or conceded its position is without bearing on the validity or binding effect of the compromise agreement, considering that these were not essential to the said compromise. *Third*, there is no question as to the jurisdiction of the RTC of Pasig City over the subject matter and parties in Civil Case No. 66213. The RTC can exercise original jurisdiction over cases involving the issuance of writs of *certiorari*, prohibition, *mandamus, quo warranto, habeas corpus* and injunction. To recall, the Petition of AEDC before the RTC of Pasig City was for the declaration of nullity of proceedings, *mandamus* and injunction. The RTC of Pasig City likewise had jurisdiction over the parties, with the voluntary submission by AEDC and proper service of summons on the DOTC Secretary and the PBAC Chairman and members. *Lastly*, there is, between Civil Case No. 66213 before the RTC of Pasig City and the Petition now pending before this Court, an identity of parties, of subject matter, and of causes of action. There is an identity of parties. In both petitions, the AEDC is the petitioner. The respondents in Civil Case No. 66213 are the DOTC Secretary and the PBAC Chairman and members. The respondents in the instant Petition are the DOTC, the DOTC Secretary, and the Manila International Airport Authority (MIAA). While it may be conceded that MIAA was not a respondent and did not participate in Civil Case No. 66213, it may be considered a successor-in-interest of the PBAC. When Civil Case No. 66213 was initiated, PBAC was then in charge of the NAIA IPT III Project, and had the authority to evaluate the bids and award the project to the one offering the lowest or most advantageous bid. Since the bidding is already over, and the structures comprising NAIA IPT III are now built, then MIAA has taken charge thereof. Furthermore, it is clear that it has been the intention of the AEDC to name as respondents in their two Petitions the government agency/ies and official/s who, at the moment each Petition was filed, had authority over the NAIA IPT III Project. There is an identity of subject matter because the two Petitions involve none other than the award and implementation of the NAIA IPT III Project. There is an identity of cause of action because, in both Petitions, AEDC is asserting the violation of its right to the award of the NAIA IPT III Project as the original proponent in the absence of any other qualified bidders. As early as in Civil Case No. 66213, AEDC already sought a declaration by the court of the absence of any other

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qualified proponent submitting a competitive bid for the NAIA IPT III Project, which, ultimately, would result in the award of the said project to it.

16. CIVIL LAW; PRESCRIPTION; THE FOUR-YEAR PRESCRIPTIVE PERIOD, WITHIN WHICH AN ACTION TO ANNUL A VOIDABLE CONTRACT MAY BE BROUGHT HAD ALREADY EXPIRED IN CASE AT BAR.— AEDC attempts to evade the effects of its compromise agreement by alleging that it was compelled to enter into such an agreement when former President Joseph E. Estrada asserted his influence and intervened in Civil Case No. 66213. This allegation deserves scant consideration. Without any proof that such events did take place, such statements remain mere allegations that cannot be given weight. One who alleges any defect or the lack of a valid consent to a contract must establish the same by full, clear and convincing evidence, not merely by preponderance thereof. And, even assuming *arguendo,* that the consent of AEDC to the compromise agreement was indeed vitiated, then President Estrada was removed from office in January 2001. AEDC filed the present Petition only on 20 October 2005. The four-year prescriptive period, within which an action to annul a voidable contract may be brought, had already expired.

17. POLITICAL LAW; EMINENT DOMAIN; RESORT TO EXPROPRIATION BY THE REPUBLIC IS JUST AND PROPER; COMPENSATION TO PIATCO MUST BE JUST AND IN ACCORDANCE WITH LAW AND EQUITY FOR THE GOVERNMENT CANNOT UNJUSTLY ENRICH ITSELF AT THE EXPENSE OF PIATCO AND ITS INVESTORS.— Contrary to Baterina's stance, PIATCO's entitlement to just and equitable consideration for its construction of NAIA IPT III and the propriety of the Republic's resort to expropriation proceedings were already recognized and upheld by this Court in *Agan* and *Gingoyon.* The Court's Decisions in both *Agan* and *Gingoyon* had attained finality, the former on 17 February 2004 and the latter on 17 March 2006. This Court already made an unequivocal pronouncement in its Resolution dated 21 January 2004 in *Agan* that for the Government of the Republic to take over the NAIA IPT III facility, it has to compensate PIATCO as a builder of the structures; and that "[t]he compensation must be just and in accordance with law and equity for the government cannot unjustly enrich itself at the expense

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of PIATCO and its investors." As between the Republic and PIATCO, the judgment on the need to compensate PIATCO before the Government may take over NAIA IPT III is already conclusive and beyond question.

18. ID.; ID.; APPROPRIATENESS OF THE REPUBLIC'S RESORT TO EXPROPRIATION WAS SETTLED IN *REPUBLIC VS. GINGOYON*.— The Court then, in *Gingoyon*, directly addressed the issue on the appropriateness of the Republic's resort to expropriation proceedings: **The Government has chosen to resort to expropriation, a remedy available under the law, which has the added benefit of an integrated process for the determination of just compensation and the payment thereof to PIATCO.** We appreciate that the case at bar is a *highly unusual case,* whereby the Government seeks to expropriate a building complex constructed on land which the State already owns. There is an inherent illogic in the resort to eminent domain on property already owned by the State. At first blush, since the State already owns the property on which NAIA 3 stands, the proper remedy should be akin to an action for ejectment. **However, the reason for the resort by the Government to expropriation proceedings is understandable in this case.** The 2004 Resolution, in requiring the payment of just compensation prior to the takeover by the Government of NAIA 3, effectively precluded it from acquiring possession or ownership of the NAIA 3 through the unilateral exercise of its rights as the owner of the ground on which the facilities stood. Thus, as things stood after the 2004 Resolution, the right of the Government to take over the NAIA 3 terminal was preconditioned by lawful order on the payment of just compensation to PIATCO as builder of the structures. xxx xxx xxx The right of eminent domain extends to personal and real property, and the NAIA 3 structures, adhered as they are to the soil, are considered as real property. The public purpose for the expropriation is also beyond dispute. It should also be noted that **Section 1 of Rule 67 (on Expropriation) recognizes the possibility that the property sought to be expropriated may be titled in the name of the Republic of the Philippines, although occupied by private individuals,** and in such case an averment to that effect should be made in the complaint. The instant expropriation complaint did aver that the NAIA 3 complex "stands on a parcel of land owned by the Bases Conversion Development Authority, another agency of [the Republic of the Philippines]."

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Admittedly, eminent domain is **not the sole judicial recourse** by which the Government may have acquired the NAIA 3 facilities while satisfying the requisites in the 2004 Resolution. **Eminent domain though may be the most effective, as well as the speediest means by which such goals may be accomplished.** Not only does it enable immediate possession after satisfaction of the requisites under the law, it also has a built-in procedure through which just compensation may be ascertained. Thus, there should be no question as to the propriety of eminent domain proceedings in this case.

19. ID.; ID.; *REPUBLIC VS. GINGOYON* CATEGORICALLY RECOGNIZED PIATCO'S OWNERSHIP OVER THE STRUCTURES IT HAD BUILT IN NAIA IPT III.— The Court, also in *Gingoyon,* categorically recognized PIATCO's ownership over the structures it had built in NAIA IPT III, to wit: **There can be no doubt that PIATCO has ownership rights over the facilities which it had financed and constructed.** The 2004 Resolution squarely recognized that right when it mandated the payment of just compensation to PIATCO prior to the takeover by the Government of NAIA 3. The fact that the Government resorted to eminent domain proceedings in the first place is a concession on its part of PIATCO's ownership. Indeed, if no such right is recognized, then there should be no impediment for the Government to seize control of NAIA 3 through ordinary ejectment proceedings. xxx **Thus, the property subject of expropriation, the NAIA 3 facilities, are real property owned by PIATCO. x x x**

20. ID.; ID.; EXPROPRIATION PROCEEDINGS SHALL BE HELD IN ACCORDANCE WITH REPUBLIC ACT NO. 8974.— It was further settled in *Gingoyon* that the expropriation proceedings shall be held in accordance with Republic Act No. 8974, thus: Unlike in the case of Rule 67, the application of Rep. Act No. 8974 will not contravene the 2004 Resolution, which requires the payment of just compensation before any takeover of the NAIA 3 facilities by the Government. The 2004 Resolution does not particularize the extent such payment must be effected before the takeover, but it unquestionably requires at least some degree of payment to the private property owner before a writ of possession may issue. The utilization of Rep. Act No. 8974 guarantees compliance with this bare minimum requirement, as it assures the private property owner the payment of, at the

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very least, the proffered value of the property to be seized. Such payment of the proffered value to the owner, followed by the issuance of the writ of possession in favor of the Government, is precisely the schematic under Rep. Act No. 8974, one which facially complies with the prescription laid down in the 2004 Resolution.

21. ID.; ID.; *REPUBLIC VS. GINGOYON* CONSTITUTES AS THE LAW OF THE CASE FOR THE EXPROPRIATION PROCEEDINGS.— *Gingoyon* constitutes as the law of the case for the expropriation proceedings, docketed as Case No. 04-0876CFM, before the RTC of Pasay City. Law of the case has been defined in the following manner — By "law of the case" is meant that "whatever is once irrevocably established as the controlling legal rule or decision between the same parties in the same case continues to be the law of the case" so long as the "facts on which such decision was predicated continue to be the facts of the case before the court" (21 C.J.S. 330). And once the decision becomes final, it is binding on all inferior courts and hence beyond their power and authority to alter or modify (*Kabigting vs. Acting Director of Prisons*, G.R. L-15548, October 30, 1962). A ruling rendered on the first appeal, constitutes the law of the case, and, even if erroneous, it may no longer be disturbed or modified since it has become final long ago.

22. ID.; ID.; THE GENERAL RULE PRECLUDING THE RE-LITIGATION OF MATERIAL FACT OR QUESTIONS WHICH WERE IN ISSUE AND ADJUDICATED IN THE FORMER ACTION ARE COMMONLY APPLIED TO ALL MATTERS ESSENTIALLY CONNECTED WITH THE SUBJECT MATTER OF THE LITIGATION; IT EXTENDS TO QUESTIONS NECESSARILY INVOLVED IN AN ISSUE, AND NECESSARILY ADJUDICATED,OR NECESSARILY IMPLIED IN THE FINAL JUDGMENT.— The extensive excerpts from *Gingoyon* demonstrate and emphasize that the Court had already adjudged the issues raised by Baterina, which he either conveniently overlooked or stubbornly refused to accept. The general rule precluding the relitigation of material facts or questions which were in issue and adjudicated in former action are commonly applied to all matters essentially connected with the subject matter of the litigation. Thus, it **extends to questions necessarily involved in an issue, and necessarily adjudicated,**

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or necessarily implied in the final judgment, although no specific finding may have been made in reference thereto, and although such matters were directly referred to in the pleadings and were not actually or formally presented. Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties and if a judgment necessarily presupposes certain premises, they are as **conclusive as the judgment itself.** Reasons for the rule are that a judgment is an adjudication on all the matters which are essential to support it, and that every proposition assumed or decided by the court leading up to the final conclusion and upon which such conclusion is based is as effectually passed upon as the ultimate question which is finally solved.

23. ID.; ID.; ALLOWING RESPONDENT'S PETITION-IN-INTERVENTION WILL ONLY RELITIGATE MATTERS THAT HAS BEEN PREVIOUSLY ADJUDICATED BY NO LESS THAN THE HIGHEST COURT OF THE LAND.— Since the issues Baterina wishes to raise as an intervenor in Case No. 04-0876CFM were already settled with finality in both *Agan* and *Gingoyon*, then there is no point in still allowing his intervention. His Petition-in-Intervention would only be a relitigation of matters that had been previously adjudicated by no less than the Highest Court of the land. And, in no manner can the RTC of Pasay City in Case No. 04-0876CFM grant the reliefs he prayed for without departing from or running afoul of the final and executory Decisions of this Court in *Agan* and *Gingoyon*. While it is true that when this Court, in a Resolution dated 1 February 2006, dismissed the Motions for Intervention in *Gingoyon*, including that of Baterina, it also observed that the interests of the movants-in-intervention may be duly litigated in proceedings which are extant before the lower courts. This does not mean, however, that the said movants-in-interest were assured of being allowed as intervenors or that the reliefs they sought as such shall be granted by the trial courts. The fate of their intervention still rests on their interest or legal standing in the case and the merits of their arguments.

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CORONA, *J., dissenting opinion:*

1. REMEDIAL LAW; CIVIL PROCEDURE; EFFECT OF JUDGMENTS; *RES JUDICATA*; ELEMENTS.— A case is barred by prior judgment or *res judicata* when the following elements are present: (1) there must be a final judgment or order; (2) it is rendered by a court having jurisdiction over the subject matter and the parties; (3) it is a judgment or an order on the merits and (4) there must be, between the first and the second actions, identity of parties, of subject matter and of causes of action.

2. ID.; ID.; ID.; ID.; ID.; ALL THE ELEMENTS OF *RES JUDICATA* ARE PRESENT IN CASE AT BAR.— The presence of the first two elements is not controversial. Regarding the third element, the order of dismissal based on amicable settlement is considered as one on the merits: A compromise agreement once approved by final order of the court has the force of *res judicata* between the parties and should not be disturbed except for vices of consent or forgery. Hence, a decision on a compromise agreement is final and executory; it has the force of law and is conclusive between the parties. The agreement was considered as the decision on the case. Moreover, the order was specified to be with prejudice. A dismissal with prejudice is an adjudication on the merits which finally disposes of the controversy and it constitutes a bar to a future action unless it is reversed. The fourth element is likewise present. There is identity of subject matter which is the NAIA IPT III. There is also an identity of parties between the instant case and the previous action by AEDC even if the PBAC chairman and members were impleaded in the previous action but not here: Well settled is the rule that only substantial, and not absolute, identity of parties is required for *res judicata* to lie. There is substantial identity of parties when there is a community of interest between a party in the first case and a party in the second case albeit the latter was not impleaded in the first case. There is a community of interest since all the respondents in both actions were involved in the approval and implementation of the NAIA IPT project under the BOT Law.

3. ID.; ID.; ID.; ID.; ID.; ALTHOUGH THE FINAL ELEMENT OF IDENTITY OF CAUSES OF ACTION IS DOUBTFUL, THE COURT OPTED TO RELAX THE RULE ON *RES JUDICATA*

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CONSIDERING THE HUGE SIGNIFICANCE AND PECULIAR CIRCUMSTANCES OF THE PRESENT CASE, THE GREAT IMPACT OF THE PROJECT ON THE NATIONAL ECONOMY AND THE COUNTRY'S REPUTATION IN THE INTERNATIONAL COMMUNITY.— The final element is doubtful, to say the least. **There is no identity of causes of action.** In the case dismissed by the Pasig court, AEDC principally sought to prevent the award of NAIA IPT III project to PIATCO which it argued to be unqualified to submit a bid (a fact later confirmed by *Agan* in 2003 when the PIATCO contracts were nullified.) In the present case, however, AEDC, on the strength of its argument that it is entitled to the award of the project as an unchallenged original proponent of an unsolicited proposal, prays that it be awarded the project. The Court should have therefore declined to dismiss this case on doubtful technicality. Given the huge significance and peculiar circumstances of this case, not to mention the great impact of this project on the national economy and the country's reputation in the international community, we can justifiably relax the application of the rule on *res judicata*. As we emphasized in *Salud v. Court of Appeals*: In our age, where courts are harassed by crowded dockets and complaints against slow foot justice, frequent technical reliance on the preclusive breadth of *res judicata* is understandable. The importance of judicial economy and avoidance of repetitive suits are strong norms in a society in need of swift justice. Be that as it may, **there should not be a mechanical and uncaring reliance on res judicata where more important societal values deserve protection.**

4. ID.; ID.; ID.; ID.; ID.; THE PRINCIPLE OF *RES JUDICATA* CAN RIGHTFULLY BE SET ASIDE IN FAVOR OF SUBSTANTIAL JUSTICE; CASES SHOULD BE DECIDED ON THEIR MERITS AND NOT ON TECHNICALITIES.— Procedural rules are mere tools to aid the courts in the speedy, just and inexpensive resolution of pending cases. Substantial justice remains the primordial and all-important objective and, to this end, the liberal construction of the rules may be permitted. Jurisprudence holds that, as much as possible, cases should be decided on their merits and not on technicalities. Indeed, the principle of *res judicata* can rightfully be set aside in favor of substantial justice.

5. ID.; SPECIAL CIVIL ACTIONS; *MANDAMUS*; LEGAL RIGHT OF PETITIONERS AS ORIGINAL PROPONENT; INTENT OF

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SECTION 4-A OF R.A. 7718 OR THE "BUILD-OPERATE-TRANSFER" (BOT) LAW IS TO PROTECT THE ORIGINAL PROPONENT.— RA 7718 was later enacted introducing several amendments to the original BOT Law (RA 6957). One such amendment was the inclusion of unsolicited proposals (Section 4-A). Under Section 4-A, after the original proponent submits its unsolicited proposal, other proponents may make lower price offers (referred to as the "swiss challenge"). The original proponent has the right to match any lower bid submitted — a form of protection and advantage conferred on the original proponent which has already "*incurred costs in the conceptual design and in the preparation of the proposal, and which may have adopted an imaginative method of construction or innovative concept for the proposal.*" Because of its valuable role in initiating an infrastructure project the government would otherwise be unable to put up or design out of its own resources, the original proponent is granted the option to match the lower price proposal of any challenger. The law recognizes the initiative and civic-mindedness, as well as the innovative concept proposal (and the costs voluntarily assumed to come up with it), of the original proponent. It accords him a preferred status and vests on him the right to pursue his approved proposal and implement the project. His status and right are tested in the crucible of a swiss challenge and may be defeated only if and when he fails to match the bid of a qualified winning bidder. Thus, the original proponent is entitled to the award of the BOT project in the following cases: 1. no competitive bid was submitted; 2. there was a lower bid title by a qualified bidder but the original proponent matched it and 3. there was a lower bid but it was made by a person/entity **not qualified to bid, in which case it is as if no competitive bid was made.** The congressional deliberations show that the legislative intent was to give protection to the original proponent.

6. ID.; ID.; ID.; THE MAJORITY'S READING OF THE LAW CONSIDERABLY WATERS DOWN THE RIGHTS ACCORDED TO AN ORIGINAL PROPONENT; REGARDLESS OF THE PRESENCE OF COMPETITIVE BIDS, THE ORIGINAL PROPONENT INCURS COSTS, AS SUCH, IT DESERVES THE PROTECTION WHICH THE LAW SEEKS TO AFFORD IT.— The majority recognizes that an original proponent of an unsolicited proposal has rights and privileges because the law intended "to encourage private sector initiative in

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conceptualizing infrastructure projects that would benefit the public." However, the majority limits the rights of an original proponent to the following: (1) the right to match the lowest or most advantageous proposal and (2) the right to be awarded the project in the event that the original proponent is able to match the lowest or most advantageous proposal submitted. Moreover, for the majority, these rights arise only when there are other proposals submitted during the public bidding of the infrastructure project. The majority's reading of the law considerably waters down the rights accorded to an original proponent. In failing to consider a situation where either no competitive bid was submitted or a lower bid was submitted by an entity not qualified to bid, the rights of the original proponent are unduly subjected to the condition of the presence of competitive bids. To reiterate, the spirit of the provision is "to protect project proponents which have already incurred costs in the conceptual design and in the preparation of the proposal." Certainly, regardless of the presence of competitive bids, the original proponent incurs costs. As such, it deserves the protection which the law seeks to afford it. The law which seeks to encourage private sector participation should be interpreted in a way that would recognize, not emasculate, rights of private investors.

7. ID.; ID.; ID.; SINCE THERE WAS NO QUALIFIED BIDDER DURING THE SWISS CHALLENGE, IT FOLLOWS THAT NO OTHER PROPOSALS COULD HAVE BEEN CONSIDERED BY RESPONDENTS AND THAT THE ORIGINAL PROPONENT REMAINED UNCHALLENGED.— Under Section 10.6 of the IRR of the BOT Law, as amended by RA 7718, after the proposal is accepted by the agency involved (in this case respondent DOTC), the latter becomes committed to pursue the project and can no longer entertain other similar proposals until the solicitation of comparative proposals. In fact, AEDC, as original proponent, and respondent DOTC already executed an MOU wherein they agreed to fast track the project. In the MOU, AEDC was also encouraged by the DOTC to commence negotiations with its financial partners and to ensure that financial commitments and resources were firmed up and made available after the final approval of the project. **This was because, at this point, the only thing left to be hurdled (before the project was awarded to AEDC) was the resolution of the swiss challenge.** However, PIATCO, the lone bidder in the swiss

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challenge, turned out to be unqualified. We said so in no uncertain terms in *Agan.* The subsequent award of the project to it and the contracts it entered into with the government were all nullified and voided. **Since there was no qualified bidder during the swiss challenge, it followed that no other proposal(s) could have been considered by respondents and the original proponent remained unchallenged. This of course meant only one thing: there was no qualified challenger to AEDC's proposal and consequently, there was no better offer to match. The legal effect of PIATCO's disqualification was simply that no other proposal could be deemed to have been received during the designated period and AEDC, having complied with all the requirements and conditions under Section 4-A of the law, had the right to be awarded the project.**

8. ID.; ID.; ID.; *MANDAMUS* IS PROPER IN CASE AT BAR.— Under Rule 65, Section 3 of the Rules of Court, a petition for *mandamus* may be filed when any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. *Mandamus* is an extraordinary writ to compel the performance, when refused, of a ministerial duty that is already imposed on respondent and there is no other plain, speedy and adequate remedy in the ordinary course of law. Petitioner should have a well-defined, clear and certain legal right to the performance of the act and it must be the clear and imperative duty of respondent to do the act required to be done. *Mandamus* will not issue to enforce a right, or to compel compliance with a duty, which is questionable or over which a substantial doubt exists. The principal function of the writ of *mandamus* is to command and to expedite, not to inquire and to adjudicate; thus, it is neither the office nor the aim of the writ to secure a legal right but to implement that which is already established. Unless the right to the relief sought is unclouded, *mandamus* will not issue.

9. ID.; ID.; ID.; PETITIONER'S RIGHT TO THE AWARD OF THE NAIA IPT III PROJECT WAS CLEAR UNDER SECTION 4-A OF THE BOT LAW GIVEN THE FACT THAT NO BETTER OFFER LEGALLY EXISTED OR COULD BE TAKEN INTO ACCOUNT; THE VESTED RIGHT WAS ACQUIRED FROM THE TIME PIATCO WAS DISQUALIFIED TO BID DURING THE SWISS CHALLENGE.— *Mandamus* applies as a remedy

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where petitioner's right is founded clearly in law. AEDC's right to the award of the NAIA IPT III project was clear under Section 4-A of the BOT Law (in the light of *Agan*) given the fact that no better offer legally existed or could be taken into account. It acquired this vested right from the time PIATCO was disqualified to bid during the swiss challenge. Respondents argue, and the majority agreed, that there are only two clear legal rights recognized in favor of the original proponent under Section 4-A of the BOT Law and Section 10.1 of its IRR: (1) the right to match the lower price proposal within 30 days and (2) the right to the award of the project if the original proponent is able to match the lower price proposal. I disagree. This view fails to consider a situation wherein there is **no other qualified bidder** like in the case of AEDC. Legally, the situation is as if no competitive bid was ever submitted. We have stated that for *mandamus* to issue, it is not necessary that the right and/or duty are absolutely expressed; they must, however, be clear. Here, it is obvious that the original proponent is entitled to the award in the event that there is no other qualified bidder during the swiss challenge. **The law need not expressly state the obvious.**

10. ID.; ID.; ID.; THERE IS NO NEED FOR PETITIONER TO MATCH ANY LOWER BID FOR THE SIMPLE REASON THAT THERE IS NO QUALIFIED BIDDER DURING THE SWISS CHALLENGE AND AS SUCH, IT BECAME THE MINISTERIAL DUTY OF RESPONDENTS TO AWARD THE NAIA IPT III.— The parties do not dispute that the government already accepted the unsolicited proposal of AEDC, subject only to the swiss challenge. Section 10.1, par. (c) of the IRR states that "if the original project proponent matches the submitted lowest price within the specified period, [it] shall immediately be awarded the project." **As a matter of fact, there was no need for AEDC to match any lower bid for the simple reason that there was no qualified bidder during the swiss challenge.** It therefore became the ministerial duty of respondents to award the NAIA IPT III project to it.

11. ID.; ID.; ID.; THE GOVERNMENT'S ARGUMENT THAT THE RIGHT CAN STILL BE EFFECTIVELY NEGATED AT THE DISCRETION OF THE APPROVING AUTHORITIES IS OPPRESSIVE TO THE PROPONENT AND ONE GOOD WAY TO DRIVE AWAY INVESTORS FROM OUR SHORES.—

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Respondents DOTC, *et al.* contend that the BOT implementing rules have provisions on "recommendation to award" and "decision to award" thereby belying any duty on their part to automatically award the project to AEDC. I disagree with this interpretation of the BOT Law. It is outrageous to even suggest that a proponent's fate can be made to hang in the balance even after the conclusion of the swiss challenge process. At this point, it has either matched the lower price proposal or there never was any other proposal or challenger. Yet DOTC, *et al.* insist that the right can still be effectively negated at the discretion of the approving authorities. This is oppressive to the proponent and one good way to drive away investors from our shores, what with the uncertainty of the process and status of their rights. AEDC having satisfied all the requisites therefor, the writ of *mandamus* shall issue. Respondents should award the NAIA IPT III project to AEDC and formalize the NEDA-approved draft concession agreement offered for public bidding during the swiss challenge and turn over possession of the facilities to AEDC.

