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[G.R. No. 178158, December 04, 2009]

STRATEGIC ALLIANCE DEVELOPMENT CORPORATION, PETITIONER, VS. RADSTOCK SECURITIES LIMITED AND PHILIPPINE NATIONAL CONSTRUCTION CORPORATION, RESPONDENTS. ASIAVEST MERCHANT BANKERS BERHAD, INTERVENOR.

[G.R. No. 180428]

LUIS SISON, PETITIONER, VS. PHILIPPINE NATIONAL CONSTRUCTION CORPORATION AND RADSTOCK SECURITIES LIMITED, RESPONDENTS.

D E C I S I O N

CARPIO, J.:

Prologue

This case is an anatomy of a P6.185 billion[1] pillage of the public coffers that ranks among one of the most brazen and hideous in the history of this country. This case answers the questions why our Government perennially runs out of funds to provide basic services to our people, why the great masses of the Filipino people wallow in poverty, and why a very select few amass unimaginable wealth at the expense of the Filipino people.

On 1 May 2007, the 30-year old franchise of Philippine National Construction Corporation (PNCC) under Presidential Decree No. 1113 (PD 1113), as amended by Presidential Decree No. 1894 (PD 1894), expired. During the 13th Congress, PNCC sought to extend its franchise. PNCC won approval from the House of Representatives, which passed House Bill No. 5749[2] renewing PNCC's franchise for another 25 years. However, PNCC failed to secure approval from the Senate, dooming the extension of PNCC's franchise. Led by Senator Franklin M. Drilon, the Senate opposed PNCC's plea for extension of its franchise.[3] Senator Drilon's privilege speech[4] explains why the Senate chose not to renew PNCC's franchise:

I repeat, Mr. President. PNCC has agreed in a compromise agreement dated 17 August 2006 to transfer to Radstock Securities Limited P17,676,063,922, no small money, Mr. President, my dear colleagues, P17.6 billion.

What does it consist of? It consists of the following: 19 pieces of real estate properties with an appraised value of P5,993,689,000. Do we know what is the bulk of this? An almost 13-hectare property right here in the Financial Center. As we leave the Senate, as we go out of this Hall, as we drive thru past the GSIS, we will see on the right a vacant lot, that is PNCC property. As we turn right on Diosdado Macapagal, we see on our right new buildings, these are all PNCC properties. That is 12.9 hectares of valuable asset right in this Financial Center that is worth P5,993,689.000.

What else, Mr. President? The 20% of the outstanding capital stock of PNCC with a par value of P2,300,000,000-- I repeat, 20% of the outstanding capital stock of PNCC worth P2,300 billion-- was assigned to Radstock.

In addition, Mr. President and my dear colleagues, please hold on to your seats because part of the agreement is 50% of PNCC's 6% share in the gross toll revenue of the Manila North Tollways Corporation for 27 years, from 2008 to 2035, is being assigned to Radstock. How much is this worth? It is worth P9,382,374,922. I repeat, P9,382,374,922.

x x x x

Mr. President, P17,676,000,000, however, was made to appear in the agreement to be only worth P6,196,156,488. How was this achieved? How was an aggregate amount of P17,676,000,000 made to appear to be only P6,196,156,488? First, the 19 pieces of real estate worth P5,993,689,000 were only assigned a value of P4,195,000,000 or only 70% of their appraised value.

Second, the PNCC shares of stock with a par value of P2.3 billion were marked to market and therefore were valued only at P713 million.

Third, the share of the toll revenue assigned was given a net present value of only P1,287,000,000 because of a 15% discounted rate that was applied.

In other words, Mr. President, the toll collection of P9,382,374,922 for 27 years was given a net present value of only P1,287,000,000 so that it is made to appear that the compromise agreement is only worth P6,196,000,000.

Mr. President, my dear colleagues, this agreement will substantially wipe out all the assets of PNCC. It will be left with nothing else except, probably, the collection for the next 25 years or so from the North Luzon Expressway. This agreement brought PNCC to the cleaners and literally cleaned the PNCC of all

its assets. They brought PNCC to the cleaners and cleaned it to the tune of P17,676,000,000.

x x x x

Mr. President, are we not entitled, as members of the Committee, to know who is Radstock Securities Limited?

Radstock Securities Limited was allegedly incorporated under the laws of the British Virgin Islands. It has no known board of directors, except for its recently appointed attorney-in-fact, Mr. Carlos Dominguez.

Mr. President, are the members of the Committee not entitled to know why 20 years after the account to Marubeni Corporation, which gave rise to the compromise agreement 20 years after the obligation was allegedly incurred, PNCC suddenly recognized this obligation in its books when in fact this obligation was not found in its books for 20 years?

In other words, Mr. President, for 20 years, the financial statements of PNCC did not show any obligation to Marubeni, much less, to Radstock. Why suddenly on October 20, 2000, P10 billion in obligation was recognized? Why was it recognized?

During the hearing on December 18, Mr. President, we asked this question to the Asset Privatization Trust (APT) trustee, Atty. Raymundo Francisco, and he was asked: "What is the basis of your recommendation to recognize this?" He said: "I based my recommendation on a legal opinion of Feria and Feria." I asked him: "Who knew of this opinion?" He said: "Only me and the chairman of PNCC, Atty. Renato Valdecantos." I asked him: "Did you share this opinion with the members of the board who recognized the obligation of P10 billion?" He said: "No." "Can you produce this opinion now?" He said: "I have no copy."

Mysteriously, Mr. President, an obligation of P10 billion based on a legal opinion which, even Mr. Arthur Aguilar, the chairman of PNCC, is not aware of, none of the members of the PNCC board on October 20, 2000 who recognized this obligation had seen this opinion. It is mysterious.

Mr. President, are the members of our Committee not entitled to know why Radstock Securities Limited is given preference over all other creditors notwithstanding the fact that this is an unsecured obligation? There is no mortgage to secure this obligation.

More importantly, Mr. President, equally recognized is the obligation of PNCC to the Philippine government to the tune of P36 billion. PNCC owes the

Philippine government P36 billion recognized in its books, apart from P3 billion in taxes. Why in the face of all of these is Radstock given preference? Why is it that Radstock is given preference to claim P17.676 billion of the assets of PNCC and give it superior status over the claim of the Philippine government, of the Filipino people to the extent of P36 billion and taxes in the amount of P3 billion? Why, Mr. President? Why is Radstock given preference not only over the Philippine government claims of P39 billion but also over other creditors including a certain best merchant banker in Asia, which has already a final and executory judgment against PNCC for about P300 million? Why, Mr. President? Are we not entitled to know why the compromise agreement assigned P17.676 billion to Radstock? Why was it executed?[5] (Emphasis supplied)

Aside from Senator Drilon, Senator Sergio S. Osmeña III also saw irregularities in the transactions involving the Marubeni loans, thus:

SEN. OSMEÑA. Ah okay. Good.

Now, I'd like to point out to the Committee that - it seems that this was a politically driven deal like IMPSA. Because the acceptance of the 10 billion or 13 billion debt came in October 2000 and the Radstock assignment was January 10, 2001. **Now, why would Marubeni sell for $2 million three months after there was a recognition that it was owed P10 billion. Can you explain that, Mr. Dominguez?**

MR. DOMINGUEZ. Your Honor, I am not aware of the decision making process of Marubeni. But my understanding was, the Japanese culture is not a litigious one and they didn't want to get into a, you know, a court situation here in the Philippines having a lot of other interest, et cetera.

SEN. OSMEÑA. Well, but that is beside the point, Mr. Dominguez. All I am asking is does it stand to reason that after you get an acceptance by a debtor that he owes you 10 billion, you sell your note for 100 million.

Now, if that had happened a year before, maybe I would have understood why he sold for such a low amount. But right after, it seems that this was part of an orchestrated deal wherein with certain powerful interest would be able to say, "Yes, we will push through. We'll fix the courts. We'll fix the board. We'll fix the APT. And we will be able to do it, just give us 55 percent of whatever is recovered," am I correct?

MR. DOMINGUEZ. As I said, Your Honor, I am not familiar with the decision making process of Marubeni. But my understanding was, as I said, they didn't want to get into a ...

SEN. OSMEÑA. All right.

MR. DOMINGUEZ. ...litigious situation.[6]

x x x x

SEN. OSMEÑA. All of these financial things can be arranged. They can hire a local bank, Filipino, to be trustee for the real estate. So ...

SEN. DRILON. Well, then, that's a dummy relationship.

SEN. OSMEÑA. In any case, to me the main point here is that a third party, Radstock, whoever owns it, bought Marubeni's right for $2 million or P100 million. Then, they are able to go through all these legal machinations and get awarded with the consent of PNCC of 6 billion. That's a 100 million to 6 billion. Now, Mr. Aguilar, you have been in the business for such a long time. I mean, this hedge funds whether it's Radstock or New Bridge or Texas Pacific Group or Carlyle or Avenue Capital, they look at their returns. So if Avenue Capital buys something for $2 million and you give him $4 million in one year, it's a 100 percent return. They'll walk away and dance to their stockholders. So here in this particular case, if you know that Radstock only bought it for $2 million, I would have gotten board approval and say, "Okay, let's settle this for $4 million." And Radstock would have jumped up and down. So what looks to me is that this was already a scheme. Marubeni wrote it off already. Marubeni wrote everything off. They just got a $2 million and they probably have no more residual rights or maybe there's a clause there, a secret clause, that says, "I want 20 percent of whatever you're able to eventually collect." So $2 million. But whatever it is, Marubeni practically wrote it off. Radstock's liability now or exposure is only $2 million plus all the lawyer fees, under-the-table, etcetera. All right. Okay. So it's pretty obvious to me that if anybody were using his brain, I would have gone up to Radstock and say, "Here's $4 million. Here's P200 million. Okay." They would have walked away. But evidently, the "ninongs" of Radstock - See, I don't care who owns Radstock. I want to know who is the ninong here who stands to make a lot of money by being able to get to courts, the government agencies, OGCC, or whoever else has been involved in this, to agree to 6 billion or whatever it was. That's a lot of money. And believe me, Radstock will probably get one or two billion and four billion will go into somebody else's pocket. Or Radstock will turn around, sell that claim for P4 billion and let the new guy just collect the payments over the years.

x x x x[7]

SEN. OSMEÑA. x x x I just wanted to know is CDCP Mining a 100 percent subsidiary of PNCC?

MR. AGUILAR. Hindi ho. Ah, no.

SEN. OSMEÑA. If they're not a 100 percent, why would they sign jointly and severally? I just want to plug the loopholes.

MR. AGUILAR. I think it was - if I may just speculate. It was just common ownership at that time.

SEN. OSMEÑA. Al right. Now - Also, the ...

MR. AGUILAR. Ah, 13 percent daw, Your Honor.

SEN. OSMEÑA. Huh?

MR. AGUILAR. Thirteen percent ho.

SEN. OSMEÑA. What's 13 percent?

MR. AGUILAR. We owned ...

x x x x

SEN. OSMEÑA. x x x CDCP Mining, how many percent of the equity of CDCP Mining was owned by PNCC, formerly CDCP?

MS. PASETES. Thirteen percent.

SEN. OSMEÑA. Thirteen. And as a 13 percent owner, they agreed to sign jointly and severally?

MS. PASETES. Yes.

SEN. OSMEÑA. One-three? So poor PNCC and CDCP got taken to the cleaners here. They sign for a 100 percent and they only own 13 percent.

x x x x[8] (Emphasis supplied)

I.
The Case

Before this Court are the consolidated petitions for review[9] filed by Strategic Alliance Development Corporation (STRADEC) and Luis Sison (Sison), with a motion for intervention filed by Asiavest Merchant Bankers Berhad (Asiavest), challenging the validity of the Compromise Agreement between PNCC and Radstock. The Court of

Appeals approved the Compromise Agreement in its Decision of 25 January 2007[10] in CA-G.R. CV No. 87971.

II.
The Antecedents

PNCC was incorporated in 1966 for a term of fifty years under the Corporation Code with the name Construction Development Corporation of the Philippines (CDCP).[11] PD 1113, issued on 31 March 1977, granted CDCP a 30-year franchise to construct, operate and maintain toll facilities in the North and South Luzon Tollways. PD 1894, issued on 22 December 1983, amended PD 1113 to include in CDCP's franchise the Metro Manila Expressway, which would "serve as an additional artery in the transportation of trade and commerce in the Metro Manila area."

Sometime between 1978 and 1981, Basay Mining Corporation (Basay Mining), an affiliate of CDCP, obtained loans from Marubeni Corporation of Japan (Marubeni) amounting to 5,460,000,000 yen and US$5 million. A CDCP official issued letters of guarantee for the loans, committing CDCP to pay solidarily for the full amount of the 5,460,000,000 yen loan and to the extent of P20 million for the US$5 million loan. However, there was no CDCP Board Resolution authorizing the issuance of the letters of guarantee. Later, Basay Mining changed its name to CDCP Mining Corporation (CDCP Mining). CDCP Mining secured the Marubeni loans when CDCP and CDCP Mining were still privately owned and managed.

Subsequently in 1983, CDCP changed its corporate name to PNCC to reflect the extent of the Government's equity investment in the company, which arose when government financial institutions converted their loans to PNCC into equity following PNCC's inability to pay the loans.[12] Various government financial institutions held a total of seventy-seven point forty-eight percent (77.48%) of PNCC's voting equity, most of which were later transferred to the Asset Privatization Trust (APT) under Administrative Orders No. 14 and 64, series of 1987 and 1988, respectively.[13] Also, the Presidential Commission on Good Government holds some 13.82% of PNCC's voting equity under a writ of sequestration and through the voluntary surrender of certain PNCC shares. In fine, the Government owns 90.3% of the equity of PNCC and only 9.70% of PNCC's voting equity is under private ownership.[14]

Meanwhile, the Marubeni loans to CDCP Mining remained unpaid. On 20 October 2000, during the short-lived Estrada Administration, the PNCC Board of Directors[15] (PNCC Board) passed Board Resolution No. BD-092-2000 admitting PNCC's liability to Marubeni for P10,743,103,388 as of 30 September 1999. PNCC Board Resolution No. BD-092-2000 reads as follows:

RESOLUTION NO. BD-092-2000

RESOLVED, That the Board recognizes, acknowledges and confirms PNCC's obligations as of September 30, 1999 with the following entities, exclusive of the interests and other charges that may subsequently accrue and still become due therein, to wit:

a). **the Government of the Republic of the Philippines in the amount of P36,023,784,751.00; and**

b). **Marubeni Corporation in the amount of P10,743,103,388.00.** (Emphasis supplied)

This was the first PNCC Board Resolution admitting PNCC's liability for the Marubeni loans. Previously, for two decades the PNCC Board consistently refused to admit any liability for the Marubeni loans.

Less than two months later, or on 22 November 2000, the PNCC Board passed Board Resolution No. BD-099-2000 amending Board Resolution No. BD-092-2000. PNCC Board Resolution No. BD-099-2000 reads as follows:

RESOLUTION NO. BD-099-2000

RESOLVED, That the Board hereby amends its Resolution No. BD-092-2000 dated October 20, 2000 so as to read as follows:

RESOLVED, That the Board recognizes, acknowledges and confirms its obligations as of September 30, 1999 with the following entities, exclusive of the interests and other charges that may subsequently accrue and still due thereon, subject to the final determination by the Commission on Audit (COA) of the amount of obligation involved, and subject further to the declaration of the legality of said obligations by the Office of the Government Corporate Counsel (OGCC), to wit:

a). **the Government of the Republic of the Philippines in the amount of P36,023,784,751.00; and**

b). **Marubeni Corporation in the amount of P10,743,103,388.00.** (Emphasis supplied)

In January 2001, barely three months after the PNCC Board first admitted liability for the Marubeni loans, Marubeni assigned its entire credit to Radstock for US$2 million or less than P100 million. In short, Radstock paid Marubeni less than 10% of the P10.743 billion admitted amount. Radstock immediately sent a notice and demand letter to PNCC.

On 15 January 2001, Radstock filed an action for collection and damages against PNCC before the Regional Trial Court of Mandaluyong City, Branch 213 (trial court). In its order of 23 January 2001, the trial court issued a writ of preliminary attachment against PNCC. The trial court ordered PNCC's bank accounts garnished and several of its real properties attached. On 14 February 2001, PNCC moved to set aside the 23 January 2001 Order and to discharge the writ of attachment. PNCC also filed a motion to dismiss the case. The trial court denied both motions. PNCC filed motions for reconsideration, which the trial court also denied. PNCC filed a petition for certiorari before the Court of Appeals, docketed as CA-G.R. SP No. 66654, assailing the denial of the motion to dismiss. On 30 August 2002, the Court of Appeals denied PNCC's petition. PNCC filed a motion for reconsideration, which the Court of Appeals also denied in its 22 January 2003 Resolution. PNCC filed a petition for review before this Court, docketed as G.R. No. 156887.

Meanwhile, on 19 June 2001, at the start of the Arroyo Administration, the PNCC Board, under a new President and Chairman, revoked Board Resolution No. BD-099-2000.

The trial court continued to hear the main case. On 10 December 2002, the trial court ruled in favor of Radstock, as follows:

> WHEREFORE, premises considered, judgment is hereby rendered in favor of the plaintiff and the defendant is directed to pay the total amount of Thirteen Billion One Hundred Fifty One Million Nine Hundred Fifty Six thousand Five Hundred Twenty Eight Pesos (P13,151,956,528.00) with interest from October 15, 2001 plus Ten Million Pesos (P10,000,000.00) as attorney's fees.
>
> SO ORDERED.[16]

PNCC appealed the trial court's decision to the Court of Appeals, docketed as CA-G.R. CV No. 87971.

On 19 March 2003, this Court issued a temporary restraining order in G.R. No. 156887 forbidding the trial court from implementing the writ of preliminary attachment and ordering the suspension of the proceedings before the trial court and the Court of Appeals. In its 3 October 2005 Decision, this Court ruled as follows:

> WHEREFORE, the petition is partly GRANTED and insofar as the Motion to Set Aside the Order and/or Discharge the Writ of Attachment is concerned, the Decision of the Court of Appeals on August 30, 2002 and its Resolution of January 22, 2003 in CA-G.R. SP No. 66654 are REVERSED and SET ASIDE. The attachments over the properties by the writ of preliminary attachment are hereby ordered LIFTED effective upon the finality of this Decision. The

Decision and Resolution of the Court of Appeals are AFFIRMED in all other respects. The Temporary Restraining Order is DISSOLVED immediately and the Court of Appeals is directed to PROCEED forthwith with the appeal filed by PNCC.

No costs.

SO ORDERED.[17]

On 17 August 2006, PNCC and Radstock entered into the Compromise Agreement where they agreed to reduce PNCC's liability to Radstock, supposedly from P17,040,843,968, to P6,185,000,000. PNCC and Radstock submitted the Compromise Agreement to this Court for approval. In a Resolution dated 4 December 2006 in G.R. No. 156887, this Court referred the Compromise Agreement to the Commission on Audit (COA) for comment. The COA recommended approval of the Compromise Agreement. In a Resolution dated 22 November 2006, this Court noted the Compromise Agreement and referred it to the Court of Appeals in CA-G.R. CV No. 87971. In its 25 January 2007 Decision, the Court of Appeals approved the Compromise Agreement.

STRADEC moved for reconsideration of the 25 January 2007 Decision. STRADEC alleged that it has a claim against PNCC as a bidder of the National Government's shares, receivables, securities and interests in PNCC. The matter is subject of a complaint filed by STRADEC against PNCC and the Privatization and Management Office (PMO) for the issuance of a Notice of Award of Sale to Dong-A Consortium of which STRADEC is a partner. The case, docketed as Civil Case No. 05-882, is pending before the Regional Trial Court of Makati, Branch 146 (RTC Branch 146).

The Court of Appeals treated STRADEC's motion for reconsideration as a motion for intervention and denied it in its 31 May 2007 Resolution. STRADEC filed a petition for review before this Court, docketed as G.R. No. 178158.

Rodolfo Cuenca (Cuenca), a stockholder and former PNCC President and Board Chairman, filed an intervention before the Court of Appeals. Cuenca alleged that PNCC had no obligation to pay Radstock. The Court of Appeals also denied Cuenca's motion for intervention in its Resolution of 31 May 2007. Cuenca did not appeal the denial of his motion.

On 2 July 2007, this Court issued an order directing PNCC and Radstock, their officers, agents, representatives, and other persons under their control, to maintain the *status quo ante*.

Meanwhile, on 20 February 2007, Sison, also a stockholder and former PNCC President and Board Chairman, filed a *Petition for Annulment of Judgment Approving Compromise Agreement* before the Court of Appeals. The case was docketed as CA-G.R. SP No. 97982.

Asiavest, a judgment creditor of PNCC, filed an *Urgent Motion for Leave to Intervene and to File the Attached Opposition and Motion-in-Intervention* before the Court of Appeals in CA-G.R. SP No. 97982.

In a Resolution dated 12 June 2007, the Court of Appeals dismissed Sison's petition on the ground that it had no jurisdiction to annul a final and executory judgment also rendered by the Court of Appeals. In the same resolution, the Court of Appeals also denied Asiavest's urgent motion.

Asiavest filed its *Urgent Motion for Leave to Intervene and to File the Attached Opposition and Motion-in-Intervention* in G.R. No. 178158.[18]

Sison filed a motion for reconsideration. In its 5 November 2007 Resolution, the Court of Appeals denied Sison's motion.

On 26 November 2007, Sison filed a petition for review before this Court, docketed as G.R. No. 180428.

In a Resolution dated 18 February 2008, this Court consolidated G.R. Nos. 178158 and 180428.

On 13 January 2009, the Court held oral arguments on the following issues:

1. Does the Compromise Agreement violate public policy?

2. Does the subject matter involve an assumption by the government of a private entity's obligation in violation of the law and/or the Constitution? Is the PNCC Board Resolution of 20 October 2000 defective or illegal?

3. Is the Compromise Agreement viable in the light of the non-renewal of PNCC's franchise by Congress and its inclusion of all or substantially all of PNCC's assets?

4. Is the Decision of the Court of Appeals annullable even if final and executory on grounds of fraud and violation of public policy and the Constitution?

III.
Propriety of Actions

The Court of Appeals denied STRADEC's motion for intervention on the ground that the motion was filed only after the Court of Appeals and the trial court had promulgated their respective decisions.

Section 2, Rule 19 of the 1997 Rules of Civil Procedure provides:

> SECTION 2. *Time to intervene*.- The motion to intervene may be filed at any time before rendition of judgment by the trial court. A copy of the pleading-in-intervention shall be attached to the motion and served on the original parties.

The rule is not absolute. The rule on intervention, like all other rules of procedure, is intended to make the powers of the Court completely available for justice.[19] It is aimed to facilitate a comprehensive adjudication of rival claims, overriding technicalities on the timeliness of the filing of the claims.[20] This Court has ruled:

> [A]llowance or disallowance of a motion for intervention rests on the sound discretion of the court after consideration of the appropriate circumstances. Rule 19 of the *Rules of Court* is a rule of procedure whose object is to make the powers of the court fully and completely available for justice. Its purpose is not to hinder or delay but to facilitate and promote the administration of justice. Thus, interventions have been allowed even beyond the prescribed period in the Rule in the higher interest of justice. Interventions have been granted to afford indispensable parties, who have not been impleaded, the right to be heard even after a decision has been rendered by the trial court, when the petition for review of the judgment was already submitted for decision before the Supreme Court, and even where the assailed order has already become final and executory. In *Lim v. Pacquing* (310 Phil. 722 (1995)], the motion for intervention filed by the Republic of the Philippines was allowed by this Court to avoid grave injustice and injury and to settle once and for all the substantive issues raised by the parties.[21]

In *Collado v. Court of Appeals*,[22] this Court reiterated that exceptions to Section 2, Rule 12 could be made in the interest of substantial justice. Citing *Mago v. Court of Appeals*,[23] the Court stated:

> It is quite clear and patent that the motions for intervention filed by the movants at this stage of the proceedings where trial had already been concluded x x x and on appeal x x x the same affirmed by the Court of Appeals and the instant petition for *certiorari* to review said judgments is already submitted for decision by the Supreme Court, are obviously and, manifestly late, beyond the period prescribed under x x x Section 2, Rule 12 of the Rules of Court.
>
> But Rule 12 of the Rules of Court, like all other Rules therein promulgated, is simply a rule of procedure, the whole purpose and object of which is to make the powers of the Court fully and completely available for justice. The purpose of procedure is not to thwart justice. Its proper aim is to facilitate the application of justice to the rival claims of contending parties. It was created not to hinder

> and delay but to facilitate and promote the administration of justice. It does not constitute the thing itself which courts are always striving to secure to litigants. It is designed as the means best adopted to obtain that thing. In other words, it is a means to an end.

Concededly, STRADEC has no legal interest in the subject matter of the Compromise Agreement. Section 1, Rule 19 of the 1997 Rules of Civil Procedure states:

> SECTION 1. *Who may intervene*. - A person who has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof may, with leave of court, be allowed to intervene in the action. The Court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether or not the intervenor's rights may be fully protected in a separate proceeding.

STRADEC's interest is dependent on the outcome of Civil Case No. 05-882. Unless STRADEC can show that RTC Branch 146 had already decided in its favor, its legal interest is simply contingent and expectant.

However, Asiavest has a direct and material interest in the approval or disapproval of the Compromise Agreement. **Asiavest is a judgment creditor of PNCC in G.R. No. 110263 and *a court has already issued a writ of execution in its favor*. Asiavest's interest is actual and material, direct and immediate characterized by either gain or loss from the judgment that this Court may render.**[24] Considering that the Compromise Agreement involves the disposition of all or substantially all of the assets of PNCC, Asiavest, as PNCC's judgment creditor, will be greatly prejudiced if the Compromise Agreement is eventually upheld.

Sison has legal standing to challenge the Compromise Agreement. Although there was no allegation that Sison filed the case as a derivative suit in the name of PNCC, it could be fairly deduced that Sison was assailing the Compromise Agreement as a stockholder of PNCC. In such a situation, a stockholder of PNCC can sue on behalf of PNCC to annul the Compromise Agreement.

A derivative action is a suit by a stockholder to enforce a corporate cause of action.[25] Under the Corporation Code, where a corporation is an injured party, its power to sue is lodged with its board of directors or trustees.[26] However, an individual stockholder may file a derivative suit on behalf of the corporation to protect or vindicate corporate rights whenever the officials of the corporation refuse to sue, or are the ones to be sued, or hold control of the corporation.[27] In such actions, the corporation is the real party-in-interest while the suing stockholder, on behalf of the corporation, is only a nominal party.[28]

In this case, the PNCC Board cannot conceivably be expected to attack the validity of the Compromise Agreement since the PNCC Board itself approved the Compromise Agreement. In fact, the PNCC Board steadfastly defends the Compromise Agreement for allegedly being advantageous to PNCC.

Besides, the circumstances in this case are peculiar. Sison, as former PNCC President and Chairman of the PNCC Board, was responsible for the approval of the Board Resolution issued on 19 June 2001 **revoking** the previous Board Resolution admitting PNCC's liability for the Marubeni loans.[29] Such revocation, however, came after Radstock had filed an action for collection and damages against PNCC on 15 January 2001. Then, when the trial court rendered its decision on 10 December 2002 in favor of Radstock, Sison was no longer the PNCC President and Chairman, although he remains a stockholder of PNCC.

When the case was on appeal before the Court of Appeals, there was no need for Sison to avail of any remedy, until PNCC and Radstock entered into the Compromise Agreement, which disposed of all or substantially all of PNCC's assets. Sison came to know of the Compromise Agreement only in December 2006. PNCC and Radstock submitted the Compromise Agreement to the Court of Appeals for approval on 10 January 2007. The Court of Appeals approved the Compromise Agreement on 25 January 2007. To require Sison at this stage to exhaust all the remedies within the corporation will render such remedies useless as the Compromise Agreement had already been approved by the Court of Appeals. PNCC's assets are in danger of being dissipated in favor of a private foreign corporation. Thus, Sison had no recourse but to avail of an extraordinary remedy to protect PNCC's assets.

Besides, in the interest of substantial justice and for compelling reasons, such as the nature and importance of the issues raised in this case,[30] this Court must take cognizance of Sison's action. This Court should exercise its prerogative to set aside technicalities in the Rules, because after all, the power of this Court to suspend its own rules whenever the interest of justice requires is well recognized.[31] In *Solicitor General v. The Metropolitan Manila Authority*,[32] this Court held:

> Unquestionably, the Court has the power to suspend procedural rules in the exercise of its inherent power, as expressly recognized in the Constitution, to promulgate rules concerning `pleading, practice and procedure in all courts.' In proper cases, procedural rules may be relaxed or suspended in the interest of substantial justice, which otherwise may be miscarried because of a rigid and formalistic adherence to such rules. x x x
>
> We have made similar rulings in other cases, thus:
>
> Be it remembered that rules of procedure are but mere tools designed to facilitate the attainment of justice. Their strict and rigid application, which would result in technicalities that tend to frustrate rather than promote

substantial justice, must always be avoided. x x x Time and again, this Court has suspended its own rules and excepted a particular case from their operation whenever the higher interests of justice so require.

IV.

The PNCC Board Acted in Bad Faith and with Gross Negligence in Directing the Affairs of PNCC

In this jurisdiction, the members of the board of directors have a three-fold duty: duty of obedience, duty of diligence, and duty of loyalty.[33] Accordingly, the members of the board of directors (1) shall direct the affairs of the corporation only in accordance with the purposes for which it was organized;[34] (2) **shall not willfully and knowingly vote for or assent to patently unlawful acts of the corporation or act in bad faith or with gross negligence in directing the affairs of the corporation**;[35] and (3) shall not acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees.[36]

In the present case, the PNCC Board blatantly violated its duty of diligence as it miserably failed to act in good faith in handling the affairs of PNCC.

First. For almost two decades, the PNCC Board had consistently refused to admit liability for the Marubeni loans because of the absence of a PNCC Board resolution authorizing the issuance of the letters of guarantee.

There is no dispute that between 1978 and 1980, Marubeni Corporation extended two loans to Basay Mining (later renamed CDCP Mining): (1) US$5 million to finance the purchase of copper concentrates by Basay Mining; and (2) Y5.46 billion to finance the completion of the expansion project of Basay Mining including working capital.

There is also no dispute that it was only on 20 October 2000 when the PNCC Board approved a resolution expressly admitting PNCC's liability for the Marubeni loans. This was the first Board Resolution admitting liability for the Marubeni loans, for PNCC never admitted liability for these debts in the past. Even Radstock admitted that PNCC's 1994 Financial Statements did not reflect the Marubeni loans.[37] Also, former PNCC Chairman Arthur Aguilar stated during the Senate hearings that "the Marubeni claim was never in the balance sheet x x x nor was it in a contingent account."[38] Miriam M. Pasetes, SVP Finance of PNCC, and Atty. Herman R. Cimafranca of the Office of the Government Corporate Counsel, confirmed this fact, thus:

> **SEN. DRILON. x x x And so, PNCC itself did not recognize this as an obligation but the board suddenly recognized it as an obligation. It was on that basis that the case was filed, is that correct? In fact, the case hinges on - they knew that this claim has prescribed but because of that board**

resolution which recognized the obligation they filed their complaint, is that correct?

MR. CIMAFRANCA. Apparently, it's like that, Senator, because the filing of the case came after the acknowledgement.

SEN. DRILON. Yes. In fact, the filing of the case came three months after the acknowledgement.

MR. CIMAFRANCA. Yes. And that made it difficult to handle on our part.

SEN. DRILON. That is correct. So, that it was an obligation which was not recognized in the financial statements of PNCC but revived - in the financial statements because it has prescribed but revived by the board effectively. That's the theory, at least, of the plaintiff. Is that correct? Who can answer that?

Ms. Pasetes, yes.

MS. PASETES. It is not an obligation of PNCC that is why it is not reflected in the financial statements.[39] (Emphasis supplied)

In short, after two decades of consistently refuting its liability for the Marubeni loans, the PNCC Board suddenly and inexplicably reversed itself by admitting in October 2000 liability for the Marubeni loans. Just three months after the PNCC Board recognized the Marubeni loans, Radstock acquired Marubeni's receivable and filed the present collection case.

Second. The PNCC Board admitted liability for the Marubeni loans despite PNCC's total liabilities far exceeding its assets. There is no dispute that the Marubeni loans, once recognized, would wipe out the assets of PNCC, "virtually emptying the coffers of the PNCC."[40] While PNCC insists that it remains financially viable, the figures in the COA Audit Reports tell otherwise.[41] **For 2006 and 2005, "the Corporation has incurred negative gross margin of P84.531 Million and P80.180 Million, respectively, and *net losses that had accumulated in a deficit of P14.823 Billion as of 31 December 2006*."**[42] The COA even opined that **"unless [PNCC] Management addresses the issue on net losses in its financial rehabilitation plan, x x x the Corporation may not be able to continue its operations as a going concern."**

Notably, during the oral arguments before this Court, the Government Corporate Counsel admitted the PNCC's **huge negative net worth**, thus:

JUSTICE CARPIO

x x x what is the net worth now of PNCC? Negative what? Negative 6 Billion at least[?]

ATTY. AGRA

Yes, your Honor.[43] (Emphasis supplied)

Clearly, the PNCC Board's admission of liability for the Marubeni loans, given PNCC's huge negative net worth of at least P6 billion as admitted by PNCC's counsel, or P14.823 billion based on the 2006 COA Audit Report, would leave PNCC an empty shell, without any assets to pay its biggest creditor, the National Government with an admitted receivable of P36 billion from PNCC.

Third. In a debilitating self-inflicted injury, the PNCC Board revived what appeared to have been a dead claim by abandoning one of PNCC's strong defenses, which is the prescription of the action to collect the Marubeni loans.

Settled is the rule that actions prescribe by the mere lapse of time fixed by law.[44] Under Article 1144 of the Civil Code, an action upon a written contract, such as a loan contract, must be brought within ten years from the time the right of action accrues. The prescription of such an action is interrupted when the action is filed before the court, when there is a written extrajudicial demand by the creditor, or when there is any written acknowledgment of the debt by the debtor.[45]

In this case, Basay Mining obtained the Marubeni loans sometime between 1978 and 1981. While Radstock claims that numerous demand letters were sent to PNCC, based on the records, the extrajudicial demands to pay the loans appear to have been made only in 1984 and 1986. Meanwhile, the written acknowledgment of the debt, in the form of Board Resolution No. BD-092-2000, was issued only on 20 October 2000.

Thus, more than ten years would have already lapsed between Marubeni's extrajudicial demands in 1984 and 1986 and the acknowledgment by the PNCC Board of the Marubeni loans in 2000. However, the PNCC Board suddenly passed Board Resolution No. BD-092-2000 expressly admitting liability for the Marubeni loans. In short, the PNCC Board admitted liability for the Marubeni loans despite the fact that the same might no longer be judicially collectible. Although the legal advantage was obviously on its side, the PNCC Board threw in the towel even before the fight could begin. During the Senate hearings, the matter of prescription was discussed, thus:

SEN. DRILON. ... the prescription period is 10 years and there were no payments - the last demands were made, when? The last demands for payment?

MS. OGAN. It was made January 2001 prior to the filing of the case.

SEN. DRILON. Yes, all right. Before that, when was the last demand made? By the time they filed the complaint more than 10 years already lapsed.

MS. OGAN. On record, Mr. Chairman, we have demands starting from - - a series of demands which started from May 23, 1984, letter from Marubeni to PNCC, demand payment. And we also have the letter of September 3, 1986, letter of Marubeni to then PNCC Chair Mr. Jaime. We have the June 24, 1986 letter from Marubeni to the PNCC Chairman. Also the March 4, 1988 letter...

SEN. DRILON. The March 4, 1988 letter is not a demand letter.

MS. OGAN. It is exactly addressed to the Asset Privatization Trust.

SEN. DRILON. It is not a demand letter? Okay.

MS. OGAN. And we have also...

SEN. DRILON. Anyway...

THE CHAIRMAN. Please answer when you are asked, Ms. Ogan. We want to put it on the record whether it is "yes" or "no".

MS. OGAN. Yes, sir.

SEN. DRILON. So, even assuming that all of those were demand letters, the 10 years prescription set in and it should have prescribed in 1998, whatever is the date, or before the case was filed in 2001.

MR. CIMAFRANCA. The 10-year period for - if the contract is written, it's 10 years and it should have prescribed in 10 years and we did raise that in our answer, in our motion to dismiss.

SEN. DRILON. I know. You raised this in your motion to dismiss and you raised this in your answer. Now, we are not saying that you were negligent in not raising that. What we are just putting on the record that indeed there is basis to argue that these claims have prescribed.

Now, the reason why there was a colorable basis on the complaint filed in 2001 was that somehow the board of PNCC recognized the obligation in a special board meeting on October 20, 2000. Hindi ba ganoon 'yon?

MS. OGAN. Yes, that is correct.

SEN. DRILON. Why did the PNCC recognize this obligation in 2000 when it

was very clear that at that point more than 10 years have lapsed since the last demand letter?

MR. AGUILAR. May I volunteer an answer?

SEN. DRILON. Please.

MR. AGUILAR. I looked into that, Mr. Chairman, Your Honor. It was as a result of and I go to the folder letter "N." In our own demand research it was not period, Your Honor, that Punongbayan in the big folder, sir, letter "N" it was the period where PMO was selling PNCC and Punongbayan and Araullo Law Office came out with an investment brochure that indicated liabilities both to national government and to Marubeni/Radstock. So, PMO said, "For good order, can you PNCC board confirm that by board resolution?" That's the tone of the letter.

SEN. DRILON. Confirm what? Confirm the liabilities that are contained in the Punongbayan investment prospectus both to the national government and to PNCC. That is the reason at least from the record, Your Honor, how the PNCC board got to deliberate on the Marubeni.

THE CHAIRMAN. What paragraph? Second to the last paragraph?

MR. AGUILAR. Yes. Yes, Mr. Chairman. Ito po 'yong - that"s to our recollection, in the records, that was the reason.

SEN. DRILON. Is that the only reason why ...

MR. AGUILAR. From just the records, Mr. Chairman, and then interviews with people who are still around.

SEN. DRILON. You mean, you acknowledged a prescribed obligation because of this paragraph?

MR. AGUILAR. I don't know what legal advice we were following at that time, Mr. Chairman.[46] (Emphasis supplied)

Besides prescription, the Office of the Government Corporate Counsel (OGCC) originally believed that PNCC had another formidable legal weapon against Radstock, that is, the lack of authority of Alfredo Asuncion, then Executive Vice-President of PNCC, to sign the letter of guarantee on behalf of CDCP. During the Senate hearings, the following exchange reveals the OGCC's original opinion:

THE CHAIRMAN. What was the opinion of the Office of the Government Corporate Counsel?

MS. OGAN. The opinion of the Office of the Government Corporate Counsel is that PNCC should exhaust all means to resist the case using all defenses available to a guarantee and a surety that there is a valid ground for PNCC's refusal to honor or make good the alleged guarantee obligation. **It appearing that from the documents submitted to the OGCC that there is no board authority in favor or authorizing Mr. Asuncion, then EVP, to sign or execute the letter of guarantee in behalf of CDCP and that said letter of guarantee is not legally binding upon or enforceable against CDCP as principals**, your Honors.[47]

x x x x

SEN. DRILON. Now that we have read this, what was the opinion of the Government Corporate Counsel, Mr. Cimafranca?

MR. CIMAFRANCA. Yes, Senator, we did issue an opinion upon the request of PNCC and our opinion was that there was no valid obligation, no valid guarantee. And we incorporated that in our pleadings in court.[48] (Emphasis supplied)

Clearly, PNCC had strong defenses against the collection suit filed by Radstock, as originally opined by the OGCC. It is quite puzzling, therefore, that the PNCC Board, which had solid grounds to refute the legitimacy of the Marubeni loans, admitted its liability and entered into a Compromise Agreement that is manifestly and grossly prejudicial to PNCC.

Fourth. The basis for the admission of liability for the Marubeni loans, which was an opinion of the Feria Law Office, was not even shown to the PNCC Board.

Atty. Raymundo Francisco, the APT trustee overseeing the proposed privatization of PNCC at the time, was responsible for recommending to the PNCC Board the admission of PNCC's liability for the Marubeni loans. **Atty. Francisco based his recommendation solely on a mere alleged opinion of the Feria Law Office. Atty. Francisco did not bother to show this "Feria opinion" to the members of the PNCC Board, except to Atty. Renato Valdecantos, who as the then PNCC Chairman did not also show the "Feria opinion" to the other PNCC Board members**. During the Senate hearings, Atty. Francisco could not produce a copy of the "Feria opinion." The Senators grilled Atty. Francisco on his recommendation to recognize PNCC's liability for the Marubeni loans, thus:

THE CHAIRMAN. x x x You were the one who wrote this letter or rather this memorandum dated 17 October 2000 to Atty. Valdecantos. Can you tell us the background why you wrote the letter acknowledging a debt which is non-existent?

MR. FRANCISCO. I was appointed as the trustee in charge of the privatization of the PNCC at that time, sir. And I was tasked to do a study and engage the services of financial advisors as well as legal advisors to do a legal audit and financial study on the position of PNCC. I bidded out these engagements, the financial advisership went to Punongbayan and Araullo. The legal audit went to the Feria Law Offices.

THE CHAIRMAN. Spell it. Boy Feria?

MR. FRANCISCO. Feria-- Feria.

THE CHAIRMAN. Lugto?

MR. FRANCISCO. Yes. Yes, Your Honor. And this was the findings of the Feria Law Office - that the Marubeni account was a legal obligation.

So, I presented this to our board. Based on the findings of the legal audit conducted by the Ferial Law Offices, sir.

THE CHAIRMAN. **Why did you not ask the government corporate counsel? Why did you have to ask for the opinion of an outside counsel?**

MR. FRANCISCO. That was the - that was the mandate given to us, sir, that we have to engage the ...

THE CHAIRMAN. Mandate given by whom?

MR. FRANCISCO. That is what we usually do, sir, in the APT.

THE CHAIRMAN. Ah, you get outside counsel?

MR. FRANCISCO. Yes, we...

THE CHAIRMAN. Not necessarily the government corporate counsel?

MR. FRANCISCO. No, sir.

THE CHAIRMAN. So, on the basis of the opinion of outside counsel, private, you proceeded to, in effect, recognize an obligation which is not even entered in the books of the PNCC? You probably resuscitated a non-existing obligation anymore?

MR. FRANCISCO. Sir, I just based my recommendation on the professional findings of the law office that we engaged, sir.

THE CHAIRMAN. Did you not ask for the opinion of the government corporate counsel?

MR. FRANCISCO. No, sir.

THE CHAIRMAN. Why?

MR. FRANCISCO. I felt that the engagements of the law office was sufficient, anyway we were going to raise it to the Committee on Privatization for their approval or disapproval, sir.

THE CHAIRMAN. The COP?

MR. FRANCISCO. Yes, sir.

THE CHAIRMAN. That's a cabinet level?

MR. FRANCISCO. Yes, sir. And we did that, sir.

THE CHAIRMAN. Now... So you sent your memo to Atty. Renato B. Valdecantos, who unfortunately is not here but I think we have to get his response to this. And as part of the minutes of special meeting with the board of directors on October 20, 2000, the board resolved in its Board Resolution No. 092-2000, the board resolved to recognize, acknowledge and confirm PNCC's obligations as of September 30, 1999, etcetera, etcetera. (A), or rather (B), Marubeni Corporation in the amount of P10,740,000.

Now, we asked to be here because the franchise of PNCC is hanging in a balance because of the - on the questions on this acknowledgement. So we want to be educated.

Now, the paper trail starts with your letter. So, that's it - that's my kuwan, Frank.

Yes, Senator Drilon.

SEN. DRILON. Thank you, Mr. Chairman.

Yes, Atty. Francisco, you have a copy of the minutes of October 20, 2000?

MR. FRANCISCO. I'm sorry, sir, we don't have a copy.

SEN. DRILON. May we ask the corporate secretary of PNCC to provide us with a copy?

Okay naman andiyan siya.

(Ms. Ogan handing the document to Mr. Francisco.)

You have familiarized yourselves with the minutes, Atty. Francisco?

MR. FRANCISCO. Yes, sir.

SEN. DRILON. Now, mention is made of a memorandum here on line 8, page 3 of this board's minutes. It says, "Director Francisco has prepared a memorandum requesting confirmation, acknowledgement, and ratification of this indebtedness of PNCC to the national government which was determined by Bureau of Treasury as of September 30, 1999 is 36,023,784,751. And with respect to PNCC's obligation to Marubeni, this has been determined to be in the total amount of 10,743,103,388, also as of September 30, 1999; that there is need to ratify this because there has already been a representation made with respect to the review of the financial records of PNCC by Punongbayan and Araullo, which have been included as part of the package of APT's disposition to the national government's interest in PNCC."

You recall having made this representation as found in the minutes, I assume, Atty. Francisco?

MR. FRANCISCO. Yes, sir. But I'd like to be refreshed on the memorandum, sir, because I don't have a copy.

SEN. DRILON. Yes, this memorandum was cited earlier by Senator Arroyo, and maybe the secretary can give him a copy? Give him a copy?

MS. OGAN. (Handing the document to Mr. Francisco.)

MR. FRANCISCO. Your Honor, I have here a memorandum to the PNCC board through Atty. Valdecantos, which says that - in the last paragraph, if I may read? "May we request therefore, that a board resolution be adopted, acknowledging and confirming the aforementioned PNCC obligations with the national government and Marubeni as borne out by the due diligence audit."

SEN. DRILON. This is the memorandum referred to in these minutes. This memorandum dated 17 October 2000 is the memorandum referred to in the minutes.

MR. FRANCISCO. I would assume, Mr. Chairman.

SEN. DRILON. Right.

Now, the Punongbayan representative who was here yesterday, Mr...

THE CHAIRMAN. Navarro.

SEN. DRILON. ... Navarro denied that he made this recommendation.

THE CHAIRMAN. He asked for opinion, legal opinion.

SEN. DRILON. He said that they never made this representation and the transcript will bear us out. They said that they never made this representation that the account of Marubeni should be recognized.

MR. FRANCISCO. Mr. Chairman, in the memorandum, I only mentioned here the acknowledgement and confirmation of the PNCC obligations. I was not asking for a ratification. I never mentioned ratification in the memorandum. I just based my memo based on the due diligence audit of the Feria Law Offices.

SEN. DRILON. Can you say that again? You never asked for a ratification...

MR. FRANCISCO. No. I never mentioned in my memorandum that I was asking for a ratification. I was just - in my memo it says, "acknowledging and confirming the PNCC obligation." This was what ...

SEN. DRILON. Isn't it the same as ratification? I mean, what's the difference?

MR. FRANCISCO. I - well, my memorandum was meant really just to confirm the findings of the legal audit as ...

SEN. DRILON. In your mind as a lawyer, Atty. Francisco, there's a difference between ratification and - what's your term? -- acknowledgment and confirmation?

MR. FRANCISCO. Well, I guess there's no difference, Mr. Chairman.

SEN. DRILON. Right.

Anyway, just of record, the Punongbayan representatives here yesterday said that they never made such representation.

In any case, now you're saying it's the Feria Law Office who rendered that opinion? Can we - you know, yesterday we were asking for a copy of this opinion but we were never furnished one. The ... no less than the Chairman of this Committee was asking for a copy.

THE CHAIRMAN. Well, copy of the opinion...

MS. OGAN. Yes, Mr. Chairman, we were never furnished a copy of this opinion because it's opinion rendered for the Asset Privatization Trust which is its client, not the PNCC, Mr. Chairman.

THE CHAIRMAN. All right. The question is whether - but you see, this is a memorandum of Atty. Francisco to the Chairman of the Asset Privatization Trust. You say now that you were never furnished a copy because that's supposed to be with the Asset ...

MS. OGAN. Yes, Mr. Chairman.

THE CHAIRMAN. ... but yet the action of - or rather the opinion of the Feria Law Offices was in effect adopted by the board of directors of PNCC in its minutes of October 20, 2000 where you are the corporate secretary, Ms. Ogan.

MS. OGAN. Yes, Mr. Chairman.

THE CHAIRMAN. So, what I am saying is that this opinion or rather the opinion of the Feria Law Offices of which you don't have a copy?

MS. OGAN. Yes, sir.

THE CHAIRMAN. And the reason being that, it does not concern the PNCC because that's an opinion rendered for APT and not for the PNCC.

MS. OGAN. Yes, Mr. Chairman, that was what we were told although we made several requests to the APT, sir.

THE CHAIRMAN. All right. Now, since it was for the APT and not for the PNCC, I ask the question why did PNCC adopt it? That was not for the consumption of PNCC. It was for the consumption of the Asset Privatization Trust. And that is what Atty. Francisco says and it's confirmed by you saying that this was a memo - you don't have a copy because this was sought for by APT and the Feria Law Offices just provided an opinion - provided the APT with an opinion. So, as corporate secretary, the board of directors of PNCC adopted it, recognized the Marubeni Corporation.

You read the minutes of the October 20, 2000 meeting of the board of directors on Item V. The resolution speaks of .. so, go ahead.

MS. OGAN. I gave my copies. Yes, sir.

THE CHAIRMAN. In effect the Feria Law Offices' opinion was for the consumption of the APT.

MS. OGAN. That was what we were told, Mr. Chairman.

THE CHAIRMAN. And you were not even provided with a copy.

THE CHAIRMAN. Yet you adopted it.

MS. OGAN. Yes, sir.

SEN DRILON. Considering you were the corporate secretary.

THE CHAIRMAN. She was the corporate secretary.

SEN. DRILON. She was just recording the minutes.

THE CHAIRMAN. Yes, she was recording.

Now, we are asking you now why it was taken up?

MS. OGAN. Yes, sir, Mr. Chairman, this was mentioned in the memorandum of Atty. Francisco, memorandum to the board.

SEN. DRILON. Mr. Chairman, Mr. Francisco represented APT in the board of PNCC. And is that correct, Mr. Francisco?

THE CHAIRMAN. You're an ex-officio member.

SEN. DRILON. Yes.

MR. FRANCISCO. Ex-officio member only, sir, as trustee in charge of the privatization of PNCC.

SEN. DRILON. With the permission of Mr. Chair, may I ask a question...

THE CHAIRMAN. Oh, yes, Senator Drilon.

SEN. DRILON. Atty. Francisco, you sat in the PNCC board as APT representative, you are a lawyer, there was a legal opinion of Feria, Feria, Lugto, Lao Law Offices which you cited in your memorandum. Did you discuss - first, did you give a copy of this opinion to PNCC?

MR. FRANCISCO. I gave a copy of this opinion, sir, to our chairman who was also a member of the board of PNCC, Mr. Valdecantos, sir.

SEN. DRILON. And because he was...

MR. FRANCISCO. Because he was my immediate boss in the APT.

SEN. DRILON. Apparently, [it] just ended up in the personal possession of Mr. Valdecantos because the corporate secretary, Glenda Ogan, who is supposed to be the custodian of the records of the board never saw a copy of this.

MR. FRANCISCO. Well, sir, my - the copy that I gave was to Mr. Valdecantos because he was the one sitting in the PNCC board, sir.

SEN. DRILON. No, you sit in the board.

MR. FRANCISCO. I was just an ex-officio member. And all my reports were coursed through our Chairman, Mr. Valdecantos, sir.

SEN. DRILON. Now, did you ever tell the board that there is a legal position taken or at least from the documents it is possible that the claim has prescribed?

MR. FRANCISCO. I took this up in the board meeting of the PNCC at that time and I told them about this matter, sir.

SEN. DRILON. No, you told them that the claim could have, under the law, could have prescribed?

MR. FRANCISCO. No, sir.

SEN. DRILON. Why? You mean, you didn't tell the board that it is possible that this liability is no longer a valid liability because it has prescribed?

MR. FRANCISCO. I did not dwell into the findings anymore, sir, because I found the professional opinion of the Feria Law Office to be sufficient.[49] (Emphasis supplied)

Atty. Francisco's act of recommending to the PNCC Board the acknowledgment of the Marubeni loans based only on an opinion of a private law firm, without consulting the OGCC and without showing this opinion to the members of the PNCC Board except to Atty. Valdecantos, reflects how shockingly little his concern was for PNCC, contrary to his claim that "he only had the interest of PNCC at heart." In fact, if what was involved was his own money, Atty. Francisco would have preferred not just two, but at least three different opinions on how to deal with the matter, and he would have maintained his non-liability.