12. ID.; ID.; ID.; THE NAIA IPT III PROJECT REMAINS A BOT PROJECT; WHILE PETITIONER NO LONGER HAS TO BUILD THE FACILITY AS ONE ALREADY EXISTS, IT WILL HAVE TO ASSUME THE PAYMENT DUE TO THE BUILDER THEREOF AND TO COMPLETE THE FACILITY AND MAKE IT FULLY FUNCTIONAL.— In view of AEDC's rights as original proponent, the NAIA IPT III project cannot be arbitrarily removed from the coverage of the BOT Law to its prejudice. AEDC, through no fault of its own, obviously can no longer fulfill its obligation under the law to build the terminal since the construction of NAIA IPT III is now substantially complete. But it can pay whatever amount is still due, specifically the fair value of the facility, pursuant to our ruling in *Gingoyon*. The majority ruled that the BOT Law is neither applicable nor practicable in view of the fact that the NAIA IPT III is substantially complete. However, the fact that the terminal is substantially built should not be a serious hindrance to the recognition of AEDC's rights under the BOT Law. While AEDC no longer has to build the facility as one already exists, it will have to assume the payment due to the builder thereof, PIATCO, and to complete the facility to make it fully functional. It would essentially undertake the burden of building it. Why should AEDC be penalized for having been unduly prevented from

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building it? Furthermore, building the facility is simply one stage of AEDC's proposal and of the project. As a BOT project, the proposal also pertained to the operation of the facility (which is also covered by the protection of Section 4-A). While AEDC can no longer build the facility without any fault on its part, it can and should operate said facility.

13. ID.; ID.; ID.; PRIVATE RESPONDENT HAS LEGAL STANDING; BEING A LEGISLATOR, TAXPAYER, CONCERNED CITIZEN, AND THE TRANSCENDENTAL IMPORTANCE OF THE ISSUES INVOLVED, IMBUED RESPONDENT WITH STANDING TO INTERVENE IN THE EXPROPRIATION CASE.— Legal standing or *locus standi* 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 the issue affected by the governmental act, as distinguished from mere interest in the question involved or a mere incidental interest. Here, Baterina invoked that his being a legislator, taxpayer, concerned citizen, and the transcendental importance of the issues involved, imbued him with standing to intervene in the expropriation case.

14. ID.; ID.; BEING A MERE PROCEDURAL TECHNICALITY, THE REQUIREMENT OF LEGAL STANDING MAY BE WAIVED OR RELAXED BY THE COURT IN THE EXERCISE OF ITS DISCRETION.— We need not go into an extensive discussion of this point. Being a mere procedural technicality, the requirement of legal standing may be waived or relaxed by the Court in the exercise of its discretion. Hence, in *Agan*, we ruled that: 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* and *Gonzales v. Raquiza* 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,*

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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," Further, "insofar as taxpayers' suits are concerned . . . (this Court) *is not devoid of discretion* as to whether or not it should be entertained." 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." ***I*n view of the serious legal questions involved and their impact on public interest, we resolve to grant standing to the petitioners.** The issues raised in these petitions involving an airport terminal costing more than ₱3 billion have a great impact on public interest. Given the transcendental importance of the case, we grant standing to Baterina.

15. ID.; ID.; ID.; TECHNICALITIES MAY BE SET ASIDE WHERE THE ISSUES ARE OF TRANSCENDENTAL IMPORTANCE.— Considering that payment (a supervening event) has already been released to and received by PIATCO and the fact that CA-G.R. SP No. 95539 was already dismissed by the CA, the Republic's petition may well be considered moot and academic. However, both the Republic and Baterina have signified their desire to submit for resolution of this Court the substantive issues raised by Baterina in the expropriation court. As we already stated and discussed, this case involves matters of transcendental importance which should not be evaded. It is imperative that all pertinent unanswered questions which remain obstacles to the operationalization of NAIA IPT III be resolved immediately and completely. We may settle these substantive issues here and now, considering that these are questions of law cognizable by this Court. Furthermore, the Court can relax or even suspend its procedural rules in the exercise of its inherent power under the Constitution "to promulgate rules concerning . . . pleading, practice and procedure in all courts." Besides, this Court is the final arbiter of all legal questions or controversies. Thus, the Court may dispense with the normal procedure of remanding the case to the expropriation court in order to avoid further delays in the resolution of the case. It

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can consider the substantive issues raised by Baterina as properly brought before this Court and rule on them accordingly.

16. ID.; ID.; ID.; REPUBLIC MAY PROPERLY RESORT TO EXPROPRIATION OF NAIA IPT III.— The builder in a BOT arrangement is the owner of the facilities it builds. In *Tatad v. Garcia*, we ruled that a foreign corporation which constructed the facilities of EDSA Light Rail Transit III under a Build-Lease-Transfer scheme was the owner of such facilities. To construe the BOT law the other way would be highly prejudicial to the proponent/builder of the project. The proponent/builder who spends a tremendous amount of money on the facilities has ownership rights over what it builds. Its rights are of course limited by the provisions of the BOT law and other relevant laws. The correctness or propriety of the expropriation of NAIA IPT III was assumed in *Gingoyon*. It was not even an issue there because the question squarely confronted was which law (Rule 67 of the Rules of Court or RA 8974) should govern the valuation of the subject matter of the expropriation proceedings. To resolve this, the Court, precisely, had to first accept the propriety of the expropriation.

17. ID.; ID.; ID.; PUBLIC USE IS HELD SYNONYMOUS WITH "PUBLIC INTEREST," "PUBLIC BENEFIT," "PUBLIC WELFARE" AND "PUBLIC CONVENIENCE" AND INCLUDES THE BROADER NOTION OF INDIRECT BENEFIT OR ADVANTAGE; WHATEVER MAY BE BENEFICIALLY EMPLOYED FOR THE GENERAL WELFARE SATISFIES THE REQUIREMENT OF PUBLIC USE.— In recognizing the right of AEDC to the award of the NAIA IPT III project, would the public purpose of the expropriation be defeated by the government's taking over a privately owned structure, only to turn over its operation to another private entity (AEDC)? The answer is no. To be valid, the taking must be for public use. The meaning of the term "public use" has evolved over time in response to changing public needs and exigencies. Public use which was traditionally understood as strictly limited to actual "use by the public" has already been abandoned. "Public use" has 'now been held to be synonymous with "public interest," "public benefit," "public welfare" and "public convenience." It includes the broader notion of indirect public

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benefit or advantage. Whatever may be beneficially employed for the general welfare satisfies the requirement of public use.

18. ID.; ID.; ID.; EXPROPRIATION MAY HAVE BEEN VIEWED AS ILLOGICAL OR PROBLEMATIC BUT THERE IS NO DOUBT THAT THE GOVERNMENT HAD THE POWER AND RIGHT TO INSTITUTE SUCH PROCEEDINGS AS LONG AS THE REQUISITES FOR ITS VALID EXERCISE WERE PRESENT.— Expropriation may have been viewed as illogical or problematic but there was no doubt that the government had the power and right to institute such proceedings as long as the requisites for its valid exercise were present, as they are here. Consequently, the ₱3,002,125,000 paid by the Republic to PIATCO as proffered value of the expropriated structure was held to be valid. AEDC will reimburse this amount to the Republic in consonance with our ruling that it (AEDC) shall assume the payment of just compensation due to PIATCO.

19. ID.; ID.; ID.; DETERMINATION OF JUST COMPENSATION IS A JUDICIAL FUNCTION.— As we stated in *Agan* (which we likewise recognized in *Gingoyon*), compensation must conform not only with law but equity as well. This means that the expropriation court is not confined to strictly following the formula spelled out in the law and instead is given latitude in its determination of the compensation due to PIATCO. After all, the determination of just compensation is a judicial function. Equity is defined as justice outside law, being ethical rather than jural and belonging to the sphere of morals than of law. It is grounded on the precepts of conscience and not on any sanction of positive law. Hence, equity finds no room for application where there is law. It cannot prevail over an express provision of the law. However, it is . . . a complement of legal jurisdiction [that] seeks to reach and to complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of cases, are incompetent to do so. x x x Equity is a principle which takes into consideration the particular and special circumstances of the case so as to prevent inflicting unintended injustice on a party. Its application should not deprive any party of an existing right, but should render complete justice to one with a meritorious cause. The determination of the final amount of fair and just compensation due PIATCO remains the task of the expropriation court.

20. ID.; ID.; ID.; JUST COMPENSATION OWING TO PIATCO FOR THE CONSTRUCTION OF NAIA IPT III SHOULD NOT INCLUDE ANY AMOUNTS THAT ARE BLOATED OR UNREASONABLE AND THOSE THAT INVOLVE ILLEGALITY, BRIBERY, CORRUPTION, COLLUSION, FRAUD AND CONTRAVENTION OF PUBLIC POLICY.— Equity seeks to render complete justice by correcting deficiencies or flaws in the law. It affords the expropriation court flexibility to take into consideration factors which it could not have considered if it applied RA 8974 alone. Needless to state, the just compensation owing to PIATCO for the construction of NAIA IPT III should not include any amounts that are bloated or unreasonable and those that involve illegality, bribery, corruption, collusion, fraud and contravention of public policy. Defects in the terminal and the amounts needed to correct them, specially those affecting public safety, must also be excluded. Therefore, Baterina's misgivings that PIATCO will be unjustly rewarded for its supposed wrongdoings have no basis and are merely speculative. In line with this, Baterina's prayer that the Solicitor General be directed to disclose evidence its office has gathered on PIATCO's alleged bad faith, corruption and fraud should be denied for being premature. The government must be given the chance to present its evidence as it deems fit. In this connection, since AEDC will ultimately shoulder the just compensation to be paid to PIATCO, it should be allowed to intervene in the expropriation proceedings.

21. ID.; ID.; ID.; THE VESTED RIGHT OF PETITIONER TO BE AWARDED THE PROJECT SHOULD BE BALANCED WITH THE LEGAL AUTHORITY OF THE GOVERNMENT TO EXPROPRIATE THE TERMINAL; THE RIGHT OF PETITIONER DOES NOT NULLIFY THE AUTHORITY OF THE GOVERNMENT AND VICE VERSA AND IN THE ABSENCE OF ANY PROHIBITION UNDER OUR LAWS, THE COURT SHOULD UPHOLD BOTH.— The BOT Law, as amended, was enacted to mobilize the resources of the private sector for the economic development of the country. AEDC took one step further and submitted an unsolicited proposal. The BOT scheme, no matter how laudable its objectives, will not attain its ends if the legal rights of an original proponent under the law are not recognized. It may be claimed that maintaining the nature of NAIA IPT III as a BOT project is inherently incompatible with the continuation of the expropriation proceedings. I think

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not. The vested right of AEDC to be awarded the project should be balanced with the legal authority of the government to expropriate the terminal. The right of AEDC does not nullify the authority of the government and vice versa. In the absence of any prohibition under our laws, this Court should uphold both.

22. ID.; ID.; ID.; PETITIONER SHOULD BE ALLOWED TO PURSUE THE PROJECT IT CONCEIVED, DESIGNED AND PROPOSED; ULTIMATELY, IT IS PUBLIC WELFARE THAT WILL BENEFIT FROM THE OPERATION OF A FULLY FUNCTIONAL WORLD-CLASS AIRPORT TERMINAL.- With due respect to the majority, AEDC should be allowed to pursue the project it conceived, designed and proposed. This will uphold its rights as an original proponent under the BOT Law, satisfy the just compensation owing to PIATCO at no cost to the government and finally bring about the long overdue operationalization of NAIA IPT III as committed by the Philippine government on January 25, 2008 at the World Economic Forum in Davos, Switzerland, not to mention the generation of the revenues that the government is entitled to under the BOT Law. Ultimately, it is public welfare that will benefit from the operation of a fully functional world-class airport terminal.

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D E C I S I O N

CHICO-NAZARIO, *J.*:

This Court is still continuously besieged by Petitions arising from the awarding of the Ninoy Aquino International Airport

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International Passenger Terminal III (NAIA IPT III) Project to the Philippine International Air Terminals Co., Inc. (PIATCO), despite the promulgation by this Court of Decisions and Resolutions in two cases, *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*[1] and *Republic v. Gingoyon*,[2] which already resolved the more basic and immediate issues arising from the said award. The sheer magnitude of the project, the substantial cost of its building, the expected high profits from its operations, and its remarkable impact on the Philippine economy, consequently raised significant interest in the project from various quarters.

Once more, two new Petitions concerning the NAIA IPT III Project are before this Court. It is only appropriate, however, that the Court first recounts its factual and legal findings in *Agan* and *Gingoyon* to ascertain that its ruling in the Petitions at bar shall be consistent and in accordance therewith.

Agan, Jr. v. Philippine International Air Terminals Co., Inc. (G.R. Nos. 155001, 155547, and 155661)

Already established and incontrovertible are the following facts in *Agan*:

> In August 1989, the [Department of Trade and Communications (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.

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[1] Decision, 450 Phil. 744 (2003); The Resolution on the Motion for Reconsideration, 465 Phil. 545 (2004).

[2] Decision, G.R. No. 166429, 19 December 2005, 478 SCRA 474; The Resolution on the Motion for Reconsideration, G.R. No. 166429, 1 February 2006, 481 SCRA 457.

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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/[Manila International Airport Authority (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).

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).

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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

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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 [Implementing Rules and Regulations (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

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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.

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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

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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.

x x x x x x x x x

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). x x x.

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On November 26, 1998, the Government and PIATCO signed an Amended and Restated Concession Agreement (ARCA). x x x.

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).

x x x x x x x x x

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. x x x.

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.

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.

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

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

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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."[3]

The Court first dispensed with the procedural issues raised in *Agan*, ruling that (a) the MIAA service providers and its employees, petitioners in G.R. Nos. 155001 and 155661, had the requisite standing since they had a direct and substantial interest to protect by reason of the implementation of the PIATCO Contracts which would affect their source of livelihood;[4] and (b) the members of the House of Representatives, petitioners in G.R. No. 155547, were granted standing in view of the serious legal questions involved and their impact on public interest.[5]

As to the merits of the Petitions in *Agan*, the Court concluded that:

> 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.[6]

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[3] Decision, *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, *supra* note 1 at 788-798.

[4] *Id*. at 800-803.

[5] *Id*. at 803-804.

[6] *Id*. at 840-841.

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Hence, the *fallo* of the Court's Decision in *Agan* reads:

> WHEREFORE, the 1997 Concession Agreement, the Amended and Restated Concession Agreement and the Supplements thereto are set aside for being null and void.[7]

In a Resolution[8] dated 21 January 2004, the Court denied with finality the Motions for Reconsideration of its 5 May 2003 Decision in *Agan* filed by therein respondents PIATCO and Congressmen Paras, *et al.*, and respondents-intervenors.[9] Significantly, the Court declared in the same Resolution that:

> This Court, however, is not unmindful of the reality that the structures comprising the NAIA IPT III facility are almost complete and that funds have been spent by PIATCO in their construction. For the government to take over the said facility, **it has to compensate respondent PIATCO as builder of the said structures**. The **compensation must be just and in accordance with law and equity** for the government can not unjustly enrich itself at the expense of PIATCO and its investors.[10] (Emphasis ours.)

It is these afore-quoted pronouncements that gave rise to the Petition in *Gingoyon*.

Republic v. Gingoyon (G.R. No. 166429)

According to the statement of facts in *Gingoyon*:

> After the promulgation of the rulings in *Agan*, the NAIA 3 facilities have remained in the possession of PIATCO, despite the avowed intent of the Government to put the airport terminal into immediate operation. The Government and PIATCO conducted several rounds of negotiation regarding the NAIA 3 facilities. It also appears that arbitral proceedings were commenced before the International Chamber of Commerce International Court of Arbitration and the International

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[7] *Id.*

[8] Resolution on the Motion for Reconsideration, *supra* note 1.

[9] Identified as employees of PIATCO, other workers of NAIA IPT III, and *Nagkaisang Maralita ng Tañong Association, Inc. (NMTAI)*, *id*. at 580-581.

[10] *Id*. at 603.

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Centre for the Settlement of Investment Disputes, although the Government has raised jurisdictional questions before those two bodies.

Then, on 21 December 2004, the Government filed a *Complaint* for expropriation with the Pasay City Regional Trial Court (RTC), together with an *Application for Special Raffle* seeking the immediate holding of a special raffle. The Government sought upon the filing of the complaint the issuance of a writ of possession authorizing it to take immediate possession and control over the NAIA 3 facilities. The Government also declared that it had deposited the amount of ₱3,002,125,000.00 (3 Billion) in Cash with the Land Bank of the Philippines, representing the NAIA 3 terminal's assessed value for taxation purposes.

The case was raffled to Branch 117 of the Pasay City RTC, presided by respondent judge Hon. Henrick F. Gingoyon (Hon. Gingoyon). On the same day that the *Complaint* was filed, the RTC issued an *Order* directing the issuance of a writ of possession to the Government, authorizing it to "take or enter upon the possession" of the NAIA 3 facilities. Citing the case of *City of Manila v. Serrano*, the RTC noted that it had the ministerial duty to issue the writ of possession upon the filing of a complaint for expropriation sufficient in form and substance, and upon deposit made by the government of the amount equivalent to the assessed value of the property subject to expropriation. The RTC found these requisites present, particularly noting that "[t]he case record shows that [the Government has] deposited the assessed value of the [NAIA 3 facilities] in the Land Bank of the Philippines, an authorized depositary, as shown by the certification attached to their complaint." Also on the same day, the RTC issued a *Writ of Possession*. According to PIATCO, the Government was able to take possession over the NAIA 3 facilities immediately after the *Writ of Possession* was issued.

However, on 4 January 2005, the RTC issued another *Order* designed to supplement its 21 December 2004 *Order* and the *Writ of Possession*. In the 4 January 2005 *Order*, now assailed in the present petition, the RTC noted that its earlier issuance of its writ of possession was pursuant to Section 2, Rule 67 of the 1997 Rules of Civil Procedure. However, it was observed that Republic Act No. 8974 (Rep. Act No. 8974), otherwise known as "An Act to Facilitate the Acquisition of Right-of-Way, Site or Location for National Government Infrastructure Projects and For Other Purposes" and its Implementing

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Rules and Regulations (Implementing Rules) had amended Rule 67 in many respects.

There are at least two crucial differences between the respective procedures under Rep. Act No. 8974 and Rule 67. Under the statute, the Government is required to make immediate payment to the property owner upon the filing of the complaint to be entitled to a writ of possession, whereas in Rule 67, the Government is required only to make an initial deposit with an authorized government depositary. Moreover, Rule 67 prescribes that the initial deposit be equivalent to the assessed value of the property for purposes of taxation, unlike Rep. Act No. 8974 which provides, as the relevant standard for initial compensation, the market value of the property as stated in the tax declaration or the current relevant zonal valuation of the Bureau of Internal Revenue (BIR), whichever is higher, and the value of the improvements and/or structures using the replacement cost method.

Accordingly, on the basis of Sections 4 and 7 of Rep. Act No. 8974 and Section 10 of the Implementing Rules, the RTC made key qualifications to its earlier issuances. *First*, it directed the Land Bank of the Philippines, Baclaran Branch (LBP-Baclaran), to immediately release the amount of US$62,343,175.77 to PIATCO, an amount which the RTC characterized as that which the Government "specifically made available for the purpose of this expropriation"; and such amount to be deducted from the amount of just compensation due PIATCO as eventually determined by the RTC. *Second*, the Government was directed to submit to the RTC a Certificate of Availability of Funds signed by authorized officials to cover the payment of just compensation. *Third*, the Government was directed "to maintain, preserve and safeguard" the NAIA 3 facilities or "perform such as acts or activities in preparation for their direct operation" of the airport terminal, pending expropriation proceedings and full payment of just compensation. However, the Government was prohibited "from performing acts of ownership like awarding concessions or leasing any part of [NAIA 3] to other parties."

The very next day after the issuance of the assailed 4 January 2005 *Order*, the Government filed an *Urgent Motion for Reconsideration*, which was set for hearing on 10 January 2005. On 7 January 2005, the RTC issued another *Order*, the second now assailed before this Court, which appointed three (3) Commissioners to ascertain the amount of just compensation for the NAIA 3 Complex.

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That same day, the Government filed a *Motion for Inhibition* of Hon. Gingoyon.

The RTC heard the *Urgent Motion for Reconsideration* and *Motion for Inhibition* on 10 January 2005. On the same day, it denied these motions in an *Omnibus Order* dated 10 January 2005. This is the third *Order* now assailed before this Court. Nonetheless, while the *Omnibus Order* affirmed the earlier dispositions in the 4 January 2005 *Order*, it excepted from affirmance "the superfluous part of the *Order* prohibiting the plaintiffs from awarding concessions or leasing any part of [NAIA 3] to other parties."

Thus, the present *Petition for Certiorari and Prohibition* under Rule 65 was filed on 13 January 2005. The petition prayed for the nullification of the RTC orders dated 4 January 2005, 7 January 2005, and 10 January 2005, and for the inhibition of Hon. Gingoyon from taking further action on the expropriation case. A concurrent prayer for the issuance of a temporary restraining order and preliminary injunction was granted by this Court in a *Resolution* dated 14 January 2005.[11]

The Court resolved the Petition of the Republic of the Philippines and Manila International Airport Authority in *Gingoyon* in this wise:

In conclusion, the Court summarizes its rulings as follows:

(1) The 2004 *Resolution* in *Agan* sets the base requirement that has to be observed before the Government may take over the NAIA 3, that there must be payment to PIATCO of just compensation in accordance with law and equity. Any ruling in the present expropriation case must be conformable to the dictates of the Court as pronounced in the *Agan* cases.

(2) Rep. Act No. 8974 applies in this case, particularly insofar as it requires the immediate payment by the Government of at least the proffered value of the NAIA 3 facilities to PIATCO and provides certain valuation standards or methods for the determination of just compensation.

(3) Applying Rep. Act No. 8974, the implementation of Writ of Possession in favor of the Government over NAIA 3 is held in abeyance

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[11] Decision, *Republic v. Gingoyon*, *supra* note 2 at 506-510.

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until PIATCO is directly paid the amount of ₱3 Billion, representing the proffered value of NAIA 3 under Section 4(c) of the law.

(4) Applying Rep. Act No. 8974, the Government is authorized to start the implementation of the NAIA 3 Airport terminal project by performing the acts that are essential to the operation of the NAIA 3 as an international airport terminal upon the effectivity of the Writ of Possession, subject to the conditions above-stated. As prescribed by the Court, such authority encompasses "the repair, reconditioning and improvement of the complex, maintenance of the existing facilities and equipment, installation of new facilities and equipment, provision of services and facilities pertaining to the facilitation of air traffic and transport, and other services that are integral to a modern-day international airport."

5) The RTC is mandated to complete its determination of the just compensation within sixty (60) days from finality of this Decision. In doing so, the RTC is obliged to comply with the standards set under Rep. Act No. 8974 and its Implementing Rules. Considering that the NAIA 3 consists of structures and improvements, the valuation thereof shall be determined using the replacements cost method, as prescribed under Section 10 of the Implementing Rules.

(6) There was no grave abuse of discretion attending the RTC *Order* appointing the commissioners for the purpose of determining just compensation. The provisions on commissioners under Rule 67 shall apply insofar as they are not inconsistent with Rep. Act No. 8974, its Implementing Rules, or the rulings of the Court in *Agan*.

(7) The Government shall pay the just compensation fixed in the decision of the trial court to PIATCO immediately upon the finality of the said decision.

(8) There is no basis for the Court to direct the inhibition of Hon. Gingoyon.

All told, the Court finds no grave abuse of discretion on the part of the RTC to warrant the nullification of the questioned orders. Nonetheless, portions of these orders should be modified to conform with law and the pronouncements made by the Court herein.[12]

The decretal portion of the Court's Decision in *Gingoyon* thus reads:

[12] *Id*. at 548-549.

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WHEREFORE, the Petition is GRANTED in PART with respect to the orders dated 4 January 2005 and 10 January 2005 of the lower court. Said orders are AFFIRMED with the following MODIFICATIONS:

1) The implementation of the Writ of Possession dated 21 December 2004 is HELD IN ABEYANCE, pending payment by petitioners to PIATCO of the amount of Three Billion Two Million One Hundred Twenty Five Thousand Pesos (₱3,002,125,000.00), representing the proffered value of the NAIA 3 facilities;

2) Petitioners, upon the effectivity of the Writ of Possession, are authorized [to] start the implementation of the Ninoy Aquino International Airport Pasenger Terminal III project by performing the acts that are essential to the operation of the said International Airport Passenger Terminal project;

3) RTC Branch 117 is hereby directed, within sixty (60) days from finality of this Decision, to determine the just compensation to be paid to PIATCO by the Government.

The *Order* dated 7 January 2005 is AFFIRMED in all respects subject to the qualification that the parties are given ten (10) days from finality of this *Decision* to file, if they so choose, objections to the appointment of the commissioners decreed therein.

The *Temporary Restraining Order* dated 14 January 2005 is hereby LIFTED.

No pronouncement as to costs.[13]

Motions for Partial Reconsideration of the foregoing Decision were filed by therein petitioners Republic and MIAA, as well as the three other parties who sought to intervene, namely, Asakihosan Corporation, Takenaka Corporation, and Congressman Baterina.

In a Resolution dated 1 February 2006, this Court denied with finality the Motion for Partial Reconsideration of therein petitioners and remained faithful to its assailed Decision based on the following ratiocination:

Admittedly, the 2004 Resolution in *Agan* could be construed as mandating the full payment of the final amount of just compensation

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[13] *Id*. at 549-550.

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before the Government may be permitted to take over the NAIA 3. However, the Decision ultimately rejected such a construction, acknowledging the public good that would result from the immediate operation of the NAIA 3. Instead, the Decision adopted an interpretation which is in consonance with Rep. Act No. 8974 and with equitable standards as well, that allowed the Government to take possession of the NAIA 3 after payment of the proffered value of the facilities to PIATCO. Such a reading is substantially compliant with the pronouncement in the 2004 *Agan* Resolution, and is in accord with law and equity. In contrast, the Government's position, hewing to the strict application of Rule 67, would permit the Government to acquire possession over the NAIA 3 and implement its operation without having to pay PIATCO a single centavo, a situation that is obviously unfair. Whatever animosity the Government may have towards PIATCO does not acquit it from settling its obligations to the latter, particularly those which had already been previously affirmed by this Court.[14]

The Court, in the same Resolution, denied all the three motions for intervention of Asakihosan Corporation, Takenaka Corporation, and Congressman Baterina, and ruled as follows:

We now turn to the three (3) motions for intervention all of which were filed after the promulgation of the Court's Decision. All three (3) motions must be denied. Under Section 2, Rule 19 of the 1997 Rules of Civil Procedure the motion to intervene may be filed at any time before rendition of judgment by the court. Since this case originated from an original action filed before this Court, the appropriate time to file the motions-in-intervention in this case if ever was before and not after resolution of this case. To allow intervention at this juncture would be highly irregular. It is extremely improbable that the movants were unaware of the pendency of the present case before the Court, and indeed none of them allege such lack of knowledge.

Takenaka and Asahikosan rely on *Mago v. Court of Appeals* wherein the Court took the extraordinary step of allowing the motion for intervention even after the challenged order of the trial court had already become final. Yet it was apparent in *Mago* that the movants therein were not impleaded despite being indispensable parties, and had not even known of the existence of the case before the trial court,

[14] Resolution, *Republic v. Gingoyon, supra* note 2 at 469-470.

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and the effect of the final order was to deprive the movants of their land. In this case, neither Takenaka nor Asahikosan stand to be dispossessed by reason of the Court's Decision. There is no palpable due process violation that would militate the suspension of the procedural rule.

Moreover, the requisite legal interest required of a party-in-intervention has not been established so as to warrant the extra-ordinary step of allowing intervention at this late stage. As earlier noted, the claims of Takenaka and Asahikosan have not been judicially proved or conclusively established as fact by any trier of facts in this jurisdiction. Certainly, they could not be considered as indispensable parties to the petition for *certiorari*. In the case of Representative Baterina, he invokes his prerogative as legislator to curtail the disbursement without appropriation of public funds to compensate PIATCO, as well as that as a taxpayer, as the basis of his legal standing to intervene. However, it should be noted that the amount which the Court directed to be paid by the Government to PIATCO was derived from the money deposited by the Manila International Airport Authority, an agency which enjoys corporate autonomy and possesses a legal personality separate and distinct from those of the National Government and agencies thereof whose budgets have to be approved by Congress.

It is also observed that the interests of the movants-in-intervention may be duly litigated in proceedings which are extant before lower courts. There is no compelling reason to disregard the established rules and permit the interventions belatedly filed after the promulgation of the Court's Decision.[15]

Asia's Emerging Dragon Corporation v. Department of Transportation and Communications and Manila International Airport Authority (G.R. No. 169914)

Banking on this Court's declaration in *Agan* that the award of the NAIA IPT III Project to PIATCO is null and void, Asia's Emerging Dragon Corporation (AEDC) filed before this Court the present Petition for *Mandamus* and Prohibition (with

[15] *Id*. at 470-471.

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Application for Temporary Restraining Order), praying of this Court that:

(1) After due hearing, judgment be rendered commanding the Respondents, their officers, agents, successors, representatives or persons or entities acting on their behalf, to formally award the NAIA-APT [*sic*] III PROJECT to Petitioner AEDC and to execute and formalize with Petitioner AEDC the approved Draft Concession Agreement embodying the agreed terms and conditions for the operation of the NAIA-IPT III Project and directing Respondents to cease and desist from awarding the NAIA-IPT Project to third parties or negotiating into any concession contract with third parties.

(2) Pending resolution on the merits, a Temporary Restraining Order be issued enjoining Respondents, their officers, agents, successors or representatives or persons or entities acting on their behalf from negotiating, re-bidding, awarding or otherwise entering into any concession contract with PIATCO and other third parties for the operation of the NAIA-IPT III Project.

Other relief and remedies, just and equitable under the premises, are likewise prayed for.[16]

AEDC bases its Petition on the following grounds:

I. PETITIONER AEDC, BEING THE RECOGNIZED AND UNCHALLENGED ORIGINAL PROPONENT, HAS THE EXCLUSIVE, CLEAR AND VESTED STATUTORY RIGHT TO THE AWARD OF THE NAIA-IPT III PROJECT;

II. RESPONDENTS HAVE A STATUTORY DUTY TO PROTECT PETITIONER AEDC AS THE UNCHALLENGED ORIGINAL PROPONENT AS A RESULT OF THE SUPREME COURT'S NULLIFICATION OF THE AWARD OF THE NAIA-IPT III PROJECT TO PIATCO[; and]

III. RESPONDENTS HAVE NO LEGAL BASIS OR AUTHORITY TO TAKE OVER THE NAIA-IPT III PROJECT, TO THE EXCLUSION OF PETITIONER AEDC, OR TO AWARD THE PROJECT TO THIRD PARTIES.[17]

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[16] *Rollo* of G.R. No. 169914, pp. 58-59.

[17] *Id*. at 33.

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At the crux of the Petition of AEDC is its claim that, being the recognized and unchallenged original proponent of the NAIA IPT III Project, it has the exclusive, clear, and vested statutory right to the award thereof. However, the Petition of AEDC should be dismissed for lack of merit, being as it is, substantially and procedurally flawed.

SUBSTANTIVE INFIRMITY

A petition for *mandamus* is governed by Section 3 of Rule 65 of the Rules of Civil Procedure, which reads –

> **SEC. 3.** *Petition for mandamus.* – When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law, the person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent, immediately or some other time to be specified by the court, to do the act required to be done to protect the rights of the petitioner, and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent.

It is well-established in our jurisprudence that only specific legal rights are enforceable by *mandamus*, that the right sought to be enforced must be certain and clear, and that the writ will not issue in cases where the right is doubtful. Just as fundamental is the principle governing the issuance of *mandamus* that the duties to be performed must be such as are clearly and peremptorily enjoined by law or by reason of official station.[18]

A rule long familiar is that *mandamus* never issues in doubtful cases. It requires a showing of a complete and clear legal right in the petitioner to the performance of ministerial acts. In varying language, the principle echoed and reechoed is that legal rights may be enforced by *mandamus* only if those rights are well-

[18] *Sanson v. Barrios*, 63 Phil. 198, 202 (1936).

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defined, clear and certain. Otherwise, the *mandamus* petition must be dismissed.[19]

The right that AEDC is seeking to enforce is supposedly enjoined by Section 4-A of Republic Act No. 6957,[20] as amended by Republic Act No. 7718, on unsolicited proposals, which provides –

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

In furtherance of the afore-quoted provision, the Implementing Rules and Regulations (IRR) of Republic Act No. 6957, as amended by Republic Act No. 7718, devoted the entire Rule 10 to Unsolicited Proposals, pertinent portions of which are reproduced below –

Sec. 10.1. Requisites for Unsolicited Proposals. – Any Agency/LGU may accept unsolicited proposals on a negotiated basis provided that all the following conditions are met:

a. the project involves a new concept or technology and/or is not part of the list of priority projects;

b. no direct government guarantee, subsidy or equity is required; and

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[19] *Isada v. Judge Bocar*, 159 Phil. 57, 67 (1975).

[20] An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for other Purposes.

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c. the Agency/LGU concerned has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days. In the event that another project proponent submits a price proposal lower than that submitted by the original proponent, the latter shall have the right to match said price proposal within thirty (30) working days. Should the original proponent fail to match the lower price proposal submitted within the specified period, the contract shall be awarded to the tenderer of the lowest price. On the other hand, if the original project proponent matches the submitted lowest price within the specified period, he shall be immediately be awarded the project.

x x x x x x x x x

Sec. 10.6. Evaluation of Unsolicited Proposals. – The Agency/LGU is tasked with the initial evaluation of the proposal. The Agency/LGU shall: 1) appraise the merits of the project; 2) evaluate the qualification of the proponent; and 3) assess the appropriateness of the contractual arrangement and reasonableness of the risk allocation. The Agency/LGU is given sixty (60) days to evaluate the proposal from the date of submission of the complete proposal. Within this 60-day period, the Agency/LGU, shall advise the proponent in writing whether it accepts or rejects the proposal. **Acceptance means commitment of the Agency/LGU to pursue the project and recognition of the proponent as the "original proponent." At this point, the Agency/LGU will no longer entertain other similar proposals until the solicitation of comparative proposals.** The implementation of the project, however, is still contingent primarily on the approval of the appropriate approving authorities consistent with Section 2.7 of these IRR, the agreement between the original proponent and the Agency/LGU of the contract terms, and the approval of the contract by the [Investment Coordination Committee (ICC)] or Local Sanggunian.

x x x x x x x x x

Sec. 10.9. Negotiation With the Original Proponent. – **Immediately after ICC/Local Sanggunian's clearance of the project, the Agency/LGU shall proceed with the in-depth negotiation of the project scope, implementation arrangements and concession agreement, all of which will be used in the Terms of Reference for the solicitation of comparative proposals**. The Agency/LGU and the proponent are given ninety (90) days upon receipt of ICC's approval of the project to

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conclude negotiations. The Agency/LGU and the original proponent shall negotiate in good faith. **However, should there be unresolvable differences during the negotiations, the Agency/LGU shall have the option to reject the proposal and bid out the project. On the other hand, if the negotiation is successfully concluded, the original proponent shall then be required to reformat and resubmit its proposal in accordance with the requirements of the Terms of Reference to facilitate comparison with the comparative proposals. The Agency/LGU shall validate the reformatted proposal if it meets the requirements of the TOR prior to the issuance of the invitation for comparative proposals.**

x x x x x x x x x

Sec. 10.11. Invitation for Comparative Proposals. The Agency/LGU shall publish the invitation for comparative or competitive proposals only after ICC/Local Sanggunian issues a no objection clearance of the draft contract. The invitation for comparative or competitive proposals should be published at least once every week for three (3) weeks in at least one (1) newspaper of general circulation. It shall indicate the time, which should not be earlier than the last date of publication, and place where tender/bidding documents could be obtained. It shall likewise explicitly specify a time of sixty (60) working days reckoned from the date of issuance of the tender/bidding documents upon which proposals shall be received. Beyond said deadline, no proposals shall be accepted. A pre-bid conference shall be conducted ten (10) working days after the issuance of the tender/bidding documents.

Sec. 10.12. Posting of Bid Bond by Original Proponent. – The original proponent shall be required at the date of the first date of the publication of the invitation for comparative proposals to **submit a bid bond equal to the amount and in the form required of the challengers**.

Sec. 10.13. Simultaneous Qualification of the Original Proponent. – The Agency/LGU shall qualify the original proponent based on the provisions of Rule 5 hereof, within thirty (30) days from start of negotiation. For consistency, the evaluation criteria used for qualifying the original proponent should be the same criteria used in the Terms of Reference for the challengers.

x x x x x x x x x

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Sec. 10.16. Disclosure of the Price Proposal. – The disclosure of the price proposal of the original proponent in the Tender Documents will be left to the discretion of the Agency/LGU. However, if it was not disclosed in the Tender Documents, the original proponent's price proposal should be revealed upon the opening of the financial proposals of the challengers. **The right of the original proponent to match the best proposal within thirty (30) working days starts upon official notification by the Agency/LGU of the most advantageous financial proposal**. (Emphasis ours.)

In her sponsorship speech on Senate Bill No. 1586 (the precursor of Republic Act No. 7718), then Senator (now President of the Republic of the Philippines) Gloria Macapagal-Arroyo explained the reason behind the proposed amendment that would later become Section 4-A of Republic Act No. 6957, as amended by Republic Act No. 7718:

The object of the amendment is to protect proponents which have already incurred costs in the conceptual design and in the preparation of the proposal, and which may have adopted an imaginative method of construction or innovative concept for the proposal. The amendment also aims to harness the ingenuity of the private sector to come up with solutions to the country's infrastructure problems.[21]

It is irrefragable that Section 4-A of Republic Act No. 6957, as amended by Republic Act No. 7718, and Section 10 of its IRR, accord certain rights or privileges to the original proponent of an unsolicited proposal for an infrastructure project. They are meant to encourage private sector initiative in conceptualizing infrastructure projects that would benefit the public. Nevertheless, none of these rights or privileges would justify the automatic award of the NAIA IPT III Project to AEDC after its previous award to PIATCO was declared null and void by this Court in *Agan*.

The rights or privileges of an original proponent of an unsolicited proposal for an infrastructure project are never meant to be absolute. Otherwise, the original proponent can hold the Government hostage and secure the award of the infrastructure

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[21] CP-Senate TSP, 25 January 1994, *Rollo* of G.R. No. 169914, p. 75.

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project based solely on the fact that it was the first to submit a proposal. The absurdity of such a situation becomes even more apparent when considering that the proposal is unsolicited by the Government. The rights or privileges of an original proponent depends on compliance with the procedure and conditions explicitly provided by the statutes and their IRR.

An unsolicited proposal is subject to evaluation, after which, the government agency or local government unit (LGU) concerned may accept or reject the proposal outright.

Under Section 10.6 of the IRR, the "acceptance" of the unsolicited proposal by the agency/LGU is limited to the "commitment of the [a]gency/LGU to pursue the project and recognition of the proponent as the 'original proponent.'" Upon acceptance then of the unsolicited proposal, the original proponent is **recognized** as such but no award is yet made to it. The **commitment** of the agency/LGU upon acceptance of the unsolicited proposal is to the **pursuit of the project**, regardless of to whom it shall subsequently award the same. The acceptance of the unsolicited proposal only precludes the agency/LGU from entertaining other similar proposals **until** the solicitation of comparative proposals.

Consistent in both the statutes and the IRR is the requirement that invitations be published for comparative or competitive proposals. Therefore, it is mandatory that a public bidding be held before the awarding of the project. The negotiations between the agency/LGU and the original proponent, as provided in Section 10.9 of the IRR, is for the sole purpose of coming up with draft agreements, which shall be used in the Terms of Reference (TOR) for the solicitation of comparative proposals. Even at this point, there is no definite commitment made to the original proponent as to the awarding of the project. In fact, the same IRR provision even gives the concerned agency/LGU, in case of unresolvable differences during the negotiations, the option to reject the original proponent's proposal and just bid out the project.

Generally, in the course of processing an unsolicited proposal, the original proponent is treated in much the same way as all

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other prospective bidders for the proposed infrastructure project. It is required to reformat and resubmit its proposal in accordance with the requirements of the TOR.[22] It must submit a bid bond equal to the amount and in the form required of the challengers.[23] Its qualification shall be evaluated by the concerned agency/ LGU, using evaluation criteria in accordance with Rule 5[24] of the IRR, and which shall be the same criteria to be used in the TOR for the challengers.[25] These requirements ensure that the public bidding under Rule 10 of IRR on Unsolicited Proposals still remain in accord with the three principles in public bidding, which are: the offer to the public, an opportunity for competition, and a basis for exact comparison of bids.[26]

The special rights or privileges of an original proponent thus come into play only when there are other proposals submitted during the public bidding of the infrastructure project. As can be gleaned from the plain language of the statutes and the IRR, the original proponent has: (1) the right to match the lowest or most advantageous proposal within 30 working days from notice thereof, and (2) in the event that the original proponent is able to match the lowest or most advantageous proposal submitted, then it has the right to be awarded the project. The second right or privilege is contingent upon the actual exercise by the original proponent of the first right or privilege. Before the project could be awarded to the original proponent, he must have been able to match the lowest or most advantageous proposal within the prescribed period. Hence, when the original proponent is able to timely match the lowest or most advantageous proposal, with all things being equal, it shall enjoy preference in the awarding of the infrastructure project.

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[22] Section 10.9 of the IRR.

[23] Section 10.12 of the IRR.

[24] On qualification of bidders.

[25] Section 10.13 of the IRR.

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

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This is the extent of the protection that Legislature intended to afford the original proponent, as supported by the exchange between Senators Neptali Gonzales and Sergio Osmeña during the Second Reading of Senate Bill No. 1586:

Senator Gonzales:

x x x x x x x x x

The concept being that in case of an unsolicited proposal and nonetheless public bidding has been held, then **[the original proponent] shall, in effect, be granted what is the equivalent of the right of first refusal by offering a bid which shall equal or better the bid of the winning bidder within a period** of, let us say, 30 days from the date of bidding.

Senator Osmeña:

x x x x x x x x x

To capture the tenor of the proposal of the distinguished Gentleman, a subsequent paragraph has to be added which says, **"IF THERE IS A COMPETITIVE PROPOSAL, THE ORIGINAL PROPONENT SHALL HAVE THE RIGHT TO EQUAL THE TERMS AND CONDITIONS OF THE COMPETITIVE PROPOSAL."**

In other words, if there is nobody who will submit a competitive proposal, then nothing is lost. Everybody knows it, and it is open and transparent. But if somebody comes in with another proposal – and because it was the idea of the original proponent – that proponent now has the right to equal the terms of the original proposal.

SENATOR GONZALES:

That is the idea, Mr. President. Because it seems to me that it is utterly unfair for one who has conceived an idea or a concept, spent and invested in feasibility studies, in the drawing of plans and specifications, and the project is submitted to a public bidding, then somebody will win on the basis of plans and specifications and concepts conceived by the original proponent**. He should at least be given the right to submit an equalizing bid**. x x x.[27] (Emphasis ours.)

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[27] CP-Senate TSP, 1 March 1994, *Rollo* of G.R. No. 169914, p. 369.

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As already found by this Court in the narration of facts in *Agan*, AEDC failed to match the more advantageous proposal submitted by PIATCO by the time the 30-day working period expired on 28 November 1996;[28] and, without exercising its right to match the most advantageous proposal, it cannot now lay claim to the award of the project.

The bidding process as to the NAIA IPT III Project was already over after the award thereof to PIATCO, even if eventually, the said award was nullified and voided. The nullification of the award to PIATCO did not revive the proposal nor re-open the bidding. AEDC cannot insist that this Court turn back the hands of time and award the NAIA IPT III Project to it, as if the bid of PIATCO never existed and the award of the project to PIATCO did not take place. Such is a simplistic approach to a very complex problem that is the NAIA IPT III Project.

In his separate opinion in *Agan*, former Chief Justice Artemio V. Panganiban noted that "[T]here was effectively no public bidding to speak of, the **entire bidding process** having been flawed and tainted **from the very outset**, therefore, the award of the concession to Paircargo's successor Piatco was void, and the Concession Agreement executed with the latter was likewise void *ab initio*. x x x.[29]" (Emphasis ours.) In consideration of such a declaration that the entire bidding process was flawed and tainted from the very beginning, then, it would be senseless to re-open the same to determine to whom the project should have been properly awarded to. The process and all proposals and bids submitted in participation thereof, and not just PIATCO's, were placed in doubt, and it would be foolhardy for the Government to rely on them again. At the very least, it may be declared that there was a failure of public bidding.[30]

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[28] Decision, *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, *supra* note 1 at 794.

[29] *Id.* at 851-852.

[30] Section 11.9 of the IRR provides that, "When no complying bids are received or in case of failure to execute the contract with a qualified

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In addition, PIATCO is already close to finishing the building of the structures comprising NAIA IPT III,[31] a fact that this Court cannot simply ignore. The NAIA IPT III Project was proposed, subjected to bidding, and awarded as a build-operate-transfer (BOT) project. A BOT project is defined as –

> A contractual arrangement whereby the project proponent undertakes the **construction, including financing**, of a given infrastructure facility, and the **operation and maintenance** thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, and operating and maintenance expenses in the project. The project proponent **transfers** the facility to the government agency or local government unit concerned at the end of the fixed term that shall not exceed fifty (50) years. This shall include a supply-and-operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government so requires, operates the facility providing in the process technology transfer and training to Filipino nationals.[32] (Emphasis ours.)

The original proposal of AEDC is for a BOT project, in which it undertook to *build*, *operate*, and *transfer* to the Government the NAIA IPT III facilities. This is clearly no longer applicable or practicable under the existing circumstances. It is undeniable that the physical structures comprising the NAIA IPT III Project are already substantially built, and there is almost nothing left for AEDC to construct. Hence, the project could no longer be awarded to AEDC based on the theory of legal impossibility of performance.

Neither can this Court revert to the original proposal of AEDC and award to it only the unexecuted components of the NAIA

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and contracting bidder due to the refusal of the latter, the bidding shall be declared a failure. In such cases, the project shall be subjected to a rebidding.

[31] Resolution, *Agan, Jr. v. Philippine International Air Terminals Co., Inc., supra* note 1, at 603.

[32] Section 1.3(c)(iii), Rule 1, of the IRR of Republic Act No. 6957.

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IPT III Project. Whoever shall assume the obligation to operate and maintain NAIA IPT III and to subsequently transfer the same to the Government (in case the operation is not assumed by the Government itself) shall have to do so on terms and conditions that would necessarily be different from the original proposal of AEDC. It will no longer include any undertaking to build or construct the structures. An amendment of the proposal of AEDC to address the present circumstances is out of the question since such an amendment would be substantive and tantamount to an entirely new proposal, which must again be subjected to competitive bidding.

AEDC's offer to reimburse the Government the amount it shall pay to PIATCO for the NAIA IPT III Project facilities, as shall be determined in the ongoing expropriation proceedings before the RTC of Pasay City, cannot restore AEDC to its status and rights as the project proponent. It must be stressed that the law requires the project proponent to undertake the construction of the project, **including** financing; financing, thus, is but a component of the construction of the structures and not the entirety thereof.

Moreover, this "reimbursement arrangement" may even result in the unjust enrichment of AEDC. In its original proposal, AEDC offered to construct the NAIA IPT III facilities for $350 million or ₱9 billion at that time. In exchange, AEDC would share a certain percentage of the gross revenues with, and pay a guaranteed annual income to the Government upon operation of the NAIA IPT III. In *Gingoyon*, the proferred value of the NAIA IPT III facilities was already determined to be ₱3 billion. It seems improbable at this point that the balance of the value of said facilities for which the Government is still obligated to pay PIATCO shall reach or exceed ₱6 billion. There is thus the possibility that the Government shall be required to pay PIATCO an amount less than ₱9 billion. If AEDC is to reimburse the Government only for the said amount, then it shall acquire the NAIA IPT III facilities for a price less than its original proposal of ₱9 billion. Yet, per the other terms of its original proposal, it may still recoup a capital investment of

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₱9 billion plus a reasonable rate of return of investment. A change in the agreed value of the NAIA IPT III facilities already built cannot be done without a corresponding amendment in the other terms of the original proposal as regards profit sharing and length of operation; otherwise, AEDC will be unjustly enriched at the expense of the Government.

Again, as aptly stated by former Chief Justice Panganiban, in his separate opinion in *Agan*:

> If the PIATCO contracts are junked altogether as I think they should be, should not AEDC automatically be considered the winning bidder and therefore allowed to operate the facility? My answer is a stone-cold 'No.' AEDC never won the bidding, never signed any contract, and never built any facility. Why should it be allowed to *automatically* step in and benefit from the greed of another?[33]

The claim of AEDC to the award of the NAIA IPT III Project, after the award thereof to PIATCO was set aside for being null and void, grounded solely on its being the original proponent of the project, is specious and an apparent stretch in the interpretation of Section 4-A of Republic Act No. 6957, as amended by Republic Act No. 7718, and Rule 10 of the IRR.

In all, just as AEDC has no legal right to the NAIA IPT III Project, corollarily, it has no legal right over the NAIA IPT III facility. AEDC does not own the NAIA IPT III facility, which this Court already recognized in *Gingoyon* as owned by PIATCO; nor does AEDC own the land on which NAIA IPT III stands, which is undisputedly owned by the Republic through the Bases Conversion Development Authority (BCDA). AEDC did not fund any portion of the construction of NAIA IPT III, which was entirely funded by PIATCO. AEDC also does not have any kind of lien over NAIA IPT III or any kind of legal entitlement to occupy the facility or the land on which it stands. Therefore, nothing that the Government has done or will do in relation to the project could possibly prejudice or injure AEDC. AEDC then does not possess any legal personality to interfere

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[33] Decision, *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, *supra* note 1 at 899.

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with or restrain the activities of the Government as regards NAIA IPT III. Neither does it have the legal personality to demand that the Government deliver or sell to it the NAIA IPT III facility despite the express willingness of AEDC to reimburse the Government the proferred amount it had paid PIATCO and complete NAIA IPT III facility at its own cost.

AEDC invokes the Memorandum of Agreement, purportedly executed between the DOTC and AEDC on 26 February 1996, following the approval of the NAIA IPT III Project by the National Economic Development Authority Board in a Resolution dated 13 February 1996, which provided for the following commitments by the parties:

a. commitment of Respondent DOTC to target mid 1996 as the time frame for the formal award of the project and commencement of site preparation and construction activities with the view of a partial opening of the Terminal by the first quarter of 1998;

b. commitment of Respondent DOTC to pursue the project envisioned in the unsolicited proposal and commence and conclude as soon as possible negotiations with Petitioner AEDC on the BOT contract;

c. commitment of Respondent DOTC to make appropriate arrangements through which the formal award of the project can be affected[;]

d. commitment of Petitioner AEDC to a fast track approach to project implementation and to commence negotiations with its financial partners, investors and creditors;

e. commitment of Respondent DOTC and Petitioner AEDC to fast track evaluation of competitive proposals, screening and eliminating nuisance comparative bids;[34]

It is important to note, however, that the document attached as Annex "E" to the Petition of AEDC is a "certified photocopy of records on file." This Court cannot give much weight to said document considering that its existence and due execution have not been established. It is not notarized, so it does not

[34] Petition, G.R. No. 169914, pp. 14-15.

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enjoy the presumption of regularity of a public document. It is not even witnessed by anyone. It is not certified true by its supposed signatories, Secretary Jesus B. Garcia, Jr. for DOTC and Chairman Henry Sy, Sr. for AEDC, or by any government agency having its custody. It is certified as a photocopy of records on file by an Atty. Cecilia L. Pesayco, the Corporate Secretary, of an unidentified corporation.