SEN. OSMEÑA. x x x

All right. And lastly, just to clear our minds, there has always been this finger-pointing, of course, whenever - this is typical Filipino. When they're caught in a bind, they always point a finger, they pretend they don't know. And it just amazes me that you have been appointed trustees, meaning, representatives of the Filipino people, that's what you were at APT, right? You were not Erap's representatives, you were representative of the Filipino people and you were tasked to conserve the assets that that had been confiscated from various cronies of the previous administration. And here, you are asked to recognize the P10 billion debt and you point only to one law firm. If you have cancer, don't you to a second opinion, a second doctor or a third doctor? This is just a question. I am just asking you for your opinion if you would take the advice of the first doctor who tells you that he's got to open you up.

MR. FRANCISCO. I would go to three or more doctors, sir.

SEN. OSMEÑA. Three or more. Yeah, that's right. And in this case the APT did not do so.

MR. FRANCISCO. We relied on the findings of the ...

SEN. OSMEÑA. If these were your money, would you have gone also to obtain a second, third opinion from other law firms. Kung pera mo itong 10 billion na ito. Siguro you're not gonna give it up that easily ano, 'di ba?

MR. FRANCISCO. Yes, sir.

SEN. OSMEÑA. You'll probably keep it in court for the next 20 years.

x x x x[50] (Emphasis supplied)

This is a clear admission by Atty. Francisco of bad faith in directing the affairs of PNCC - that he would not have recognized the Marubeni loans if his own funds were involved or if he were the owner of PNCC.

The PNCC Board admitted liability for the P10.743 billion Marubeni loans **without seeing, reading or discussing** the "Feria opinion" which was the sole basis for its admission of liability. Such act surely goes against ordinary human nature, and amounts to gross negligence and utter bad faith, even bordering on fraud, on the part of the PNCC Board in directing the affairs of the corporation. Owing loyalty to PNCC and its stockholders, the PNCC Board should have exercised utmost care and diligence in admitting a gargantuan debt of P10.743 billion that would certainly force PNCC into insolvency, a debt that previous PNCC Boards in the last two decades consistently refused to admit.

Instead, the PNCC Board admitted PNCC's liability for the Marubeni loans relying solely

on a mere opinion of a private law office, which opinion the PNCC Board members never saw, except for Atty. Valdecantos and Atty. Francisco. The PNCC Board knew that PNCC, as a government owned and controlled corporation (GOCC), must rely "**exclusively**" on the opinion of the OGCC. Section 1 of Memorandum Circular No. 9 dated 27 August 1998 issued by the President states:

> SECTION 1. **All legal matters pertaining to government-owned or controlled corporations**, their subsidiaries, other corporate off-springs and government acquired asset corporations (GOCCs) **shall be *exclusively* referred to and handled by the Office of the Government Corporate Counsel (OGCC)**. (Emphasis supplied)

The PNCC Board acted in bad faith in relying on the opinion of a private lawyer knowing that PNCC is required to rely **"exclusively"** on the OGCC's opinion. Worse, the PNCC Board, in admitting liability for P10.743 billion, relied on the recommendation of a private lawyer whose opinion the PNCC Board members have not even seen.

During the oral arguments, Atty. Sison explained to the Court that the intention of APT was for the PNCC Board **merely to disclose** the claim of Marubeni as part of APT's full disclosure policy to prospective buyers of PNCC. **Atty. Sison stated that it was not the intention of APT for the PNCC Board to admit liability for the Marubeni loans**, thus:

> x x x It was the Asset Privatization Trust A-P-T that was tasked to sell the company. The A-P-T, for purposes of disclosure statements, tasked the Feria Law Office to handle the documentation and the study of all legal issues that had to be resolved or clarified for the information of prospective bidders and or buyers. **In the performance of its assigned task the Feria Law Office came upon the Marubeni claim and mentioned that the APTC and/or PNCC must disclose that there is a claim by Marubeni against PNCC for purposes of satisfying the requirements of full disclosure. This seemingly innocent statement or requirement made by the Feria Law Office was then taken by two officials of the Asset Privatization Trust and with malice aforethought turned it into the basis for a multi-billion peso debt by the now government owned and/or controlled PNCC**. x x x.[51] (Emphasis supplied)

While the PNCC Board passed Board Resolution No. BD-099-2000 amending Board Resolution No. BD-092-2000, such amendment merely added conditions for the recognition of the Marubeni loans, namely, subjecting the recognition to a final determination by COA of the amount involved and to the declaration by OGCC of the legality of PNCC's liability. However, the PNCC Board reiterated and stood firm that it "**recognizes, acknowledges and confirms its obligations**" for the Marubeni loans. Apparently, Board Resolution No. BD-099-2000 was a futile attempt to "revoke" Board Resolution No. BD-092-2000. Atty. Alfredo Laya, Jr., a former PNCC Director, spoke on his protests against Board Resolution No. BD-092-2000 at the Senate hearings, thus:

> MR. LAYA. Mr. Chairman, if I can ...

THE CHAIRMAN. Were you also at the board?

MR. LAYA. At that time, yes, sir.

THE CHAIRMAN. Okay, go ahead.

MR. LAYA. That's why if - maybe this can help clarify the sequence. There was this meeting on October 20. This matter of the Marubeni liability or account was also discussed. Mr. Macasaet, if I may try to refresh. And there was some discussion, sir, and in fact, they were saying even at that stage that there should be a COA or an OGCC audit. Now, that was during the discussion of October 20. Later on, the minutes came out. The practice, then, sir, was for the minutes to come out at the start of the meeting of the subsequent. So the minutes of October 20 came out on November 22 and then we were going over it. And that is in the subsequent minutes of the meeting ...

THE CHAIRMAN. May I interrupt. You were taking up in your November 22 meeting the October 20 minutes?

MR. LAYA. Yes, sir.

THE CHAIRMAN. This minutes that we have?

MR. LAYA. Yes, sir.

THE CHAIRMAN. All right, go ahead.

MR. LAYA. Now, in the November 22 meeting, we noticed this resolution already for confirmation of the board - proceedings of October 20. So immediately we made - actually, protest would be a better term for that - we protested the wording of the resolution and that's why we came up with this resolution amending the October 20 resolution.

SEN. DRILON. So you are saying, Mr. Laya, that the minutes of October 20 did not accurately reflect the decisions that you made on October 20 because you were saying that this recognition should be subject to OGCC and COA? You seem to imply and we want to make it - and I want to get that for the record. You seem to imply that there was no decision to recognize the obligation during that meeting because you wanted it to subject it to COA and OGCC, is that correct?

MR. LAYA. Yes, your Honor.

SEN. DRILON. So how did...

MR. LAYA. That's my understanding of the proceedings at that time, that's why in the subsequent November 22 meeting, we raised this point about obtaining a COA and OGCC opinion.

SEN. DRILON. Yes. But you know, the November 22 meeting repeated the wording of the resolution previously adopted only now you are saying subject to final determination which is completely of different import from what you are saying was your understanding of the decision arrived at on October 20.

MR. LAYA. Yes, sir. Because our thinking then...

SEN. DRILON. What do you mean, yes, sir?

MR. LAYA. It's just a claim under discussion but then the way it is translated, as the minutes of October 20 were not really verbatim.

SEN. DRILON. So, you never intended to recognize the obligation.

MR. LAYA. I think so, sir. That was our - personally, that was my position.

SEN. DRILON. How did it happen, Corporate Secretary Ogan, that the minutes did not reflect what the board ...

THE CHAIRMAN. Ms. Pasetes ...

MS. PASETES. Yes, Mr. Chairman.

THE CHAIRMAN. ... you are the chief financial officer of PNCC.

MS. PASETES. Your Honor, before that November 22 board meeting, management headed by Mr. Rolando Macasaet, myself and Atty. Ogan had a discussion about the recognition of the obligations of 10 billion of Marubeni and 36 billion of the national government on whether to recognize this as an obligation in our books or recognize it as an obligation in the pro forma financial statement to be used for the privatization of PNCC because recognizing both obligations in the books of PNCC would defeat our going concern status and that is where the position of the president then, Mr. Macasaet, stemmed from and he went back to the board and moved to reconsider the position of October 20, 2000, Mr. Chair.[52] (Emphasis supplied)

In other words, despite Atty. Laya's objections to PNCC's admitting liability for the Marubeni loans, the PNCC Board still admitted the same and merely imposed additional conditions to temper somehow the devastating effects of Board Resolution No. BD-092-2000.

The act of the PNCC Board in issuing Board Resolution No. BD-092-2000 expressly admitting liability for the Marubeni loans demonstrates the PNCC Board's gross and willful disregard of the requisite care and diligence in managing the affairs of PNCC, amounting to bad faith and resulting in grave and irreparable injury to PNCC and its stockholders. This reckless and treacherous move on the part of the PNCC Board clearly constitutes a serious breach of its fiduciary duty to PNCC and its stockholders, rendering the members of the PNCC Board liable under Section 31 of the Corporation Code, which provides:

> SEC. 31. *Liability of directors, trustees or officers*. -- Directors or trustees who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.
>
> When a director, trustee or officer attempts to acquire or acquires, in violation of his duty, any interest adverse to the corporation in respect of any matter which has been reposed in him in confidence, as to which equity imposes a disability upon him to deal in his own behalf, he shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.

Soon after the short-lived Estrada Administration, the PNCC Board revoked its previous admission of liability for the Marubeni loans. During the oral arguments, Atty. Sison narrated to the Court:

> x x x After President Estrada was ousted, I was appointed as President and Chairman of PNCC in April of 2001, this particular board resolution was brought to my attention and I immediately put the matter before the board. I had no problem in convincing them to reverse the recognition as it was illegal and had no basis in fact. The vote to overturn that resolution was unanimous. Strange to say that some who voted to overturn the recognition were part of the old board that approved it. Stranger still, Renato Valdecantos who was still a member of the Board voted in favor of reversing the resolution he himself instigated and pushed. **Some of the board members who voted to recognize the obligation of Marubeni even came to me privately and said "*pinilit lang kami*."** x x x.[53] (Emphasis supplied)

In approving PNCC Board Resolution Nos. BD-092-2000 and BD-099-2000, the PNCC Board caused undue injury to the Government and gave unwarranted benefits to Radstock, through manifest partiality, evident bad faith or gross inexcusable negligence of the PNCC Board. Such acts are declared under Section 3(e) of RA 3019 or the Anti-Graft and Corrupt Practices Act, as "**corrupt practices xxx and xxx unlawful**." Being unlawful and criminal

acts, these PNCC Board Resolutions are void *ab initio* and cannot be implemented or in any way given effect by the Executive or Judicial branch of the Government.

Not content with forcing PNCC to commit corporate suicide with the admission of liability for the Marubeni loans under Board Resolution Nos. BD-092-2000 and BD-099-2000, the PNCC Board drove the last nail on PNCC's coffin when the PNCC Board entered into the manifestly and grossly disadvantageous Compromise Agreement with Radstock. This time, the OGCC, headed by Agnes DST Devanadera, reversed itself and recommended approval of the Compromise Agreement to the PNCC Board. As Atty. Sison explained to the Court during the oral arguments:

> x x x While the case was pending in the Court of Appeals, Radstock in a rare display of extreme generosity, conveniently convinced the Board of PNCC to enter into a compromise agreement for ½ the amount of the judgment rendered by the RTC or P6.5 Billion Pesos. **This time the OGCC, under the leadership of now Solicitor General Agnes Devanadera, approved the compromise agreement abandoning the previous OGCC position that PNCC had a meritorious case and would be hard press to lose the case**. What is strange is that although the compromise agreement we seek to stop ostensibly is for P6.5 Billion only, truth and in fact, the agreement agrees to convey to Radstock all or substantially all of the assets of PNCC worth P18 Billion Pesos. There are three items that are undervalued here, the real estate that was turned over as a result of the controversial agreement, the toll revenues that were being assigned and the value of the new shares of PNCC the difference is about P12 Billion Pesos. x x x (Emphasis supplied)

V.

The Compromise Agreement is Void for Being Contrary to the Constitution, Existing Laws, and Public Policy

For a better understanding of the present case, the pertinent terms and conditions of the Compromise Agreement between PNCC and Radstock are quoted below:

> COMPROMISE AGREEMENT
>
> KNOW ALL MEN BY THESE PRESENTS:
>
> This Agreement made and entered into this 17th day of August 2006, in Mandaluyong City, Metro Manila, Philippines, by and between:
>
> **PHILIPPINE NATIONAL CONSTRUCTION CORPORATION, a government acquired asset corporation**, created and existing under the laws of the Republic of the Philippines, with principal office address at EDSA corner

Reliance Street, Mandaluyong City, Philippines, duly represented herein by its Chairman ARTHUR N. AGUILAR, pursuant to a Board Resolution attached herewith as Annex "A" and made an integral part hereof, hereinafter referred to as PNCC;

- and -

RADSTOCK SECURITIES LIMITED, a private corporation incorporated in the British Virgin Islands, with office address at Suite 1402 1 Duddell Street, Central Hongkong duly-represented herein by its Director, CARLOS G. DOMINGUEZ, pursuant to a Board Resolution attached herewith as Annex "B" and made an integral part hereof, hereinafter referred to as RADSTOCK.

WITNESSETH:

WHEREAS, on January 15, 2001, RADSTOCK, as assignee of Marubeni Corporation, filed a complaint for sum of money and damages with application for a writ of preliminary attachment with the Regional Trial Court (RTC), Mandaluyong City, docketed as Civil Case No. MC-01-1398, to collect on PNCC's guarantees on the unpaid loan obligations of CDCP Mining Corporation as provided under an Advance Payment Agreement and Loan Agreement;

WHEREAS, on December 10, 2002, the RTC of Mandaluyong rendered a decision in favor of plaintiff RADSTOCK directing PNCC to pay the total amount of Thirteen Billion One Hundred Fifty One Million Nine Hundred Fifty-Six Thousand Five Hundred Twenty-Eight Pesos (P13,151,956,528.00) with interest from October 15, 2001 plus Ten Million Pesos (P10,000,000.00) as attorney's fees.

WHEREAS, PNCC had elevated the case to the Court of Appeals (CA-G.R. SP No. 66654) on Certiorari and thereafter, to the Supreme Court (G.R. No. 156887) which Courts have consistently ruled that the RTC did not commit grave abuse of discretion when it denied PNCC's Motion to Dismiss which sets forth similar or substantially the same grounds or defenses as those raised in PNCC's Answer;

WHEREAS, the case has remained pending for almost six (6) years even after the main action was appealed to the Court of Appeals;

WHEREAS, on the basis of the RTC Decision dated December 10, 2002, the current value of the judgment debt against PNCC stands at P17,040,843,968.00 as of July 31, 2006 (the "Judgment Debt");

WHEREAS, RADSTOCK is willing to settle the case at the reduced

Compromise Amount of Six Billion One Hundred Ninety-Six Million Pesos (P6,196,000,000.00) which may be paid by PNCC, either in cash or in kind to avoid the trouble and inconvenience of further litigation as a gesture of goodwill and cooperation;

WHEREAS, it is an established legal policy or principle that litigants in civil cases should be encouraged to compromise or amicably settle their claims not only to avoid litigation but also to put an end to one already commenced (Articles 2028 and 2029, Civil Code);

WHEREAS, this Compromise Agreement has been approved by the respective Board of Directors of both PNCC and RADSTOCK, subject to the approval of the Honorable Court;

NOW, THEREFORE, for and in consideration of the foregoing premises, and the mutual covenants, stipulations and agreements herein contained, PNCC and RADSTOCK have agreed to amicably settle the above captioned Radstock case under the following terms and conditions:

1. RADSTOCK agrees to receive and accept from PNCC in full and complete settlement of the Judgment Debt, the reduced amount of Six Billion, One Hundred Ninety-Six Million Pesos (P6,196,000,000.00) (the "Compromise Amount").

2. This Compromise Amount shall be paid by PNCC to RADSTOCK in the following manner:

a. PNCC shall assign to a third party assignee to be designated by RADSTOCK all its rights and interests to the following real properties provided the assignee shall be duly qualified to own real properties in the Philippines;

(1) PNCC's rights over that parcel of land located in Pasay City with a total area of One Hundred Twenty-Nine Thousand Five Hundred Forty-Eight (129,548) square meters, more or less, and which is covered by and more particularly described in Transfer Certificate of Title No. T-34997 of the Registry of Deeds for Pasay City. The transfer value is P3,817,779,000.00.

PNCC's rights and interests in Transfer Certificate of Title No. T-34997 of the Registry of Deeds for Pasay City is defined and delineated by Administrative Order No. 397, Series of 1998, and RADSTOCK is fully aware and recognizes that PNCC has an undertaking to cede at least 2 hectares of this property to its creditor, the Philippine National Bank; and that furthermore, the Government Service Insurance System has also a current and existing claim in the nature of boundary conflicts, which undertaking and claim will not result in the diminution of area or value of the property. Radstock recognizes and

acknowledges the rights and interests of GSIS over the said property.

(2) T-452587 (T-23646) - Parañaque (5,123 sq. m.) subject to the clarification of the Privatization and Management Office (PMO) claims thereon. The transfer value is P45,000,900.00.

(3) T-49499 (529715 including T-68146-G (S-29716) (1,9747-A)-Parañaque (107 sq. m.) (54 sq. m.) subject to the clarification of the Privatization and Management Office (PMO) claims thereon. The transfer value is P1,409,100.00.

(4) 5-29716-Parañaque (27,762 sq. m.) subject to the clarification of the Privatization and Management Office (PMO) claims thereon. The transfer value is P242,917,500.00.

(5) P-169 - Tagaytay (49,107 sq. m.). The transfer value is P13,749,400.00.

(6) P-170 - Tagaytay (49,100 sq. m.). The transfer value is P13,749,400.00.

(7) N-3320 - Town and Country Estate, Antipolo (10,000 sq. m.). The transfer value is P16,800,000.00.

(8) N-7424 - Antipolo (840 sq. m.). The transfer value is P940,800.00.

(9) N-7425 - Antipolo (850 sq. m.). The transfer value is P952,000.00.

(10) N-7426 - Antipolo (958 sq. m.). The transfer value is P1,073,100.00.

(11) T-485276 - Antipolo (741 sq. m.). The transfer value is P830,200.00.

(12) T-485277 - Antipolo (680 sq. m.). The transfer value is P761,600.00.

(13) T-485278 - Antipolo (701 sq. m.). The transfer value is P785,400.00.

(14) T-131500 - Bulacan (CDCP Farms Corp.) (4,945 sq, m.). The transfer value is P6,475,000.00.

(15) T-131501 - Bulacan (678 sq. m.). The transfer value is P887,600.00.

(16) T-26,154 (M) - Bocaue, Bulacan (2,841 sq. m.). The transfer value is P3,779,300.00.

(17) T-29,308 (M) - Bocaue, Bulacan (733 sq. m.). The transfer value is P974,400.00.

(18) T-29,309 (M) Bocaue, Bulacan (1,141 sq. m.). The transfer value is

P1,517,600.00.

(19) T-260578 (R. Bengzon) Sta. Rita, Guiguinto, Bulacan (20,000 sq. m.). The transfer value is P25,200,000.00.

The transfer values of the foregoing properties are based on 70% of the appraised value of the respective properties.

b. PNCC shall issue to RADSTOCK or its assignee common shares of the capital stock of PNCC issued at par value which shall comprise 20% of the outstanding capital stock of PNCC after the conversion to equity of the debt exposure of the Privatization Management Office (PMO) and the National Development Company (NDC) and other government agencies and creditors such that the total government holdings shall not fall below 70% voting equity subject to the approval of the Securities and Exchange Commission (SEC) and ratification of PNCC's stockholders, if necessary. The assigned value of the shares issued to RADSTOCK is P713 Million based on the approximate last trading price of PNCC shares in the Philippine Stock Exchange as the date of this agreement, based further on current generally accepted accounting standards which stipulates the valuation of shares to be based on the lower of cost or market value.

Subject to the procurement of any and all necessary approvals from the relevant governmental authorities, PNCC shall deliver to RADSTOCK an instrument evidencing an undertaking of the Privatization and Management Office (PMO) to give RADSTOCK or its assignee the right to match any offer to buy the shares of the capital stock and debts of PNCC held by PMO, in the event the same shares and debt are offered for privatization.

c. PNCC shall assign to RADSTOCK or its assignee 50% of the PNCC's 6% share in the gross toll revenue of the Manila North Tollways Corporation (MNTC), with a Net Present Value of P1.287 Billion computed in the manner outlined in Annex "C" herein attached as an integral part hereof, that shall be due and owing to PNCC pursuant to the Joint Venture Agreement between PNCC and First Philippine Infrastructure Development Corp. dated August 29, 1995 and other related existing agreements, commencing in 2008. It shall be understood that as a result of this assignment, PNCC shall charge and withhold the amounts, if any, pertaining to taxes due on the amounts assigned.

Under the Compromise Agreement, PNCC shall pay Radstock the reduced amount of P6,185,000,000.00 in full settlement of PNCC's guarantee of CDCP Mining's debt allegedly totaling P17,040,843,968.00 as of 31 July 2006. To satisfy its reduced obligation, PNCC undertakes to (1) "assign to a third party assignee to be designated by Radstock all its rights and interests" to the listed real properties therein; (2) issue to Radstock or its assignee common shares of the capital stock of PNCC issued at par value which shall

comprise 20% of the outstanding capital stock of PNCC; and (3) assign to Radstock or its assignee 50% of PNCC's 6% share, **for the next 27 years (2008-2035)**, in the gross toll revenues of the Manila North Tollways Corporation.

A. The PNCC Board has no power to compromise the P6.185 billion amount.

Does the PNCC Board have the power to compromise the P6.185 billion "reduced" amount? The answer is in the negative.

The Dissenting Opinion asserts that PNCC has the power, citing Section 36(2) of Presidential Decree No. 1445 (PD 1445), otherwise known as the Government Auditing Code of the Philippines, enacted in 1978. Section 36 states:

> SECTION 36. Power to Compromise Claims. -- (1) When the interest of the government so requires, the Commission may compromise or release in whole or in part, any claim or settled liability to any government agency not exceeding ten thousand pesos and with the written approval of the Prime Minister, it may likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the Prime Minister, with their recommendations, to the National Assembly.
>
> (2) The respective governing bodies of government-owned or controlled corporations, and self-governing boards, commissions or agencies of the government shall have the exclusive power to compromise or release any similar claim or liability when expressly authorized by their charters and if in their judgment, the interest of their respective corporations or agencies so requires. **When the charters do not so provide, the power to compromise shall be exercised by the Commission in accordance with the preceding paragraph.** (Emphasis supplied)

The Dissenting Opinion asserts that since PNCC is incorporated under the Corporation Code, the PNCC Board has all the powers granted to the governing boards of corporations incorporated under the Corporation Code, which includes the power to compromise claims or liabilities.

Section 36 of PD 1445, enacted on 11 June 1978, has been **superseded by a later law** -- Section 20(1), Chapter IV, Subtitle B, Title I, Book V of Executive Order No. 292 or the **Administrative Code of 1987**, which provides:

> Section 20. Power to Compromise Claims. - (1) When the interest of the Government so requires, the Commission may compromise or release in whole or in part, **any settled claim or liability to any government agency** not exceeding ten thousand pesos arising out of any matter or case before it or within its jurisdiction, and with the written approval of the President, it may

> likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos. **In case the claim or liability exceeds one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the President, with their recommendations, to the Congress**[.] x x x (Emphasis supplied)

Under this provision,[54] the authority to compromise a settled claim or liability exceeding P100,000.00 involving a government agency, as in this case where the liability amounts to P6.185 billion, is vested not in COA but exclusively in Congress. Congress alone has the power to compromise the P6.185 billion purported liability of PNCC. Without congressional approval, the Compromise Agreement between PNCC and Radstock involving P6.185 billion is void for being contrary to Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987.

PNCC is a "**government agency**" because Section 2 on Introductory Provisions of the Revised Administrative Code of 1987 provides that -

> *Agency of the Government* refers to any of the various units of the Government, including a department, bureau, office, instrumentality, **or government-owned or controlled corporation**, or a local government or a distinct unit therein. (Boldfacing supplied)

Thus, Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987 applies to PNCC, which indisputably is a government owned or controlled corporation.

In the same vein, the COA's stamp of approval on the Compromise Agreement is void for violating Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987. Clearly, the Dissenting Opinion's reliance on the COA's finding that the terms and conditions of the Compromise Agreement are "fair and above board" is patently erroneous.

Citing *Benedicto v. Board of Administrators of Television Stations RPN, BBC and IBC*,[55] the Dissenting Opinion views that congressional approval is not required for the validity of the Compromise Agreement because the liability of PNCC is not yet "**settled**."

In *Benedicto,* the PCGG filed in the Sandiganbayan a civil case to recover from the defendants (including Roberto S. Benedicto) their ill-gotten wealth consisting of funds and other properties. The PCGG executed a compromise agreement with Roberto S. Benedicto ceding to the latter a substantial part of his ill-gotten assets and the State granting him immunity from further prosecution. The Court held that prior congressional approval is not required for the PCGG to enter into a compromise agreement with persons against whom it has filed actions for recovery of ill-gotten wealth.

In *Benedicto*, the Court found that the government's claim against Benedicto was not yet settled unlike here where the PNCC Board expressly admitted the liability of PNCC for the

Marubeni loans. **In *Benedicto*, the ownership of the alleged ill-gotten assets was still being litigated in the Sandiganbayan and *no party ever admitted any liability*, unlike here where the PNCC Board had already admitted through a formal Board Resolution PNCC's liability for the Marubeni loans**. PNCC's express admission of liability for the Marubeni loans is essentially the premise of the execution of the Compromise Agreement. **In short, Radstock's claim against PNCC is *settled* by virtue of PNCC's express admission of liability for the Marubeni loans. The Compromise Agreement merely reduced this *settled liability* from P17 billion to P6.185 billion**.

The provision of the Revised Administrative Code on the power to settle claims or liabilities was precisely enacted to prevent government agencies from admitting liabilities against the government, then compromising such "settled" liabilities. **The present case is exactly what the law seeks to prevent, a compromise agreement on a creditor's claim settled through admission by a government agency without the approval of Congress for amounts exceeding P100,000.00**. What makes the application of the law even more necessary is that the PNCC Board's twin moves are manifestly and grossly disadvantageous to the Government. First, the PNCC admitted solidary liability for a staggering P10.743 billion private debt incurred by a private corporation which PNCC does not even control. Second, the PNCC Board agreed to pay Radstock P6.185 billion as a compromise settlement ahead of all other creditors, including the Government which is the biggest creditor.