Even assuming for the sake of argument, that the said Memorandum of Agreement, is in existence and duly executed, it does little to support the claim of AEDC to the award of the NAIA IPT III Project. The commitments undertaken by the DOTC and AEDC in the Memorandum of Agreement may be simply summarized as a commitment to comply with the procedure and requirements provided in Rules 10 and 11 of the IRR. It bears no commitment on the part of the DOTC to award the NAIA IPT III Project to AEDC. On the contrary, the document includes express stipulations that negate any such government obligation. Thus, in the first clause,[35] the DOTC affirmed its commitment to pursue, implement and complete the NAIA IPT III Project on or before 1998, noticeably without mentioning that such commitment was to pursue the project specifically with AEDC. Likewise, in the second clause,[36] it was emphasized that the DOTC shall pursue the project under Rules 10 and 11 of the IRR of Republic Act No. 6957, as

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[35] The first stipulation in the Memorandum of Agreement exactly reads:

1. The DOTC, on its own behalf and in representation of the [Government of the Philippines (GOP)], hereby represents that the NAIA IPT 3 project is consistent with the development program of the DOTC and the GOP, and the Government is unequivocally committed to pursue, implement and complete the same on or before the year 1998. (*Rollo*, pp. 107.)

[36] The second stipulation in the Memorandum of Agreement is reproduced below:

2. The DOTC will undertake the NATIA IPT 3 Project under R.A. No. 6957 as amended by R.A. No. 7718 and its IRR. Having officially secured ICC approval of the unsolicited proposal of AEDC, the DOTC commits to pursue the project under Rules 10 and 11 of the IRR, subject to the existing laws, rules and regulations applicable or relevant thereto. (*Id*.)

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amended by Republic Act No. 7718. And most significantly, the tenth clause of the same document provided:

> 10. Nothing in this Memorandum of Understanding shall be understood, interpreted or construed as permitting, allowing or authorizing the circumvention of, or non-compliance with, or as waiving, the provisions of, and requirements and procedures under, existing laws, rules and regulations.[37]

AEDC further decries that:

> 24. In carrying out its commitments under the DOTC-AEDC MOU, Petitioner AEDC undertook the following activities, incurring in the process tremendous costs and expenses.
>
> a. pre-qualified 46 design and contractor firms to assist in the NAIA-IPT III Project;
>
> b. appointed a consortium of six (6) local banks as its financial advisor in June 1996;
>
> c. hired the services of GAIA South, Inc. to prepare the Project Description Report and to obtain the Environmental Clearance Certificate (ECC) for the NAIA-IPT III Project;
>
> d. coordinated with the Airline Operators Association, Bases Conversion Development Authority, Philippine Air Force, Bureau of Customs, Bureau of Immigration, relative to their particular requirements regarding the NAIA-IPT III [P]roject; and
>
> e. negotiated and entered into firm commitments with Ital Thai, Marubeni Corporation and Mitsui Corporation as equity partners.[38]

While the Court may concede that AEDC, as the original proponent, already expended resources in its preparation and negotiation of its unsolicited proposal, the mere fact thereof does not entitle it to the instant award of the NAIA IPT III Project. AEDC was aware that the said project would have to undergo public bidding, and there existed the possibility that

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[37] *Id*. at 108.

[38] Petition, *Rollo* of G.R. No. 169914, p. 22.

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another proponent may submit a more advantageous bid which it cannot match; in which case, the project shall be awarded to the other proponent and AEDC would then have no means to recover the costs and expenses it already incurred on its unsolicited proposal. It was a given business risk that AEDC knowingly undertook.

Additionally, the very defect upon which this Court nullified the award of the NAIA IPT III Project to PIATCO similarly taints the unsolicited proposal of AEDC. This Court found Paircargo Consortium financially disqualified after striking down as incorrect the PBAC's assessment of the consortium's financial capability. According to the Court's *ratio* in *Agan*:

> As the minimum project cost was estimated to be US$350,000,000.00 or roughly ₱9,183,650,000.00, 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**.
>
> x x x x x x x x x
>
> 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**, 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.**
>
> x x x x x x x x x
>
> 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

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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.[39]

Pursuant to the above-quoted ruling, AEDC, like the Paircargo Consortium, would not be financially qualified to undertake the NAIA IPT III Project. Based on AEDC's own submissions to the Government, it had then a paid-in capital of only **₱150,000,000.00**,[40] which was less than the **₱558,384,871.55** that Paircargo Consortium was capable of investing in the NAIA IPT III Project, and even far less that what this Court prescribed as the minimum equity investment required for the project in the amount of **₱2,755,095,000.00** or 30% of the project cost. AEDC had not sufficiently demonstrated that it would have been financially qualified to undertake the project **at the time of submission of the bids**.

Instead, AEDC took pains to present to this Court that allowing it to take over and operate NAIA IPT III at present would be beneficial to the Government. This Court must point out, however, that AEDC is precisely making a new proposal befitting the current status of the NAIA IPT III Project, contrary to its own argument that it is merely invoking its original BOT proposal. And it is not for this Court to evaluate AEDC's new proposal and assess whether it would truly be most beneficial for the Government, for the same is an executive function rather than judicial, for which the statutes and regulations have sufficiently provided standards and procedures for evaluation.

It can even be said that if the award of the NAIA IPT III Project was merely a matter of choosing between PIATCO and AEDC (which it is not), there could be no doubt that PIATCO is more qualified to operate the structure that PIATCO

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[39] Decision, *Agan, Jr. v. PIATCO*, *supra* note 1 at pp. 809-813.

[40] *Rollo* of G.R. No. 169914, p. 84.

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itself built and PIATCO's offer of ₱17.75 Billion in annual guaranteed payments to the Government is far better that AEDC's offer of ₱135 Million.

Hence, AEDC is not entitled to a writ of *mandamus*, there being no specific, certain, and clear legal right to be enforced, nor duty to be performed that is clearly and peremptorily enjoined by law or by reason of official station.

PROCEDURAL LAPSES

In addition to the substantive weaknesses of the Petition of AEDC, the said Petition also suffers from procedural defects.

AEDC revived its hope to acquire the NAIA IPT III Project when this Court promulgated its Decision in *Agan* on 5 May 2003. The said Decision became final and executory on 17 February 2004 upon the denial by this Court of the Motion for Leave to File Second Motion for Reconsideration submitted by PIATCO. It is this Decision that declared the award of the NAIA IPT III Project to PIATCO as null and void; without the same, then the award of the NAIA IPT III Project to PIATCO would still subsist and other persons would remain precluded from acquiring rights thereto, including AEDC. Irrefutably, the present claim of AEDC is rooted in the Decision of this Court in *Agan*. However, AEDC filed the Petition at bar only 20 months after the promulgation of the Decision in *Agan* on 5 May 2003.

It must be emphasized that under Sections 2 and 3, Rule 65 of the revised Rules of Civil Procedure, petitions for prohibition and *mandamus*, such as in the instant case, can only be resorted to when there is no other plain, speedy and adequate remedy for the party in the ordinary course of law.

In *Cruz v. Court of Appeals*,[41] this Court elucidates that –

> Although Rule 65 does not specify any period for the filing of a petition for *certiorari* and *mandamus*, it must, nevertheless, be filed within a reasonable time. In *certiorari* cases, the definitive rule now is that such reasonable time is **within three months** from the

[41] 322 Phil. 649, 664-665 (1996).

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commission of the complained act. The same rule should apply to *mandamus* cases.

The unreasonable delay in the filing of the petitioner's *mandamus* suit unerringly negates any claim that the application for the said extraordinary remedy was the most expeditious and speedy available to the petitioner. (Emphasis ours.)

As the revised Rules now stand, a petition for *certiorari* may be filed within 60 days from notice of the judgment, order or resolution sought to be assailed.[42] Reasonable time for filing a petition for *mandamus* should likewise be for the same period. The filing by the AEDC of its petition for *mandamus* 20 months after its supposed right to the project arose is evidently beyond reasonable time and negates any claim that the said petition for the extraordinary writ was the most expeditious and speedy remedy available to AEDC.

AEDC contends that the "reasonable time" within which it should have filed its petition should be reckoned only from 21 September 2005, the date when AEDC received the letter from the Office of the Solicitor General refusing to recognize the rights of AEDC to provide the available funds for the completion of the NAIA IPT III Project and to reimburse the costs of the structures already built by PIATCO. It has been unmistakable that even long before said letter – especially when the Government instituted with the RTC of Pasay City expropriation proceedings for the NAIA IPT III on 21 December 2004 – that the Government would not recognize any right that AEDC purportedly had over the NAIA IPT III Project and that the Government is intent on taking over and operating the NAIA IPT III itself.

Another strong argument against the AEDC's Petition is that it is already barred by *res judicata*.

In *Agan*,[43] it was noted that on 16 April 1997, the AEDC instituted before the RTC of Pasig City Civil Case No. 66213,

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[42] REVISED RULES OF CIVIL PROCEDURE, Rule 65, Section 3.

[43] Decision, *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, *supra* note 1 at 794.

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a Petition for the Declaration of Nullity of the Proceedings, *Mandamus* and Injunction, against the DOTC Secretary and the PBAC Chairman and members.

In Civil Case No. 66213, AEDC prayed for:

i) the nullification of the proceedings before the DOTC-PBAC, including its decision to qualify Paircargo Consortium and to deny Petitioner AEDC's access to Paircargo Consortium's technical and financial bid documents;

ii) the protection of Petitioner AEDC's right to match considering the void challenge bid of the Paircargo Consortium and the denial by DOTC-PBAC of access to information vital to the effective exercise of its right to match;

iii) the declaration of the absence of any other qualified proponent submitting a competitive bid in an unsolicited proposal.[44]

Despite the pendency of Civil Case No. 66213, the DOTC issued the notice of award for the NAIA IPT III Project to PIATCO on 9 July 1997. The DOTC and PIATCO also executed on 12 July 1997 the 1997 Concession Agreement. AEDC then alleges that:

k) On September 3, 1998, then Pres. Joseph Ejercito Estrada convened a meeting with the members of the Board of Petitioner AEDC to convey his "desire" for the dismissal of the *mandamus* case filed by Petition AEDC and in fact urged AEDC to immediately withdraw said case.

l) The President's direct intervention in the disposition of this *mandamus* case was a clear imposition that Petitioner AEDC had not choice but to accept. To do otherwise was to take a confrontational stance against the most powerful man in the country then under the risk of catching his ire, which could have led to untold consequences upon the business interests of the stakeholders in AEDC. Thus, Petitioner AEDC was constrained to agree to the signing of a Joint Motion to Dismiss and to the filing of the same in court.

m) Unbeknownst to AEDC at that time was that simultaneous with the signing of the July 12, 1997 Concession Agreement, the

[44] Petition, *Rollo* of G.R. No. 169914, pp. 26-27.

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DOTC and PIATCO executed a secret side agreement grossly prejudicial and detrimental to the interest of Government. It stipulated that in the event that the Civil Case filed by AEDC on April 16, 1997 is not resolved in a manner favorable to the Government, PIATCO shall be entitled to full reimbursement for all costs and expenses it incurred in order to obtain the NAIA IPT III BOT project in an amount not less than One Hundred Eighty Million Pesos (Php 180,000,000.00). This was apparently the reason why the President was determined to have AEDC's case dismissed immediately.

n) On February 9, 1999, after the Amended and Restated Concession Agreement (hereinafter referred to as "ARCA") was signed without Petitioner AEDC's knowledge, Petitioner AEDC signed a Joint Motion to Dismiss upon the representation of the DOTC that it would provide AEDC with a copy of the 1997 Concession Agreement. x x x.[45]

On 30 April 1999, the RTC of Pasig City issued an Order dismissing **with prejudice** Civil Case No. 66213 upon the execution by the parties of a Joint Motion to Dismiss. According to the Joint Motion to Dismiss –

The parties, assisted by their respective counsel, respectfully state:

1. Philippine International Air Terminals Company, Inc. ("PIATCO") and the respondents have submitted to petitioner, through the Office of the Executive Secretary, Malacañang, a copy of the Concession Agreement which they executed for the construction and operation of the Ninoy Aquino International Airport International Passenger Terminal III Project ("NAIA IPT III Project), which petitioner requested.

2. Consequently, the parties have **decided to amicably settle** the instant case and **jointly move for the dismissal** thereof without any of the parties admitting liability or conceding to the position taken by the other in the instant case.

3. Petitioner, on the other hand, and the respondents, on the other hand, hereby **release and forever discharge each other from any and all liabilities**, direct or indirect, whether criminal or civil, which arose in connection with the instant case.

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[45] *Id*. at 27-28.

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4. The parties agree to bear the costs, attorney's fees and other expenses they respectively incurred in connection with the instant case. (Emphasis ours.)

AEDC, however, invokes the purported pressure exerted upon it by then President Joseph E. Estrada, the alleged fraud committed by the DOTC, and paragraph 2 in the afore-quoted Joint Motion to Dismiss to justify the non-application of the doctrine of *res judicata* to its present Petition.

The elements of *res judicata*, in its concept as a bar by former judgment, are as follows: (1) the former judgment or order must be final; (2) it must be a judgment or order on the merits, that is, it was rendered after a consideration of the evidence or stipulations submitted by the parties at the trial of the case; (3) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and (4) there must be, between the first and second actions, identity of parties, of subject matter and of cause of action.[46] All of the elements are present herein so as to bar the present Petition.

First, the Order of the RTC of Pasig City, dismissing Civil Case No. 66213, was issued on 30 April 1999. The Joint Motion to Dismiss, deemed a compromise agreement, once approved by the court is immediately executory and not appealable.[47]

Second, the Order of the RTC of Pasig City dismissing Civil Case No. 66213 pursuant to the Joint Motion to Dismiss filed by the parties constitutes a judgment on the merits.

The Joint Motion to Dismiss stated that the parties were willing to settle the case amicably and, consequently, moved for the dismissal thereof. It also contained a provision in which the parties – the AEDC, on one hand, and the DOTC Secretary and PBAC, on the other – released and forever discharged each other from any and all liabilities, whether criminal or civil, arising in connection with the case. It is undisputable that the

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[46] *Vda. de Cruz v. Carriaga*, G.R. No. 75109-10, 28 June 1989, 174 SCRA 330, 340.

[47] *Spouses Magat v. Spouses Delizo*, 413 Phil. 24, 31-32 (2001).

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parties entered into a compromise agreement, defined as "a contract whereby the parties, by making reciprocal concessions, avoid a litigation or put an end to one already commenced.[48] Essentially, it is a contract perfected by mere consent, the latter being manifested by the meeting of the offer and the acceptance upon the thing and the cause which are to constitute the contract. Once an agreement is stamped with judicial approval, it becomes more than a mere contract binding upon the parties; having the sanction of the court and entered as its determination of the controversy, it has the force and effect of any other judgment.[49] Article 2037 of the Civil Code explicitly provides that a compromise has upon the parties the effect and authority of *res judicata*.

Because of the compromise agreement among the parties, there was accordingly a judicial settlement of the controversy, and the Order, dated 30 April 1999, of the RTC of Pasig City was no less a judgment on the merits which may be annulled only upon the ground of extrinsic fraud.[50] Thus, the RTC of Pasig City, in the same Order, correctly granted the dismissal of Civil Case No. 66213 ***with prejudice***.

A scrutiny of the Joint Motion to Dismiss submitted to the RTC of Pasig City would reveal that the parties agreed to discharge one another from any and all liabilities, whether criminal or civil, arising from the case, after AEDC was furnished with a copy of the 1997 Concession Agreement between the DOTC and PIATCO. This complete waiver was the reciprocal concession of the parties that puts to an end the present litigation, without any residual right in the parties to litigate the same in the future. Logically also, there was no more need for the parties to admit to any liability considering that they already agreed to absolutely discharge each other therefrom, without necessarily conceding to the other's position. For AEDC, it was a declaration

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[48] CIVIL CODE, Article 2028.

[49] *Domingo v. Court of Appeals*, G.R. No. 102360, 20 March 1996, 255 SCRA 189, 199-200.

[50] *Varela v. Villanueva*, 95 Phil. 248, 262 (1954).

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that even if it was not conceding to the Government's position, it was nonetheless waiving any legal entitlement it might have to sue the Government on account of the NAIA IPT III Project. Conversely, for the Government, it was an avowal that even if it was not accepting AEDC's stance, it was all the same relinquishing its right to file any suit against AEDC in connection with the same project. That none of the parties admitted liability or conceded its position is without bearing on the validity or binding effect of the compromise agreement, considering that these were not essential to the said compromise.

Third, there is no question as to the jurisdiction of the RTC of Pasig City over the subject matter and parties in Civil Case No. 66213. The RTC can exercise original jurisdiction over cases involving the issuance of writs of *certiorari*, prohibition, *mandamus*, *quo warranto*, *habeas corpus* and injunction.[51] To recall, the Petition of AEDC before the RTC of Pasig City was for the declaration of nullity of proceedings, *mandamus* and injunction. The RTC of Pasig City likewise had jurisdiction over the parties, with the voluntary submission by AEDC and proper service of summons on the DOTC Secretary and the PBAC Chairman and members.

Lastly, there is, between Civil Case No. 66213 before the RTC of Pasig City and the Petition now pending before this Court, an identity of parties, of subject matter, and of causes of action.

There is an identity of parties. In both petitions, the AEDC is the petitioner. The respondents in Civil Case No. 66213 are the DOTC Secretary and the PBAC Chairman and members. The respondents in the instant Petition are the DOTC, the DOTC Secretary, and the Manila International Airport Authority (MIAA). While it may be conceded that MIAA was not a respondent and did not participate in Civil Case No. 66213, it may be considered a successor-in-interest of the PBAC. When Civil Case No. 66213 was initiated, PBAC was then in charge of

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[51] Batas Pambansa Blg. 129, otherwise known as The Judiciary Reorganization Act of 1980, Section 21 (1).

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the NAIA IPT III Project, and had the authority to evaluate the bids and award the project to the one offering the lowest or most advantageous bid. Since the bidding is already over, and the structures comprising NAIA IPT III are now built, then MIAA has taken charge thereof. Furthermore, it is clear that it has been the intention of the AEDC to name as respondents in their two Petitions the government agency/ies and official/s who, at the moment each Petition was filed, had authority over the NAIA IPT III Project.

There is an identity of subject matter because the two Petitions involve none other than the award and implementation of the NAIA IPT III Project.

There is an identity of cause of action because, in both Petitions, AEDC is asserting the violation of its right to the award of the NAIA IPT III Project as the original proponent in the absence of any other qualified bidders. As early as in Civil Case No. 66213, AEDC already sought a declaration by the court of the absence of any other qualified proponent submitting a competitive bid for the NAIA IPT III Project, which, ultimately, would result in the award of the said project to it.

AEDC attempts to evade the effects of its compromise agreement by alleging that it was compelled to enter into such an agreement when former President Joseph E. Estrada asserted his influence and intervened in Civil Case No. 66213. This allegation deserves scant consideration. Without any proof that such events did take place, such statements remain mere allegations that cannot be given weight. One who alleges any defect or the lack of a valid consent to a contract must establish the same by full, clear and convincing evidence, not merely by preponderance thereof.[52] And, even assuming *arguendo*, that the consent of AEDC to the compromise agreement was indeed vitiated, then President Estrada was removed from office in January 2001. AEDC filed the present Petition only on 20 October 2005. The four-year prescriptive period, within which

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[52] *Cenido v. Apacionado*, G.R. No. 132474, 19 November 1999, 318 SCRA 688, 702.

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an action to annul a voidable contract may be brought, had already expired.[53]

The AEDC further claims that the DOTC committed fraud when, without AEDC's knowledge, the DOTC entered into an Amended and Restated Concession Agreement (ARCA) with PIATCO. The fraud on the part of the DOTC purportedly also vitiated AEDC's consent to the compromise agreement. It is true that a judicial compromise may be set aside if fraud vitiated the consent of a party thereof; and that the extrinsic fraud, which nullifies a compromise, likewise invalidates the decision approving it.[54] However, once again, AEDC's allegations of fraud are unsubstantiated. There is no proof that the DOTC and PIATCO willfully and deliberately suppressed and kept the information on the execution of the ARCA from AEDC. The burden of proving that there indeed was fraud lies with the party making such allegation. Each party must prove his own affirmative allegations. The burden of proof lies on the party who would be defeated if no evidence were given on either side. In this jurisdiction, fraud is never presumed.[55]

Moreover, a judicial compromise may be rescinded or set aside on the ground of fraud in accordance with Rule 38 of the Rules on Civil Procedure on petition for relief from judgment. Section 3 thereof prescribes the periods within which the petition for relief must be filed:

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[53] According to Article 1391 of the Civil Code, the action for annulment shall be brought within four years.

This period shall begin:

In cases of intimidation, violence or undue influence, from the time the defect of the consent ceases.

In case of mistake or fraud, from the time of the discovery of the same.

And when the action refers to contracts entered into by minors or other incapacitated persons, from the time the guardianship ceases.

[54] *Olego v. Rebueno*, 160-A Phil. 592, 602-603 (1975).

[55] *Benitez v. Intermediate Appellate Court*, G.R. No. 71535, 16 September 1987, 154 SCRA 41, 46.

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SEC. 3. *Time for filing petition; contents and verification.*– A petition provided for in either of the preceding sections of this Rule must be verified, filed within sixty (60) days after the petitioner learns of the judgment, final order or other proceeding to be set aside, and not more than six (6) months after such judgment or final order was entered, or such proceeding was taken, and must be accompanied with affidavits showing the fraud, accident, mistake or excusable negligence relied upon, and the facts constituting the petitioner's good and substantial cause of action or defense, as the case may be.

According to this Court's ruling in *Argana v. Republic*,[56] as applied to a judgment based on compromise, both the 60-day and six-month reglementary periods within which to file a petition for relief should be reckoned from the date when the decision approving the compromise agreement was rendered because such judgment is considered immediately executory and entered on the date that it was approved by the court. In the present case, the Order of the RTC of Pasig City granting the Joint Motion to Dismiss filed by the parties in Civil Case No. 66213 was issued on 30 April 1999, yet AEDC only spoke of the alleged fraud which vitiated its consent thereto in its Petition before this Court filed on 20 October 2005, more than six years later.

It is obvious that the assertion by AEDC of its vitiated consent to the Joint Motion to Dismiss Civil Case No. 66213 is nothing more than an after-thought and a desperate attempt to escape the legal implications thereof, including the barring of its present Petition on the ground of *res judicata*.

It is also irrelevant to the legal position of AEDC that the Government asserted in *Agan* that the award of the NAIA IPT III Project to PIATCO was void. That the Government eventually took such a position, which this Court subsequently upheld, does not affect AEDC's commitments and obligations under its judicially-approved compromise agreement in Civil Case No. 66213, which AEDC signed willingly, knowingly, and ably assisted by legal counsel.

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[56] G.R. No. 147227, 19 November 2004, 443 SCRA 184, 207.

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In addition, it cannot be said that there has been a fundamental change in the Government's position since Civil Case No. 66213, contrary to the allegation of AEDC. The Government then espoused that AEDC is not entitled to the award of the NAIA IPT III Project. The Government still maintains the exact same position presently. That the Government eventually reversed its position on the validity of its award of the project to PIATCO is not inconsistent with its position that neither should AEDC be awarded the project.

For the foregoing substantive and procedural reasons, the instant Petition of AEDC should be dismissed.

Republic of the Philippines v. Court of Appeals and Baterina (G.R. No. 174166)

As mentioned in *Gingoyon*, expropriation proceedings for the NAIA IPT III was instituted by the Government with the RTC of Pasay City, docketed as Case No. 04-0876CFM. Congressman Baterina, together with other members of the House of Representatives, sought intervention in Case No. 04-0876CFM by filing a Petition for Prohibition in Intervention (with Application for Temporary Restraining Order and Writ of Preliminary Injunction). Baterina, *et al*. believe that the Government need not file expropriation proceedings to gain possession of NAIA IPT III and that PIATCO is not entitled to payment of just compensation, arguing thus –

A) Respondent PIATCO does not own Terminal III because BOT Contracts do not vest ownership in PIATCO. As such, neither PIATCO nor FRAPORT are entitled to compensation.

B) Articles 448, *ET SEQ.*, of the New Civil Code, as regards builders in good faith/bad faith, do not apply to PIATCO's Construction of Terminal III.

C) Article 1412(2) of the New Civil Code allows the Government to demand the return of what it has given without any obligation to comply with its promise.

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D) The payment of compensation to PIATCO is unconstitutional, violative of the Build-Operate-Transfer Law, and violates the Civil Code and other laws.[57]

On 27 October 2005, the RTC of Pasay City issued an Order admitting the Petition in Intervention of Baterina, *et al.*, as well as the Complaint in Intervention of Manuel L. Fortes, Jr. and the Answer in Intervention of Gina B. Alnas, *et al.* The Republic sought reconsideration of the 27 October 2005 Order of the RTC of Pasay City, which, in an Omnibus Order dated 13 December 2005, was denied by the RTC of Pasay City as regards the intervention of Baterina, *et al.* and Fortes, but granted as to the intervention of Alnas, *et al.* On 22 March 2006, Baterina, *et al.* filed with the RTC of Pasay City a Motion to Declare in Default and/or Motion for Summary Judgment considering that the Republic and PIATCO failed to file an answer or any responsive pleading to their Petition for Prohibition in Intervention.

In the meantime, on 19 December 2005, the Court's Decision in *Gingoyon* was promulgated. Baterina also filed a Motion for Intervention in said case and sought reconsideration of the Decision therein. However, his Motion for Intervention was denied by this Court in a Resolution dated 1 February 2006.

On 27 March 2006, the RTC of Pasay City issued an Order and Writ of Execution, the dispositive portion of which reads –

WHEREFORE, let a writ of execution be issued in this case directing the Sheriff of this court to immediately implement the Order dated January 4, 2005 and January 10, 2005, as affirmed by the Decision of the Supreme Court in G.R. No. 166429 in the above-entitled case dated December 19, 2005, in the following manner:

1. Ordering the General Manager, the Senior Assistant General Manager and the Vice President of Finance of the Manila International Airport Authority (MIAA) to immediately withdraw the amount of ₱3,002,125,000.00 from the above-mentioned Certificates of US Dollar Time Deposits with the Land Bank of the Philippines, Baclaran Branch;

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[57] *Rollo* of G.R. No. 174166, Vol. I, p. 121.

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2. Ordering the Branch Manager, Land Bank of the Philippines, Baclaran Branch to immediately release the sum of ₱3,002,125,000.00 to PIATCO;

Return of Service of the Writs shall be made by the Sheriff of this court immediately thereafter;[58]

The RTC of Pasay City, in an Order, dated 15 June 2006, denied the Motions for Reconsideration of its Order and Writ of Execution filed by the Government and Fortes. Baterina, meanwhile, went before the Court of Appeals *via* a Petition for *Certiorari* and Prohibition (With Urgent Prayer for the Issuance of a Temporary Restraining Order and Writ of Preliminary Injunction), docketed as CA-G.R. No. 95539, assailing the issuance, in grave abuse of discretion, by the RTC of Pasay City of its Orders dated 27 March 2006 and 15 June 2006 and Writ of Execution dated 27 March 2006.

During the pendency of CA-G.R. No. 95539 with the Court of Appeals, the RTC of Pasay City issued an Order, dated 7 August 2006, denying the Urgent Manifestation and Motion filed by the Republic in which it relayed willingness to comply with the Order and Writ of Execution dated 27 March 2006, provided that the trial court shall issue an Order expressly authorizing the Republic to award concessions and lease portions of the NAIA IPT III to potential users. The following day, on 8 August 2006, the RTC of Pasay City issued an Order denying the intervention of Baterina, *et al.* and Fortes in Case No. 04-0876CFM. In a third Order, dated 9 August 2006, the RTC of Pasay City directed PIATCO to receive the amount of ₱3,002,125,000.00 from the Land Bank of the Philippines, Baclaran Branch.

By 24 August 2006, the Republic was all set to comply with the 9 August 2006 Order of the RTC of Pasay City. Hence, the representatives of the Republic and PIATCO met before the RTC of Pasay City for the supposed payment by the former to the latter of the proferred amount. However, on the same day, the Court of Appeals, in CA G.R. No. 95539, issued a

[58] *Rollo* of G.R. No. 174166, Vol. I, pp. 238-240.

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Temporary Restraining Order (TRO) enjoining, among other things, the RTC of Pasay City from implementing the questioned Orders, dated 27 March 2006 and 15 June 2006, or "from otherwise causing payment and from further proceeding with the determination of just compensation in the expropriation case involved herein, until such time that petitioner's motion to declare in default and motion for partial summary judgment shall have been resolved by the trial court; or it is clarified that PIATCO categorically disputes the proferred value for NAIA Terminal 3." The TRO was to be effective for 30 days. Two days later, on 26 August 2006, the Republic filed with the Court of Appeals an Urgent Motion to Lift Temporary Restraining Order, which the appellate court scheduled for hearing on 5 September 2006.

While the Urgent Motion to lift the TRO was still pending with the Court of Appeals, the Republic already filed the present Petition for *Certiorari* and Prohibition With Urgent Application for a Temporary Restraining Order and/or Writ of Preliminary Injunction, attributing to the Court of Appeals grave abuse of discretion in granting the TRO and seeking a writ of prohibition against the Court of Appeals to enjoin it from giving due course to Baterina's Petition in CA-G.R. No. 95539. The Republic thus raises before this Court the following arguments:

I

THE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO AN EXCESS OR LACK OF JURISDICTION WHEN IT GRANTED THE TEMPORARY RESTRAINING ORDER.

A. THIS HONORABLE COURT'S DECISION IN GINGOYON CONSTITUTES THE "LAW OF THE CASE."

B. THE TRO IS IN DIRECT CONTRAVENTION OF THIS COURT'S DECISION WICH HAD ATTAINED FINALITY.

II

THE REPUBLIC IS SUFFERING IRREPARABLE DAMAGE.

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III

THE COURT OF APPEALS MUST BE PROHIBITED FROM GIVING DUE COURSE TO A PETITION THAT IS DEFECTIVE IN FORM AND SUBSTANCE.

A. PRIVATE RESPONDENT HAS NO LEGAL STANDING.

1. THIS HONORABLE COURT HAS RULED THAT PRIVATE RESPONDENT HAS NO LEGAL STANDING.

2. PRIVATE RESPONDENT HAS LOST HIS STANDING AS AN INTERVENOR.

B. PRIVATE RESPONDENT FAILED TO DEMONSTRATE THAT HE IS ENTITLED TO THE INJUNCTIVE RELIEFS PRAYED FOR.

C. THE BOND POSTED IS INSUFFICIENT.

IV

GRANTING *ARGUENDO* THAT PRIVATE RESPONDENT'S PETITION IS SUFFICIENT IN FORM AND SUBSTANCE, THE SAME HAS BECOME MOOT AND ACADEMIC.

A. THE MOTION TO DECLARE IN DEFAULT AND/OR MOTION FOR PARTIAL SUMMARY JUDGMENT HAS ALREADY BEEN RESOLVED.

B. PIATCO HAS CATEGORICALLY DISPUTED THE PROFFERED VALUE FOR NAIA TERMINAL III.[59]

The Republic prays of this Court that:

(a) Pending the determination of the merits of this petition, a temporary restraining order and/or a writ of preliminary injunction be ISSUED restraining the Court of Appeals from implementing the writ of preliminary injunction in CA-G.R. SP No. 95539 and proceeding in said case such as hearing it on September 5, 2006. After both parties have been heard, the preliminary injunction be MADE PERMANENT;

(b) The Resolution date 24 August 2006 of the Court of Appeals be SET ASIDE; and

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[59] *Rollo* of G.R. No. 174166, Vol. I, pp. 34-36.

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(c) CA-G.R. SP No. 95539 be ORDERED DISMISSED.

Other just and equitable reliefs are likewise prayed for.[60]

On 4 September 2006, the Republic filed a Manifestation and Motion to Withdraw Urgent Motion to Lift Temporary Restraining Order with the Court of Appeals stating, among other things, that it had decided to withdraw the said Motion as it had opted to avail of other options and remedies. Despite the Motion to Withdraw filed by the Government, the Court of Appeals issued a Resolution, dated 8 September 2006, lifting the TRO it issued, on the basis of the following –

In view of the pronouncement of the Supreme Court in the Gingoyon case upholding the right of PIATCO to be paid the proferred value in the amount of ₱3,002,125,000.00 prior to the implementation of the writ of possession issued by the trial court on December 21, 2004 over the NAIA Passenger Terminal III, and directing the determination of just compensation, there is no practical and logical reason to maintain the effects of the Temporary Restraining Order contained in our Resolution dated August 24, 2006. Thus, We cannot continue restraining what has been mandated in a final and executory decision of the Supreme Court.

WHEREFORE, Our Resolution dated 24 August 2006 be SET ASIDE. Consequently, the Motion to Withdraw the Motion to Lift the Temporary Restraining Order is rendered moot and academic.[61]

There being no more legal impediment, the Republic tendered on 11 September 2006 Land Bank check in the amount of ₱3,002,125,000.00 representing the proferred value of NAIA IPT III, which was received by a duly authorized representative of PIATCO.

On 27 December 2006, the Court of Appeals rendered a Decision in CA G.R. No. 95539 dismissing Baterina's Petition.

The latest developments before the Court of Appeals and the RTC of Pasay City render the present Petition of the Republic moot.

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[60] *Id.* at 53-54.

[61] *Id.*, Resolution, p. 3.

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Nonetheless, Baterina, as the private respondent in the instant Petition, presented his own prayer that a judgment be rendered as follows:

A. For this Honorable Court, in the exercise of its judicial discretion to relax procedural rules consistent with *Metropolitan Traffic Command v. Gonong* and deem that justice would be better served if all ***legal issues*** involved in the expropriation case and in Baterina are resolved in this case once and for all, to **DECLARE** that:

i. TERMINAL 3, as a matter of law, is public property and thus not a proper object of eminent domain proceedings; and

ii. PIATCO, as a matter of law, is merely the builder of TERMINAL 3 and, as such, it may file a claim for recovery on *quantum meruit* with the Commission on Audi[t] for determination of the amount thereof, if any.

B. To **DIRECT** the Regional Trial Court of Pasay City, Branch 117 to dismiss the expropriation case;

C. To **DISMISS** the instant Petition and DENY The Republic's application for TRO and/or writ of preliminary injunction for lack of merit;

D. To **DECLARE** that the ₱3 Billion (representing the proferred value of TERMINAL 3) paid to PIATCO on 11 September 2006 as **funds held in trust** by PIATCO for the benefit of the Republic and subject to the outcome of the proceedings for the determination of recovery on *quantum meruit* due to PIATCO, if any.

E. To **DIRECT** the Solicitor General to disclose the evidence it has gathered on corruption, bribery, fraud, bad faith, *etc*., to this Honorable Court and the Commission on Audit, and to **DECLARE** such evidence to be admissible in any proceeding for the determination of any compensation due to PIATCO, if any.

[F]. In the alternative, to:

i. **SET ASIDE** the trial court's *Order* dated 08 August 2006 denying Private Respondent's motion for intervention in the expropriation case, and

ii. Should this Honorable Court lend credence to the argument of the Solicitor General in its *Comment* dated 20 April 2006

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> that "there are issues as to material fact that require presentation of evidence," to **REMAND** the resolution of the legal issues raised by Private Respondent to the trial court consistent with this Honorable Court's holding in the *Gingoyon Resolution* that ***"the interests of the movants-in-intervention [meaning Takenaka, Asahikosan, and herein Private Respondent] may be duly litigated in proceedings which are extant before the lower courts***."[62]

In essence, Baterina is opposing the expropriation proceedings on the ground that NAIA IPT III is already public property. Hence, PIATCO is not entitled to just compensation for NAIA IPT III. He is asking the Court to make a definitive ruling on this matter considering that it was not settled in either *Agan* or *Gingoyon*.

We disagree. Contrary to Baterina's stance, PIATCO's entitlement to just and equitable consideration for its construction of NAIA IPT III and the propriety of the Republic's resort to expropriation proceedings were already recognized and upheld by this Court in *Agan* and *Gingoyon*.

The Court's Decisions in both *Agan* and *Gingoyon* had attained finality, the former on 17 February 2004 and the latter on 17 March 2006.

This Court already made an unequivocal pronouncement in its Resolution dated 21 January 2004 in *Agan* that for the Government of the Republic to take over the NAIA IPT III facility, it has to compensate PIATCO as a builder of the structures; and that "[t]he compensation must be just and in accordance with law and equity for the government cannot unjustly enrich itself at the expense of PIATCO and its investors."[63] As between the Republic and PIATCO, the judgment on the need to compensate PIATCO before the Government may take over NAIA IPT III is already conclusive and beyond question.

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[62] *Id.*, Vol. III, Petition, pp. 80-82.

[63] *Supra* note 10.

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Hence, in *Gingoyon*, this Court declared that:

This pronouncement contains the fundamental premises which permeate this decision of the Court. Indeed, *Agan*, final and executory as it is, stands as governing law in this case, and any disposition of the present petition must conform to the conditions laid down by the Court in its 2004 *Resolution*.

x x x x x x x x x

The pronouncement in the 2004 Resolution is especially significant to this case in two aspects, namely: (i) that PIATCO must receive payment of just compensation determined in accordance with law and equity; and (ii) that the government is barred from taking over NAIA 3 until such just compensation is paid. The parties cannot be allowed to evade the directives laid down by this Court through any mode of judicial action, such as the complaint for eminent domain.

It cannot be denied though that the Court in the 2004 Resolution prescribed mandatory guidelines which the Government must observe before it could acquire the NAIA 3 facilities. Thus, the actions of respondent judge under review, as well as the arguments of the parties must, to merit affirmation, pass the threshold test of whether such propositions are in accord with the 2004 Resolution.[64]

The Court then, in *Gingoyon*, directly addressed the issue on the appropriateness of the Republic's resort to expropriation proceedings:

The Government has chosen to resort to expropriation, a remedy available under the law, which has the added benefit of an integrated process for the determination of just compensation and the payment thereof to PIATCO. We appreciate that the case at bar is a **highly unusual case**, whereby the Government seeks to expropriate a building complex constructed on land which the State already owns. There is an inherent illogic in the resort to eminent domain on property already owned by the State. At first blush, since the State already owns the property on which NAIA 3 stands, the proper remedy should be akin to an action for ejectment.

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[64] Decision, *Republic v. Gingoyon*, *supra* note 2 at 511-512.

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However, the reason for the resort by the Government to expropriation proceedings is understandable in this case. The 2004 Resolution, in requiring the payment of just compensation prior to the takeover by the Government of NAIA 3, effectively precluded it from acquiring possession or ownership of the NAIA 3 through the unilateral exercise of its rights as the owner of the ground on which the facilities stood. Thus, as things stood after the 2004 Resolution, the right of the Government to take over the NAIA 3 terminal was preconditioned by lawful order on the payment of just compensation to PIATCO as builder of the structures.

x x x x x x x x x

The right of eminent domain extends to personal and real property, and the NAIA 3 structures, adhered as they are to the soil, are considered as real property. The public purpose for the expropriation is also beyond dispute. It should also be noted that **Section 1 of Rule 67 (on Expropriation) recognizes the possibility that the property sought to be expropriated may be titled in the name of the Republic of the Philippines, although occupied by private individuals**, and in such case an averment to that effect should be made in the complaint. The instant expropriation complaint did aver that the NAIA 3 complex "stands on a parcel of land owned by the Bases Conversion Development Authority, another agency of [the Republic of the Philippines]."

Admittedly, eminent domain is **not the sole judicial recourse** by which the Government may have acquired the NAIA 3 facilities while satisfying the requisites in the 2004 Resolution. **Eminent domain though may be the most effective, as well as the speediest means by which such goals may be accomplished**. Not only does it enable immediate possession after satisfaction of the requisites under the law, it also has a built-in procedure through which just compensation may be ascertained. Thus, there should be no question as to the propriety of eminent domain proceedings in this case.

Still, in applying the laws and rules on expropriation in the case at bar, we are impelled to apply or construe these rules in accordance with the Court's prescriptions in the 2004 Resolution to achieve the end effect that the Government may validly take over the NAIA 3 facilities. Insofar as this case is concerned, the 2004 Resolution is effective not only as a legal precedent, but as the source of rights and prescriptions that must be guaranteed, if not enforced, in the resolution of this petition. Otherwise, the integrity and efficacy of

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the rulings of this Court will be severely diminished.[65] (Emphasis ours.)

The Court, also in *Gingoyon*, categorically recognized PIATCO's ownership over the structures it had built in NAIA IPT III, to wit:

There can be no doubt that PIATCO has ownership rights over the facilities which it had financed and constructed. The 2004 Resolution squarely recognized that right when it mandated the payment of just compensation to PIATCO prior to the takeover by the Government of NAIA 3. The fact that the Government resorted to eminent domain proceedings in the first place is a concession on its part of PIATCO's ownership. Indeed, if no such right is recognized, then there should be no impediment for the Government to seize control of NAIA 3 through ordinary ejectment proceedings.

x x x x x x x x x

Thus, the property subject of expropriation, the NAIA 3 facilities, are real property owned by PIATCO. x x x (Emphasis ours.)[66]

It was further settled in *Gingoyon* that the expropriation proceedings shall be held in accordance with Republic Act No. 8974,[67] thus:

Unlike in the case of Rule 67, the application of Rep. Act No. 8974 will not contravene the 2004 Resolution, which requires the payment of just compensation before any takeover of the NAIA 3 facilities by the Government. The 2004 Resolution does not particularize the extent such payment must be effected before the takeover, but it unquestionably requires at least some degree of payment to the private property owner before a writ of possession may issue. The utilization of Rep. Act No. 8974 guarantees compliance with this bare minimum requirement, as it assures the private property owner the payment of, at the very least, the proffered value of the property to be seized. Such payment of the proffered value to the owner, followed by the

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[65] *Id.* at 512-514.

[66] *Id.* at 522.

[67] An Act to Facilitate the Acquisition of Right-of-Way, Site or Location for National Government Infrastructure Projects and for other Purposes. *Id.* at 524-525.

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issuance of the writ of possession in favor of the Government, is precisely the schematic under Rep. Act No. 8974, one which facially complies with the prescription laid down in the 2004 Resolution.

And finally, as to the determination of the amount due PIATCO, this Court ruled in *Gingoyon* that:

> Under Rep. Act No. 8974, the Government is required to "immediately pay" the owner of the property the amount equivalent to the sum of (1) one hundred percent (100%) of the value of the property based on the current relevant zonal valuation of the [BIR]; and (2) the value of the improvements and/or structures as determined under Section 7. As stated above, the BIR zonal valuation cannot apply in this case, thus the amount subject to immediate payment should be limited to "the value of the improvements and/or structures as determined under Section 7," with Section 7 referring to the "implementing rules and regulations for the equitable valuation of the improvements and/or structures on the land." Under the present implementing rules in place, the valuation of the improvements/ structures are to be based using **"the replacement cost method."** However, the replacement cost is only one of the factors to be considered in determining the just compensation.
>
> In addition to Rep. Act No. 8974, the 2004 *Resolution* in *Agan* also mandated that the payment of just compensation should be **in accordance with equity as well**. Thus, in ascertaining the ultimate amount of just compensation, the duty of the trial court is to ensure that such amount conforms not only to the law, such as Rep. Act No. 8974, but to principles of equity as well.
>
> Admittedly, there is no way, at least for the present, to immediately ascertain the value of the improvements and structures since such valuation is a matter for factual determination. Yet Rep. Act No. 8974 permits an expedited means by which the Government can immediately take possession of the property without having to await precise determination of the valuation. Section 4(c) of Rep. Act No. 8974 states that "in case the completion of a government infrastructure project is of utmost urgency and importance, **and there is no existing valuation of the area concerned**, the implementing agency shall immediately pay the owner of the property its **proferred value**, taking into consideration the standards prescribed in Section 5 [of the law]." The "proffered value" may strike as a highly subjective standard based solely on the intuition of the government, but Rep. Act

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No. 8974 does provide relevant standards by which "proffered value" should be based, as well as the certainty of judicial determination of the propriety of the proffered value.

In filing the complaint for expropriation, the Government alleged to have deposited the amount of ₱3 Billion earmarked for expropriation, representing the assessed value of the property. The making of the deposit, including the determination of the amount of the deposit, was undertaken under the erroneous notion that Rule 67, and not Rep. Act No. 8974, is the applicable law. Still, as regards the amount, the Court sees no impediment to recognize this sum of ₱3 Billion as the proffered value under Section 4(b) of Rep. Act No. 8974. After all, in the initial determination of the proffered value, the Government is not strictly required to adhere to any predetermined standards, although its proffered value may later be subjected to judicial review using the standards enumerated under Section 5 of Rep. Act No. 8974.[68]

Gingoyon constitutes as the law of the case for the expropriation proceedings, docketed as Case No. 04-0876CFM, before the RTC of Pasay City. Law of the case has been defined in the following manner –

By "law of the case" is meant that "whatever is once irrevocably established as the controlling legal rule or decision between the same parties in the same case continues to be the law of the case" so long as the "facts on which such decision was predicated continue to be the facts of the case before the court" (21 C.J.S. 330). And once the decision becomes final, it is binding on all inferior courts and hence beyond their power and authority to alter or modify (*Kabigting vs. Acting Director of Prisons*, G.R. L-15548, October 30, 1962).[69]

A ruling rendered on the first appeal, constitutes the law of the case, and, even if erroneous, it may no longer be disturbed or modified since it has become final long ago.[70]

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[68] *Id*. at 526-528.

[69] *People's Homesite and Housing Corporation v. Mencias*, 127 Phil. 448, 460 (1967).

[70] *People v. Olarte*, 125 Phil. 895,899 (1967).

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The extensive excerpts from *Gingoyon* demonstrate and emphasize that the Court had already adjudged the issues raised by Baterina, which he either conveniently overlooked or stubbornly refused to accept.

The general rule precluding the relitigation of material facts or questions which were in issue and adjudicated in former action are commonly applied to all matters essentially connected with the subject matter of the litigation. Thus, it **extends to questions necessarily involved in an issue, and necessarily adjudicated, or necessarily implied in the final judgment**, although no specific finding may have been made in reference thereto, and although such matters were directly referred to in the pleadings and were not actually or formally presented. Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties and if a judgment necessarily presupposes certain premises, they are as **conclusive as the judgment itself**. Reasons for the rule are that a judgment is an adjudication on all the matters which are essential to support it, and that every proposition assumed or decided by the court leading up to the final conclusion and upon which such conclusion is based is as effectually passed upon as the ultimate question which is finally solved.[71]

Since the issues Baterina wishes to raise as an intervenor in Case No. 04-0876CFM were already settled with finality in both *Agan* and *Gingoyon*, then there is no point in still allowing his intervention. His Petition-in-Intervention would only be a relitigation of matters that had been previously adjudicated by no less than the Highest Court of the land. And, in no manner can the RTC of Pasay City in Case No. 04-0876CFM grant the reliefs he prayed for without departing from or running afoul of the final and executory Decisions of this Court in *Agan* and *Gingoyon*.

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[71] *Smith Bell & Co. (Phils.), Inc. v. Court of Appeals*, G.R. No. 56294, 20 May 1991, 197 SCRA 201, 210.

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While it is true that when this Court, in a Resolution dated 1 February 2006, dismissed the Motions for Intervention in *Gingoyon*, including that of Baterina, it also observed that the interests of the movants-in-intervention may be duly litigated in proceedings which are extant before the lower courts. This does not mean, however, that the said movants-in-interest were assured of being allowed as intervenors or that the reliefs they sought as such shall be granted by the trial courts. The fate of their intervention still rests on their interest or legal standing in the case and the merits of their arguments.

WHEREFORE, in view of the foregoing:

a. The Petition in G.R. No. 169914 is hereby *DISMISSED* for lack of merit; and

b. The Petition in G.R. No. 174166 is hereby likewise *DISMISSED* for being moot and academic.

No costs.

SO ORDERED.

Ynares-Santiago, Austria-Martinez, Carpio Morales, Tinga, and *Leonardo-de Castro, JJ.,* concur.

Puno, C.J., concurs in the result.

Quisumbing, Velasco, Jr., and *Brion, JJ.*, join the dissent of *J.* Corona.

Corona, J., see dissenting opinion.

Carpio, Azcuna, Nachura, and *Reyes, JJ.,* no part.

DISSENTING OPINION

CORONA, *J.*:

Before the Court are consolidated cases involving the Ninoy Aquino International Airport International Passenger Terminal III (NAIA IPT III). G.R. No. 169914 is a special civil action for *mandamus* and prohibition under Rule 65 of the Rules of

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Court originally filed before us. G. R. No. 174166 is a petition for *certiorari* and prohibition also under Rule 65 seeking to nullify the August 24, 2006 resolution of the Court of Appeals (CA) in CA-G.R. SP No. 95539 and to enjoin the CA from proceeding with said case.[1]

On May 5, 2003, we rendered a decision in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*[2] nullifying the 1997 Concession Agreement, the Amended and Restated Concession Agreement (ARCA) and its Supplements executed by the government (through the Department of Transportation and Communication [DOTC] and the Manila International Airport Authority [MIAA]) and the Philippine International Air Terminals Co., Inc. (PIATCO) for the development of NAIA IPT III.

On December 19, 2005, we ruled in *Republic v. Gingoyon*[3] that the national government could expropriate NAIA IPT III, with RA 8974[4] as the governing law.

In these consolidated petitions, NAIA IPT III is once again at the vortex of yet another storm. 2008 marks the fifteenth year after NAIA IPT III was first conceptualized and proposed as a BOT project. Up to now there appears to be no light at the end of the tunnel as this is the third decision of the Supreme Court on that project. How many more will there be before this project is finally opened?

Unfortunately, by its decision today in G.R. No. 169914, the majority may have not only unwittingly prolonged the opening and operation of NAIA IPT III. More significantly, it may have watered down the spirit of RA 6957, otherwise known as the

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[1] Penned by Associate Justice Renato C. Dacudao (retired) and concurred in by Associate Justices Rosmari D. Carandang and Estela M. Perlas-Bernabe of the Eighth Division of the CA; *rollo* (G.R. No. 174166), pp. 60-61.

[2] G.R. Nos. 155001, 155547, 155661 (450 Phil. 744).

[3] G.R. No. 166429, 478 SCRA 474.

[4] An Act to Facilitate the Acquisition of Right-of-Way, Site or Location for National Government Infrastructure Projects and for Other Purposes.

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Build-Operate-and-Transfer Law (BOT Law), as amended by RA 7718. In the process, it diluted the rights of an original proponent under Section 4-A of the said law. Thus, I respectfully dissent.

In G.R. No. 169914, petitioner Asia's Emerging Dragon Corporation (AEDC) seeks to: (1) compel respondents DOTC, Secretary Leandro R. Mendoza[5] and MIAA or their agents and successors to execute and formalize with AEDC the draft concession agreement for the operation of NAIA IPT III and (2) direct them to cease and desist from awarding the operation of NAIA IPT III to third parties, or negotiating and entering into any concession agreement with third parties.[6]

In G.R. No. 174166, petitioner Republic of the Philippines, through the DOTC and MIAA, prays that the August 24, 2006 resolution of the CA be set aside[7] and CA-G.R. SP No. 95539 be ordered dismissed.[8] In the August 24, 2006 resolution, the CA issued a Temporary Restraining Order (TRO) enjoining the payment of the proffered value of NAIA IPT III.