The Dissenting Opinion further argues that since the PNCC is incorporated under the Corporation Code, it has the power, through its Board of Directors, to compromise **just like any other *private* corporation** organized under the Corporation Code. Thus, the Dissenting Opinion states:

> Not being a government corporation created by special law, PNCC does not owe its creation to some charter or special law, but to the Corporation Code. Its powers are enumerated in the Corporation Code and its articles of incorporation. **As an autonomous entity**, it undoubtedly has the power to compromise, and to enter into a settlement through its Board of Directors, **just like any other private corporation** organized under the Corporation Code. To maintain otherwise is to ignore the character of PNCC as a corporate entity organized under the Corporation Code, by which it was vested with a personality and identity distinct and separate from those of its stockholders or members. (Boldfacing and underlining supplied)

The Dissenting Opinion is woefully wide off the mark. **The PNCC is not "*just like any other private corporation*" precisely because it is not a private corporation but indisputably a government owned corporation**. Neither is PNCC "**an autonomous entity**" considering that PNCC is under the Department of Trade and Industry, over which the President exercises control. To claim that PNCC is an "autonomous entity" is to say that it is a lost command in the Executive branch, a concept that violates the President's constitutional power of control over the entire Executive branch of government.[56]

The government nominees in the PNCC Board, who practically compose the entire PNCC Board, are public officers subject to the Anti-Graft and Corrupt Practices Act, accountable to the Government and the Filipino people. To hold that a corporation incorporated under the Corporation Code, despite its being 90.3% owned by the Government, is "**an autonomous entity**" that could solely through its Board of Directors compromise, and transfer ownership of, substantially all its assets to a private third party without the approval required under the Administrative Code of 1987,[57] is to invite the plunder of all such government owned corporations.

The Dissenting Opinion's claim that PNCC is an autonomous entity just like any other private corporation is inconsistent with its assertion that Section 36(2) of the Government Auditing Code is the governing law in determining PNCC's power to compromise. Section 36(2) of the Government Auditing Code expressly states that it applies to the governing bodies of "**government-owned or controlled corporations**." The phrase "government-owned or controlled corporations" refers to both those created by special charter as well as those incorporated under the Corporation Code. Section 2, Article IX-D of the Constitution provides:

> SECTION 2. (1) **The Commission on Audit shall have the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities,** including government-owned or controlled corporations with original charters, and on a post-audit basis: (a) constitutional bodies, commissions and offices that have been granted fiscal autonomy under this Constitution; (b) autonomous state colleges and universities; (c) **other government-owned or controlled corporations and their subsidiaries**; and (d) such non-governmental entities receiving subsidy or equity, directly or indirectly, from or through the Government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity. However, where the internal control system of the audited agencies is inadequate, the Commission may adopt such measures, including temporary or special pre-audit, as are necessary and appropriate to correct the deficiencies. It shall keep the general accounts of the Government and, for such period as may be provided by law, preserve the vouchers and other supporting papers pertaining thereto.
>
> (2) The Commission shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and **promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties**.

(Emphasis supplied)

In explaining the extent of the jurisdiction of COA over government owned or controlled corporations, this Court declared in *Feliciano v. Commission on Audit*:[58]

> The COA's audit jurisdiction extends not only to government "agencies or instrumentalities," but also to "government-owned and controlled corporations with original charters" as well as "other government-owned or controlled corporations" without original charters.
>
> x x x x
>
> Petitioner forgets that the constitutional criterion on the exercise of COA's audit jurisdiction depends on the government's ownership or control of a corporation. The nature of the corporation, whether it is private, quasi-public, or public is immaterial.
>
> The Constitution vests in the COA audit jurisdiction over "government-owned and controlled corporations with original charters," as well as "government-owned or controlled corporations" without original charters. GOCCs with original charters are subject to COA pre-audit, while GOCCs without original charters are subject to COA post-audit. GOCCs without original charters refer to corporations created under the Corporation Code but are owned or controlled by the government. The nature or purpose of the corporation is not material in determining COA's audit jurisdiction. Neither is the manner of creation of a corporation, whether under a general or special law.

Clearly, the COA's audit jurisdiction extends to government owned or controlled corporations incorporated under the Corporation Code. Thus, the COA must apply the Government Auditing Code in the audit and examination of the accounts of such government owned or controlled corporations **even though incorporated under the Corporation Code**. This means that Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987 on the power to compromise, **which superseded Section 36 of the Government Auditing Code**, applies to the present case in determining PNCC's power to compromise. In fact, the COA has been regularly auditing PNCC on a post-audit basis in accordance with Section 2, Article IX-D of the Constitution, the Government Auditing Code, and COA rules and regulations.

B. PNCC's toll fees are public funds.

PD 1113 granted PNCC a 30-year franchise to construct, operate and maintain toll facilities in the North and South Luzon Expressways. Section 1 of PD 1113[59] provides:

> **Section 1.** Any provision of law to the contrary notwithstanding, there is hereby **granted to the Construction and Development Corporation of the**

> **Philippines (CDCP)**, a corporation duly organized and registered under the laws of the Philippines, hereinafter called the GRANTEE, **for a period of thirty (30) years from May 1, 1977 the right, privilege and authority to construct, operate and maintain toll facilities covering the expressways** from Balintawak (Station 9 + 563) to Carmen, Rosales, Pangasinan and from Nichols, Pasay City (Station 10 + 540) to Lucena, Quezon, hereinafter referred to collectively as North Luzon Expressway, respectively.
>
> **The franchise herein granted shall include the right to collect toll fees** at such rates as may be fixed and/or authorized by the Toll Regulatory Board hereinafter referred to as the Board created under Presidential Decree No. 1112 for the use of the expressways above-mentioned. (Emphasis supplied)

Section 2 of PD 1894,[60] which amended PD 1113 to include in PNCC's franchise the Metro Manila expressway, also provides:

> Section 2. **The term of the franchise provided under Presidential Decree No. 1113 for the North Luzon Expressway and the South Luzon Expressway which is thirty (30) years from 1 May 1977 shall remain the same**; provided that, the franchise granted for the Metro Manila Expressway and all extensions linkages, stretches and diversions that may be constructed after the date of approval of this decree shall likewise have a term of thirty (30) years commencing from the date of completion of the project. (Emphasis supplied)

Based on these provisions, the franchise of the PNCC expired on 1 May 2007 or thirty years from 1 May 1977.

PNCC, however, claims that under PD 1894, the North Luzon Expressway (NLEX) shall have a term of 30 years from the date of its completion in 2005. PNCC argues that the proviso in Section 2 of PD 1894 gave "toll road projects completed within the franchise period and after the approval of PD No. 1894 on 12 December 1983 their own thirty-year term commencing from the date of the completion of the said project, notwithstanding the expiry of the said franchise."

This contention is untenable.

The proviso in Section 2 of PD 1894 refers to the franchise granted for the Metro Manila Expressway and all extensions linkages, stretches and diversions constructed after the approval of PD 1894. **It does not pertain to the NLEX because the term of the NLEX franchise, "*which is 30 years from 1 May 1977, shall remain the same*," as expressly provided in the first sentence of the same Section 2 of PD 1894**. To construe that the NLEX franchise had a new term of 30 years starting from 2005 glaringly conflicts with the plain, clear and unequivocal language of the first sentence of Section 2 of PD 1894. That would be clearly absurd.

There is no dispute that Congress did not renew PNCC's franchise after its expiry on 1 May 2007. However, PNCC asserts that it "remains a viable corporate entity even after the expiration of its franchise under Presidential Decree No. 1113." PNCC points out that the Toll Regulatory Board (TRB) granted PNCC a "Tollway Operation Certificate" (TOC) which conferred on PNCC the authority to operate and maintain toll facilities, which includes the power to collect toll fees. PNCC further posits that the toll fees are private funds because they represent "the consideration given to tollway operators in exchange for costs they incurred or will incur in constructing, operating and maintaining the tollways."

This contention is devoid of merit.

With the expiration of PNCC's franchise, the assets and facilities of PNCC were automatically turned over, by operation of law, to the government at no cost. Sections 2(e) and 9 of PD 1113 and Section 5 of PD 1894 provide:

> Section 2 [of PD 1113]. In consideration of this franchise, the GRANTEE shall:
>
> (e) Turn over the toll facilities and all equipment directly related thereto to the government upon expiration of the franchise period without cost.
>
> Section 9 [of PD 1113]. For the purposes of this franchise, the Government, shall turn over to the GRANTEE (PNCC) not later than April 30, 1977 all physical assets and facilities including all equipment and appurtenances directly related to the operations of the North and South Toll Expressways: Provided, That, the extensions of such Expressways shall also be turned over to GRANTEE upon completion of their construction or of functional sections thereof: Provided, However, **That upon termination of the franchise period, said physical assets and facilities including improvements thereon, together with equipment and appurtenances directly related to their operations, shall be turned over to the Government without any cost or obligation on the part of the latter.** (Emphasis supplied)
>
> Section 5 [of PD No. 1894]. In consideration of this franchise, the GRANTEE shall:
>
> (a) Construct, operate and maintain at its own expense the Expressways; and
>
> **(b) Turn over, without cost, the toll facilities and all equipment, directly related thereto to the Government upon expiration of the franchise period.** (Emphasis supplied)

The TRB does not have the power to give back to PNCC the toll assets and facilities which were automatically turned over to the Government, by operation of law, upon the expiration of the franchise of the PNCC on 1 May 2007. Whatever power the TRB may have to grant authority to operate a toll facility or to issue a "Tollway Operation Certificate," such power does not obviously include the authority to transfer back to PNCC

ownership of National Government assets, like the toll assets and facilities, which have become National Government property upon the expiry of PNCC's franchise. Such act by the TRB would repeal Section 5 of PD 1894 which automatically vested in the National Government ownership of PNCC's toll assets and facilities upon the expiry of PNCC's franchise. The TRB obviously has no power to repeal a law. Further, PD 1113, as amended by PD 1894, granting the franchise to PNCC, is a later law that must necessarily prevail over PD 1112 creating the TRB. Hence, the provisions of PD 1113, as amended by PD 1894, are controlling.

The government's ownership of PNCC's toll assets and facilities inevitably results in the government's ownership of the toll fees and the net income derived from these toll assets and facilities. Thus, the toll fees form part of the National Government's General Fund, which includes public moneys of every sort and other resources pertaining to any agency of the government.[61] **Even Radstock's counsel admits that the toll fees are public funds, to wit**:

> ASSOCIATE JUSTICE CARPIO:
>
> Okay. Now, when the franchise of PNCC expired on May 7, 2007, under the terms of the franchise under PD 1896, all the assets, toll way assets, equipment, etcetera of PNCC became owned by government at no cost, correct, under the franchise?
>
> DEAN AGABIN:
>
> Yes, Your Honor.
>
> **ASSOCIATE JUSTICE CARPIO:**
>
> **Okay. So this is now owned by the national government. [A]ny income from these assets of the national government is national government income, correct?**
>
> **DEAN AGABIN:**
>
> **Yes, Your Honor.**[62]
>
> x x x x
>
> **ASSOCIATE JUSTICE CARPIO:**
>
> **x x x My question is very simple x x x Is the income from these assets of the national government (interrupted)**
>
> **DEAN AGABIN:**

Yes, Your Honor.[63]

x x x x

ASSOCIATE JUSTICE CARPIO:

So, it's the government [that] decides whether it goes to the general fund or another fund. [W]hat is that other fund? Is there another fund where revenues of the government go?

DEAN AGABIN:

It's the same fund, Your Honor, except that (interrupted)

ASSOCIATE JUSTICE CARPIO:

So it goes to the general fund?

DEAN AGABIN:

Except that it can be categorized as a private fund in a commercial sense, and it can be categorized as a public fund in a Public Law sense.

ASSOCIATE JUSTICE CARPIO:

Okay. So we agree that, okay, it goes to the general fund. I agree with you, but you are saying it is categorized still as a private funds?

DEAN AGABIN:

Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO:

But it's part of the general fund. Now, if it is part of the general fund, who has the authority to spend that money?

DEAN AGABIN:

Well, the National Government itself.

ASSOCIATE JUSTICE CARPIO:

Who in the National Government, the Executive, Judiciary or Legislative?

DEAN AGABIN:

Well, the funds are usually appropriated by the Congress.

ASSOCIATE JUSTICE CARPIO:

x x x you mean to say there are exceptions that money from the general fund can be spent by the Executive without going t[hrough] Congress, or xxx is [that] the absolute rule?

DEAN AGABIN:

Well, in so far as the general fund is concerned, that is the absolute rule set aside by the National Government.

ASSOCIATE JUSTICE CARPIO:

x x x you are saying this is general fund money - the collection from the assets[?]

DEAN AGABIN:

Yes.[64] (Emphasis supplied)

Forming part of the General Fund, the toll fees can only be disposed of in accordance with the **fundamental** principles governing financial transactions and operations of any government agency, to wit: **(1) no money shall be paid out of the Treasury except in pursuance of an appropriation made by law, as expressly mandated by Section 29(1), Article VI of the Constitution; and (2) government funds or property shall be spent or used *solely* for public purposes, as expressly mandated by Section 4(2) of PD 1445 or the Government Auditing Code.**[65]

Section 29(1), Article VI of the Constitution provides:

> Section 29(1). No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.

The power to appropriate money from the General Funds of the Government belongs **exclusively** to the Legislature. Any act in violation of this iron-clad rule is unconstitutional.

Reinforcing this Constitutional mandate, Sections 84 and 85 of PD 1445 require that before a government agency can enter into a contract involving the expenditure of government funds, there must be an **appropriation law** for such expenditure, thus:

> Section 84. *Disbursement of government funds.*
>
> 1. Revenue funds shall not be paid out of any public treasury or depository except in pursuance of an appropriation law or other specific statutory authority.
>
> x x x x
>
> Section 85. *Appropriation before entering into contract.*
>
> 1. No contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure.
>
> x x x x

Section 86 of PD 1445, on the other hand, requires that the proper accounting official must certify that funds have been appropriated for the purpose.[66] **Section 87 of PD 1445 provides that any contract entered into contrary to the requirements of Sections 85 and 86 shall be void, thus:**

> Section 87. *Void contract and liability of officer.* **Any contract entered into contrary to the requirements of the two immediately preceding sections shall be void**, and the officer or officers entering into the contract shall be liable to the government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties. (Emphasis supplied)

Applying Section 29(1), Article VI of the Constitution, as implanted in Sections 84 and 85 of the Government Auditing Code, a law must first be enacted by Congress appropriating P6.185 billion as compromise money before payment to Radstock can be made.[67] Otherwise, such payment violates a prohibitory law and thus void under Article 5 of the Civil Code which states that "**[a]cts executed against the provisions of mandatory or prohibitory laws shall be void**, except when the law itself authorizes their validity."

Indisputably, without an appropriation law, PNCC cannot lawfully pay P6.185 billion to Radstock. Any contract allowing such payment, like the Compromise Agreement, "**shall be void**" as provided in Section 87 of the Government Auditing Code. In *Comelec v. Quijano-Padilla*,[68] **this Court ruled:**

> Petitioners are justified in refusing to formalize the contract with PHOTOKINA. Prudence dictated them not to enter into a contract not backed up by sufficient appropriation and available funds. Definitely, to act otherwise would be a futile exercise for the contract would inevitably suffer the vice of nullity. In *Osmeña vs. Commission on Audit*, this Court held:

The Auditing Code of the Philippines (P.D. 1445) further provides that no contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor and the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof. **Any contract entered into contrary to the foregoing requirements shall be VOID**.

Clearly then, the contract entered into by the former Mayor Duterte was void from the very beginning since the agreed cost for the project (P,368,920.00) was way beyond the appropriated amount (P,419,180.00) as certified by the City Treasurer. Hence, the contract was properly declared void and unenforceable in COA's 2nd Indorsement, dated September 4, 1986. The COA declared and we agree, that:

The prohibition contained in Sec. 85 of PD 1445 (Government Auditing Code) is explicit and mandatory. Fund availability is, as it has always been, an indispensable prerequisite to the execution of any government contract involving the expenditure of public funds by all government agencies at all levels. Such contracts are not to be considered as final or binding unless such a certification as to funds availability is issued (Letter of Instruction No. 767, s. 1978). Antecedent of advance appropriation is thus essential to government liability on contracts (Zobel vs. City of Manila, 47 Phil. 169). **This contract being violative of the legal requirements aforequoted, the same contravenes Sec. 85 of PD 1445 and is null and void by virtue of Sec. 87.**

Verily, the contract, as expressly declared by law, is inexistent and void ab initio. This is to say that the proposed contract is without force and effect from the very beginning or from its incipiency, as if it had never been entered into, and hence, cannot be validated either by lapse of time or ratification. (Emphasis supplied)

Significantly, Radstock's counsel admits that an appropriation law is needed before PNCC can use toll fees to pay Radstock, thus:

ASSOCIATE JUSTICE CARPIO:

Okay, I agree with you. Now, you are saying that money can be paid out of the general fund only through an appropriation by Congress, correct? That's what you are saying.

DEAN AGABIN:

Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO:

I agree with you also. Okay, now, can PNCC xxx use this money to pay Radstock without Congressional approval?

DEAN AGABIN:

Well, I believe that that may not be necessary. Your Honor, because earlier, the government had already decreed that PNCC should be properly paid for the reclamation works which it had done. And so (interrupted)

ASSOCIATE JUSTICE CARPIO:

No. I am talking of the funds.

DEAN AGABIN:

And so it is like a foreign obligation.

ASSOCIATE JUSTICE CARPIO:

Counsel, I'm talking of the general funds, collection from the toll fees. Okay. You said, they go to the general fund. You also said, money from the general fund can be spent only if there is an appropriation law by Congress.

DEAN AGABIN:

Yes, Your Honor.

There is no law.

DEAN AGABIN:

Yes, except that, Your Honor, this fund has not yet gone to the general fund.

ASSOCIATE JUSTICE CARPIO:

No. It's being collected everyday. As of May 7, 2007, national government owned those assets already. All those x x x collections that would have gone to PNCC are now national government owned. It goes to the general fund. And any body who uses that without appropriation from Congress commits malversation, I tell you.

DEAN AGABIN:

That is correct, Your Honor, as long as it has already gone into the general fund.

ASSOCIATE JUSTICE CARPIO:

Oh, you mean to say that it's still being held now by the agent, PNCC. It has not been remitted to the National Government?

DEAN AGABIN:

Well, if PNCC (interrupted)

ASSOCIATE JUSTICE CARPIO:

But if (interrupted)

DEAN AGABIN:

If this is the share that properly belongs to PNCC as a private entity (interrupted)

ASSOCIATE JUSTICE CARPIO:

No, no. I am saying that - You just agreed that all those collections now will go to the National Government forming part of the general fund. If, somehow, PNCC is holding this money in the meantime, it holds xxx it in trust, correct? Because you said, it goes to the general fund, National Government. So it must be holding this in trust for the National Government.

DEAN AGABIN:

Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO:

Okay. Can the person holding in trust use it to pay his private debt?

DEAN AGABIN:

No, Your Honor.

ASSOCIATE JUSTICE CARPIO:

Cannot be.

DEAN AGABIN:

But I assume that there must be some portion of the collections which properly pertain to PNCC.

ASSOCIATE JUSTICE CARPIO:

If there is some portion that xxx may be [for] operating expenses of PNCC. But that is not

DEAN AGABIN:

Even profit, Your Honor.

ASSOCIATE JUSTICE CARPIO:

Yeah, but that is not the six percent. Out of the six percent, that goes now to PNCC, that's entirely national government. But the National Government and the PNCC can agree on service fees for collecting, to pay toll collectors.

DEAN AGABIN:

Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO:

But those are expenses. We are talking of the net income. It goes to the general fund. And it's only Congress that can authorize that expenditure. Not even the Court of Appeals can give its stamp of approval that it goes to Radstock, correct?

DEAN AGABIN:

Yes, Your Honor.[69] (Emphasis supplied)

Without an appropriation law, the use of the toll fees to pay Radstock would constitute malversation of public funds. **Even counsel for Radstock expressly admits that the use of the toll fees to pay Radstock constitutes malversation of public funds, thus:**

ASSOCIATE JUSTICE CARPIO:

x x x As of May 7, 2007, [the] national government owned those assets already. All those x x x collections that would have gone to PNCC are now national government owned. It goes to the general fund. And any body who uses that without appropriation from Congress commits malversation, I tell you.

DEAN AGABIN:

That is correct, Your Honor, as long as it has already gone into the general fund.

ASSOCIATE JUSTICE CARPIO:

Oh, you mean to say that it's still being held now by the agent, PNCC. It has not been remitted to the National Government?

DEAN AGABIN:

Well, if PNCC (interrupted)

ASSOCIATE JUSTICE CARPIO:

But if (interrupted)

DEAN AGABIN:

If this is the share that properly belongs to PNCC as a private entity (interrupted)

ASSOCIATE JUSTICE CARPIO:

No, no. I am saying that - You just agreed that all those collections now will go to the National Government forming part of the general fund. If, somehow, PNCC is holding this money in the meantime, it holds x x x it in trust, correct? Because you said, it goes to the general fund, National Government. So it must be holding this in trust for the National Government.

DEAN AGABIN:

Yes, Your Honor.[70] (Emphasis supplied)

Indisputably, funds held in trust by PNCC for the National Government cannot be used by PNCC to pay a private debt of CDCP Mining to Radstock, otherwise the PNCC Board will be liable for malversation of public funds.

In addition, to pay Radstock P6.185 billion violates the **fundamental** public policy, expressly articulated in Section 4(2) of the Government Auditing Code,[71] that **government funds or property shall be spent or used *solely* for pubic purposes**, thus:

Section 4. *Fundamental Principles*. x x x (2) **Government funds or property**

shall be spent or used *solely* for public purposes. (Emphasis supplied)

There is no question that the subject of the Compromise Agreement is CDCP Mining's **private debt** to Marubeni, which Marubeni subsequently assigned to Radstock. **Counsel for Radstock admits that Radstock holds a *private debt* of CDCP Mining**, thus:

ASSOCIATE JUSTICE CARPIO:

So your client is holding a private debt of CDCP Mining, correct?

DEAN AGABIN:

Correct, Your Honor.[72] (Emphasis supplied)

CDCP Mining obtained the Marubeni loans when CDCP Mining and PNCC (then CDCP) were still privately owned and managed corporations. The Government became the majority stockholder of PNCC only because government financial institutions converted their loans to PNCC into equity when PNCC failed to pay the loans. **However, CDCP Mining have always remained a majority privately owned corporation with PNCC owning only 13% of its equity as admitted by former PNCC Chairman Arthur N. Aguilar and PNCC SVP Finance Miriam M. Pasetes during the Senate hearings**, thus:

SEN. OSMEÑA. x x x - I just wanted to know is CDCP Mining a 100 percent subsidiary of PNCC?

MR. AGUILAR. Hindi ho. Ah, no.

SEN. OSMEÑA. If they're not a 100 percent, why would they sign jointly and severally? I just want to plug the loopholes.

MR. AGUILAR. I think it was - if I may just speculate. It was just common ownership at that time.

SEN. OSMEÑA. Al right. Now - Also, the ...

MR. AGUILAR. Ah, 13 percent daw, your Honor.

SEN. OSMEÑA. Huh?

MR. AGUILAR. Thirteen percent ho.

SEN. OSMEÑA. What's 13 percent?

MR. AGUILAR. We owned ...

MS. PASETES. Thirteen percent of ...

SEN. OSMEÑA. PNCC owned ...

MS. PASETES. (Mike off) CDCP ...

SEN. DRILON. Use the microphone, please.

MS. PASETES. Sorry. Your Honor, the ownership of CDCP of CDCP Basay Mining ...

SEN. OSMEÑA. No, no, the ownership of CDCP. CDCP Mining, how many percent of the equity of CDCP Mining was owned by PNCC, formerly CDCP?

MS. PASETES. Thirteen percent.

SEN. OSMEÑA. Thirteen. And as a 13 percent owner, they agreed to sign jointly and severally?

MS. PASETES. Yes.

SEN. OSMEÑA. One-three?

So poor PNCC and CDCP got taken to the cleaners here. They sign for a 100 percent and they only own 13 percent.

x x x x[73] **(Emphasis supplied)**

PNCC cannot use public funds, like toll fees that indisputably form part of the General Fund, to pay a private debt of CDCP Mining to Radstock. Such payment cannot qualify as expenditure for a public purpose. The toll fees are merely held in trust by PNCC for the National Government, which is the owner of the toll fees.

Considering that there is no appropriation law passed by Congress for the P6.185 billion compromise amount, the Compromise Agreement is void for being contrary to law, specifically Section 29(1), Article VI of the Constitution and Section 87 of PD 1445. And since the payment of the P6.185 billion pertains to CDCP Mining's private debt to Radstock, the Compromise Agreement is also void for being contrary to the fundamental public policy that government funds or property shall be spent or used solely for public purposes, as provided in Section 4(2) of the Government Auditing Code.

C. Radstock is not qualified to own land in the Philippines.

Radstock is a private corporation incorporated in the British Virgin Islands. Its office address is at Suite 14021 Duddell Street, Central Hongkong. As a foreign corporation, with

unknown owners whose nationalities are also unknown, Radstock is not qualified to own land in the Philippines pursuant to Section 7, in relation to Section 3, Article XII of the Constitution. These provisions state:

> Section. 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural lands of the public domain may be further classified by law according to the uses to which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. Private corporations or associations may not hold such lands of the public domain except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one hundred thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than twelve hectares thereof by purchase, homestead, or grant.
>
> Taking into account the requirements of conservation, ecology, and development, and subject to the requirements of agrarian reform, the Congress shall determine, by law, the size of lands of the public domain which may be acquired, developed, held, or leased and the conditions therefor.
>
> x x x x
>
> Section 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.