The antecedent facts from *Agan* serve as a backdrop for both petitions:

> 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 [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

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[5] In his capacity as Secretary of Transportation and Communication.

[6] *Rollo* (G.R. No. 169914), p. 58.

[7] This was rendered moot when the CA issued a resolution dated September 8, 2006 lifting the TRO issued by virtue of the August 24, 2006 resolution and setting aside the said resolution.

[8] *Rollo* (G.R. No. 174166), pp. 53-54.

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[NAIA IPT III] under a build-operate-and-transfer arrangement pursuant to RA 6957 as amended by RA 7718 (BOT Law).

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.[9]

On February 26, 1996, respondent DOTC and AEDC signed a memorandum of understanding (MOU) stipulating the following:

1. The DOTC, on its own behalf and in representation of the [Government of the Philippines (GOP)], hereby represents that the [NAIA IPT III] project is consistent with the development program of the DOTC and the GOP, and the Government is unequivocally committed to pursue, implement and complete the same on or before the year 1998.

2. The DOTC will undertake the [NAIA IPT III] Project under [RA 6957] as amended by [RA 7718] and its IRR. Having officially secured ICC approval of the unsolicited proposal of AEDC, the DOTC commits to pursue the project under Rules 10 and 11 of the IRR, subject to the existing laws, rules and regulations applicable or relevant thereto.

3. The DOTC hereby officially declares the necessity and urgency of the [NAIA IPT III] Project. **Accordingly, the DOTC hereby manifests its desire for AEDC to have at least a partial soft opening of Terminal 3 by the first quarter of 1998, to substantially complete the works by mid 1998 and to commission and open the Terminal by the third quarter of 1998**.

4. In pursuance of paragraph 3 hereof, AEDC shall adopt a fast track approach to project implementation and accordingly has

[9] *Supra* note 2, at 788-789.

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engaged project advisors and consultants to prepare the preliminary designs and tender documents for the major works of the project.

5. Without prejudice to the outcome of negotiations on the terms and conditions of the BOT Contract that shall be executed, **the parties commit themselves** to the aforesaid schedule.

6. Consistent with the fast track approach and to anticipate and preempt delays resulting from financing and other problems, **AEDC shall, and is hereby encouraged by the DOTC** to, forthwith commence negotiations with its financial partners, investors and creditors to ensure that financial commitments are firmed up and financial resources are made available after the final approval of the project.

7. Due to the complexity and urgency of the project, the parties recognize the need for closer and timely coordination between the DOTC and AEDC. The parties hereto hereby agree to form forthwith a Joint Working Committee (JWC) composed of members from, and acceptable to, both parties to ensure complete and adequate coordination between them.

8. In conjunction with the "fast track" approach proposed by AEDC, the DOTC shall:

    a. Commence and conclude, within the soonest possible time, negotiations with AEDC on the BOT contract;

    b. Fast track the publication, invitation and evaluation of counter proposals for the Project; and

    c. Coordinate with the Department of Public Works and Highways (DPWH), the Metro Manila Development Authority (MMDA), the concerned local government units and other government agencies to ensure proper interfacing of the [NAIA IPT III] design and road access requirements with the existing road and interchange improvement and traffic management projects particularly at the South Luzon Expressway (SLE) and EDSA; and

9. AEDC may be called upon to render assistance to DOTC in the activities enumerated to par. 8 hereof.

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10. Nothing in the [MOU] shall be understood, interpreted or construed as permitting, allowing or authorizing the circumvention of, or non-compliance with, or as waiving, the provisions of, and requirements and procedures under, existing laws, rules and regulations.

x x x x x x x x x[10]

We continue with the narration of facts in *Agan*:

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.

x x x x x x x x x

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.

x x x x x x x x x

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

x x x x x x x x x

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.

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[10] *Rollo* (G.R. No. 169914), pp. 107-108.

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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 IPT 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 [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.

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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.

x x x x x x x x x

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 [NAIA IPT III]" (1997 Concession Agreement).

x x x x x x x x x

On November 26, 1998, the Government and PIATCO signed an Amended and Restated Concession Agreement (ARCA).

x x x x x x x x x

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).

x x x x x x x x x[11]

In the meantime, the petition for the declaration of nullity of proceedings, *mandamus* and injunction filed by AEDC against the Secretary of DOTC *et al.*[12] in the Regional Trial Court (RTC) of Pasig City (Pasig court), Branch 261, docketed as Civil Case No. 66213[13] was dismissed with prejudice in an order

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[11] *Supra* note 2, at 788-796.

[12] *Rollo* (G.R. No. 169914), p. 297.

[13] The causes of action were the following:

"FIRST CAUSE OF ACTION

58. x x x [T]he Joint Venture has failed to fulfill the requirements to prequalify since: (a) the designated facility operator of the Joint Venture for the [NAIA IPT III] Project does not possess the nationality requirement

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dated April 30, 1999[14] after the parties signed and filed a joint motion to dismiss on February 9, 1999.[15]

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imposed by the Constitution, the BOT Law, the IRR and the PBAC Bid Documents and Bulletins; and (b) the Joint Venture does not possess the minimum financial capability to qualify as a challenge bidder for the NAIA IPT III Project as required by the BOT law, the IRR and the PBAC Bid Documents and Bulletins.

59. The prequalification of the Joint Venture being contrary to the Constitution, the law, the IRR and the Bid Documents and Bulletins, as well as being attended with serious irregularities, all proceedings in connection therewith should be declared null and void and the Joint Venture should be declared disqualified as a challenge bidder to the NAIA IPT III Project.

SECOND CAUSE OF ACTION

x x x x x x x x x

61. There being no valid and legal challenge bid, respondents, and all persons doing under them, should be permanently enjoined from conducting proceedings on the challenge bid of the Joint Venture which is void *ab initio*, including the awarding of the subject Concession Agreement, and the implementation of said Concession Agreement if already awarded. Thus, respondents should be directed to act on petitioner's unsolicited proposal without considering the void challenge bid of the Joint Venture.

THIRD CAUSE OF ACTION

x x x x x x x x x

63. Assuming *arguendo* that the Joint Venture has legally fulfilled the requirements for prequalification set under the BOT Law and the IRR, it should still be disqualified for failing to comply with the mandatory requirements within the periods prescribed under the BOT law and the IRR.

64. Pursuant to the same BOT Law, the DOTC should award the NAIA IPT III Project to petitioner, in the absence of any other qualified proponent submitting a competitive bid in an unsolicited proposal." (*Id*. at 333-335.)

[14] AEDC's Memorandum, p. 4. The order issued by First Vice-Executive Judge Alfredo C. Flores states in full:

"Submitted for resolution is a 'Joint Motion To Dismiss.'

Extant on the motion is the signature of Lucio C. Tan in representation of [AEDC] assisted by the Law Firm of Carpio Villaraza & Cruz. The Secretary of [DOTC], the Honorable Vicente C. Rivera, Jr., on his behalf and on behalf of the other respondents, signed, assisted by the Solicitor General, the Honorable Ricardo P. Galvez. It bears the Conforme of the Executive Secretary, the Honorable Ronaldo B. Zamora.

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As already stated, we nullified in 2003 the contracts between the government and PIATCO for being contrary to public policy[16] and for lack of the requisite financial capacity of the Paircargo Consortium (predecessor of PIATCO). We quote our conclusion in *Agan*:

> 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

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Finding the "Joint Motion To Dismiss" in order, being premised upon amicable settlement, let this case be, as it is hereby DISMISSED with prejudice. Cost *de oficio.*

SO ORDERED."

[15] The motion states in full:

"JOINT MOTION TO DISMISS

The parties, assisted by their respective counsel, respectfully state:

1. [PIATCO] and the respondents have submitted to petitioner [AEDC], through the Office of the Executive Secretary, Malacañang, a copy of the Concession Agreement (attached as Annex "A") which they executed for the construction and operation of the [NAIA IPT III Project] which petitioner requested.

2. Consequently, the parties have decided to amicably settle the instant case and jointly move for the dismissal thereof without any of the parties admitting liability or conceding to the position taken by the other in the instant case.

3. Petitioner, on the one hand, and the respondents, on the other hand, hereby release and forever discharge each other from any and all liabilities, direct or indirect, whether criminal or civil, which arose in connection with the instant case.

4. The parties agree to bear the costs, attorney's fees and other expenses they respectively incurred in connection with the instant case.

PRAYER

WHEREFORE, it is respectfully prayed that the instant case be dismissed." (*Id*. at 349-350.)

[16] *Supra* note 2, at 678-679.

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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.[17]

Thereafter, on December 21, 2004, the government filed a complaint in the RTC,[18] Pasay City, Branch 117 (the expropriation court), for the expropriation of the NAIA IPT III facilities. This case ultimately reached us by way of a petition for *certiorari* and prohibition in *Gingoyon* where we ruled that: (1) RA 8974 applied insofar as it required the immediate payment by the government to PIATCO of the proffered value (₱3,002,125,000) of NAIA IPT III before the government could take possession of the facility; (2) the government was authorized to start the implementation of the NAIA IPT III airport terminal project by performing acts essential to its operation as an international airport terminal upon the effectivity of the writ of possession and (3) the government was to pay just compensation to PIATCO as fixed in the decision of the trial court immediately upon the finality of the said decision.[19] As of today, therefore, the issue of expropriation has been settled in favor of the government. What remains to be settled by the Pasay City RTC is solely the issue of valuation of NAIA IPT III under RA 8974.

On March 10, 2005, former Congressman Salacnib Baterina,[20] private respondent in G.R. No. 174166, sought to intervene in the expropriation proceedings in the RTC by filing a motion to intervene, motion to admit and a petition for prohibition in

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[17] *Id.*, p. 678.

[18] Presided by Judge Henrick Gingoyon (now deceased). He was replaced by Judge Jesus B. Mupas.

[19] *Supra* note 3, at 548-550.

[20] Together with Clavel Martinez, Hermy Banico, Francisco B. Mero and Carlito P. Rallistan; *rollo*, (G.R. No. 174166), p. 20.

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intervention.[21] He asserted his legal interest by virtue of being a legislator, taxpayer, concerned citizen and the transcendental importance of the case.[22] He sought to permanently enjoin the Republic from making or causing any payment of just compensation to PIATCO for NAIA IPT III arguing that the latter was not the owner of such structure.[23]

Meanwhile, in a letter to respondent DOTC dated March 14, 2005, AEDC offered to immediately operate the NAIA IPT III project.[24] DOTC did not respond. In another letter dated September 1, 2005, AEDC demanded the immediate implementation of the February 26, 1996 MOU. Again, DOTC did not reply. It was only after AEDC wrote a third letter on September 8, 2005 that the government, through the Office of the Solicitor General, responded in a letter dated September 21, 2005 stating:

> We have carefully searched Philippine law, in vain, for the basis of what you claim is AEDC's "vested and perfected legal right to operate NAIA IPT III." xxx
>
> We have also searched carefully the [MOU]. We see nothing in its language to believe that there is any existing obligation on the part of Government to recognize in AEDC the right to operate the terminal.[25]

Thus, on October 20, 2005, AEDC filed G.R. No. 169914.

Meanwhile, in another venue of conflict (the Pasay City RTC expropriation court), the events leading to G.R. No. 174166 were unfolding.

In an order dated October 27, 2005, the expropriation court granted the petition (for intervention) of Baterina.[26] The Republic's

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[21] *Id.*, p. 21.

[22] Baterina's Comment with Prayer for Affirmative Reliefs, p. 6.

[23] *Id.*, p. 7.

[24] *Rollo* (G.R. No. 169914), p. 31.

[25] *Id.*, p. 364.

[26] *Rollo* (G.R. No. 174166), p. 21.

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motion for reconsideration was denied in an omnibus order dated December 13, 2005.[27]

Gingoyon was promulgated on December 19, 2005 by this Court, prompting Baterina to file a motion for intervention with motion for reconsideration in intervention on January 6, 2006.[28] This was denied in a resolution dated February 1, 2006.[29] The decision in *Gingoyon* became final and executory on March 17, 2006.[30]

On March 22, 2006, Baterina filed in the expropriation court a motion to declare in default and/or motion for summary judgment and prayed therein that the court (1) declare PIATCO and the Republic in default insofar as the petition for prohibition in intervention was concerned and (2) render a partial summary judgment on the issues of [a] whether the state, through the Bases Conversion Development Authority (BCDA), was the owner of NAIA IPT III and [b] whether NAIA IPT III was a proper object of expropriation.[31]

On March 27, 2006, the expropriation court *motu proprio* issued an order directing MIAA to immediately release to PIATCO the proffered value of NAIA IPT III in the amount of ₱3,002,125,000.[32] On the same date, the ceiling of the arrival lobby section of NAIA IPT III collapsed, creating a 100-square foot hole in the ceiling.[33] This prompted the republic to file an urgent motion to quash the writ of execution.[34]

On March 29, 2006, AEDC filed a motion for leave to admit attached answer-in-intervention.[35]

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[27] *Id*., pp. 21-22.

[28] *Supra* note 22, at 13.

[29] 481 SCRA 457.

[30] *Rollo* (G.R. No. 174166), p. 23.

[31] *Supra* note 22, at 16.

[32] *Rollo* (G.R. No. 174166), p. 24.

[33] *Id*.

[34] *Id*.

[35] *Id*., p. 25.

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On June 15, 2006, the expropriation court denied the republic's motion to quash the writ of execution.[36] On June 21, 2006, the Republic manifested that it would comply with the order of payment.[37]

On August 3, 2006, Baterina filed a petition for *certiorari* and prohibition [with urgent prayer for the issuance of a temporary restraining order (TRO) and writ of preliminary injunction] in the CA,[38] docketed as CA-G.R. SP No. 95539.[39]

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[36] *Id*., p. 26.

[37] *Id*.

[38] The other intervenors did not join Baterina in the petition before the CA; *id*., p. 27.

[39] *Id*., pp. 27, 363-365. In the petition entitled "*Salacnib F. Baterina v. Hon. Jesus B. Mupas, in his capacity as Acting Presiding Judge of the [RTC] of Pasay City, Branch 117, Republic of the Philippines, [DOTC], [MIAA], and [PIATCO]*," Baterina sought the following reliefs:

"A. Upon the filing of this Petition, to issue a [TRO] directing Public Respondent Judge to desist and desist from implementing the assailed *Orders* or otherwise causing payment of the proffered amount to PIATCO, and from further proceeding with the determination of just compensation in the expropriation case until such time that:

i. Petitioner's *Motion to Declare in Default* and *Motion for Partial Summary Judgment* shall have been received by the [RTC];

ii. It is clarified that PIATCO categorically disputes the proffered value for [NAIA IPT III];

iii. It is clarified that Public Respondents have been specifically authorized by the President of the Republic of the Philippines to file the *Complaint* for expropriation of [NAIA IPT III].

B. After further proceedings, to issue a Writ of Preliminary Injunction restraining Public Respondent Judge to cease and desist from implementing the assailed *Orders* or otherwise causing payment of the proffered amount to PIATCO, and from further proceeding with the determination of just compensation in the expropriation case until such time that:

i. Petitioner's *Motion to Declare in Default and Motion for Partial Summary Judgment* shall have been resolved by the [RTC];

ii. It is clarified that PIATCO categorically disputes the proffered value for [NAIA IPT III]; and

iii. It is clarified that Public Respondents have been specifically authorized by the President of the Republic of the Philippines to file the *Complaint* for expropriation of [NAIA IPT III].

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In an order dated August 8, 2006, the expropriation court reconsidered its December 13, 2005 omnibus order and denied, among others, the motion for intervention and motion to admit of Baterina.[40] it also disallowed the intervention of AEDC.[41]

In a resolution dated August 24, 2006, the CA (in CA-G.R. SP No. 95539) issued a TRO:

x x x directing [Judge Jesus B. Mupas], in his capacity as Acting Presiding Judge of the [RTC] of Pasay City, Branch 117, or whoever is, or may be acting in his place and stead, as well as the other public respondents herein named,[42] to cease and desist from implementing the assailed Orders[43] subject of this petition for *certiorari* and prohibition with urgent prayer for the issuance of a [TRO] and writ of preliminary injunction, or from otherwise causing payment and from further proceeding with the determination of just compensation in the expropriation case involved herein, until such time that petitioner's motion to declare in default and motion for partial summary judgment shall have been resolved by the [RTC]; or that it is clarified that PIATCO categorically disputes the proffered value of [NAIA IPT III].[44] x x x

On September 4, 2006, the Republic filed G.R. No 174166[45] in this Court. However, on September 8, 2006, the CA lifted

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C. To declare and set aside as null and void the *Order*s dated 27 March 2006 and 15 June 2006 and the Writ of Execution dated 27 March 2006.

D. To direct the [RTC] of Pasay City, Branch 117, to forthwith [resolve] Petitioner's *Motion to Declare in Default and Motion for Partial Summary Judgment* dated 22 March 2006.

Other reliefs, just and equitable in the premises, are likewise prayed for."

[40] *Id.*, pp. 28-29.

[41] *Id.*, p. 29.

[42] Republic of the Philippines, DOTC, MIAA and PIATCO; *id.*, p. 60.

[43] The order and writ of execution both dated March 27, 2006 and order dated June 15, 2006; *id.*, p. 301.

[44] *Id.*, pp. 60-61.

[45] Republic's Consolidated Memorandum, p. 12.

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the TRO and set aside its August 24, 2006 resolution.[46] On September 11, 2006, the Republic tendered to the expropriation court a check[47] payable to PIATCO in the amount of ₱3,002,125,000 representing the proffered value of NAIA IPT III.[48] This was received by PIATCO's duly authorized representative.[49]

In a Resolution of this Court dated September 12, 2006, the cases docketed as G.R. Nos. 169914 and 174166 were consolidated. Oral arguments were held on November 14, 2006.

In a manifestation dated July 12, 2007, Baterina informed the Court that the CA promulgated its decision on December 27, 2006 in CA-G.R. SP No. 95539.[50] The CA denied due course and dismissed the action on the ground that Baterina was barred by the doctrine of "law of the case" from questioning the legality of the expropriation. On January 18, 2007, Baterina filed a motion to suspend proceedings with *ad cautelam* motion for reconsideration of the decision. This was denied in a resolution dated May 21, 2007.[51]

Baterina thus filed a motion for time to file petition for review on *certiorari* with this Court praying for an extension of thirty days within which to file a petition from the CA's December 27, 2006 decision and May 21, 2007 resolution. This was docketed as G.R. No. 178022. However, since the issues that he wanted to raise in this petition were the same as those already raised

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[46] *Id*.

[47] Land Bank Manager's Check No. 0000008082; *id*.

[48] *Id*.

[49] *Id*.

[50] This was consolidated with CA-G.R. SP No. 95583 entitled "*Manuel L. Fortes, Jr. v. Hon. Jesus B. Mupas, in his capacity as Acting Presiding Judge of the Regional Trial Court of Pasay City, Branch 117, Republic of the Philippines, Department of Transportation and Communications, Manila International Airport Authority and Philippine International Air Terminals Co., Inc.*" in a resolution dated October 13, 2006.

[51] Associate Justice Estela M. Perlas-Bernabe was replaced by Associate Justice Monina Arevalo Zenarosa in the Special Former Eighth Division.

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in G.R. No. 174166, he manifested that he would no longer pursue G.R. No. 178022. Consequently, the latter action was terminated.

THE ISSUES IN G.R. NO. 169914

The issues raised by AEDC in G.R. No. 169914 are:

1. whether AEDC, as the recognized and unchallenged original proponent, has the exclusive, clear and vested statutory right to the award of the NAIA IPT III project;
2. whether respondents DOTC *et al.* have the statutory duty to award the NAIAI IPT III project to AEDC as the unchallenged original proponent, after the nullification of the award to PIATCO and
3. whether respondents DOTC *et al.* have the legal basis or authority to take over the NAIA IPT III project, to the exclusion of AEDC, or to award the project to third parties.[52]

THE ISSUES IN G.R. NO. 174166

On the other hand, the Republic raises the following issues in G.R. No. 174166:

1. whether respondent Baterina has legal standing to sue and
2. whether CA-G.R. SP No. 95539 has become moot and academic.

The issues that Baterina wants us to decide may be distilled into two:

1. whether NAIA IPT III is owned by BCDA and is a proper object of expropriation and
2. whether PIATCO is entitiled to just compensation under RA 8974 or based on *quantum meruit* or not at all.

For purposes of clarity, the issues in G.R. Nos. 169914 and 174166 will be tackled separately.

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[52] *Rollo* (G.R. No. 169914), p. 33.

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(A) G.R. No. 169914

During the oral arguments, there were discussions regarding the possibility that the claim of AEDC may already be barred by *res judicata* since it previously filed Civil Case No. 66213 in the Pasig Regional Trial Court in 1997. This case was dismissed with prejudice upon a joint motion to dismiss filed by the parties and granted by the court in 1999.

Respondents DOTC *et al*. hardly exerted any effort to argue and emphasize this point. They merely stated that "the alleged clarity of AEDC's claimed legal right had been diluted by its own [joint motion] to dismiss a previous petition for *Mandamus* against the Republic, with prejudice."[53] Instead, DOTC *et al.* chose to meet the substantive issues raised in AEDC's petition head on.

The parties in their joint motion specifically stated that they were "jointly mov[ing] for the dismissal [of the case] **without any of the parties admitting liability or conceding to the position taken by the other in the instant case."**[54] However, the Pasig court still dismissed the case with prejudice. For this reason, the majority ruled that AEDC's petition is already barred by *res judicata*.

I disagree.

A case is barred by prior judgment or *res judicata* when the following elements are present: (1) there must be a final judgment or order; (2) it is rendered by a court having jurisdiction over the subject matter and the parties; (3) it is a judgment or an order on the merits and (4) there must be, between the first and the second actions, identity of parties, of subject matter and of causes of action.[55]

The presence of the first two elements is not controversial. Regarding the third element, the order of dismissal based on amicable settlement is considered as one on the merits:

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[53] *Supra* note 45, at 35.

[54] *Supra* note 14.

[55] *Balanay v. Paderanga*, G.R. No. 136963, 28 August 2006, citations omitted.

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A compromise agreement once approved by final order of the court has the force of *res judicata* between the parties and should not be disturbed except for vices of consent or forgery. Hence, a decision on a compromise agreement is final and executory; it has the force of law and is conclusive between the parties.[56]

The agreement was considered as the decision on the case.[57] Moreover, the order was specified to be with prejudice. A dismissal with prejudice is an adjudication on the merits which finally disposes of the controversy and it constitutes a bar to a future action unless it is reversed.[58]

The fourth element is likewise present. There is identity of subject matter which is the NAIA IPT III. There is also an identity of parties between the instant case and the previous action by AEDC even if the PBAC chairman and members were impleaded in the previous action but not here:

Well settled is the rule that only substantial, and not absolute, identity of parties is required for *res judicata* to lie. There is substantial identity of parties when there is a community of interest between a party in the first case and a party in the second case albeit the latter was not impleaded in the first case.[59]

There is a community of interest since all the respondents in both actions were involved in the approval and implementation of the NAIA IPT project under the BOT Law.

However, **the final element is doubtful,** to say the least. **There is no identity of causes of action.** In the case dismissed by the Pasig court, AEDC principally sought to prevent the award of NAIA IPT III project to PIATCO which it argued to be unqualified to submit a bid (a fact later confirmed

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[56] *Martir v. Verano*, G.R. No. 170395, 28 July 2006.

[57] *Philippine National Oil Company-Energy Development Corporation (PNOC-EDC) v. Abella*, G.R. No. 153904, 17 January 2005, 448 SCRA 549, 566.

[58] *Nabus v. Court of Appeals*, G.R. No. 91670, 7 February 1991, 193 SCRA 732, 741.

[59] *Supra* note 53.

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by *Agan* in 2003 when the PIATCO contracts were nullified.) In the present case, however, AEDC, on the strength of its argument that it is entitled to the award of the project as an unchallenged original proponent of an unsolicited proposal, prays that it be awarded the project.

The Court should have therefore declined to dismiss this case on doubtful technicality. Given the huge significance and peculiar circumstances of this case, not to mention the great impact of this project on the national economy and the country's reputation in the international community, we can justifiably relax the application of the rule on *res judicata*. As we emphasized in *Salud v. Court of Appeals*:[60]

> In our age, where courts are harassed by crowded dockets and complaints against slow foot justice, frequent technical reliance on the preclusive breadth of *res judicata* is understandable. The importance of judicial economy and avoidance of repetitive suits are strong norms in a society in need of swift justice. Be that as it may, **there should not be a mechanical and uncaring reliance on *res judicata* where more important societal values deserve protection.**[61]

Procedural rules are mere tools to aid the courts in the speedy, just and inexpensive resolution of pending cases.[62] Substantial justice remains the primordial and all-important objective and, to this end, the liberal construction of the rules may be permitted. Jurisprudence holds that, as much as possible, cases should be decided on their merits and not on technicalities.[63] Indeed, the principle of *res judicata* can rightfully be set aside in favor of substantial justice.[64]

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[60] G.R. No. 100156, 27 June 1994, 233 SCRA 384.

[61] *Id.*, p. 389.

[62] *Sanchez v. Court of Appeals*, G.R. No. 152766, June 20, 2003.

[63] Herrera, *Comments on the 1997 Rules of Civil Procedure as Amended* (1st Ed., 1997), p. 22, citing *Pacific Asia Overseas Shipping Corp. v. NLRC*, G.R. No. 76595, 6 May 1988, 161 SCRA 122; *The International Corporate Bank, Inc. v. The Intermediate Appellate Court, et al.*, G.R. No. 69560, 30 June 1988, 163 SCRA 296.

[64] *De Leon v. Balinag*, G.R. No. 169996, 11 August 2006.

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We now proceed to resolve the substantive issues.

LEGAL RIGHT OF AEDC AS ORIGINAL PROPONENT

The proposal submitted by AEDC for the NAIA IPT III project was an unsolicited proposal governed by Section 4-A of RA 6957, as amended by RA 7718:[65]

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

The pertinent implementing rules and regulations (IRR) on unsolicited proposals state:

> Sec. 10.1. Requisites for Unsolicited Proposals. – Any Agency/LGU may accept unsolicited proposals on a negotiated basis provided that all the following conditions are met:
>
> a. the project involves a new concept or technology and/or is not part of the list of priority projects;
>
> b. no direct government guarantee, subsidy or equity is required; and
>
> c. the Agency/LGU concerned has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days.

[65] Act Amending Certain Sections of Republic Act No. 6957, Entitled "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes."

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> **In the event that another project proponent submits a price proposal lower than that submitted by the original proponent, the latter shall have the right to match said price proposal within thirty (30) working days.** Should the original project proponent fail to match the lower price proposal submitted within the specified period, the contract shall be awarded to the tenderer of the lowest price. **On the other hand, if the original project proponent matches the submitted lowest price within the specified period, he shall immediately be awarded the project.**

x x x x x x x x x

Sec. 10.6. Evaluation of Unsolicited Proposals. - The Agency/LGU is tasked with the initial evaluation of the proposal. The Agency/LGU shall: 1) appraise the merits of the project; 2) evaluate the qualification of the proponent; and 3) assess the appropriateness of the contractual arrangement and reasonableness of the risk allocation. The Agency/LGU is given sixty (60) days to evaluate the proposal from the date of submission of the complete proposal. Within this 60-day period the Agency/LGU, shall advise the proponent in writing whether it accepts or rejects the proposal. **Acceptance means commitment of the Agency/LGU to pursue the project and recognition of the proponent as the "original proponent." At this point, the Agency/LGU will no longer entertain other similar proposals until the solicitation of comparative proposals.** The implementation of the project, however, is still contingent primarily on the approval of the appropriate approving authorities consistent with Section 2.7 of these IRR, the agreement between the original proponent and the Agency/LGU of the contract terms, and the approval of the contract by the ICC or Local Sanggunian.

x x x x x x x x x

Sec. 10.9. Negotiation With the Original Proponent. – Immediately after ICC/Local Sanggunian's clearance of the project, the Agency/LGU shall proceed with the in-depth negotiation of the project scope, implementation arrangements and concession agreement, all of which will be used in the Terms of Reference [TOR] for the solicitation of comparative proposals. The Agency/LGU and the proponent are given ninety (90) days upon receipt of ICC's approval of the project to conclude negotiations. The Agency/LGU and the original proponent shall negotiate in good faith. However should there be unresolvable differences during the negotiations, the Agency/LGU shall have the

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option to reject the proposal and bid out the project. On the other hand, **if the negotiation is successfully concluded, the original proponent shall then be required to reformat and resubmit its proposal in accordance with the requirements of the [TOR] to facilitate comparison with the comparative proposals.** The Agency/LGU shall validate the reformatted proposal if it meets the requirements of the TOR prior to the issuance of the invitation for comparative proposals.

x x x x x x x x x

Sec. 10.13. Simultaneous Qualification of the Original Proponent. - The Agency/LGU shall qualify the original proponent based on the provisions of Rule 5 hereof, within thirty (30) days from start of negotiation. For consistency, **the evaluation criteria used for qualifying the original proponent should be the same criteria used in the [TOR] for the challengers.** (Emphasis supplied)

AEDC argues that once an unsolicited proposal is accepted by the government and the proponent assumes the status of a recognized original proponent, the government becomes committed to pursue the project with it (the original proponent) unless a better competitive or comparative proposal is offered by a challenger in a process known as the "swiss challenge" and the original proponent is unable to match such better offer.[66] It asserts that necessarily, if the swiss challenge process fails to produce a better price offer, as in this case, the vested right to the award of the project to the recognized original proponent is deemed perfected and it "shall immediately be awarded the project" by the government, consistent with the clear intent and logical implication of Section 10.1(c) of the IRR.[67]

According to AEDC, the swiss challenge failed to produce a better offer from a qualified challenger **because PIATCO was found to be ineligible and disqualified by this Court and the award to PIATCO and all agreements it entered into with respondents DOTC *et al.* were declared null and void.**[68]

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[66] *Rollo* (G.R. No. 169914), pp. 35-38.

[67] *Id*.

[68] *Id*.

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AEDC claims that this evidences its "exclusive, clear and vested statutory right" to the formal award of the NAIA IPT III project and the formalization and execution of the draft concession agreement for the operation of the project. And respondents DOTC *et al.* are duty bound to recognize and give effect and protection to such right.[69]

Respondents DOTC *et al.*, on the other hand, counter:

A plain reading of these provisions reveals that the BOT Law accords the "original proponent" the following rights:

1. The right to match the lower price proposal within thirty (30) days;

2. The right to the award of the project if the original proponent is able to match the lower price proposal.

These are the only clear rights recognized in favor of the original proponent in the context of a claim to the automatic award of the [NAIA IPT III] Project, as [AEDC] prays in the instant petition. Nothing in the BOT Law or its implementing rules says, expressly or impliedly, that the original proponent is automatically entitled to the award of the BOT Project in case the award to the challenger is subsequently nullified, or if the challenger is later declared to be unqualified, as what transpired in the instant case. xxx[70]

INTENT OF SECTION 4-A OF THE BOT LAW IS TO PROTECT ORIGINAL PROPONENT

As we noted in *Agan*, the lack of infrastructure funds has forced the government to resort to the BOT Law which allows and even encourages the private sector to participate in projects needed by the public.[71] Indeed, the declared policy of the law states:

It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and

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[69] *Id.*, pp. 41 and 44.

[70] *Id.*, pp. 451-452.

[71] *Supra* note 2, at 667.

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development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government. Such incentives, aside from financial incentives as provided by law, shall include providing a climate of minimum government regulations and procedures and specific government undertakings in support of the private sector.[72]

This is consistent with the state policy enshrined in the Constitution that "[t]he State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments."[73]

RA 7718 was later enacted introducing several amendments to the original BOT Law (RA 6957). One such amendment was the inclusion of unsolicited proposals (Section 4-A). In her sponsorship speech,[74] then Senator Gloria Macapagal-Arroyo[75] explained the concept behind unsolicited proposals and the objective of the amendment:

Unsolicited proposals refer to proposals of the private sector for projects not included in the medium-term infrastructure program of the agencies. In the proposed amendments, new and/or unsolicited proposals for national projects eligible for implementation, which are not included in the list of projects eligible for financing under the law and which do not involve government financing or direct guarantee, may still be pursued and implemented by the agencies concerned provided a copy of each proposal and the eventual contract is submitted to the NEDA Board for their information, within 30 days from receipt and/or signing thereof.

The object of the amendment is to protect proponents which have already incurred costs in the conceptual design and in the preparation of the proposal, and which may have adopted an imaginative method of construction or innovative concept for the proposal. The amendment also aims to harness the ingenuity of the private sector to come up

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[72] RA 6957 (1990), as amended by RA 7718 (1994), Sec. 1.

[73] Art. II, Sec. 20.

[74] On Senate Bill No. 1586.

[75] Now incumbent President of the Republic of the Philippines.

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with solutions to the country's infrastructure problems.[76] (Emphasis supplied)

Under Section 4-A, after the original proponent submits its unsolicited proposal, other proponents may make lower price offers (referred to as the "swiss challenge"). The original proponent has the right to match any lower bid submitted – a form of protection and advantage conferred on the original proponent which has already "*incurred costs in the conceptual design and in the preparation of the proposal, and which may have adopted an imaginative method of construction or innovative concept for the proposal.*"[77] Because of its valuable role in initiating an infrastructure project the government would otherwise be unable to put up or design out of its own resources, the original proponent is granted the option to match the lower price proposal of any challenger.

The law recognizes the initiative and civic-mindedness, as well as the innovative concept proposal (and the costs voluntarily assumed to come up with it), of the original proponent. It accords him a preferred status and vests on him the right to pursue his approved proposal and implement the project. His status and right are tested in the crucible of a swiss challenge and may be defeated only if and when he fails to match the bid of a qualified winning bidder.

Thus, the original proponent is entitled to the award of the BOT project in the following cases:

1. no competitive bid was submitted;
2. there was a lower bid title by a qualified bidder but the original proponent matched it and
3. there was a lower bid but it was made by a person/ entity **not qualified to bid, in which case it is as if no competitive bid was made.**

The congressional deliberations show that the legislative intent was to give protection to the original proponent. The following

[76] January 25, 1994, Senate deliberations; *rollo* (G.R. No. 169914), p. 75.

[77] *Id*.

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statements of former Senators Neptali Gonzales and Sergio Osmeña III during the second reading of Senate Bill No. 1586 (precursor of RA 7718) were clearly reflective of this intent:

Senator Gonzales:

xxx x x x x x x

The concept being that in case of an unsolicited proposal and nonetheless public bidding has been held, then [the original proponent] shall, in effect, be granted what is the equivalent of the right of first refusal by offering a bid which shall equal or better the bid of the winning bidder within a period of, let us say, 30 days from the date of bidding.

Senator Osmeña:

xxx x x x x x x

To capture the tenor of the proposal of the distinguished Gentleman, a subsequent paragraph has to be added which says: "IF THERE IS A COMPETITIVE PROPOSAL, THE ORIGINAL PROPONENT SHALL HAVE THE RIGHT TO EQUAL THE TERMS AND CONDITIONS OF THE COMPETITIVE PROPOSAL."

In other words, **if there is nobody who will submit a competitive proposal, then nothing is lost**. Everybody knows it, and it is open and transparent. But if somebody comes in with another proposal—and because it was the idea of the original proponent—that proponent now has the right to equal the terms of the original proposal.

Senator Gonzales:

That is the idea, Mr. President. **Because it seems to me that it is utterly unfair for one who has conceived an idea or a concept, spent and invested in feasibility studies, in the drawing of plans and specifications, and the project is submitted to a public bidding, then somebody will win on the basis of plans and specifications and concepts conceived by the original proponent. He should at least be given the right to submit an equalizing bid.** xxx[78] (Emphasis supplied)

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[78] March 1, 1994, Senate deliberations; *id*. at 369.

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As an original proponent, AEDC should rightfully be accorded this protection.[79]

The majority recognizes that an original proponent of an unsolicited proposal has rights and privileges because the law intended "to encourage private sector initiative in conceptualizing infrastructure projects that would benefit the public."[80] However, the majority limits the rights of an original proponent to the following: (1) the right to match the lowest or most advantageous proposal and (2) the right to be awarded the project in the event that the original proponent is able to match the lowest or most advantageous proposal submitted. Moreover, for the majority, these rights arise only when there are other proposals submitted during the public bidding of the infrastructure project.

The majority's reading of the law considerably waters down the rights accorded to an original proponent. In failing to consider a situation where either no competitive bid was submitted or a lower bid was submitted by an entity not qualified to bid, the rights of the original proponent are unduly subjected to the condition of the presence of competitive bids. To reiterate, the spirit of the provision is "to protect project proponents which have already incurred costs in the conceptual design and in the preparation of the proposal." Certainly, regardless of the presence of competitive bids, the original proponent incurs costs. As such, it deserves the protection which the law seeks to afford it. The law which seeks to encourage private sector participation should be interpreted in a way that would recognize, not emasculate, rights of private investors.

THE SWISS CHALLENGE DID NOT PRODUCE A LOWER BID

Under Section 10.6 of the IRR of the BOT Law, as amended by RA 7718, after the proposal is accepted by the agency involved

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[79] Counsel of AEDC stated during the oral arguments on November 14, 2006 that his client spent around ₱180,000,000 for its expenses as original proponent; TSN, p. 71.

[80] Majority opinion, p. 22.

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(in this case respondent DOTC), the latter becomes committed to pursue the project and can no longer entertain other similar proposals until the solicitation of comparative proposals. In fact, AEDC, as original proponent, and respondent DOTC already executed an MOU wherein they agreed to fast track the project.[81] In the MOU, AEDC was also encouraged by the DOTC to commence negotiations with its financial partners and to ensure that financial commitments and resources were firmed up and made available after the final approval of the project.[82] **This was because, at this point, the only thing left to be hurdled (before the project was awarded to AEDC) was the resolution of the swiss challenge.**

However, PIATCO, the lone bidder in the swiss challenge, turned out to be unqualified. We said so in no uncertain terms in *Agan*. The subsequent award of the project to it and the contracts it entered into with the government were all nullified and voided.[83] **Since there was no qualified bidder during the swiss challenge, it followed that no other proposal(s) could have been considered by respondents and the original proponent remained unchallenged.**

This of course meant only one thing: there was no qualified challenger to AEDC's proposal and consequently, there was no better offer to match. The legal effect of PIATCO's disqualification was simply that no other proposal could be deemed to have been received during the designated period and AEDC, having complied with all the requirements and conditions under Section 4-A of the law, had the right to be awarded the project.

MANDAMUS IS PROPER

Under Rule 65, Section 3[84] of the Rules of Court, a petition for *mandamus* may be filed when any tribunal, corporation,

[81] *Supra* note 10.

[82] *Id*.

[83] *Supra* note 2, at 653 and 679.

[84] SEC. 3. *Petition for Mandamus*. — When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which

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board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. *Mandamus* is an extraordinary writ to compel the performance, when refused, of a ministerial duty that is already imposed on respondent and there is no other plain, speedy and adequate remedy in the ordinary course of law. Petitioner should have a well-defined, clear and certain legal right to the performance of the act and it must be the clear and imperative duty of respondent to do the act required to be done.[85]

Mandamus will not issue to enforce a right, or to compel compliance with a duty, which is questionable or over which a substantial doubt exists. The principal function of the writ of *mandamus* is to command and to expedite, not to inquire and to adjudicate; thus, it is neither the office nor the aim of the writ to secure a legal right but to implement that which is already established. Unless the right to the relief sought is unclouded, *mandamus* will not issue.[86]

Mandamus applies as a remedy where petitioner's right is founded clearly in law.[87] AEDC's right to the award of the NAIA IPT III project was clear under Section 4-A of the BOT Law (in the light of *Agan*) given the fact that no better offer legally existed or could be taken into account. It acquired this

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the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law, the person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent, immediately or at some other time to be specified by the court, to do the act required to be done to protect the rights of the petitioner, and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent. xxx

[85] *University of San Agustin, Inc. v. Court of Appeals*, G.R. No. 100588, 7 March 1994, 230 SCRA 761, 771, citations omitted.

[86] *BPI Family Savings Bank, Inc. v. Manikan*, G.R. No. 148789, 16 January 2003, 395 SCRA 373, 375, citing *Pacheco v. Court of Appeals*, 389 Phil. 200 (2000).

[87] *Pacheco v. Court of Appeals*, *id*. at 203, citation omitted.

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vested right from the time PIATCO was disqualified to bid during the swiss challenge.

Respondents argue, and the majority agreed, that there are only two clear legal rights recognized in favor of the original proponent under Section 4-A of the BOT Law and Section 10.1 of its IRR: (1) the right to match the lower price proposal within 30 days and (2) the right to the award of the project if the original proponent is able to match the lower price proposal.

I disagree. This view fails to consider a situation wherein there is **no other qualified bidder** like in the case of AEDC. Legally, the situation is as if no competitive bid was ever submitted. We have stated that for *mandamus* to issue, it is not necessary that the right and/or duty are absolutely expressed; they must, however, be clear.[88] Here, it is obvious that the original proponent is entitled to the award in the event that there is no other qualified bidder during the swiss challenge. **The law need not expressly state the obvious**.

The parties do not dispute that the government already accepted the unsolicited proposal of AEDC, subject only to the swiss challenge. Section 10.1, par. (c) of the IRR states that "if the original project proponent matches the submitted lowest price within the specified period, [it] shall immediately be awarded the project." **As a matter of fact, there was no need for AEDC to match any lower bid for the simple reason that there was no qualified bidder during the swiss challenge**. It therefore became the ministerial duty of respondents to award the NAIA IPT III project to it.

Respondents DOTC *et al.* contend that the BOT implementing rules have provisions on "recommendation to award"[89] and

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[88] *Supra* note 84.

[89] Rule 11, Sec. 11.1. Recommendation to Award. - Within seven (7) calendar days from the date the financial evaluation shall have been completed, the Agency/LGU PBAC will submit a recommendation of award to the Head of Agency/LGU. The PBAC will prepare and submit a detailed evaluation/assessment report on its decision regarding the evaluation of the bids and explain in clear terms the basis of its recommendations.

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"decision to award"[90] thereby belying any duty on their part to automatically award the project to AEDC.[91] I disagree with this interpretation of the BOT Law. It is outrageous to even suggest that a proponent's fate can be made to hang in the balance even after the conclusion of the swiss challenge process. At this point, it has either matched the lower price proposal or there never was any other proposal or challenger. Yet DOTC *et al*. insist that the right can still be effectively negated at the discretion of the approving authorities. This is oppressive to the proponent and one good way to drive away investors from our shores, what with the uncertainty of the process and status of their rights.

AEDC having satisfied all the requisites therefor, the writ of *mandamus* shall issue. Respondents should award the NAIA IPT III project to AEDC and formalize the NEDA-approved draft concession agreement offered for public bidding during the swiss challenge and turn over possession of the facilities to AEDC.[92]

In finalizing the draft concession agreement, care should be taken that the parties do not repeat the mistake of introducing "material and substantial amendments" which resulted in the nullification of the PIATCO contracts. It is important to note that in its representations to this Court, AEDC obligated itself to:

1. construct an underground passenger access tunnel connecting terminals I, II and III;[93]
2. complete the construction of NAIA IPT III;[94]

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[90] Rule 11, Sec. 11.2. Decision to Award. – Within seven (7) calendar days from the submission by PBAC of the recommendation to award, the Agency/LGU Head shall decide on the award. The approval shall be manifested by signing and issuing the Notice of Award to the awardee within seven (7) calendar days from approval thereof.

[91] *Rollo* (G.R. No. 169914), p. 454.

[92] *Supra* note 2, at 656.

[93] AEDC's Memorandum, p. 35.

[94] *Id.*, p. 36.

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3. finance the additional investments necessary to put NAIA IPT III in operation;[95]

4. reimburse the government the initial payment of ₱3,002,125,000 it made to PIATCO[96] and

5. pay the obligations owing to the general contractors.[97]

Needless to say, the government is likewise entitled to the fees and income it should receive from AEDC under the BOT Law.

THE NAIA IPT III PROJECT REMAINS A BOT PROJECT

In view of AEDC's rights as original proponent, the NAIA IPT III project cannot be arbitrarily removed from the coverage of the BOT Law to its prejudice. AEDC, through no fault of its own, obviously can no longer fulfill its obligation under the law to build the terminal since the construction of NAIA IPT III is now substantially complete. But it can pay whatever amount is still due, specifically the fair value of the facility, pursuant to our ruling in *Gingoyon.*[98]

The majority ruled that the BOT Law is neither applicable nor practicable in view of the fact that the NAIA IPT III is substantially complete. However, the fact that the terminal is substantially built should not be a serious hindrance to the recognition of AEDC's rights under the BOT Law. While AEDC no longer has to build the facility as one already exists, it will have to assume the payment due to the builder thereof, PIATCO, and to complete the facility to make it fully functional. It would

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[95] *Id*., p. 43.

[96] *Id*.

[97] TSN of November 14, 2006 Oral Arguments, pp. 28, 179-180. These are the Takenaka and Asahikosan Corporations.

[98] The dispositive portion of the decision states:

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3) RTC Branch 117 is hereby directed, within sixty (60) days from finality of this Decision, to determine the just compensation to be paid to PIATCO by the Government; (*Republic v. Gingoyon*, *supra* note 3, at 550).

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essentially undertake the burden of building it. Why should AEDC be penalized for having been unduly prevented from building it?

Furthermore, building the facility is simply one stage of AEDC's proposal and of the project. As a BOT project, the proposal also pertained to the operation of the facility (which is also covered by the protection of Section 4-A).[99] While AEDC can no longer build the facility without any fault on its part, it can and should operate said facility.

Thus, after the concession agreement is finalized, AEDC may lawfully proceed with the operation of NAIA IPT III. Our ruling in *Gingoyon*:

x x x x x x x x x

(4) Applying [RA 8974], the Government is authorized to start the implementation of the [NAIA IPT III] project by performing the acts that are essential to the operation of the [NAIA IPT III] as an international airport terminal upon the effectivity of the Writ of Possession, subject to the conditions above-stated. As prescribed by the Court, such authority encompasses "the repair, reconditioning and improvement of the complex, maintenance of the existing facilities and equipment, installation of new failities and equipment, provision of services and facilities pertaining to the facilitation of air traffic and transport, and other services that are integral to a modern-day international airport."[100]

must be taken in the context of the legal right of AEDC to the award of the project. This necessarily includes the turn-over of possession and the operation of NAIA IPT III.

Accordingly, it follows that prohibition[101] also lies to prevent respondents' threatened acts to bid out or award to third parties

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[99] Indeed, Sec. 2 (b) of RA 6957, as amended by RA 7718, defines a BOT project as "[a] contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the **operation and maintenance thereof**…."

[100] *Supra* note 3, at 548.

[101] Sec. 2. Petition for prohibition. — When the proceedings of any tribunal, corporation, board, officer or person, whether exercising judicial,

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the operation of NAIA IPT III. Otherwise, the rights of AEDC would be rendered inutile.

(B) G.R. No. 174166

We will first settle the prodecural issues involved here.

PRIVATE RESPONDENT HAS LEGAL STANDING

Petitioner Republic argues that private respondent Baterina has no legal standing to sue.[102] According to the Republic, this Court in *Gingoyon* already rejected Baterina's legal standing:

> We now turn to the three (3) motions for intervention all of which were filed after the promulgation of the Court's Decision. All three (3) motions must be denied. Under Section 2, Rule 19 of the 1997 Rules of Civil Procedure[,] the motion to intervene may be filed at any time before rendition of judgment by the court. Since this case originated from an original action filed before this Court, the appropriate time to file the motions-in-intervention in this case if ever was before and not after resolution of this case. To allow intervention at this juncture would be highly irregular. It is extremely improbable that the movants were unaware of the pendency of the present case before the Court, and indeed none of them allege such lack of knowledge.
>
> Moreover, the requisite legal interest required of a party-in-intervention has not been established so as to warrant the extra-ordinary step of allowing intervention at this late stage. x x x In the case of Representative Baterina, he invokes his prerogative as legislator to curtail the disbursement without appropriation of public funds to compensate PIATCO, as well as that as a taxpayer, as the basis of

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quasi-judicial or ministerial functions, are without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent to desist from further proceedings in the action or matter specified therein, or otherwise granting such incidental reliefs as law and justice may require. xxx

[102] *Rollo* (G.R. No. 174166), p. 43.

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his legal standing to intervene. However, it should be noted that the amount which the Court directed to be paid by the Government to PIATCO was derived from the money deposited by the [MIAA], an agency which enjoys corporate autonomy and possesses a legal personality separate and distinct from those of the National Government and agencies thereof whose budgets have to be approved by Congress.

It is also observed that the interests of the movants-in-intervention may be duly litigated in proceedings which are extant before lower courts. There is no compelling reason to disregard the established rules and permit the interventions belatedly filed after the promulgation of the Court's Decision.[103]

It also contends Baterina lost his standing as intervenor in the expropriation case pending before the RTC when the latter denied his motion for intervention on August 8, 2006.[104]

Baterina counters that the Court in *Gingoyon* did not actually rule that he had no legal standing to intervene.[105] It simply denied the motion because it was filed only after the rendition of the decision.[106] Moreover, the Court merely "noted" that the proffered value was derived from money deposited by MIAA and did not make any conclusion, whether of law or fact.[107] In addition, the December 13, 2005 order which recognized his standing to intervene was already final, thus Acting Presiding Judge Mupas of the expropriation court committed grave abuse of discretion when he reconsidered this ruling in his August 8, 2006 order.[108]

Legal standing or *locus standi* is a party's personal and substantial interest in a case such that he has sustained or will

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[103] *Supra* note 28, at 470-471.

[104] *Rollo* (G.R. No. 174166), p. 44.

[105] *Supra* note 22, at 61.

[106] *Id.*

[107] *Id.*, p. 63.

[108] According to Baterina, this Order is now the subject of a Supplemental Petition for *Certiorari* and Prohibition he filed in the CA; *id.*, pp. 67-68.

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sustain direct injury as a result of the governmental act being challenged.[109] It calls for more than just a generalized grievance.[110] The term "interest" means a material interest, an interest in the issue affected by the govermental act, as distinguished from mere interest in the question involved or a mere incidental interest.[111] Here, Baterina invoked that his being a legislator, taxpayer, concerned citizen, and the transcendental importance of the issues involved, imbued him with standing to intervene in the expropriation case.[112]

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[109] *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618, 632-633 (2000).

[110] *Id*.

[111] *Id*.

[112] *Supra* note 22, at 58. In his Motion for Intervention and Motion to Admit the Petition for Prohibition in Intervention he stated:

x x x x x x x x x

2. As legislators and taxpayers, the Respondents-in-intervention have a legal interest in the matter of litigation insofar as they stand to be benefited or injured by the impending payment of just compensation by the government to defendants-in-intervention PIATCO and FRAPORT AG Frankfurt Airport Services.

3. As legislators and taxpayers, the Respondents-in-intervention have an interest in the instant case, because public funds are in danger of being misused and dissipated. It is the fundamental duty of the [Respondents]-in-intervention not only to appropriate public funds, but more importantly, to see to it that public funds are being used properly and legally.

4. Likewise, the [Respondents]-in-intervention's standing in the *PIATCO cases* was affirmed by the Supreme Court because as legislators, they have standing to question the disbursement of any public funds, especially if **unappropriated by the legislature**. The plan to compensate PIATCO and/or FRAPORT is also illegal and affects matters of transcendental importance to the nation.