The OGCC admits that Radstock cannot own lands in the Philippines. However, the OGCC claims that Radstock can own ***the rights to ownership of lands*** in the Philippines, thus:

> ASSOCIATE JUSTICE CARPIO:
>
> Under the law, a foreigner cannot own land, correct?
>
> ATTY. AGRA:
>
> Yes, Your Honor.
>
> ASSOCIATE JUSTICE CARPIO:
>
> Can a foreigner who xxx cannot own land assign the right of ownership to the land?
>
> ATTY. AGRA:
>
> Again, Your Honor, at that particular time, it will be PNCC, not through Radstock, that chain of events should be, there's a qualified nominee

(interrupted)

ASSOCIATE JUSTICE CARPIO:

Yes, xxx you said, Radstock will assign the right of ownership to the qualified assignee[.] So my question is, can a foreigner own the right to ownership of a land when it cannot own the land itself?

ATTY. AGRA:

The foreigner cannot own the land, Your Honor.

ASSOCIATE JUSTICE CARPIO:

But you are saying it can own the right of ownership to the land, because you are saying, the right of ownership will be assigned by Radstock.

ATTY. AGRA:

The rights over the properties, Your Honors, if there's a valid assignment made to a qualified party, then the assignment will be made.

ASSOCIATE JUSTICE CARPIO:

Who makes the assignment?

ATTY. AGRA:

It will be Radstock, Your Honor.

ASSOCIATE JUSTICE CARPIO:

So, if Radstock makes the assignment, it must own its rights, otherwise, it cannot assign it, correct?

ATTY. AGRA:

Pursuant to the compromise agreement, once approved, yes, Your Honors.

ASSOCIATE JUSTICE CARPIO:

So, you are saying that Radstock can own the rights to ownership of the land?

ATTY. AGRA:

Yes, Your Honors.

ASSOCIATE JUSTICE CARPIO:

Yes?

ATTY. AGRA:

The premise, Your Honor, you mentioned a while ago was, if this Court approves said compromise (interrupted)

ASSOCIATE JUSTICE CARPIO:

No, no. Whether there is such a compromise agreement - - It's an academic question I am asking you, can a foreigner assign rights to ownership of a land in the Philippines?

ATTY. AGRA:

Under the Compromise Agreement, Your Honors, these rights should be respected.

ASSOCIATE JUSTICE CARPIO:

So, it can?

ATTY. AGRA:

It can. Your Honor. But again, this right must, cannot be perfected or cannot be, could not take effect.

ASSOCIATE JUSTICE CARPIO:

But if it cannot - - It's not perfected, how can it assign?

ATTY. AGRA:

Not directly, Your Honors. Again, there must be a qualified nominee assigned by Radstock.

ASSOCIATE JUSTICE CARPIO:

It's very clear, it's an indirect way of selling property that is prohibited by law, is it not?

ATTY. AGRA:

Again, Your Honor, know, believe this is a Compromise Agreement. This is a dacion en pago.

ASSOCIATE JUSTICE CARPIO:

So, dacion en pago is an exception to the constitutional prohibition.

ATTY. AGRA:

No, Your Honor. PNCC, will still hold on to the property, absent a valid assignment of properties.

ASSOCIATE JUSTICE CARPIO:

But what rights will PNCC have over that land when it has already signed the compromise? It is just waiting for instruction xxx from Radstock what to do with it? So, it's a trustee of somebody, because it does not, it cannot, [it] has no dominion over it anymore? It's just holding it for Radstock. So, PNCC becomes a dummy, at that point, of Radstock, correct?

ATTY. AGRA:

No, Your Honor, I believe it (interrupted)

ASSOCIATE JUSTICE CARPIO:

Yeah, but it does not own the land, but it still holding the land in favor of the other party to the Compromise Agreement

ATTY. AGRA:

Pursuant to the compromise agreement, that will happen.

ASSOCIATE JUSTICE CARPIO:

Okay. May I (interrupted)

ATTY. AGRA:

Again, Your Honor, if the compromise agreement ended with a statement that Radstock will be the owner of the property (interrupted)

ASSOCIATE JUSTICE CARPIO:

Yeah. Unfortunately, it says, to a qualified assignee.

ATTY. AGRA:

Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO:

And at this point, when it is signed and execut[ed] and approved, PNCC has no dominion over that land anymore. Who has dominion over it?

ATTY. AGRA:

Pending the assignment to a qualified party, Your Honor, PNCC will hold on to the property.

ASSOCIATE JUSTICE CARPIO:

Hold on, but who x x x can exercise acts of dominion, to sell it, to lease it?

ATTY. AGRA:

Again, Your Honor, without the valid assignment to a qualified nominee, the compromise agreement in so far as the transfer of these properties will not become effective. It is subject to such condition. Your Honor.[74] (Emphasis supplied)

There is no dispute that Radstock is disqualified to own lands in the Philippines. Consequently, Radstock is also disqualified to own the rights to ownership of lands in the Philippines. Contrary to the OGCC's claim, Radstock cannot own the rights to ownership of any land in the Philippines because Radstock cannot lawfully own the land itself. Otherwise, there will be a blatant circumvention of the Constitution, which prohibits a foreign private corporation from owning land in the Philippines. In addition, Radstock cannot transfer the rights to ownership of land in the Philippines if it cannot own the land itself. **It is basic that an assignor or seller cannot assign or sell something he does not own at the time the ownership, or the rights to the ownership, are to be transferred to the assignee or buyer.**[75]

The third party assignee under the Compromise Agreement who will be designated by Radstock can only acquire rights duplicating those which its assignor (Radstock) is entitled by law to exercise.[76] Thus, the assignee can acquire ownership of the land only if its assignor, Radstock, owns the land. Clearly, the assignment by PNCC of the real properties to a nominee to be designated by Radstock is a circumvention of the Constitutional

prohibition against a private foreign corporation owning lands in the Philippines. Such circumvention renders the Compromise Agreement void.

D. Public bidding is required for the disposal of government properties.

Under Section 79 of the Government Auditing Code,[77] the disposition

of government lands to private parties requires public bidding.[78] COA Circular No. 89-926, issued on 27 January 1989, sets forth the guidelines on the disposal of property and other assets of the government. Part V of the COA Circular provides:

> **V.** MODE OF DISPOSAL/DIVESTMENT: -
>
> This Commission recognizes the following modes of disposal/divestment of assets and property of national government agencies, local government units and government-owned or controlled corporations and their subsidiaries, aside from other such modes as may be provided for by law.
>
> **1.** Public Auction
>
> **Conformably to existing state policy, the divestment or disposal of government property as contemplated herein shall be undertaken primarily thru public auction.** Such mode of divestment or disposal shall observe and adhere to established mechanics and procedures in public bidding, viz:
>
> a. adequate publicity and notification so as to attract the greatest number of interested parties; (vide, Sec. 79, P.D. 1445)
>
> b. sufficient time frame between publication and date of auction;
>
> c. opportunity afforded to interested parties to inspect the property or assets to be disposed of;
>
> d. confidentiality of sealed proposals;
>
> e. bond and other prequalification requirements to guarantee performance; and
>
> f. fair evaluation of tenders and proper notification of award.
>
> It is understood that the Government reserves the right to reject any or all of the tenders. (Emphasis supplied)

Under the Compromise Agreement, PNCC shall dispose of substantial parcels of land, by

way of *dacion en pago*, in favor of Radstock. Citing *Uy v. Sandiganbayan,*[79] PNCC argues that a *dacion en pago* is an exception to the requirement of a public bidding.

PNCC's reliance on *Uy* is misplaced. There is nothing in *Uy* declaring that public bidding is dispensed with in a *dacion en pago* transaction. The Court explained the transaction in *Uy* as follows:

> We do not see any infirmity in either the MOA or the SSA executed between PIEDRAS and respondent banks. By virtue of its shareholdings in OPMC, PIEDRAS was entitled to subscribe to 3,749,906,250 class "A" and 2,499,937,500 class "B" OPMC shares. Admittedly, it was financially sound for PIEDRAS to exercise its pre-emptive rights as an existing shareholder of OPMC lest its proportionate shareholdings be diluted to its detriment. However, PIEDRAS lacked the necessary funds to pay for the additional subscription. Thus, it resorted to contract loans from respondent banks to finance the payment of its additional subscription. The mode of payment agreed upon by the parties was that the payment would be made in the form of part of the shares subscribed to by PIEDRAS. The OPMC shares therefore were agreed upon by the parties to be equivalent payment for the amount advanced by respondent banks. We see the wisdom in the conditions of the loan transaction. In order to save PIEDRAS and/or the government from the trouble of selling the shares in order to raise funds to pay off the loans, an easier and more direct way was devised in the form of the dacion en pago agreements.
>
> Moreover, we agree with the Sandiganbayan that neither PIEDRAS nor the government sustained any loss in these transactions. In fact, after deducting the shares to be given to respondent banks as payment for the shares, PIEDRAS stood to gain about 1,540,781,554 class "A" and 710,550,000 class "B" OPMC shares virtually for free. Indeed, the question that must be asked is whether or not PIEDRAS, in the exercise of its pre-emptive rights, would have been able to acquire any of these shares at all if it did not enter into the financing agreements with the respondent banks.[80]

Suffice it to state that in *Uy*, neither PIEDRAS[81] **nor the government suffered any loss in the** *dacion en pago* transactions, unlike here where the government stands to lose at least P6.185 billion worth of assets.

Besides, a *dacion en pago* is in essence a form of sale, which basically involves a disposition of a property. In *Filinvest Credit Corp. v. Philippine Acetylene, Co., Inc.*,[82] **the Court defined** *dacion en pago* in this wise:

> *Dacion en pago*, according to Manresa, is the transmission of the ownership of a thing by the debtor to the creditor as an accepted equivalent of the performance of obligation. In*dacion en pago*, as a special mode of payment, the debtor offers another thing to the creditor who accepts it as equivalent of

payment of an outstanding debt. **The undertaking really partakes in one sense of the nature of sale, that is, the creditor is really buying the thing or property of the debtor, payment for which is to be charged against the debtor's debt.**As such, the essential elements of a contract of sale, namely, consent, object certain, and cause or consideration must be present. In its modern concept, what actually takes place in*dacion en pago*is an objective novation of the obligation where the thing offered as an accepted equivalent of the performance of an obligation is considered as the object of the contract of sale, while the debt is considered as the purchase price. In any case, common consent is an essential prerequisite, be it sale or innovation to have the effect of totally extinguishing the debt or obligation.[83] **(Emphasis supplied)**

E. PNCC must follow rules on preference of credit.

Radstock is only one of the creditors of PNCC. Asiavest is PNCC's judgment creditor. In its Board Resolution No. BD-092-2000, PNCC admitted not only its debt to Marubeni but also its debt to the National Government[84] in the amount of **P36 billion**.[85] **During the Senate hearings, PNCC admitted that it owed the Government** P36 billion, thus:

SEN. OSMEÑA. All right. Now, second question is, the management of PNCC also recognize the obligation to the national government of 36 billion. It is part of the board resolution.

MS. OGAN. Yes, sir, it is part of the October 20 board resolution.

SEN. OSMEÑA. All right. So if you owe the national government 36 billion and you owe Marubeni 10 billion, you know, I would just declare bankruptcy and let an orderly disposition of assets be done. What happened in this case to the claim, the 36 billion claim of the national government? How was that disposed of by the PNCC? Mas malaki ang utang ninyo sa national government, 36 billion. Ang gagawin ninyo, babayaran lahat ang utang ninyo sa Marubeni without any assets left to satisfy your obligations to the national government. There should have been, at least, a pari passu payment of all your obligations, 'di ba?

MS. PASETES. Mr. Chairman...

SEN. OSMEÑA. Yes.

MS. PASETES. PNCC still carries in its books an equity account called equity adjustments arising from transfer of obligations to national government - - 5.4 billion - - in addition to shares held by government amounting to 1.2 billion.

SEN. OSMEÑA. What is the 36 billion?

THE CHAIRMAN. Ms. Pasetes...

SEN. OSMEÑA. Wait, wait, wait.

THE CHAIRMAN. Baka ampaw yun eh.

SEN. OSMEÑA. Teka muna. What is the 36 billion that appear in the resolution of the board in September 2000 (sic)? This is the same resolution that recognizes, acknowledges and confirms PNCC's obligations to Marubeni. And subparagraph (a) says "Government of the Philippines, in the amount of 36,023,784,000 and change. And then (b) Marubeni Corporation in the amount of 10,743,000,000. So, therefore, in the same resolution, you acknowledged that had something like P46.7 billion in obligations. Why did PNCC settle the 10 billion and did not protect the national government's 36 billion? And then, number two, why is it now in your books, the 36 billion is now down to five? If you use that ratio, then Marubeni should be down to one.

MS. PASETES. Sir, the amount of 36 billion is principal plus interest and penalties.

SEN. OSMEÑA. And what about Marubeni? Is that just principal only?

MS. PASETES. Principal and interest.

SEN. OSMEÑA. So, I mean, you know, it's equal treatment. Ten point seven billion is principal plus penalties plus interest, hindi ba?

MS. PASETES. Yes, sir. Yes, Your Honor.

SEN. OSMEÑA. All right. So now, what you are saying is that you gonna pay Marubeni 6 billion and change and the national government is only recognizing 5 billion. I don't think that's protecting the interest of the national government at all.[86]

In giving priority and preference to Radstock, the Compromise Agreement is certainly in fraud of PNCC's other creditors, including the National Government, and violates the provisions of the Civil Code on concurrence and preference of credits.

This Court has held that while the Corporation Code allows the transfer of all or substantially all of the assets of a corporation, the transfer should not prejudice the creditors of the assignor corporation.[87] Assuming that PNCC may transfer all or substantially all its assets, to allow PNCC to do so **without the consent of its creditors or without requiring Radstock to assume PNCC's debts** will defraud the other PNCC creditors[88] since the assignment will place PNCC's assets beyond the reach of its other

creditors.[89] As this Court held in *Caltex (Phil.), Inc. v. PNOC Shipping and Transport Corporation*:[90]

While the Corporation Code allows the transfer of all or substantially all the properties and assets of a corporation, the transfer should not prejudice the creditors of the assignor. **The only way the transfer can proceed without prejudice to the creditors is to hold the assignee liable for the obligations of the assignor**. **The acquisition by the assignee of all or substantially all of the assets of the assignor necessarily includes the assumption of the assignor's liabilities, unless the creditors who did not consent to the transfer choose to rescind the transfer on the ground of fraud.** To allow an assignor to transfer all its business, properties and assets without the consent of its creditors and without requiring the assignee to assume the assignor's obligations will defraud the creditors. The assignment will place the assignor's assets beyond the reach of its creditors. (Emphasis supplied)

Also, the law, specifically Article 1387[91] of the Civil Code, presumes that there is fraud of creditors when property is alienated by the debtor after judgment has been rendered against him, thus:

> **Alienations by onerous title are also presumed fraudulent when made by persons against whom some judgment has been rendered in any instance or some writ of attachment has been issued**. The decision or attachment need not refer to the property alienated, and need not have been obtained by the party seeking rescission. (Emphasis supplied)

As stated earlier, Asiavest is a judgment creditor of PNCC in G.R. No. 110263 and a court has already issued a writ of execution in its favor. **Thus, when PNCC entered into the Compromise Agreement conveying several prime lots in favor of Radstock, by way of *dacion en pago*, there is a legal presumption that such conveyance is fraudulent under Article 1387 of the Civil Code**.[92] This presumption is strengthened by the fact that the conveyance has virtually left PNCC's other creditors, including the biggest creditor - the National Government - with no other asset to garnish or levy.

Notably, the presumption of fraud or intention to defraud creditors is not just limited to the two instances set forth in the first and second paragraphs of Article 1387 of the Civil Code. Under the third paragraph of the same article, "the design to defraud creditors may be proved in any other manner recognized by the law of evidence." In *Oria v. Mcmicking,*[93] this Court considered the following instances as **badges of fraud**:

> 1. The fact that the consideration of the conveyance is fictitious or is inadequate.
>
> 2. A transfer made by a debtor after suit has begun and while it is pending against him.

3. A sale upon credit by an insolvent debtor.

4. Evidence of large indebtedness or complete insolvency.

5. The transfer of all or nearly all of his property by a debtor, especially when he is insolvent or **greatly embarrassed financially.**

6. The fact that the transfer is made between father and son, when there are present other of the above circumstances.

7. The failure of the vendee to take exclusive possession of all the property. (Emphasis supplied)

Among the circumstances indicating fraud is a transfer of all or nearly all of the debtor's assets, especially when the debtor is greatly embarrassed financially. Accordingly, neither a declaration of insolvency nor the institution of insolvency proceedings is a condition *sine qua non* for a transfer of all or nearly all of a debtor's assets to be regarded in fraud of creditors. **It is sufficient that a debtor is greatly embarrassed financially**.

In this case, PNCC's huge negative net worth - at least P6 billion as expressly admitted by PNCC's counsel during the oral arguments, or P14 billion based on the 2006 COA Audit Report - necessarily translates to an extremely embarrassing financial situation. With its **huge negative net worth** arising from unpaid billions of pesos in debt, PNCC cannot claim that it is financially stable. As a consequence, the Compromise Agreement stipulating a transfer in favor of Radstock of substantially all of PNCC's assets constitutes fraud. To legitimize the Compromise Agreement just because there is still no judicial declaration of PNCC's insolvency will work fraud on PNCC's other creditors, the biggest creditor of which is the National Government. To insist that PNCC is very much liquid, given its admitted huge negative net worth, is nothing but denial of the truth. The toll fees that PNCC collects belong to the National Government. Obviously, PNCC cannot claim it is liquid based on its collection of such toll fees, because PNCC merely holds such toll fees in trust for the National Government. PNCC does not own the toll fees, and such toll fees do not form part of PNCC's assets.

PNCC owes the National Government P36 billion, **a substantial part of which constitutes taxes and fees,** thus:

SEN. ROXAS. Thank you, Mr. Chairman.

Mr. PNCC Chairman, could you describe for us the composition of your debt of about five billion - there are in thousands, so this looks like five and half billion. Current portion of long-term debt, about five billion. What is this made of?

MS. PASETES. The five billion is composed of what is owed the Bureau of Treasury and the Toll Regulatory Board for concession fees that's almost

three billion and another 2.4 billion owed Philippine National Bank.

SEN. ROXAS. So, how much is the Bureau of Treasury?

MS. PASETES. Three billion.

SEN. ROXAS. Three - Why do you owe the Bureau of Treasury three billion?

MS. PASETES. That represents the concession fees due Toll Regulatory Board principal plus interest, Your Honor.

x x x x[94] (Emphasis supplied)

In addition, PNCC's 2006 Audit Report by COA states as follows:

TAX MATTERS

The Company was assessed by the Bureau of Internal Revenue (BIR) of its deficiencies in various taxes. However, no provision for any liability has been made yet in the Company's financial statements.

- 1980 deficiency income tax, deficiency contractor's tax and deficiency documentary stamp tax assessments by the BIR totaling P212.523 Million.

x x x x

- Deficiency business tax of P64 Million due the Belgian Consortium, PNCC's partner in its LRT Project.

- 1992 deficiency income tax, deficiency value-added tax and deficiency expanded withholding tax of P1.04 Billion which was reduced to P709 Million after the Company's written protest.

x x x x

- 2002 deficiency internal revenue taxes totaling P72.916 Million.

x x x x.[95] (Emphasis supplied)

Clearly, PNCC owes the National Government substantial taxes and fees amounting to billions of pesos.

The P36 billion debt to the National Government was acknowledged by the PNCC Board in the same board resolution that recognized the Marubeni loans. Since PNCC is clearly

insolvent with a huge negative net worth, the government enjoys preference over Radstock in the satisfaction of PNCC's liability arising from taxes and duties, pursuant to the provisions of the Civil Code on concurrence and preference of credits. Articles 2241,[96] 2242[97] and 2243[98] of the Civil Code expressly mandate that taxes and fees due the National Government "**shall be preferred**" and "**shall first be satisfied**" over claims like those arising from the Marubeni loans which "**shall enjoy no preference**" under Article 2244.[99]

However, in flagrant violation of the Civil Code, the PNCC Board favored Radstock over the National Government in the order of credits. This would strip PNCC of its assets leaving virtually nothing for the National Government. This action of the PNCC Board is manifestly and grossly disadvantageous to the National Government and amounts to fraud.

During the Senate hearings, Senator Osmeña pointed out that in the Board Resolution of 20 October 2000, PNCC acknowledged its obligations to the National Government amounting to P36,023,784,000 and to Marubeni amounting to P10,743,000,000. Yet, Senator Osmeña noted that in the PNCC books at the time of the hearing, the P36 billion obligation to the National Government was reduced to P5 billion. PNCC's Miriam M. Pasetes could not properly explain this discrepancy, except by stating that the P36 billion includes the principal plus interest and penalties, thus:

> SEN. OSMEÑA. Teka muna. What is the 36 billion that appear in the resolution of the board in September 2000 (sic)? This is the same resolution that recognizes, acknowledges and confirms PNCC's obligations to Marubeni. And subparagraph (a) says "Government of the Philippines, in the amount of 36,023,784,000 and change. And then (b) Marubeni Corporation in the amount of 10,743,000,000. So, therefore, in the same resolution, you acknowledged that had something like P46.7 billion in obligations. Why did PNCC settle the 10 billion and did not protect the national government's 36 billion? And then, number two, why is it now in your books, the 36 billion is now down to five? If you use that ratio, then Marubeni should be down to one.
>
> MS. PASETES. Sir, the amount of 36 billion is principal plus interest and penalties.
>
> SEN. OSMEÑA. And what about Marubeni? Is that just principal only?
>
> MS. PASETES. Principal and interest.
>
> SEN. OSMEÑA. So, I mean, you know, it's equal treatment. Ten point seven billion is principal plus penalties plus interest, hindi ba?
>
> MS. PASETES. Yes, sir. Yes, Your Honor.
>
> SEN. OSMEÑA. All right. So now, what you are saying is that you gonna pay

> Marubeni 6 billion and change and the national government is only recognizing 5 billion. I don't think that's protecting the interest of the national government at all.[100]

PNCC failed to explain satisfactorily why in its books the obligation to the National Government was reduced when no payment to the National Government appeared to have been made. **PNCC failed to justify why it made it appear that the obligation to the National Government was less than the obligation to Marubeni. It is another obvious ploy to justify the preferential treatment given to Radstock to the great prejudice of the National Government.**

VI.
Supreme Court is Not Legitimizer of Violations of Laws

During the oral arguments, counsels for Radstock and PNCC admitted that the Compromise Agreement violates the Constitution and existing laws. However, they rely on this Court to approve the Compromise Agreement to shield their clients from possible criminal acts arising from violation of the Constitution and existing laws. In their view, once this Court approves the Compromise Agreement, their clients are home free from prosecution, and can enjoy the **P6.185 billion** loot. The following exchanges during the oral arguments reveal this view:

> ASSOCIATE JUSTICE CARPIO:
>
> If there is no agreement, they better remit all of that to the National Government. They cannot just hold that. They are holding that [in] trust, as you said, x x x you agree, for the National Government.
>
> DEAN AGABIN:
>
> Yes, that's why, they are asking the Honorable Court to approve the compromise agreement.
>
> **ASSOCIATE JUSTICE CARPIO:**
>
> **We cannot approve that if the power to authorize the expenditure [belongs] to Congress. How can we usurp x x x the power of Congress to authorize that expenditure[?] It's only Congress that can authorize the expenditure of funds from the general funds.**
>
> **DEAN AGABIN:**
>
> **But, Your Honor, if the Honorable Court would approve of this compromise agreement, I believe that this would be binding on Congress.**

ASSOCIATE JUSTICE CARPIO:

Ignore the Constitutional provision that money shall be paid out of the National Treasury only pursuant to an appropriation by law. You want us to ignore that[?]

DEAN AGABIN:

Not really, Your Honor, but I suppose that Congress would have no choice, because this is a final judgment of the Honorable Court. [101]

x x x x

ASSOCIATE JUSTICE CARPIO:

So, if Radstock makes the assignment, it must own its rights, otherwise, it cannot assign it, correct?

ATTY. AGRA:

Pursuant to the compromise agreement, **once approved**, yes, Your Honors.

ASSOCIATE JUSTICE CARPIO:

So, you are saying that Radstock can own the rights to ownership of the land?

ATTY. AGRA:

Yes, Your Honors.

ASSOCIATE JUSTICE CARPIO:

Yes?

ATTY. AGRA:

The premise, Your Honor, you mentioned a while ago was, if this Court approves said compromise (interrupted).[102] (Emphasis supplied)

This Court is not, and should never be, a rubber stamp for litigants hankering to pocket public funds for their selfish private gain. This Court is the ultimate guardian of the public interest, the last bulwark against those who seek to plunder the public coffers. This Court cannot, and must never, bring itself down to the level of legitimizer of violations of the Constitution, existing laws or public policy.

Conclusion

In sum, the acts of the PNCC Board in (1) issuing Board Resolution Nos. BD-092-2000 and BD-099-2000 expressly admitting liability for the Marubeni loans, and (2) entering into the Compromise Agreement, constitute evident bad faith and gross inexcusable negligence, amounting to fraud, in the management of PNCC's affairs. Being public officers, the government nominees in the PNCC Board must answer not only to PNCC and its stockholders, but also to the Filipino people for grossly mishandling PNCC's finances.

Under Article 1409 of the Civil Code, the Compromise Agreement is "**inexistent and void from the beginning**," and "**cannot be ratified**," thus:

> Art. 1409. **The following contracts are inexistent and void from the beginning**:
>
> (1) Those whose cause, object or purpose is **contrary to law**, morals, good customs, public order or **public policy**;
>
> x x x
>
> (7) Those **expressly prohibited or declared void by law**.
>
> **These contracts cannot be ratified**. x x x. (Emphasis supplied)

The Compromise Agreement is indisputably contrary to the Constitution, existing laws and public policy. Under Article 1409, the Compromise Agreement is expressly declared void and "**cannot be ratified**." **No court, not even this Court, can ratify or approve the Compromise Agreement**. This Court must perform its duty to defend and uphold the Constitution, existing laws, and fundamental public policy. This Court must not shirk in declaring the Compromise Agreement ***inexistent and void ab initio***.

WHEREFORE, we **GRANT** the petition in G.R. No. 180428. We **SET ASIDE** the Decision dated 25 January 2007 and the Resolutions dated 12 June 2007 and 5 November 2007 of the Court of Appeals. We **DECLARE** (1) PNCC Board Resolution Nos. BD-092-2000 and BD-099-2000 admitting liability for the Marubeni loans **VOID *AB INITIO*** for causing undue injury to the Government and giving unwarranted benefits to a private party, constituting a corrupt practice and unlawful act under Section 3(e) of the Anti-Graft and Corrupt Practices Act, and (2) the Compromise Agreement between the Philippine National Construction Corporation and Radstock Securities Limited **INEXISTENT AND VOID *AB INITIO*** for being contrary to Section 29(1), Article VI and Sections 3 and 7, Article XII of the Constitution; Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987; Sections 4(2), 79, 84(1), and 85 of the Government Auditing Code; and Articles 2241, 2242, 2243 and 2244 of the Civil Code.

We **GRANT** the intervention of Asiavest Merchant Bankers Berhad in G.R. No. 178158

but **DECLARE** that Strategic Alliance Development Corporation has no legal standing to sue.

SO ORDERED.

Puno, C.J., Chico-Nazario, Abad, and *Villarama, JJ.,* concur.
Corona, Velasco, Jr., and *Nachura, JJ.,* joins the dissent of J. Bersamin.
*Carpio Morales, J.***,** pls. see concurring opinion.
Brion, J., join concurring opinion of J. de Castro.
Peralta and *Del Castillo, JJ.*, no part.
Bersamin, J., please see dissent.

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[1] This is a conservative amount since the real properties conveyed under the Compromise Agreement are valued only at 70% of their appraised value. In addition, payment from 50% of the toll fees for 27 years, amounting to P9.382 billion, is given a net present value of only P1.287 billion. **Senator Franklin M. Drilon puts the actual value of the compromise at P17.676 billion**.

[2] AN ACT RENEWING THE FRANCHISE OF THE PHILIPPINE NATIONAL CONSTRUCTION CORPORATION (PNCC), FORMERLY KNOWN AS THE CONSTRUCTION AND DEVELOPMENT CORPORATION OF THE PHILIPPINES (CDCP), GRANTED UNDER PRESIDENTIAL DECREE NO. 1113, AS AMENDED BY PRESIDENTIAL DECREE NO. 1894, TO ANOTHER (25) YEARS FROM THE DATE OF THE APPROVAL OF THIS ACT AND FOR OTHER PURPOSES.

[3] On 7 February 2007, Senator Franklin Drilon introduced P.S. Res. No. 618 or the RESOLUTION DIRECTING THE SENATE COMMITTEE ON FINANCE TO CONDUCT AN INQUIRY, IN AID OF LEGISLATION, INTO THE COMPROMISE AGREEMENT ENTERED INTO BY THE PHILIPPINE NATIONAL CONSTRUCTION CORPORATION (PNCC) WITH RADSTOCK SECURITIES LIMITED, FOR THE PURPOSE OF PROVIDING REMEDIAL LEGISLATION AND POLICY PARAMETERS ON COMPROMISE AGREEMENTS TO PROTECT GOVERNMENT ASSETS AND ENSURE THE JUDICIOUS USE OF GOVERNMENT FUNDS. This Resolution was submitted to the Senate and referred to the Committee on Finance.

[4] Delivered on 21 December 2006 during the Plenary Session.

[5] Record of the Senate, Vol. III, Session No. 55, 21 December 2006.

[6] Transcript of Committee Hearings, 19 December 2006, pp. 69-70.

[7] Id., 14 December 2006, pp. 62-64.

[8] Id. at 64-66.

[9] Under Rule 45 of the Rules of Court.

[10] *Rollo*, pp. 31-43. Penned by Associate Justice (now a member of this Court) Mariano C. Del Castillo, concurred in by then Presiding Justice Ruben T. Reyes and Associate Justice Arcangelita Romilla Lontok.

[11] http://www.pncc.com.ph/

[12] http://www.pncc.com.ph/

[13] Id.

[14] Id.

[15] The members of the PNCC Board who were present during the meeting were Renato B. Valdecantos, Chairman, Rolando L. Macasaet, President and Chief Executive Officer, Braulio B. Balbas, Jr., Romulo F. Coronado, Basilio R. Cruz, Jr., Alfredo F. Laya, Jr., Victor Pineda, Edwin Tanonliong, Jose Luis Vera, Hermogenes Concepcion, Jr., and Raymundo Francisco, Directors.

[16] Penned by Judge Amalia F. Dy.

[17] *Philippine National Construction Corporation v. Dy*, G.R. No. 156887, 3 October 2005, 472 SCRA 1, 12.

[18] *Rollo*, pp. 237-290.

[19] *Pinlac v. Court of Appeals*, 457 Phil. 527 (2003).

[20] Id.

[21] *Office of the Ombudsman v. Masing*, G.R. No. 165416, 22 January 2008, 542 SCRA 253, 265.

[22] 439 Phil. 149 (2002), citing *Mago v. Court of Appeals,* 363 Phil. 225 (1999) and *Director of Lands v. Court of Appeals*, No. L-45168, 25 September 1979, 93 SCRA 239.

[23] 363 Phil. 225, 234 (1999), which in turn cited *Director of Lands v. Court of Appeals*, No. L-45168, 25 September 1979, 93 SCRA 239, 245-246.

[24] *National Power Corporation v. Province of Quezon and Municipality of Pagbilao*, G.R. No. 171586, 15 July 2009.

[25] *Hi-Yield Realty Incorporated v. Court of Appeals*, G.R. No. 168863, 23 June 2009.

[26] Id.

[27] Id.

[28] Id.

[29] TSN, Oral Arguments, pp. 19-20.

[30] *Del Mar v. PAGCOR*, 400 Phil. 307 (2000).

[31] *Agote v. Lorenzo*, G.R. No. 142675, 22 July 2005, 464 SCRA 60.

[32] G.R. No. 102782, 11 December 1991, 204 SCRA 837, 842-843.

[33] Villanueva, Philippine Corporate Law, 2001, p. 318. Section 31 of the Corporation Code.

[34] Villanueva, Philippine Corporate Law, 2001, pp. 321-322. Section 25 of the Corporation Code pertinently provides:

x x x x

The directors or trustees and officers to be elected shall perform the duties enjoined on them by law and by the by-laws of the corporation. x x x x

[35] Section 31 of the Corporation Code.

[36] Id.

[37] *Philippine National Construction Corporation v. Dy*, supra note 17 at 10.

[38] No stopping PNCC-Radstock deal, Daxim Lucas, 26 April 2007 (http://business.inquirer.net/ money/topstories/view/20070426-62559/No stopping PNCC-

Radstock_deal).

[39] Transcript of Committee Hearings, 14 December 2006, pp. 26-28.

[40] P.S. Res. No. 618, introduced by Senator Franklin M. Drilon.

[41] The Annual Audit Report on the PNCC For the Year Ended December 31, 2006 pertinently provides: "There is a variance of P43.959 Billion between PNCC recorded balance of obligations to various Government Financial Institutions (GFIs) and the amount confirmed by the Bureau of Treasury (BTr). Said obligations are still not fully converted to equity as prescribed under LOI 1295. If converted, the available capital stock of P44.568 Million would not be sufficient to cover the recorded outstanding obligations of P5.552 Billion or the BTr confirmed amount of P50.893 Billion."

The Annual Audit Report on the PNCC For the Year Ended December 31, 2007 pertinently provides: "The Corporation's liabilities are understated by P42.50 billion due to non-recognition of advances made by the Bureau of Treasury for the account of PNCC. x x x The Corporation has designed a corporate strategic plan to include the servicing of accounts with the BTr via conversion of the obligations into long-term debt or equity. However, said obligations are still not converted to long term-debt and fully converted to equity as prescribed under LOI 1295. If converted, the available capital stock of P445.68 million would not be sufficient to cover the recorded outstanding obligations of P5.55 billion or the BTr confirmed amount of P48.05 billion.

[42] Annual Audit Report on the PNCC For the Year Ended December 31, 2006.

[43] TSN, Oral Arguments, pp. 299-304.

[44] Article 1139 of the Civil Code.

[45] Article 1155 of the Civil Code.

[46] Transcript of Committee Hearings, 14 December 2006, pp. 23-26.

[47] Id., 19 December 2006, p. 47.

[48] Id., 14 December 2006, p. 108.

[49] Id., 19 December 2006, pp. 13-25.

[50] Id. at 82-83.

[51] TSN, Oral Arguments, pp. 12-13.

[52] Transcript of Committee Hearings, 19 December 2006, pp. 36-39.

[53] TSN, Oral Arguments, pp. 19-20.

[54] See *The Alexandra Condominium Corporation v. Laguna Lake Development Authority*, G.R. No.169228, 11 September 2009.

[55] G.R. No. 87710, 31 March 1992, 207 SCRA 659.

[56] *Rufino v. Endriga*, G.R. Nos. 139554 and 139565, 21 July 2006, 496 SCRA 13.

[57] Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987.

[58] 464 Phil. 441, 453, 461-462 (2004).

[59] PRESIDENTIAL DECREE NO. 1113 - GRANTING THE CONSTRUCTION AND DEVELOPMENT CORPORATION OF THE PHILIPPINES (CDCP) A FRANCHISE TO OPERATE, CONSTRUCT AND MAINTAIN TOLL FACILITIES IN THE NORTH AND SOUTH LUZON TOLL EXPRESSWAYS AND FOR OTHER PURPOSES.

[60] PRESIDENTIAL DECREE NO. 1894 - AMENDING THE FRANCHISE OF THE PHILIPPINE NATIONAL CONSTRUCTION CORPORATION TO CONSTRUCT, MAINTAIN AND OPERATE TOLL FACILITIES IN THE NORTH LUZON AND SOUTH LUZON EXPRESSWAYS TO INCLUDE THE METRO MANILA EXPRESSWAY TO SERVE AS AN ADDITIONAL ARTERY IN THE TRANSPORTATION OF TRADE AND COMMERCE IN THE METRO MANILA AREA

[61] Section 3, Definition of Terms, Government Auditing Code.

[62] TSN, Oral Arguments, pp. 504-506.

[63] Id. at 508.

[64] Id. at 515-518.

[65] Section 4 of the Government Auditing Code provides:

"*Fundamental principles*. Financial transactions and operations of any government agency

shall be governed by the fundamental principles set forth hereunder, to wit:

1. No money shall be paid out of any public treasury of depository except in pursuance of an appropriation law or other specific statutory authority;

2. Government funds or property shall be spent or used solely for public purposes;

3. Trust funds shall be available and may be spent only for the specific purpose for which the trust was created or the funds received;

4. Fiscal responsibility shall, to the greatest extent, be shared by all those exercising authority over the financial affairs, transactions, and operations of the government agency;

5. Disbursements or disposition of government funds or property shall invariably bear the approval of the proper officials;

6. Claims against government funds shall be supported with complete documentation;

7. All laws and regulations applicable to financial transactions shall be faithfully adhered to;

8. Generally accepted principles and practices of accounting as well as of sound management and fiscal administration shall be observed, provided that they do not contravene existing laws and regulations. (Emphasis supplied)

[66] Section 86. *Certificate showing appropriation to meet contract.* Except in the case of a contract for personal service, for supplies for current consumption or to be carried in stock not exceeding the estimated consumption for three months, or banking transactions of government-owned or controlled banks no contract involving the expenditure of public funds by any government agency shall be entered into or authorized unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract, and the sum so certified shall not thereafter be available for expenditure for any other purpose until the obligation of the government agency concerned under the contract is fully extinguished.

See *Melchor v. COA*, G.R. No. 95398, 16 August 1991, 200 SCRA 704; *Osmeña v. COA*, G.R. No. 98355, 2 March 1994, 230 SCRA 585; *Comelec v. Quijano-Padilla*, 438 Phil. 72 (2002).

[67] See *Guingona, Jr. v. Carague*, G.R. No. 94571, 22 April 1991, 196 SCRA 221.

[68] 438 Phil. 72, 96-98 (2002).

[69] TSN, Oral Arguments, pp. 518-526.

[70] Id. at 521-523.

[71] The Court applied this provision in *Brgy. Sindalan, San Fernando, Pampanga v. Court of Appeals*, G.R. No. 150640, 22 March 2007, 518 SCRA 649.

[72] TSN, Oral Arguments, p. 504.

[73] Transcript of Committee Hearings, 14 December 2006, pp. 64-66.

[74] TSN, Oral Arguments, pp. 470-480.

[75]Article 1459 of the Civil Code provides: "The thing must be licit and the vendor must have a right to transfer the ownership thereof at the time it is delivered." The vendor cannot transfer ownership of the thing if he does not own the thing or own rights of ownership to the thing. The only possible exception is in a short sale of securities or commodities, where the seller borrows from the broker or third party the securities or commodities the ownership of which is immediately transferred to the buyer. This is feasible only when the subject matter of the transaction is a **fungible object**.

[76] See *Casabuena v. Court of Appeals*, 350 Phil. 237 (1998).

[77] Section 79 of the Government Auditing Codes provides as follows: "When government property has become unserviceable for any cause, or is no longer needed, it shall, upon application of the officer accountable therefor, be inspected by the head of the agency or his duly authorized representative in the presence of the auditor concerned and, if found to be valueless or unsaleable, it may be destroyed in their presence. **If found to be valuable, it may be sold at public auction to the highest bidder** under the supervision of the proper committee on award or similar body in the presence of the auditor concerned or other authorized representative of the Commission, after advertising by printed notice in the Official Gazette, or for not less than three consecutive days in any newspaper of general circulation, or where the value of the property does not warrant the expense of publication, by notices posted for a like period in at least three public places in the locality where the property is to be sold. **In the event that the public auction fails, the property may be sold at a private sale at such price as may be fixed by the same committee or body concerned and approved by the Commission**." (Emphasis supplied)

[78] *Chavez v. Public Estates Authority*, 433 Phil. 506 (2002).

[79] G.R. No. 111544, 6 July 2004, 433 SCRA 424.

[80] Id. at 438-439.

[81] Piedras Petroleum Company, Inc.

[82] 197 Phil. 394 (1982).

[83] Id. at 402-403.

[84] TSN, Oral Arguments, pp. 355-356.

[85]According to this article, the current amount of PNCC's debt is P50 billion. The PNCC's Legacy of Debt by GEMMA B. BAGAYAUA, abs-cbnNEWS.com/Newsbreak 01/13/2009 (http://www.abs-cbnnews.com/nation/01/13/09/pncc%E2%80%99s-legacy-debt#comment-form)

[86] Transcript of the Committee Hearings, 18 December 2006, pp. 122-124.

[87] *Caltex (Philippines), Inc. v. PNOC Shipping and Transport Corporation,* G.R. No. 150711, 10 August 2006, 498 SCRA 400.

[88] Id.

[89] Id.

[90] Id.

[91]Article 1387. All contracts by virtue of which the debtor alienates property by gratuitous title are presumed to have been entered into in fraud of creditors, when the donor did not reserve sufficient property to pay all debts contracted before the donation.

Alienations by onerous title are also presumed fraudulent when made by persons against whom some judgment has been rendered in any instance or some writ of attachment has been issued. The decision or attachment need not refer to the property alienated, and need not have been obtained by the party seeking rescission.

In addition to these presumptions, the design to defraud creditors may be proved in any other manner recognized by law and of evidence.

[92] See *China Banking Corporation v. Court of Appeals,* 384 Phil. 116 (2000).

[93] 21 Phil. 243 (1912), cited in *China Banking Corporation v. Court of Appeals*, 384 Phil. 116 (2000) and *Caltex v. PNOC Shipping and Transport Corporation*, G.R. No. 150711, 10 August 2006, 498 SCRA 400.

[94] Transcript of Committee Hearings, 18 December 2006, pp. 163-165.

[95] 2006 Annual Audit Report, pp. 23-24; 2007 Annual Audit Report, pp. 23-24.

[96] Article 2241. With reference to specific movable property of the debtor, **the following claims or liens shall be preferred**:

(1) **Duties, taxes and fees due thereon to the State or any subdivision thereof**;

(2) Claims arising from misappropriation, breach of trust, or malfeasance by public officials committed in the performance of their duties, on the movables, money or securities obtained by them;

(3) Claims for the unpaid price of movable sold, on said movables, so long as they are in the possession of the debtor, up to the amount of the same; and if the movable has been resold by the debtor and the price is still unpaid, the lien may be enforced on the price; this right is not lost by the immobilization of the thing by destination, provided it has not lost its form, substance and identity; neither is the right lost by the sale of the thing together with other property for a lump sum, when the price thereof can be determined proportionally;

(4) Credits guaranteed with a pledge so long as the things pledged are in the hands of the creditor, or those guaranteed by a chattel mortgage, upon the things pledged or mortgaged, up to the value thereof;

(5) Credits for the making, repair, safekeeping or preservation of personal property, on the movable thus made, repaired, kept or possessed;

(6) Claims for laborers' wages, on the goods manufactured or the work done;

(7) For expenses of salvage, upon the goods salvaged;

(8) Credits between the landlord and the tenant, arising from the contract of tenancy on shares, on the share of each in the fruits or harvest;

(9) Credits for transportation, upon the goods carried, for the price of the contract and incidental expenses, until their delivery and for thirty days thereafter;

(10) Credits for lodging and supplies usually furnished to travelers by hotel keepers, on the

movables belonging to the guest as long as such movables are in the hotel, but not for money loaned to the guests;

(11) Credits for seeds and expenses for cultivation and harvest advanced to the debtor, upon the fruits harvested.

(12) Credits for rent for one year, upon the personal property of the lessee existing on the immovable leased and on the fruits of the same, but not on money or instruments of credits;

(13) Claims in favor of the depositor if the depositary has wrongfully sold the thing deposited, upon the price of the sale.

In the foregoing cases, if the movables to which the lieu or preference attaches have been wrongfully taken, the creditor may demand them from any possessor, within thirty days from the unlawful seizure. (Emphasis supplied)

[97]Article 2242. With reference to specific immovable property and real rights of the debtor, the following claims, mortgages and liens shall be preferred, and shall constitute an encumbrance on the immovable or real right:

(1) **Taxes due upon the land or building**;

(2) For the unpaid price of real property sold, upon the immovable sold;

(3) Claims of laborers, masons, mechanics and other workmen, as well as of architects, engineers and contractors, engaged in the construction, reconstruction or repair of buildings, canals or other works, upon said buildings, canals or other works;

(4) Claims of furnishers of materials used in the construction, reconstruction, or repair of buildings, canals or other works, upon said buildings, canals or other works;

(5) Mortgage credits recorded in the Registry of Property, upon the real estate mortgaged;

(6) Expenses for the preservation or improvement of real property when the law authorizes reimbursement, upon the immovable preserved or improved;

(7) Credits annotated in the Registry of Property, in virtue of a judicial order, by attachments or executions, upon the property affected, and only as to later credits;

(8) Claims or co-heirs for warranty in the partition of an immovable among them, upon the real property thus divided;

(9) Claims of donors of real property for pecuniary charges or other conditions imposed upon the donee, upon the immovable donated;

(10) Credits of insurers, upon the property insured, for the insurance premium for two years. (Emphasis supplied)

[98] Article 2243. The claims or credits enumerated in the two preceding articles shall be considered as mortgages or pledges or real or personal property, or liens within the purview of legal provisions governing insolvency. **Taxes mentioned in No. 1, article 2241, and No. 1, article 2242, shall be first satisfied**. (Emphasis supplied)

[99] Article 2245. **Credits of any other kind or class, or by any other right or title not comprised in the four preceding articles, shall enjoy no preference**. (Emphasis supplied)

[100] Transcript of the Committee Hearings, 18 December 2006, p. 123.

[101] TSN, Oral Arguments, pp. 527-529.

[102] Id. at 473-474.

D I S S E N T

BERSAMIN, *J.*:

I hereby register my dissent to the majority opinion of Justice Carpio that grants the petition in G.R. No. 180428, and declares (1) PNCC Board Resolution Nos. BD-092-2000 and BD-099-2000 (recognizing liability for the Marubeni Corporation (Marubeni) loans) void *ab initio* for causing undue injury to the Government and giving unwarranted benefits to a private party; and (2) the *compromise agreement* between the Philippine National Construction Corporation (PNCC) and Radstock Securities Limited (Radstock) inexistent and void *ab initio* for being contrary to Section 29(1), Article VI and Sections 3 and 7, Article XII of the *Constitution*; Section 20(1), Chapter IV, Subtitle B, Title I, Book V of the *Administrative Code of* 1987; Sections 4(2), 79, 84 and 85 of the *Government Auditing Code*; Section 3(g) of the *Anti-Graft and Corrupt Practices Act*; Article 217 of the *Revised Penal Code*; and Articles 2241, 2242, 2243 and 2244 of the *Civil Code*; and that grants the intervention of Asiavest Merchant Bankers Berhad in G.R. No. 178158.

The majority opinion declares that Strategic Alliance Development Corporation has no legal standing to sue.

I humbly submit that the PNCC Board resolutions and the *compromise agreement* entered into by and between PNCC and Radstock were valid and effective, and did not violate any

provision of the *Constitution* or any other law; and that the intervention of Asiavest Merchant Bankers Berhad in G.R. No. 178158 has no legal and factual bases.

Let me justify this submission.

The Case, in a Nutshell

Respondent Radstock had sued for collection and damages respondent PNCC in the Regional Trial Court (RTC) in Mandaluyong City (Civil Case No. MC 01-1398). The RTC rendered judgment in favor of Radstock, mandating PNCC to pay to Radstock the amount of P13,151,956,528.00, plus interests and attorney's fees. PNCC appealed to the Court of Appeals (CA).[1] On August 18, 2006, after negotiations held while the appeal (CA-GR CV No. 87971) was still pending in the CA, PNCC and Radstock entered into a *compromise agreement*, agreeing to reduce PNCC's adjudged liability in the amount of P17,040,843,968.00 as of July 31, 2006 to P6,185,000,000. [2]

Considering that at the time of the execution of the *compromise agreement*, G.R. No. 156887 (*i.e.*, the appeal of PNCC from the CA's affirmance of the RTC's denial of PNCC's *motion to dismiss* in Civil Case No. MC 01-1398) was still also pending in this Court, PNCC and Radstock submitted the *compromise agreement* for approval of the Court, which saw fit to require said parties to refer the *compromise agreement* to the Commission on Audit (COA) for study and recommendation. On its part, COA recommended the approval of the *compromise agreement*.

Thereafter, on November 22, 2006, the Court instructed PNCC and Radstock to submit the *compromise agreement* to the CA for approval because CA-GR CV No. 87971 was still pending. [3] On January 25, 2007, the CA approved it.[4]

The approval of the *compromise agreement* quickly invited adverse reaction from several quarters, none of whom had been parties up to that point in the litigation. One of them was Strategic Alliance Development Corporation (STRADEC), the petitioner in G.R. No. 178185.[5] Another was Rodolfo Cuenca. STRADEC and Cuenca wanted to intervene in order to assail the *compromise agreement* between PNCC and Radstock as null and void. The CA rejected their proposed interventions.[6] On the other hand, Luis Sison (Sison), the petitioner in G.R. No. 180428,[7] filed a *petition for annulment of judgment approving the compromise agreement,*[8] which was raffled to another division of the CA. The CA dismissed the petition.[9]

Before the Court now are the appeals of STRADEC and Sison. Cuenca did not pursue his cause after the rejection of his intervention.

Common Antecedents[10]

In the period between 1978 and 1980, Marubeni, a corporation organized under the laws of Japan, had extended two loan accommodations to PNCC for the following purposes: (1) the sum of US$5 million to finance the purchase of copper concentrates by Construction Development Corporation of the Philippines (CDCP) Mining Corporation (a subsidiary of PNCC), which PNCC had guaranteed to pay jointly and severally up to the amount of P20 million; and (2) ¥5.46 billion, or its equivalent in Philippine Pesos of P2,099,192,619.00, to finance the completion of the expansion project of CDCP Mining Corporation in Basay, and as working capital, which PNCC had also guaranteed to pay jointly and severally. By a *deed of assignment* dated January 10, 2001, Marubeni assigned the credit to Radstock, a corporation organized under the laws of the British Virgin Islands, with office address at Suite 602, 76 Kennedy Road, Hong Kong. After due date of the obligation, Marubeni and Radstock had demanded payment, but PNCC failed and refused to pay the obligation.

Upon default of PNCC, Radstock sued PNCC in the RTC in Mandaluyong City to recover the debt and consequential damages, praying for the issuance of a writ of preliminary attachment. The suit was docketed as Civil Case No. MC 01-1398.

On January 23, 2001, the RTC issued a writ of preliminary attachment, the service of which led to the garnishment of PNCC's bank accounts and the attachment of several of PNCC's real properties. On February 14, 2001, PNCC moved to set aside the order of January 23, 2001, and to discharge the writ of attachment. Two weeks later, PNCC filed a *motion to dismiss*. The RTC denied both motions.After the RTC denied PNCC's corresponding motions for reconsideration, PNCC instituted a special civil action for *certiorari* in the CA (C.A.-G.R. SP No. 66654).

Notwithstanding the pendency of C.A.-G.R. SP No. 66654, Civil Case No. MC 01-1398 proceeded in the RTC. In its answer in Civil Case No. MC 01-1398, PNCC reiterated the grounds of its *motion to dismiss* as affirmative defenses, namely: 1) that the plaintiff had no legal capacity to sue; 2) that the loan obligation had already prescribed because no valid demand had been made; and 3) that the letter of guarantee had been signed by a person not authorized to do so by a valid board resolution.

In C.A.-G.R. SP No. 66654, PNCC argued similar grounds to assail the denial of its *motion to dismiss*, to wit: 1) that the cause of action was barred by prescription; 2) that the pleading asserting the claim stated no cause of action; 3) that the condition precedent for filing of the instant suit had not been complied with; and 4) that the plaintiff had no legal capacity to sue. PNCC further argued that the RTC had committed grave abuse of discretion in issuing the writ of attachment, for there had been no valid grounds to grant the writ.

On August 30, 2002, the CA decided C.A.-G.R. SP No. 66654. It held that the RTC did not act with grave abuse of discretion; and that the denial of the *motion to dismiss*, being interlocutory, could not be questioned through a special civil action for *certiorari*. The CA denied PNCC's *motion for reconsideration* on January 22, 2003.