5. As matters involving the nature of the PIATCO Contracts are of transcendental importance, the [Respondents]-in-intervention are not real parties in interest. They have sufficient legal interest in the matter in litigation, such that they will either gain or lose by the direct legal operation and effect of the judgment in the instant case as regards the payment of just compensation by the government to PIATCO and FRAPORT AG Frankfurt Airport Services. (Emphasis in the original)

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We need not go into an extensive discussion of this point. Being a mere procedural technicality, the requirement of legal standing may be waived or relaxed by the Court in the exercise of its discretion. Hence, in *Agan*, we ruled that:

> 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* and *Gonzales v. Raquiza* 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*, 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," Further, "insofar as taxpayers' suits are concerned . . . (this Court) *is not devoid of discretion* as to whether or not it should be entertained." 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." **In view of the serious legal questions involved and their impact on public interest, we resolve to grant standing to the petitioners.** [113] (Emphasis supplied)

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[113] *Supra* note 2, at 803-804, citations omitted. In the recent case of *David v. Macapagal-Arroyo*, a summary of the various pronouncements of this Court regarding its liberal policy on standing was provided:

> "By way of summary, the following rules may be culled from the cases decided by this Court. Taxpayers, voters, concerned citizens, and legislators may be accorded standing to sue, provided that the following requirements are met:
>
> (1) the cases involve constitutional issues;
>
> (2) for **taxpayers**, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;

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The issues raised in these petitions involving an airport terminal costing more than ₱3 billion have a great impact on public interest. Given the transcendental importance of the case, we grant standing to Baterina.

TECHNICALITIES MAY BE SET ASIDE WHERE THE ISSUES ARE OF TRANSCENDENTAL IMPORTANCE

The remaining relief being pursued by the Republic in G.R. No. 174166 is the issuance of a writ of injunction permanently enjoining the CA from proceeding with and resolving CA-G.R. SP No. 95539, the petition filed by Baterina.[114]

In CA-G.R. SP No. 95539, Baterina basically wanted to stop the payment to PIATCO of the ₱3,002,125,000 proffered value of NAIA IPT III[115] and for the expropriation court to first resolve the issue of the ownership of NAIA IPT III and its propriety as an object of expropriation.

Considering that payment (a supervening event) has already been released to and received by PIATCO and the fact that CA-G.R. SP No. 95539 was already dismissed by the CA, the Republic's petition may well be considered moot and academic. However, both the Republic and Baterina have signified their desire to submit for resolution of this Court the substantive issues raised by Baterina in the expropriation court.[116] As we

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(3) for **voters**, there must be a showing of obvious interest in the validity of the election law in question;

(4) for **concerned citizens**, there must be a showing that the issues raised are of transcendental importance which must be settled early; and

(5) for **legislators**, there must be a claim that the official action complained of infringes upon their prerogatives as legislators." (Emphasis supplied) (G.R. No. 171396, 3 May 2006, 489 SCRA 160, 220-221)

[114] Manifestation dated September 12, 2006 , p. 2.

[115] *Supra* note 39.

[116] The Solicitor General stated:

> "It is submitted that the correct interpretation of the applicable law on the expropriation of [NAIA IPT III] could avoid the said dreaded consequences. It is further submitted that this Honorable Court had, in many similar instances where its silence on an issue will only

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already stated and discussed, this case involves matters of transcendental importance which should not be evaded. It is imperative that all pertinent unanswered questions which remain obstacles to the operationalization of NAIA IPT III be resolved immediately and completely. We may settle these substantive issues here and now, considering that these are questions of law cognizable by this Court.

Furthermore, the Court can relax or even suspend its procedural rules in the exercise of its inherent power under the Constitution "to promulgate rules concerning … pleading, practice and procedure in all courts."[117] Besides, this Court is the final arbiter of all legal questions or controversies.

Thus, the Court may dispense with the normal procedure of remanding the case to the expropriation court in order to avoid further delays in the resolution of the case.[118] It can consider the substantive issues raised by Baterina as properly brought before this Court and rule on them accordingly.

Now, the substantive issues.

REPUBLIC MAY PROPERLY RESORT TO EXPROPRIATION OF NAIA IPT III

The power of eminent domain is the inherent right of the State to condemn private property for public use upon payment

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prolong or multiply litigation, exercised the judicial prerogative to lay down the parameters for the application of a law. There is no reason for it to do otherwise now." (*Supra* note 45, at 44)

Baterina, on his part, stated:

"… [p]rivate respondent moves that this Honorable Court exercise its judicial discretion to relax the rules of procedure and exercise its discretion in determining whether justice would be better served if all the legal issues involved, which will not require a trial of facts, were to be given due course or otherwise be taken up by this Honorable Court." (Manifestation and Motion for Relaxation of Procedural Rules in the Exercise of this Honorable Court's Judicial Discretion, p. 13)

[117] Art. VIII, Sec. 5 (5).

[118] *National Commercial Bank of Saudi Arabia v. Court of Appeals*, G.R. No. 124267, 18 August 2004, 437 SCRA 1, 9, citations omitted.

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of just compensation.[119] Thus, for expropriation to be valid, the following requirements must be met: (1) the taking must be for public use and (2) just compensation must be paid to the owner of the private property.[120]

At the very heart of Baterina's intervention in the expropriation case is his argument that the Republic could not rightfully expropriate NAIA IPT III because the government already owned it. Stated differently, PIATCO, as builder of the structure under a BOT arrangement, never owned NAIA IPT III. It was the Republic, from the onset, which owned it because:

1. Sec. 2 (b) of the BOT Law[121] does not contemplate that ownership over the built structure is vested upon the project proponent;
2. If the legislature intended that the project proponent would have ownership of the structure, then the BOT Law would have simply said so;
3. The statement in *Tatad v. Garcia, Jr.*[122] regarding the ownership of structures built under a BOT arrangement is *obiter dictum;* and

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[119] *Didipio Earth-Savers' Multi-Purpose Association, Incorporated (Desama) v. Gozun*, G.R. No. 157882, 30 March 2006, 485 SCRA 586, 604, citing *Robern Development Corporation v. Quitain*, 373 Phil. 773, 792-793 (1999).

[120] See CONSTITUTION, Art. III, Sec. 9.

[121] Build-operate-and-transfer — A contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The project proponent operates the facility over the fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, and operating and maintenance expenses in the project. The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term which shall not exceed fifty (50) years: x x x

[122] 13 Phil. 296 (1995).

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4. NAIA IPT III was built on land owned by the BCDA thus it belongs to the owner of the land under the Civil Code.[123]

I disagree. The builder in a BOT arrangement is the owner of the facilities it builds.

In *Tatad v. Garcia*, we ruled that a foreign corporation which constructed the facilities of EDSA Light Rail Transit III under a Build-Lease-Transfer scheme was the owner of such facilities:

What private respondent owns are the rail tracks, rolling stocks like the coaches, rail stations, terminals and the power plant, not a public utility. xxx What constitutes a public utility is not their ownership but their use to serve the public.

The Constitution, in no uncertain terms, requires a franchise for the operation of a public utility. However, it does not require a franchise before one can own the facilities needed to operate a public utility so long as it does not operate them to serve the public.

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In law, there is a clear distinction between the "operation" of a public utility and the ownership of the facilities and equipment used to serve the public.

Ownership is defined as a relation in law by virtue of which a thing pertaining to one person is completely subjected to his will in everything not prohibited by law or the concurrence with the rights of another.

x x x x x x x x x

The right to operate a public utility may exist independently and separately from the ownership of the facilities thereof. One can own said facilities without operating them as a public utility, or conversely, one may operate a public utility without owning the facilities used to serve the public. xxx

x x x x x x x x x

The BOT scheme is expressly defined as one where the contractor undertakes the construction and financing of an infrastructure facility,

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[123] *Supra* note 22, at 82-90; Baterina's Memorandum, pp. 32-39.

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and operates and maintains the same. The contractor operates the facility for a fixed period during which it may recover its expenses and investment in the project plus a reasonable rate of return thereon. After the expiration of the agreed term, **the contractor transfers the ownership and operation of the project to the government**.[124] (Emphasis supplied)

There is no reason why this ruling should not apply here.

We already stated in *Gingoyon* that:

x x x In *Tatad v. Garcia*, the Court acknowledged that the operator of the EDSA Light Rail Transit project under a BOT scheme was the owner of the facilities such as "the rail tracks, rolling stocks like the coaches, rail stations, terminals and the power plant."

There can be no doubt that PIATCO has ownership rights over the facilities which it had financed and constructed. The 2004 [Agan] Resolution squarely recognized that right when it mandated the payment of just compensation to PIATCO prior to the takeover by the Government of [NAIA IPT III]. The fact that the Government resorted to eminent domain proceedings in the first place is a concession on its part of PIATCO's ownership. Indeed, if no such right is recognized, then there should be no impediment for the Government to seize control of NAIA 3 through ordinary ejectment proceedings.

Since the rights of PIATCO over the NAIA 3 facilities are established, the nature of these facilities should now be determined. x x x[125] (Emphasis supplied)

To construe the BOT law the other way would be highly prejudicial to the proponent/builder of the project. The proponent/builder who spends a tremendous amount of money on the facilities has ownership rights[126] over what it builds. Its rights

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[124] *Supra* note 120, at 321-323, 328.

[125] *Supra* note 3, at 521-522.

[126] These rights are: the *jus utendi* or the right to receive from the thing what it produces; the *jus abutendi* or the right to consume the thing by its use; the *jus disponendi* or the power of the owner to alienate, encumber, transform and even destroy the thing owned; the *jus vindicandi* or the right to exclude from the possession of the thing owned any other person to

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are of course limited by the provisions of the BOT law and other relevant laws.

The correctness or propriety of the expropriation of NAIA IPT III was assumed in *Gingoyon*. It was not even an issue there because the question squarely confronted was which law (Rule 67 of the Rules of Court or RA 8974) should govern the valuation of the subject matter of the expropriation proceedings. To resolve this, the Court, precisely, had to first accept the propriety of the expropriation:

> The Government has chosen to resort to expropriation, a remedy available under the law, which has the added benefit of an integrated process for the determination of just compensation and the payment thereof to PIATCO. We appreciate that the case at bar is a highly unusual case, whereby the Government seeks to expropriate a building complex constructed on land which the State already owns. There is an inherent illogic in the resort to eminent domain on property already owned by the State. At first blush, since the State already owns the property on which [NAIA IPT III] stands, the proper remedy should be akin to an action for ejectment.
>
> However, the reason for the resort by the Government to expropriation proceedings is understandable in this case. The 2004 [*Agan*] Resolution, in requiring the payment of just compensation prior to the takeover by the Government of [NAIA IPT III], effectively precluded it from acquiring possession or ownership of the [NAIA IPT III] through the unilateral exercise of its rights as the owner of the ground on which the facilities stood. Thus, as things stood after the 2004 [*Agan*] Resolution, the right of the Government to take over the [NAIA IPT III] terminal was preconditioned by lawful order on the payment of just compensation to PIATCO as builder of the structures.
>
> The determination of just compensation could very well be agreed upon by the parties without judicial intervention, and it appears that steps towards that direction had been engaged in. Still, ultimately, the Government resorted to its inherent power of eminent domain

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whom the owner has not transmitted such thing; the *jus possidendi* or the right to possess and *jus fruendi* or the right to the fruits. (*Austria-Magat v. Court of Appeals*, G.R. No. 106755, 1 February 2002, 375 SCRA 556, 566; *Distilleria Washington, Inc. v. La Tondeña Distillers, Inc.*, G.R. No. 120961, 2 October 1997, 280 SCRA 116, 125)

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through expropriation proceedings. **Is eminent domain appropriate in the first place, with due regard not only to the law on expropriation but also to the Court's 2004 Resolution in *Agan*?**

The right of eminent domain extends to personal and real property, and the [NAIA IPT III] structures, adhered as they are to the soil, are considered as real property. The public purpose for the expropriation is also beyond dispute. It should also be noted that Section 1 of Rule 67 (on Expropriation) recognizes the possibility that the property sought to be expropriated may be titled in the name of the Republic of the Philippines, although occupied by private individuals, and in such case an averment to that effect should be made in the complaint. The instant expropriation complaint did aver that the [NAIA IPT III] complex "stands on a parcel of land owned by the Bases Conversion Development Authority, another agency of [the Republic of the Philippines]."

Admittedly, eminent domain is not the sole judicial recourse by which the Government may have acquired the [NAIA IPT III] facilities while satisfying the requisites in the 2004 [*Agan*] Resolution. Eminent domain though may be the most effective, as well as the speediest means by which such goals may be accomplished. Not only does it enable immediate possession after satisfaction of the requisites under the law, it also has a built-in procedure through which just compensation may be ascertained. **Thus, there should be no question as to the propriety of eminent domain proceedings in this case.**[127] (Emphasis supplied)

In recognizing the right of AEDC to the award of the NAIA IPT III project, would the public purpose of the expropriation be defeated by the government's taking over a privately owned structure, only to turn over its operation to another private entity (AEDC)? The answer is no.

To be valid, the taking must be for public use. The meaning of the term "public use" has evolved over time in response to changing public needs and exigencies. Public use which was traditionally understood as strictly limited to actual "use by the public" has already been abandoned.[128] "Public use" has `now

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[127] *Supra* note 3, at 512-514.

[128] *Reyes v. National Housing Authority*, G.R. No. 147511, 20 January 2003, 395 SCRA 494, 501.

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been held to be synonymous with "public interest," "public benefit," "public welfare" and "public convenience."[129] It includes the broader notion of indirect public benefit or advantage.[130] Whatever may be beneficially employed for the general welfare satisfies the requirement of public use.[131]

In the 2006 case of *Didipio Earth-Savers' Multi-Purpose Association, Incorporated (DESAMA) v. Gozun*,[132] we considered the taking of land by the State to enable holders of Financial and Technical Assistant Agreements to pursue their mining operations as taking for a public use since "mining is an industry which is of public benefit."[133] We said: "That public use is negated by the fact that the State would be taking private properties for the benefit of private mining firms or mining contractors is not at all true."[134]

We took our cue from earlier cases wherein we considered the expanded and modern meaning of "public use":

1. In *Heirs of Juancho Ardona v. Reyes*,[135] we held that promotion of tourism is within the meaning of "public use"—

The petitioners' contention that the promotion of tourism is not "public use" because **private concessionaires would be allowed to maintain various facilities** such as restaurants, hotels, stores, *etc*. inside the tourist complex is impressed with even less merit. Private bus firms, taxicab fleets, roadside restaurants, and other private businesses using public streets and highways do not

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[129] *Id*.

[130] *Didipio Earth-Savers' Multi-Purpose Association, Incorporated (DESAMA) v. Gozun*, G.R. No. 157882, 30 March 2006, 485 SCRA 586, 613.

[131] *Heirs of Juancho Ardona v. Reyes*, G.R. Nos. 60553 to 60555, 26 October 1983, 125 SCRA 220, 235, citing Chief Justice Enrique M. Fernando, *The Constitution of the Philippines*, 2nd ed., pp. 523-524.

[132] *Supra* note 128.

[133] *Id*. at 614.

[134] *Id*.

[135] *Supra* note 129.

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diminish in the least bit the public character of expropriations for roads and streets. The lease of store spaces in underpasses of streets built on expropriated land does not make the taking for a private purpose. Airports and piers catering exclusively to private airlines and shipping companies are still for public use. The expropriation of private land for slum clearance and urban development is for a public purpose even if the developed area is later sold to private homeowners, commercial firms, entertainment and service companies, and other private concerns.[136] (Emphasis supplied)

2. In *Estate of Salud Jimenez v. Philippine Export Processing Zone*,[137] we ruled that the establishment of an export processing zone is a legitimate public purpose notwithstanding that portion of the land was leased to private commercial banks:

… The expropriation of Lot 1406-B for the purpose of being **leased to [commercial] banks** and for the construction of a [transportation] terminal has the purpose of making banking and transportation facilities easily accessible to the persons working at the industries located in [the Philippine Export Processing Zone].[138]

3. In *Reyes v. National Housing Authority*,[139] we stated that the low cost housing project on the expropriated lots is compliant with the "public use" requirement:

The act of respondent [National Housing Authority] in entering into a contract with a real estate developer for the construction of low cost housing on the expropriated lots **to be sold to qualified low income beneficiaries** cannot be taken to mean as a deviation from the stated public purpose of their taking.[140] (Emphasis supplied)

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[136] *Id*. at 235.

[137] G.R. No. 137285, 16 January 2001, 349 SCRA 240.

[138] *Id*. p. 262.

[139] *Supra* note 126.

[140] *Id*.

Clearly, the State, through expropriation proceedings, may take private property even if, admittedly, it will transfer this property again to another private party as long as there is a public purpose to the taking. In 2005, the United States Supreme Court held in *Kelo v. New London*[141] that promotion of economic development qualifies as a public use even if private parties are benefited:

> Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff*, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. In *Monsanto*, we recognized that the "most direct beneficiaries" of the data-sharing provisions were the subsequent pesticide applicants, but benefiting them in this way was necessary to promoting competition in the pesticide market. The owner of the department store in *Berman* objected to "taking from one businessman for the benefit of another businessman," referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. Our rejection of that contention has particular relevance to the instant case: "The public end may be as well or better served through an agency of private enterprise than through a department of government–or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[142]

Expropriation may have been viewed as illogical[143] or problematic but there was no doubt that the government had the power and right to institute such proceedings as long as the requisites for its valid exercise were present, as they are here. Consequently, the ₱3,002,125,000 paid by the Republic to PIATCO as proffered value of the expropriated structure was held to be valid. AEDC will reimburse this amount to the Republic in consonance with our ruling that it (AEDC) shall assume the payment of just compensation due to PIATCO.

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[141] 545 US 469 [2005], <www.supremecourtus.gov/opinions/04pdf/04-108.pdf > (visited February 5, 2007).

[142] *Id*.

[143] *Supra* note 3, at 513.

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DETERMINATION OF JUST COMPENSATION IS A JUDICIAL FUNCTION

Baterina argues that if expropriation is permitted, PIATCO will be entitled to just compensation based on the replacement cost of the structures which will include contractor's profit and overhead costs.[144] He asserts that PIATCO is, at best, only entitled to recover its costs on the basis of *quantum meruit* and, at worst, is not at all entitled to compensation since it is guilty of fraud and bad faith.[145]

The Republic counters that nothing in RA 8974 precludes the expropriation court from considering evidence of illegality or wrongdoing on the part of PIATCO in the determination of just compensation.[146]

I agree with the Republic.

In *Agan*, we stated:

> This Court, however, is not unmindful of the reality that the structures comprising the NAIA IPT III facility are almost complete and that funds have been spent by PIATCO in their construction. For the government to take over the said facility, it has to compensate [PIATCO] as builder of the said structures. **The compensation must be just and in accordance with law and equity for the government can not unjustly enrich itself at the expense of PIATCO and its investors.**[147] (Emphasis supplied)

In determining the proper amount to be paid under RA 8974, we held in *Gingoyon* that:

> Under [RA 8974], the Government is required to "immediately pay" the owner of the property the amount equivalent to the sum of (1) one hundred percent (100%) of the value of the property based on the current relevant zonal valuation of the [BIR]; and

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[144] Baterina's Memorandum, p. 24.

[145] *Id*. p. 57.

[146] *Supra* note 45, at 39.

[147] *Supra* note 2, at 603.

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(2) the value of the improvements and/or structures as determined under Section 7. As stated above, the BIR zonal valuation cannot apply in this case, thus the amount subject to immediate payment should be limited to "the value of the improvements and/or structures as determined under Section 7," with Section 7 referring to the "implementing rules and regulations for the equitable valuation of the improvements and/or structures on the land." Under the present implementing rules in place, the valuation of the improvements/ structures are to be based using "the replacement cost method." **However, the replacement cost is only one of the factors to be considered in determining the just compensation.**

In addition to [RA 8974], the 2004 *Resolution* in *Agan* also mandated that the payment of just compensation should be in accordance with equity as well. Thus, in ascertaining the ultimate amount of just compensation, the duty of the trial court is to ensure that such amount conforms not only to the law, such as [RA 8974], but to principles of equity as well.[148] (Emphasis supplied)

As we stated in *Agan* (which we likewise recognized in *Gingoyon*), compensation must conform not only with law but equity as well. This means that the expropriation court is not confined to strictly following the formula spelled out in the law and instead is given latitude in its determination of the compensation due to PIATCO.[149] After all, the determination of just compensation is a judicial function.

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[148] *Supra* note 3, at 526.

[149] In the dissenting opinion of then Senior Associate Justice, now Chief Justice Puno in *Gingoyon*, he stated that:

… *Agan* involved solely the issue of the validity of the PIATCO contracts. After striking down the contracts as void, we ruled that the State must pay just compensation to PIATCO before it could exercise the right to take over considering the undeniable fact that the latter spent a considerable sum of money to build the structures comprising the NAIA IPT III. **The Court, however, did not spell out a rigid formula for just compensation to be paid to PIATCO except to say that it must be according to law and equity. The Court's language was carefully crafted to give the trial court sufficient flexibility in determining just compensation considering the exchange of charges and countercharges that the cost in building the said structures was unreasonably bloated.** (Emphasis supplied) (*Supra* note 3, at 551)

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Equity is defined as justice outside law, being ethical rather than jural and belonging to the sphere of morals than of law.[150] It is grounded on the precepts of conscience and not on any sanction of positive law.[151] Hence, equity finds no room for application where there is law.[152] It cannot prevail over an express provision of the law. However, it is

> … a complement of legal jurisdiction [that] seeks to reach and to complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of cases, are incompetent to do so. x x x[153]

Equity is a principle which takes into consideration the particular and special circumstances of the case so as to prevent inflicting unintended injustice on a party. Its application should not deprive any party of an existing right, but should render complete justice to one with a meritorious cause.

The determination of the final amount of fair and just compensation[154] due PIATCO remains the task of the expropriation court.

Equity seeks to render complete justice by correcting deficiencies or flaws in the law. It affords the expropriation court flexibility to take into consideration factors which it could not have considered if it applied RA 8974 alone. Needless to state, the just compensation owing to PIATCO for the construction of NAIA IPT III should not include any amounts that are bloated or unreasonable and those that involve illegality, bribery,

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[150] *Aparente, Sr. v. National Labor Relations Commission*, G.R. No. 117652, 27 April 2000, 331 SCRA 82, 93, citation omitted.

[151] *Id*.

[152] *Id*.

[153] *Tamio v. Ticson*, G.R. No. 154895, 18 November 2004, 443 SCRA 44, 55, citation omitted.

[154] In a long line of cases, this Court applied the standard of *quantum meruit* to null and void projects. See *Republic v. CA*, G.R. No. 103882, November 25, 1998; *Eslao v. COA*, G.R. No. 89745, April 8, 1991; *F.F. Mañacop Construction Corp. v. CA and MIAA*, 266 SCRA 335 and *EPG Construction, et al. v. Vigilar*, 354 SCRA 566.

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corruption, collusion, fraud and contravention of public policy. Defects in the terminal and the amounts needed to correct them, specially those affecting public safety, must also be excluded. Therefore, Baterina's misgivings that PIATCO will be unjustly rewarded for its supposed wrongdoings have no basis and are merely speculative.

In line with this, Baterina's prayer that the Solicitor General be directed to disclose evidence its office has gathered on PIATCO's alleged bad faith, corruption and fraud should be denied for being premature. The government must be given the chance to present its evidence as it deems fit. In this connection, since AEDC will ultimately shoulder the just compensation to be paid to PIATCO, it should be allowed to intervene in the expropriation proceedings.[155]

A FINAL NOTE

The BOT Law, as amended, was enacted to mobilize the resources of the private sector for the economic development of the country. AEDC took one step further and submitted an unsolicited proposal. The BOT scheme, no matter how laudable its objectives, will not attain its ends if the legal rights of an original proponent under the law are not recognized.

It may be claimed that maintaining the nature of NAIA IPT III as a BOT project is inherently incompatible with the continuation of the expropriation proceedings. I think not. The vested right of AEDC to be awarded the project should be balanced with the legal authority of the government to expropriate the terminal. The right of AEDC does not nullify the authority of the government and vice versa. In the absence of any prohibition under our laws, this Court should uphold both.

With due respect to the majority, AEDC should be allowed to pursue the project it conceived, designed and proposed. This

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[155] AEDC has no objection to this since it stated in its Memorandum that "[t]hus it is submitted that the expropriation in the lower court may still be pursued as the equitable process by which PIATCO as the builder of NAIA IPT III may be paid compensation that is just and in accordance with law, thereby upholding the principle of unjust enrichment." (p. 51)

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will uphold its rights as an original proponent under the BOT Law, satisfy the just compensation owing to PIATCO at no cost to the government and finally bring about the long overdue operationalization of NAIA IPT III as committed by the Philippine government on January 25, 2008 at the World Economic Forum in Davos, Switzerland, not to mention the generation of the revenues that the government is entitled to under the BOT Law. Ultimately, it is public welfare that will benefit from the operation of a fully functional world-class airport terminal.

The finality of this decision will effectively end the first phase of the expropriation proceedings given that we have categorically upheld the legal authority of the Republic to expropriate NAIA IPT III. There should be no more hindrance to the determination by the expropriation court of the final amount of just compensation (in accordance with law and equity) to be paid to PIATCO. As we have also ruled on the issues raised by Baterina, there is no need to maintain CA-G.R. SP No. 95539. Hence, it is dismissed.

Accordingly, I vote that the petition for *mandamus* and prohibition in G.R. No 169914 be *GRANTED*. Respondents, their officers, agents, successors, representatives or persons or entities acting on their behalf should be ordered to:

1) formally award the NAIA IPT III project to AEDC;

2) execute and formalize with AEDC the approved draft concession agreement (with a provision on the assignment to and assumption by AEDC of the national government's obligation to pay just compensation to PIATCO) and

3) cease and desist from entering into any concession contract with third parties for the operation of the NAIA IPT III project.

On the other hand, the petition for *certiorari* and prohibition in G.R. No. 174166 should be *DISMISSED* for being moot and academic.