Soon after the CA had rendered its decision in C.A.-G.R. SP No. 66654, the RTC promulgated its judgment in Civil Case No. MC 01-1398, declaring PNCC liable to Radstock in the amount of P13,151,956,528, plus interest and attorney's fees. The RTC also threw out all of PNCC's affirmative defenses for being inconsistent with the evidence presented.

PNCC appealed the judgment to the CA (C.A.-G.R. CV No. 87971).

Even with the main case (Civil Case No. MC 01-1398) having been meanwhile decided, PNCC still appealed by petition for review on *certiorari* the CA decision in C.A.-G.R. SP No. 66654, alleging that the CA gravely erred by holding that *certiorari* was not available against the denial of a *motion to dismiss;* and insisting that the RTC had not gravely abused its discretion in issuing its assailed orders. The appeal was docketed as G.R. No. 156887.

On October 3, 2005, the Court resolved G.R. No. 156887, *viz*:

> WHEREFORE, the petition is partly GRANTED and insofar as the Motion to Set Aside the Order and/or Discharge the Writ of Attachment is concerned, the Decision of the Court of Appeals on August 30, 2002 and its Resolution of January 22, 2003 in CA-G.R. SP No. 66654 are REVERSED and SET ASIDE. The attachments over the properties by the writ of preliminary attachment are hereby ordered LIFTED effective upon the finality of this Decision. The Decision and Resolution of the Court of Appeals are AFFIRMED in all other respects. The Temporary Restraining Order is DISSOLVED immediately and the Court of Appeals is directed to PROCEED forthwith with the appeal filed by PNCC.
>
> No costs.
>
> SO ORDERED.

After receiving the decision in G.R. No. 156887, the representatives and counsel of PNCC and Radstock met for a number of times in order to discuss a possible settlement between them. They reached a final settlement on August 17, 2006. They submitted to the Court their *compromise agreement* on August 18, 2006.[11] In the *compromise agreement*, PNCC and Radstock agreed to reduce PNCC's adjudged liability as of July 31, 2006 from P17,040,843,968.00 to P6,185,000,000.

On December 4, 2006, the Court in G.R. No. 156887 referred the *compromise agreement* to the COA for comment. In due time, COA submitted its *compliance*, whereby it recommended the approval of the *compromise agreement*.[12]

On November 22, 2006, the Court instructed PNCC and Radstock to submit the

compromise agreement to the CA because the appeal of the RTC decision was still pending thereat.[13]

On January 25, 2007, the CA rendered its decision approving the *compromise agreement*.[14]

Alleging a claim against PNCC arising from the rejection of its bid during the bidding conducted in 2000 by the Privatization and Management Office (PMO) for the privatization of the Government's PNCC shares,[15] STRADEC sought reconsideration of the decision of January 25, 2007.

Cuenca, a stockholder of PNCC and its former President and Chairman of the Board of Directors, filed a *motion for intervention*, maintaining that PNCC had no obligation to pay Radstock.[16]

On May 31, 2007, however, the CA denied STRADEC's *motion for reconsideration* and Cuenca's *motion for intervention*.[17]

In the meanwhile, on February 20, 2007, Sison also joined the legal fray in the CA by filing his *petition for annulment of judgment approving the compromise agreement* (C.A.-G.R. SP No. 97982).[18]

Asiavest Merchant Bankers Berhad (Asiavest), representing itself as a judgment creditor of PNCC, manifested its intention to participate in C.A.-G.R. SP No. 97982 through its *urgent motion for leave to intervene and to file the attached opposition and motion-in-intervention*.

On June 12, 2007, the CA (Ninth Division) promulgated a resolution in C.A.-G.R. SP No. 97982 dismissing Sison's *petition for annulment of judgment approving the compromise agreement* and denying Asiavest's *urgent motion for leave to intervene*.[19]

Sison moved for reconsideration of the dismissal, but the CA denied his *motion for reconsideration*.[20]

On June 20, 2007, STRADEC came to the Court to seek a review on *certiorari* (G.R. No. 178158), praying that the *compromise agreement* be declared void for violating the law and public policy. It sought a temporary restraining order or writ of preliminary injunction.[21]

Cuenca did not appeal.

On July 2, 2007, the Court directed PNCC and Radstock, their officers, agents, representatives and other persons acting under their orders to maintain the *status quo ante*.[22]

On September 21, 2007, Asiavest presented its *urgent motion for leave to intervene and to file the attached opposition and motion-in-intervention* in G.R. No. 178158.[23]

On November 26, 2007, Sison also came to the Court *via* his own petition for review on *certiorari* to appeal the CA decision (G.R. No. 180428).[24]

On February 18, 2008, the Court consolidated G.R. No. 180428 and G.R. No. 178158.[25]

Additional Antecedents in G.R. No. 178158

In 2000, STRADEC and Dong-A Pharmaceutical Co., Ltd., a Korean corporation, formed a consortium to participate in the bidding for the shares and other interests of the Philippine Government in PNCC. The consortium was named Dong-A Consortium.[26] Dong-A Consortium's bid of P1,228,888,800.00 was the highest.[27] On October 30, 2000, during the bidding process, the representative of the Assets Privatization Trust (APT) conducting the bidding announced that the indicative price for the Government's shares, receivables and other interests in PNCC was P7 billion.[28] All the bids, including that of Dong-A Consortium, were thus rejected.[29] In several communications thereafter, Dong-A Consortium demanded that APT issue the notice of award to it. However, APT did not comply, denying any irregularity in the bidding and informing Dong-A Consortium that its Board of Directors had confirmed the decision to reject Dong-A Consortium's bid.[30]

On October 3, 2005, STRADEC commenced an action for the declaration of its right to the notice of award and for damages in the RTC in Makati (docketed as Civil Case No. 05-882) against the PMO (formerly APT) and PNCC.[31]

On October 6, 2006, STRADEC filed a *motion for intervention* in this Court, seeking to intervene in order to seek the nullification of the *compromise agreement*.[32] After the CA had approved the *compromise agreement* through the decision in C.A.-G.R. CV No. 87971, STRADEC filed a *motion for reconsideration*. The CA denied the *motion for reconsideration* on May 31, 2007, resulting in STRADEC's present appeal in G.R. No. 178158.

Arguments of the Parties

In G.R. No. 178158, STRADEC contends that:

I. The Court of Appeals not only committed serious reversible error but may have also gravely abused its discretion in refusing to allow petitioner STRADEC to intervene in the case.

II. The Compromise Agreement between respondents Radstock and PNCC is void for being contrary to law and public policy.

III. In the event the Compromise Agreement between respondents Radstock and PNCC is upheld, said Compromise Agreement should be made subject to the outcome of Civil Case No. 05-882.

In G.R. No. 180428, Sison submits the following arguments in support of his petition:[33]

I. An action to annul a final and executory judgment of the Court of Appeals where such judgment was procured through fraud, and without fault, negligence or participation of the party concerned, can be filed and maintained before the Court of Appeals. Hence, the Court of Appeals gravely erred in dismissing the petition for annulment of judgment for supposed lack of jurisdiction.

II. Resolving the jurisdiction issues presented in this case will enrich jurisprudence.

III. Petitioner has a meritorious cause of action, and the instant petition warrants judicial review due to compelling reasons.

On their part, Radstock and PNCC similarly argued in their respective memoranda that:[34]

1. The Compromise Agreement does not violate public policy.

2. The subject matter does not involve an assumption by the government of a private entity's obligation in violation of the law and/or the Constitution.

3. The PNCC Board Resolution of October 20, 2000 is not defective or illegal.

4. The Compromise Agreement is viable and does not include all oR substantially all of PNCC's assets.

5. The Decision of the Court of Appeals is not annullable as there was no fraud practiced here.

On January 13, 2009, the Court conducted oral arguments in both appeals, and limited the matters to be covered to the following:

1. Does the Compromise Agreement violate public policy?

2. Does the subject matter involve an assumption by the government of a private entity's obligation in violation of the law and/or the Constitution?

Is the PNCC Board Resolution of October 20, 2000 defective or illegal?

3. Is the Compromise Agreement viable in light of the non-renewal of PNCC's franchise by Congress and its inclusion of all or substantially all of PNCC's assets?

4. Is the Decision of the Court of Appeals annullable even if final and executory on the grounds of fraud, public policy and the Constitution?[35]

Submissions

I
G.R. No. 178158

STRADEC seeks the reversal of the CA's denial of its *motion for intervention* to enable it to have the *compromise agreement* between Radstock and PNCC declared void, or, alternatively, to have the *compromise agreement* made subject to the outcome of Civil Case No. 05-882.

I believe and submit that STRADEC's position is untenable. Thus, I join the majority opinion in its rejection of STRADEC's intervention.

A
CA Committed No Grave Abuse of Discretion
in denying STRADEC's Motion for Intervention

Section 2, Rule 19 of the 1997 *Rules of Civil Procedure* requires that the *motion for intervention* "may be filed at any time before the rendition of judgment by the trial court."

The CA found that STRADEC had filed its *motion for intervention* only after the CA and the RTC had promulgated their respective decisions. Worthy to note, indeed, is that as of the time when the *joint motion for judgment based on compromise agreement* was submitted by PNCC and Radstock to the CA for consideration and approval, no *motion for intervention* was as yet attached to the CA *rollo*.[36] Consequently, the CA held that STRADEC's *motion for intervention* had been filed out of time.

Yet, STRADEC insists that the requirement for its intervention to be made prior to the rendition of judgment by the RTC should not apply considering that it had no legal interest in the subject matter of the litigation until upon the execution of the *compromise agreement*. It asserts that it became imbued with a legal interest in the subject matter in litigation due to its being the winning bidder during the public bidding on October 30, 2000, by which it came to have the right to acquire the Government's shares, receivables, securities and other interests in PNCC, only after the execution of the *compromise agreement*, because its right would be defeated if the *compromise agreement* were

approved considering that the *compromise agreement* provided for the transfer to Radstock of the Government's properties, rights, securities and other interests in PNCC.

STRADEC's insistence is untenable. The CA's rejection of STRADEC's intervention was proper and in accord with the *Rules of Court* and pertinent jurisprudence.

Rule 19 of the 1997 *Rules of Civil Procedure,* which regulates the procedure for permitting an intervention, relevantly provides:

> Section 1. *Who may intervene*. -- A person who has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof may, with leave of court, be allowed to intervene in the action. The court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether or not the intervenor's rights may be fully protected in a separate proceeding. (2[a], [b]a, R12)

To be able to intervene in an action, therefore, the prospective intervenor must show an interest in the litigation that is of such direct and material character that he will either gain or lose by the direct legal operation and effect of judgment.[37]

STRADEC did not demonstrate sufficiently enough that it had the requisite legal interest in the subject matter of the litigation between Radstock and PNCC. On the contrary, STRADEC's interest, if any, was far from direct and material, but was, at best, a mere expectancy, contingent and purely inchoate, due to such interest being dependent on a favorable outcome of Civil Case No. 05-882, which was then still pending in the RTC. Therein lay the weakness of STRADEC's position.

Intervention is a proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adverse to both of them. It is the act or proceeding by which a third person becomes a party to a suit pending between two others. It is the admission, by leave of court, of a person not an original party to pending legal proceedings, by which such person becomes a party for the protection of some alleged right or interest to be affected by such proceedings.[38]

I contend that the right to intervene is not absolute, for intervention is merely permissive; and that the conditions for the right of intervention to be exercised must be shown by the party proposing to intervene. The procedure to secure the right to intervene is fixed by a statute or rule, and intervention can be secured only in accordance with the terms of the applicable statutory or reglementary provision. Under the rules on intervention, the allowance or disallowance of a motion to intervene is addressed to the sound discretion of the court or judge. [39]

B

Allowance of STRADEC's Intervention Will Unduly Delay Adjudication of the Rights of the Original Parties

The decision of the RTC pronouncing PNCC liable to Radstock for P13,151,956,528.00, plus interests and attorney's fees, for an obligation incurred between 1978 and 1980, was promulgated as early as on December 10, 2002. Matters involved in the case have also already reached this Court (G.R. No. 156887), with the Court upholding the denial of PNCC's *motion to dismiss*. Allowing STRADEC to intervene would mean having to remand the case to the CA or the RTC for the reception of evidence and the introduction of new issues. Under such circumstances, the intervention would give birth to the unwanted prospect of letting this case drag on for a few more years.

I submit that the petition fails because the Court cannot permit a further delay.

The purpose of intervention - never an independent action, but ancillary and supplemental to the existing litigation - is not to obstruct or to unnecessarily delay the placid operation of the machinery of trial, but merely to afford one not an original party, yet having a certain right or interest in the pending case, the opportunity to appear and be joined so he can assert or protect such right or interest.[40] Accordingly, as a general guide for determining whether a party may be allowed to intervene or not, the trial court, in the exercise of its sound discretion, shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether or not the intervenor's rights may be fully protected in a separate proceeding.[41]

C

STRADEC's Rights Are Fully Protected in Civil Case No. 05-882

STRADEC apprehends that its right cannot be fully protected in Civil Case No. 05-882 because it would have nothing to acquire except worthless shares should the *compromise agreement* be upheld, considering that the assets of PNCC were being conveyed to Radstock under the *compromise agreement*.

STRADEC's apprehensions are unwarranted.

STRADEC's apprehensions would not be assuaged through its intervention in the action between Radstock and PNCC or through the nullification of the *compromise agreement*. STRADEC was a stranger in relation to the transaction by which PNCC had incurred the obligations subject of the *compromise agreement*. Indeed, it would be irregular to subordinate to STRADEC's unsettled claim the right of Radstock to collect as PNCC's creditor. The alleged possibility that STRADEC might be left with worthless shares was no

reason to allow its intervention in order only to assail the *compromise agreement*, for such intervention would not enable PNCC to avoid its liability to Radstock, or to save PNCC from being liable with its own assets for its obligations to Radstock, should the courts ultimately find that the obligations were justly due and demandable. On the other hand, STRADEC could still hold PNCC's remaining assets liable should it prevail in Civil Case No. 05-882. Based on COA's earlier cited *compliance*, PNCC had remaining assets by which it could start anew and pursue its plans to revitalize its operation.[42]

II
G.R. No. 180428

I disagree with the majority opinion in respect of Sison's petition for annulment of judgment approving the *compromise agreement*.

Let me give my reasons for my dissent.

A
CA's Denial of Sison's *Petition for Annulment of Judgment Approving the Compromise Agreement* Was Correct

Sison assails the resolution dated November 5, 2007 in C.A.-G.R. SP No. 97982, whereby the CA, Ninth Division, denied his *motion for reconsideration* of the decision promulgated on June 12, 2007 dismissing his *petition for annulment of judgment approving the compromise agreement*, and also denied Asiavest's *urgent motion for leave to intervene and to file the attached opposition and motion-in-intervention.*[43]

Sison contends that the CA thereby gravely erred in holding that it had no jurisdiction over his petition for annulment in C.A.-G.R. SP No. 97982 respecting the final disposition of the CA in C.A.-G.R. CV NO. 87971.[44]

The CA rationalized its dismissal of Sison's petition thuswise:[45]

> Stripped to its barest essential, the petition should be dismissed. The Court of Appeals has no jurisdiction to annul its own final and executory judgment.
>
> The Court's jurisdiction over actions for annulment of judgment, as in the instant case, pertains only to those rendered by the Regional Trial Courts (Sec. 9[2], BP Blg. 129; Sec. 1 Rule 47, 1997 Rules of Civil Procedure).

Sison's contention is untenable and erroneous. We should instead sustain the CA, whose ruling was correct and in accord with the *Rules of Court* and applicable jurisprudence.

The jurisdiction to annul a judgment rendered by the Regional Trial Court is expressly granted to the CA by Section 9 (2) of *Batas Pambansa Blg*. 129, otherwise known as the *Judiciary Reorganization Act*. The procedure for the purpose is governed by Rule 47, 1997 *Rules of Civil Procedure*, whose Section 1 provides:

> Section 1. *Coverage*. - This Rule shall govern the annulment by the Court of Appeals of judgments or final orders and resolutions in civil actions of Regional Trial Courts for which the ordinary remedies of new trial, appeal, petition for relief or other appropriate remedies are no longer available through no fault of the petitioner.

Explaining the coverage of the procedure under Rule 47 in *Grande v. University of the Philippines,*[46] the Court definitely ruled out the application of Rule 47 to the nullification of a decision of the CA, *viz:*

> The annulment of judgments, as a recourse, is equitable in character, allowed only in exceptional cases, as where there is no available or other adequate remedy. It is generally governed by Rule 47 of the 1997 Rules of Civil Procedure. Section 1 thereof expressly states that the Rule "shall govern the annulment by the Court of Appeals of judgments of final orders and resolutions in civil action of Regional Trial Courts for which the ordinary remedies of new trial, appeal, petition for relief or other appropriate remedies are no longer available through no fault of the petitioner." Clearly, Rule 47 applies only to petitions for the nullification of judgments rendered by regional trial courts filed with the Court of Appeals. It does not pertain to the nullification of decisions of the Court of Appeals.

Still, Sison supports his choice of remedy by citing the ruling in *Conde v. Intermediate Appellate Court.*[47]

I find Sison's reliance on *Conde* to be misplaced.

The error attributed to the Intermediate Appellate Court in *Conde* was not its refusal to exercise jurisdiction, but rather its declaration that the complaint for annulment of judgment should be filed with the Supreme Court. Such declaration was erroneous, considering that the Supreme Court has no original jurisdiction to look into allegations of fraud upon which the complaint for annulment is based.[48] The reasoning in *Conde* emphasized the principle that the Supreme Court decides only questions of law, because it is not its function to analyze or weigh evidence,[49] especially if newly introduced. By virtue of the Supreme Court's remanding the case to the Intermediate Appellate Court, however, it then behooved the Intermediate Appellate Court in *Conde* to take cognizance of the remanded case. Its hesitation to follow the order of remand merited for the Intermediate Appellate Court an admonition.

In dismissing Sison's petition for annulment of the approval of the *compromise agreement*,

the CA was simply applying the pertinent law and rules. Thereby, the CA did not err, because the CA could not, on its own accord, take cognizance of his petition to annul its own judgment absent any specific directive from the Supreme Court, as in *Conde*.

Sison then points out the lack of any remedy under the *Rules of Court* in instances wherein a *compromise agreement* was entered into late in the litigation process, such as during the appeal, by which persons aggrieved by the *compromise agreement* were prevented from filing an action to annul the judgment based on a *compromise agreement* or from resorting to other remedies. He posits that the *Rules of Court* must now be given a liberal interpretation, thereby warranting the allowance of his petition *vis-à-vis* the *compromise agreement*.

Again, I cannot side with Sison. That he now finds himself bereft of any available remedy is not due to the lack of any remedies under the law or the *Rules of Court*, but rather due to his wrong choice of remedy. Also, his lack of standing to assail the *compromise agreement*, which we shall shortly delve on, militated against his position.

B

Sison Has No Standing to Assail the Compromise Agreement

Sison alleges in his petition that he is a stockholder of record of PNCC by virtue of his holding 52,000 common shares.[50] Even as a stockholder of PNCC, however, he lacks the requisite standing to assail the *compromise agreement* executed between PNCC and Radstock.

A corporation is vested by law with a personality separate and distinct from that of each person composing or representing it.[51] This legal personality of the corporation gives rise to the proposition that a stockholder may not generally bring a suit to repudiate the actions of the corporation, unless it is a stockholder's suit, more commonly known as a derivative suit. Although Sison does not allege that he filed a derivative suit, it can be fairly deduced that he was assailing the *compromise agreement* based on his being a stockholder of PNCC.

Did Sison's action qualify as a stockholder's suit?

In this jurisdiction, the stockholder must comply with the essential requisites for the filing of a derivative suit. The requisites are set forth in Section 1, Rule 8 of the *Interim Rules of Procedure Governing Intra-Corporate Controversies,*[52] namely:

1. That he was a stockholder or member at the time the acts or transactions subject of the action occurred and at the time the action was filed;

2. That he exerted all reasonable efforts to exhaust all remedies available under the articles of incorporation, by-laws, laws or rules governing the corporation or partnership to obtain the relief he desires, and alleges the same with particularity in the complaint;

3. No appraisal rights are available for the act or acts complained of; and

4. The suit is not a nuisance or harassment suit.

Sison's petition did not qualify as a stockholder's suit. To begin with, he did not allege that he had exhausted all remedies available under the articles of incorporation, by-laws, or rules governing the corporation to obtain the relief he desired. And, secondly, he did not allege that no appraisal rights were available for the act or acts complained of.

A stockholder's suit is always one in equity, but it cannot prosper without first complying with the legal requisites for its institution.[53] Consequently, Sison's petition was correctly disallowed.

III
The Compromise Agreement
Was Not Prejudicial to PNCC

The decision of PNCC to enter into the *compromise agreement* with Radstock did not prejudice PNCC and its stockholders for several reasons.

Firstly, the *compromise agreement* reduced PNCC's probable liability from the staggering starting sum of P13,151,956,528.00, as the RTC had adjudged, to the much lesser sum of P6,196,000,000.00. Considering that it was highly probable for the CA, as the appellate forum, to affirm the higher liability given its frequency of upholding, rather than reversing or modifying, the RTC on appeal, PNCC thereby effectively avoided the much greater liability. The result was certainly favorable to PNCC and its stockholders.

Secondly, the chances of PNCC for success in its appeal against Radstock were realistically very low. This was because by the time of the execution of the *compromise agreement,* the CA, in C.A.-G.R. SP No. 66654, and the Court, in G.R. No. 156887, had already passed upon the merits of PNCC's *motion to dismiss* by denying substantially *all* the affirmative defenses that PNCC had raised against Radstock. Specifically, the CA affirmed the RTC's denial of PNCC's *motion to dismiss*. In G.R. No. 156887, [54] the Court affirmed the CA's ruling, holding as follows:

> We have carefully reviewed the Motion to Dismiss and the action taken by the court *a quo* and we find nothing that may constitute a grave abuse. The Order of April 19, 2001 which first denied the Motion to Dismiss meticulously explained the legal and factual basis for the trial court's rejection of the four grounds raised by PNCC:

With respect to the first issue of whether or not the instant action had already been barred by prescription, the Court, after judicious examination of the environmental circumstances of this case and upon examination of the pertinent jurisprudence, is inclined to rule in the NEGATIVE.The averment on the pleadings submitted by the parties had so far revealed that the above-entitled case instituted by plaintiff Radstock Securities Limited for a sum of money and damages against defendant Philippine National Construction Corporation is not barred by prescription in light of the several demand letters and correspondences exchanged by the parties up to July 25, 1996. Further, it is interesting to note that defendant had, in the Board meeting held last October 20, 2000, clearly acknowledged the subject indebtedness to Marubeni. . . .

xxx

Regarding the issue of whether or not the plaintiff has a valid cause of action against the defendant, the Court notes that the defendant heavily relies on the argument that the subject letter of guarantee executed by Alfredo Asuncion is void for lack of authority from the PNCC Board of Directors. This is misplaced in light of the fact that when a corporation such as the defendant in this case presents an officer to be the duly authorized signatory to a document coupled with submission of a duly notarized Secretary's Certificate said third party has every right to rely on the regularity of actions done by said corporation. . . .

xxx

As regards the issue of whether or not the condition precedent for filing the instant suit has not been complied with, the [C]ourt finds the contention asserted by defendant to be bereft of merit. In setting up this ground of prematurity, defendant argues that plaintiff failed to comply with the provisions on arbitration embodied in the advance agreement executed on August 9, 1978 and loan Agreement executed on May 19, 1980. Apparently however, this case is being filed against defendant PNCC under the letters of guarantee [sic]. [P]laintiff is not filing this case against CDCP-M under the loan agreement and the advance payment agreement entered between Marubeni and CDPM wherein [sic] arbitration clauses are provided.

xxx

Lastly, the defendant contended that the plaintiff has no legal capacity to sue and in support thereof it claims that RADSTOCK is engaged in business in the Philippines without any proof that it has a required license. This argument is erroneous. The plaintiff in this case is suing on an isolated transaction.... As correctly stated by the Plaintiff, it does not intend to engage in any other business in the Philippines except to sue and collect what has been assigned to it

by Marubeni Corporation.

> If error had been committed by the trial court, it was not of the character of grave abuse that relief through the extraordinary remedy of *certiorari* may be availed. Indeed, the grounds relied upon by PNCC are matters that are better threshed out during the trial since they can only be considered after evidence has been adduced and weighed.

With its affirmative defenses thus disposed of, the settlement by means of the *compromise agreement* would surely work to the benefit of PNCC and its stockholders.

IV
Compromise Agreement Was Not Contrary to Law, Morals, Good Customs, Public Order and Public Policy

Was the *compromise agreement* between PNCC and Radstock contrary to law, morals, good customs, public order and public policy?

A
Compromise Agreement Did Not Require Congressional Approval

During the oral arguments held on January 13, 2009, a concern about the validity of the *compromise agreement* due to the lack of presidential or congressional approval was raised. Allegedly, the lack of presidential or congressional approval contravened the law, particularly Section 20, Chapter 4, Sub-Title B, Title 1, Book 5, of Executive Order No. 292,[55] which required such approval in the disposition of properties valued at more than P100,000.00.[56]

I contend and hold that the cited law did not apply, considering that the liability of PNCC to Radstock was *not yet settled* at the time of the execution of the *compromise agreement.*

In *Benedicto v. Board of Administrators of Television Stations* and *Guingona, Jr. v. PCGG*,[57] the Court clarified that Section 20, Chapter 4, Sub-Title B, Title 1, Book 5, of Executive Order No. 292, was applicable only to a *settled claim or liability*, to wit:

> Prior congressional approval is not required for the PCGG to enter into a *compromise agreement* with persons against whom it has filed actions for recovery of ill-gotten wealth. Section 20, Chapter 4, Subtitle B, Title I, Book V of the Revised Administrative Code of 1987 (E.O. No. 292) cited by Senator Guingona is inapplicable as it refers to a settled claim or liability. The provision reads:
>
> Section 20. *Power to Compromise Claims*. -

> (1) When the interest of the Government so requires, the Commission may compromise or release, in whole or in part, any settled claim or liability to any government agency not exceeding ten thousand pesos arising out of any matter or case before it or within its jurisdiction, and with the written approval of the President, it may likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos. In case the claim or liability exceeds one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the President, with their recommendations, to the Congress;
>
> xxx xxx xxx
>
> The Government's claim against Benedicto is not yet settled, and the ownership of the alleged ill-gotten assets is still being litigated in the Sandiganbayan. Hence, the PCGG's *compromise agreement* with Benedicto need not be submitted to the Congress for approval. (Underline supplied for emphasis)

The exception of a compromise or release of a claim or liability *yet to be settled* from the requirement for presidential and congressional approval is realistic and practical. In a settlement by *compromise agreement*, the negotiating party must have the freedom to negotiate and bargain with the other party. Otherwise, tying the hands of the Government representative by requiring him to submit each step of the negotiation to the President and to Congress will unduly hinder him from effectively entering into any *compromise agreement*.

The majority opinion stresses that *Benedicto v. Board of Administrators of Television Stations* is inapplicable, arguing that the claim in *Benedicto* was *not yet settled* because no party therein ever admitted liability, while the claim subject of this case was already settled upon the PNCC Board's recognition of PNCC's obligation to Marubeni.

I cannot agree with the majority, considering that the recognition by PNCC of its obligation to Marubeni did not signify that the claim was already settled. On the contrary, the claim of Marubeni was far from settled, inasmuch as it still became the subject of litigation in the courts in which PNCC resisted liability by pleading various defenses. In fact, the PNCC Board's resolution dated June 19, 2001 essentially revoked the previous resolutions (*i.e.*, Resolution No. BD-092-2000 and Resolution No. BD-099-2000) recognizing PNCC's debts to Marubeni.

The majority hold that the PNCC Board had no autonomous power to compromise. They cite Section 36(2) of Presidential Decree (P.D.) 1445 (*Government Auditing Code of the Philippines*), which requires the express grant by the charters of the government-owned or government-controlled corporations (GOCCs) involved of the power to enter into compromise agreements, and insist that nowhere in P.D. 1113, as amended, was the PNCC's Board given the authority to enter into *compromise agreements*. Thus, they

conclude that the *compromise agreement* was illegal.

With all due respect, I believe that the majority err.

Firstly, it is incorrect to state that P.D. 1113 and its amendatory law, P.D. 1894, constituted the charter of PNCC, because said laws merely granted to PNCC a *secondary* franchise. The existence of PNCC was independent of the operation of said laws. Hence, the silence of P.D. 1113 and P.D. 1894 on the grant to PNCC of the power to enter into *compromise agreements* was irrelevant.

It becomes appropriate to stress, for purposes of clarity, that the *primary franchise* of a corporation should not be confused with its *secondary franchise,* if any. According to *J.R.S. Business Corp. v. Imperial Insurance, Inc.*:[58]

> For practical purposes, franchises, so far as relating to corporations, are divisible into (1) **corporate or general franchises**; and (2) **special or secondary franchises**. **The former is the franchise to exist as a corporation, while the latter are certain rights and privileges conferred upon existing corporations, such as the right to use the streets of a municipality to lay pipes or tracks, erect poles or string wires**.

The distinction between the two franchises of a corporation should always be delineated. The *primary franchise* (or the right to exist as such) is vested in the individuals composing the corporation, not in the corporation itself, and cannot be conveyed in the absence of a legislative authority to do so; but the special or secondary franchise of a corporation is vested in the corporation itself, and may ordinarily be conveyed or mortgaged under a general power granted to the corporation to dispose of its property, except such special or secondary franchises as are charged with a public use.[59]

The general law under which a private corporation is formed or organized is the *Corporation Code*, whose requirements must be complied with by individuals desiring to incorporate themselves. Only upon such compliance will the corporation come into being and acquire a juridical personality, as to give rise to its right to exist and to act as a legal entity. This right is a corporation's *primary franchise*. In contrast, a government corporation is normally created by special law, often referred to as its charter.[60]

And, secondly, PNCC, prior to its acquisition by the Government, was a private corporation organized under the *Corporation Code*, and, as such, it was governed by the *Corporation Code* and its own articles of incorporation. This fact has been judicially recognized in *PNCC v. Pabion*,[61] to wit:

> xxx GOCCs may either be (1) with original charter or created by special law; or (2) incorporated under general law, via either the Old Corporation Code or the New Corporation Code.

xxx xxx xxx

xxx, **we have no doubt that over GOCCs established or organized under the Corporation Code, SEC can exercise jurisdiction. These GOCCs are regarded as private corporations despite common misconceptions. That the government may own the controlling shares in the corporation does not diminish the fact that the latter owes its existence to the Corporation Code.** More pointedly, Section 143 of the Corporation Code gives SEC the authority and power to implement its provisions, specifically for the purpose of regulating the entities created pursuant to such provisions. These entities include corporations in which the controlling shares are owned by the government or its agencies.

Glaringly erroneous, therefore, is petitioner's reliance on *Quimpo v. Tanodbayan* and its theory that it is immaterial "whether a corporation is acquired by purchase or through the conversion of the loans of the GFIs into equity in a corporation [because] such corporation loses its status as a private corporation and attains a new status as a GOCC." *First*, based on the discussion above, **PNCC does not "lose" its status as a private corporation, even if we were to assume that it is a GOCC. Second, neither would such loss of status prevent it from being further classified into an acquired asset corporation, as will be discussed below.**

xxx xxx xxx

Lest the focus of our disposition of this case be lost in the maze of arguments strewn before us, **we stress that PNCC is a corporation created in accordance with the general corporation statute. Hence, it is essentially a private corporation, notwithstanding the government's interest therein through the debt-to-equity conversion imposed by PD 1295.** Being a private corporation, PNCC is subject to SEC regulation and jurisdiction.

Not being a government corporation created by special law, PNCC does not owe its creation to some charter or special law, but to the *Corporation Code*. Its powers are enumerated in the *Corporation Code*[62] and its articles of incorporation. As an autonomous entity, it undoubtedly has the power to compromise and to enter into a settlement through its Board of Directors, just like any other private corporation organized under the *Corporation Code*. To maintain otherwise is to ignore the character of PNCC as a corporate entity organized under the *Corporation Code,* by which it was vested with a personality and an identity distinct and separate from those of its stockholders or members.[63]

B

Public Bidding Was not Required

Sison opposes the disposition of PNCC's assets through the *compromise agreement* as against public policy for lack of a public bidding.

I cannot agree with Sison.

The rationale for requiring a public bidding is the need to prevent the Government from being shortchanged by minimizing the occasions for corruption and the temptations to commit abuse of discretion on the part of government authorities.[64]

As a rule, divestment or disposal of government property should be undertaken primarily through public bidding. The mode of disposition of Government properties and assets is not limited to public bidding, however, because there are recognized exceptions, including when public bidding is not the most advantageous means for the Government to divest or dispose of its properties.

The *compromise agreement* was not entered into one-sidedly in favor of Radstock, for, as in all compromises, it involved reciprocal concessions from both parties. PNCC's decision to enter into the *compromise agreement* was apparently an exercise of a business judgment to advance its interests. The obvious direct consequence of the *compromise agreement* was to limit PNCC's adjudged liability of P13,151,956,528 (which *would be* higher due to increments from interest charges) to a lesser liability of P6,185,000,000. Under the circumstances, the *compromise agreement* could not be considered as disadvantageous to PNCC and the National Government.

The Court itself referred the *compromise agreement* to the COA, the primary guardian of public accountability. In due time, the COA recommended the approval of the *compromise agreement,* stating in its *compliance* dated October 3, 2006 submitted to the Court,[65] thus:

> The Government Accounting and Auditing Manual (GAAM) Volume I, prescribed under COA Circular No. 91-368 dated January 1, 1992, specifically under Title 7, Chapter 3 thereof, primarily governs the disposal/divestment of government assets. Section 501 of the said Chapter states:
>
> > Sec. 501. *Authority or responsibility for property disposal/divestment*. - The full and sole authority and responsibility for the divestment and disposal of property and other assets owned by the national government agencies or instrumentalities, local government units and government-owned and/or controlled corporations and their subsidiaries shall be lodged in the heads of the departments, bureaus, and offices of the national government, the local government units and the governing bodies or managing heads of government-owned or controlled corporations and their subsidiaries conformably to their respective corporate charters or

articles of incorporation, who shall constitute the appropriate committee or body to undertake the same**.**

The sale or disposal of the properties of the government is based on their assessed value and not just on a percentage thereof. Admittedly, and as discussed earlier, the audit guidelines under COA Circular No. 89-296 as reiterated in the Government Accounting and Auditing Manual are not applicable in the herein case. Nonetheless, consistent with the objective of public bidding, COA favors the disposal of government properties in the amount most advantageous to the government. It is noted that the transfer value of 70% of assessed value still falls within the standards set by government financial institutions which invariably range from 70% to 100% of the appraised value for properties situated in urban areas. The maximum percentage prescribed in Section 37 of Republic Act No. 8791, the Banking Law of 2000, provides that loans and other credit accommodations against real estate shall not exceed 75% of the appraised value of the respective real estate security. Taking this into account and the declared policy that the authority to dispose its assets is lodged with the head of the entity, COA deems the herein transfer valuation reasonable.

Under the regular procedure involving disposal of government property, COA would have initially conducted an appraisal of the property to determine its valuation. However, considering the exceptional circumstances in the instant case, the appraisals performed by the established independent appraisers are allowable. The parties engaged the services of Royal Asia Appraisal Corporation, Cuervo Appraisers, Inc., Asian Appraisal Co., Inc. and Valencia Appraisal Corporation which are reputable appraisal firms. Even COA has had occasions to engage the services of the last three independent appraisers mentioned above to help ensure that the government will not be disadvantaged in any manner. Hence, COA finds no reason to doubt the reasonableness of their appraisal.

The other terms and conditions of the compromise agreement appear to be fair and above board and COA finds no compelling grounds to oppose the same. Accordingly, COA recommends the approval of the parties' compromise agreement appended in their "Joint Motion for Judgment Based on Compromise." [66]

COA Circular No. 89-296 (dated January 27, 1989) relevantly provides:

III. DEFINITION AND SCOPE: - These audit guidelines shall be observed and adhered to in the divestment or disposal of property and other assets of all government entities/instrumentalities, whether national, local or corporate, including the subsidiaries thereof but shall not apply to the disposal of merchandise or inventory held for sale in the regular course of business nor to the disposal by government financial institutions of foreclosed assets or

collaterals acquired in the regular course of business and not transferred to the National Government under Proclamation No. 50. They shall not also cover dation in payment as contemplated under Article 1245 of the New Civil Code. [67]

In this regard, it is well to point out that the majority also invoke COA Circular No. 89-296, citing Part V thereof entitled *Modes of Disposal/Divestment*.

The cited rule does provide an exception. According to COA's *compliance*, *supra*, the audit guidelines under COA Circular No. 89-296 did not apply to the *compromise agreement* due to its being akin to a *dacion en pago*. Under Article 1245 of the *Civil Code,* a *dacion en pago* or a dation in payment involves the alienation of property to the creditor in satisfaction of a debt in money. The modern concept of dation in payment considers it as a novation by change of the object.[68] Thus, the *compromise agreement* was a *dacion en pago*, in that a novation by a change of the object took place due to the original obligation of PNCC to pay its liability (adjudged in the amount of P13,151,956,528) being thereby converted into another obligation whereby PNCC would transfer the real properties listed in the *compromise agreement* to the qualified assignees nominated by Radstock. Regardless of the pegging of the values of the listed properties at specified amounts, the transfer to Radstock's assignees would already constitute a performance of PNCC's obligations. In other words, the obligation of PNCC to Radstock would be deemed fulfilled, although Radstock might realize a lesser value from the assignees for the properties.

Verily, the dispositions made in the *compromise agreement,* being in the nature of a *dacion en pago*, did not require public bidding. This conclusion accords with the holding in *Uy v. Sandiganbayan,*[69] where the Court sustained the argument of PCGG that the *dacion en pago* transactions were beyond the ambit of COA Circular No. 89-296.

C
Expiration of PNCC'S Legislative Franchise
Did Not Affect the Compromise Agreement

Sison argues that the legislative franchise granted to PNCC already expired on May 1, 2007 and was not extended or renewed by Congress; that upon the expiration of the legislative franchise of PNCC, all its assets, including those derived from its operations, reverted to the National Government; and that the disposition of PNCC funds under the *compromise agreement*, being beyond the expiration of PNCC's franchise, would violate the constitutional provision requiring an appropriation law for the expenditure of National Government funds.

I consider Sison's submissions not well-taken.

Section 5 of Presidential Decree (P.D.) No. 1894,[70] amendatory of P.D. No. 1113, PNCC's

legislative franchise, provides:

> Section 5. In consideration of this franchise, the GRANTEE shall:
>
> (a) Construct, operate and maintain at its own expense the Expressways; and
> (b) Turn over, without cost, the toll facilities and all equipment, directly related thereto to the Government upon expiration of the franchise period.[71]

The law is clear enough. The mandated reversion applied only to the "toll facilities and all equipment directly related thereto," and did not extend to *all* the assets of PNCC. Sison's interpretation was plainly at war with what the law itself explicitly contemplated. Worse, his interpretation would nullify PNCC's right to due process as to its other assets, and even tended to thwart the national policy to encourage the private sector to invest and participate in public works involving toll operations.

P.D. No. 1894 likewise contemplated the continuance of PNCC's tollways operations beyond the expiration of its legislative franchise on May 1, 2007. That is clear from Section 2 of P.D. No. 1894, which states:

> Section 2.The term of the franchise provided under Presidential Decree No. 1113 for the North Luzon Expressway and the South Luzon Expressway which is thirty (30) years from 1 May 1977 shall remain the same; provided that, the franchise granted for the Metro Manila Expressway and all extensions linkages, stretches and diversions that may be constructed after the date of approval of this decree shall likewise have a term of thirty (30) years commencing from the date of completion of the project.

If the reversion covered *all* assets, PNCC would be unable to exist and to continue to operate upon the expiration of its legislative franchise under P.D. No. 1113.

Yet, the majority pointedly assert that Radstock's counsel already admitted during the oral argument that all of PNCC's assets and properties had reverted to the National Government.

The assertion of the majority is too sweeping. It ignores that the so-called *admission* of Radstock's counsel was not, properly speaking, a judicial admission that bound Radstock on the matter of reversion.

To begin with, the statements in question made by Radstock's counsel did not relate to facts, but to conclusions of law. Indeed, a judicial admission is an admission made in the course of the proceeding in the same case, verbal or written, by a party accepting for the purposes of the suit the truth of some alleged fact, which said party cannot thereafter disprove.[72] Clearly, the rule on admissions does not apply to a *wrong* interpretation and

mistaken application of the laws, and the Court is not to be bound by a mistaken interpretation of the law made by a counsel, even if said interpretation is adverse to the client.

Even granting, *arguendo*, that PNCC's secondary franchise expired, *all* the properties and funds of PNCC might not automatically revert to the National Government, to the detriment and in violation of the right to due process of PNCC's private creditors, particularly those that transacted with it when it was still a purely private corporation. We have always sustained the view that a GOCC has a personality of its own, distinct and separate from that of the National Government; and has all the powers of the corporation under the *Corporation Law* pursuant to which it has been established.[73] To accord with our precedent rulings, we should not declare the PNCC's funds to be beyond reach for being by nature public funds of the National Government.[74]

Secondly, the majority thereby sweep aside the principle of parity between contracting parties. We ought to remember that when the National Government enters into a commercial transaction, it abandons its sovereign capacity and descends to the level of the other party, to be treated like the latter. By engaging in a particular business through the instrumentality of a corporation (*that is*, PNCC), therefore, the National Government should be considered as divesting itself *pro hac vice* of its sovereign character, so as to render the corporation subject to the rules of law governing private corporations.[75] This is only fair.

Thirdly, to have *all* the properties and assets of PNCC deemed reverted to the Government upon expiration of PNCC's franchise to operate the tollways would definitely violate the right to due process of PNCC's private creditors. Such a sudden change in the characterization of PNCC's properties and assets from private to public would leave PNCC's private creditors with very limited recourses, despite their valid claims.

Incidentally, the *compromise agreement* listed the properties to be affected by the agreement between PNCC and Radstock, as follows:

1. PNCC's right over that parcel of land located in Pasay City with a total area of 129,548 square meters, more or less, particularly described in Transfer Certificate of Title No. T-34997 of the Registry of Deeds for Pasay City. The transfer value is P3,817,779,000.00;

2. T-452587 (T-23646) - Parañaque (5,123 square meters) subject to the clarification of the PMO claims thereon. The transfer value is P45,000,900.00;

3. T-49499 (529715 including T-68146-G (S-29716) (1,9747-A)-Parañaque (107 square meters) (54 square meters) subject to the clarification of the PMO claims thereon. The transfer value is P1,409,100.00;

4. 5(sic)-29716-Parañaque (27,762 square meters) subject to the clarification of the PMO claims thereon. The transfer value is P242,917,500.00;

5. P-169 - Tagaytay (49,107 square meters). The transfer value is P13,749,400.00;

6. P-170 - Tagaytay (49,100 square meters). The transfer value is P13,749,400.00;

7. N-3320-Town and Country Estate; Antipolo (10,000 square meters). The transfer value is P16,800,000.00;

8. N-7424 - Antipolo (840 square meters). The transfer value is P940,800.00;

9. N-7425 - Antipolo (850 square meters) The transfer value is P952,000.00;

10. N-7426 - Antipolo (958 square meters). The transfer value is P1,073,100.00;

11. T-485276 - Antipolo (741 square meters) The transfer value is P830,200.00;

12. T-485277 - Antipolo (741 square meters). The transfer value is P761,600.00;

13. T-485278 - Antipolo (701 square meters). The transfer value is P785,400.00;

14. T-131500-Bulacan (CDCP Farms Corp.) (4,945 square meters). The transfer value is P6,475,000.00;

15. T-131501-Bulacan (678 square meters). The transfer value is P887,600.00;

16. T-26,154 (M) - Bocaue, Bulacan (2,841 square meters) The transfer value is P3,779,300.00;

17. T-29,308 (M) - Bocaue, Bulacan (733 square meters). The transfer value is P974,400.00;

18. T-29,309 (M) - Bocaue, Bulacan (1,141 square meters). The transfer value is P1,517,600.00; and

19. T- 260578 (R. Bengzon) Sta. Rita, Guiguinto, Bulacan (20,000 square meters). The transfer value is P25,2000,0000.00.

Rather than generalizing that all the aforecited properties reverted to the National Government upon the expiration of PNCC's legislative franchise, Sison should first establish in proceedings appropriate for the purpose a premise for his jealously argued interpretation that such properties were directly related to the operation and maintenance of the tollways covered by its expired secondary franchise. Before that is done, it is not reasonable to generalize on the matter. Consequently, Sison's insistence that PNCC became a mere trustee of the National Government upon the expiration of the legislative franchise is dismissed for being unfounded.

D
Toll Operation Certificate from TRB to PNCC
Was Legal Basis for PNCC to Collect and Appropriate
Revenues Generated from PNCC-operated Tollways
and Its Share in Gross Receipts of NLEX Tollway Development

Sison insists that upon the expiration of its legislative franchise, PNCC could not validly dispose of the revenues collected from its operated tollways and of its share in the gross receipts of the tollway development and operation contractors, because such revenues and receipts already belonged to the National Government.

However, the fact is that the Manila North Tollway Corporation (MNTC), a joint-venture company between PNCC and Metro Pacific Group, was granted a toll operation certificate (TOC) by the Toll Regulatory Board (TRB) authorizing MNTC to operate and maintain the NLEX from 2005 to 2035 through its operations and maintenance company, the Tollway Management Corporation (TMC).[76]

Sison counters that the TOC was not the equivalent of and could not replace the legislative franchise of PNCC under P.D. No. 1849.

Sison's arguments are not persuasive.

Under P.D. No. 1112,[77] TRB has the following powers, among others:

> Section 3. *Powers and Duties of the Board.* The Board shall have in addition to its general powers of administration the following powers and duties:
>
> (a) Subject to the approval of the President of the Philippines, to enter into contracts in behalf of the Republic of the Philippines with persons, natural or juridical, for the construction, operation and maintenance of toll facilities such as but not limited to national highways, roads, bridges, and public thoroughfares. Said contract shall be open to citizens of the Philippines and/or to corporations or associations qualified under the Constitution and authorized by law to engage in toll operations;
>
> (b) Determine and decide the kind, type and nature of public improvement that

will be constructed and/or operated as toll facilities;

xxx xxx xxx

(e) To grant authority to operate a toll facility and to issue therefore the necessary "Toll Operation Certificate" subject to such conditions as shall be imposed by the Board including *inter alia* the following:[78]

xxx xxx xxx

Undoubtedly, TRB had the statutory authority to enter in behalf of the National Government into a contract for the construction, operation and maintenance of toll facilities; to determine and decide the kind, type, and nature of public improvement to be constructed and operated as toll facilities; and to issue a TOC to authorize a grantee to operate a toll facility.

In addition, P.D. No. 1894, amending P.D. No. 1113, invested TRB with the jurisdiction and supervision over PNCC as the grantee with respect to the Expressways, and the toll facilities necessarily appurtenant thereto. Its Section 4 states, *viz*:

> Section 4. The Toll Regulatory Board is hereby given jurisdiction and supervision over the GRANTEE with respect to the Expressways, the toll facilities necessarily appurtenant thereto and, subject to the provisions of Section 8 and 9 hereof, the toll that the GRANTEE will charge the users thereof.

By its issuance of the TOC, therefore, TRB was simply exercising its powers under P.D. No. 1112. It did not thereby extend PNCC's legislative franchise, which it could not legally do. Its issuance of the TOC was proper, not *ultra vires*, even if the effect was to permit PNCC, through MNTC, to continue to operate the toll facilities.

In this jurisdiction, the power of administrative agencies to issue operating permits or franchises to public utilities has long been recognized. In *Philippine Airlines v. Civil Aeronautics Board*,[79] for instance, the Court pronounced:

> Given the foregoing postulates, we find that the Civil Aeronautics Board has the authority to issue a Certificate of Public Convenience and Necessity, or Temporary Operating Permit to a domestic air transport operator, who, though not possessing a legislative franchise, meets all the other requirements prescribed by law. Such requirements were enumerated in Section 21 of R.A. 776.
>
> There is nothing in the law nor in the Constitution, which indicates that a legislative franchise is an indispensable requirement for an entity to operate as a domestic air transport operator. Although Section 11 of Article XII recognizes

Congress' control over any franchise, certificate or authority to operate a public utility, it does not mean Congress has exclusive authority to issue the same. Franchises issued by Congress are not required before each and every public utility may operate. In many instances, Congress has seen it fit to delegate this function to government agencies, specialized particularly in their respective areas of public service.

A reading of Section 10 of the same reveals the clear intent of Congress to delegate the authority to regulate the issuance of a license to operate domestic air transport services:

> SECTION 10. *Powers and Duties of the Board*. (A) Except as otherwise provided herein, the Board shall have the power to regulate the economic aspect of air transportation, and shall have general supervision and regulation of, the carriers, general sales agents, cargo sales agents, and air freight forwarders as well as their property rights, equipment, facilities and franchise, insofar as may be necessary for the purpose of carrying out the provision of this Act. [80]

Likewise, we said in *Metropolitan Cebu Water District v. Adala*:[81]

> Moreover, this Court, in *Philippine Airlines, Inc. vs. Civil Aeronautics Board*, has construed the term "franchise" broadly so as to include, not only authorizations issuing directly from Congress in the form of statute, but also those granted by administrative agencies to which the power to grant franchises has been delegated by Congress, to wit:
>
> > Congress has granted certain administrative agencies the power to grant licenses for, or to authorize the operation of certain public utilities. With the growing complexity of modern life, the multiplication of the subjects of governmental regulation, and the increased difficulty of administering the laws, there is constantly growing tendency towards the delegation of greater powers by the legislature, and towards the generally recognized that a franchise may be derived indirectly from the state through a duly designated agency, and to this extent, the power to grant franchises has frequently been delegated, even to agencies other than those of legislative in nature. In pursuance of this, it has been held that privileges conferred by grant by local authorities as agents for the state constitute as much a legislative franchise as though the grant had been made by an act of the Legislature. [82]

For its part, the Executive Department has also recognized the power of TRB to issue the TOC to PNCC independently of the legislative franchise that was due to expire on May 1,

2007. This recognition was reflected in the opinion dated November 24, 1995 of then Justice Secretary Teofisto T. Guingona, Jr., to wit:[83]

> Upon re-examination of P.D. No. 1113 (PNCC Charter), as amended by P.D. No. 1894, we reiterate the view expressed in Opinion No. 45, s. 1995 that TRB has no authority to extend the legislative franchise of PNCC over the existing NSLE. However, TRB is not precluded under Section 3(e) of P.D. No. 1112 (TRB Charter) to grant PNCC and its joint venture partner the authority to operate the existing toll facility of the NSLE and to issue therefore the necessary "Toll Operation Certificate" for a period coinciding with the term of the proposed Metro Manila Skyway.
>
> xxx xxx xxx
>
> It should be noted that the existing franchise of PNCC over the NSLE, which will expire on May 1, 2007, gives it the "right, privilege and authority to construct, maintain and operate" the NSLE. The Toll Operation Certificate which TRB may issue to the PNCC and its joint venture partner after the expiration of its franchise on May 1, 2007 is an entirely new authorization, this time for the operation and maintenance of the NSLE, which is already an existing toll facility. In other words, the right of PNCC and its joint venture partner, after May 1, 2007, to operate and maintain the existing NSLE will no longer be founded on its legislative franchise which is not thereby extended, but on the new authorization to be granted by the TRB pursuant to Section 3(e), abovequoted, of P.D. 1112. [84]

It serves well to note, too, that the TOC was not for the same project covered by PNCC's legislative franchise under P.D. No. 1894, but for a new project, the rehabilitation of the NLEX, which was completed in 2005. In the effort to rehabilitate the NLEX, the MNTC incurred substantial costs. The authority to collect reasonable toll fees from users of that expressway was the consideration given to the MNTC as the tollway operator to enable it to recoup the investment**.**

In this connection, the claim of the majority that Radstock's counsel admitted during the oral arguments that an appropriation law was needed to authorize the payment by PNCC out of the toll fees is unwarranted. The supposed admission was apparently counsel's response to the query of whether the collection of toll fees went to the general fund of the National Government. As such, the response was an expression of counsel's interpretation of the law, which, albeit sounding like an admission, has no legal significance for purposes of this resolution. It hardly requires clarification that an opinion on a matter of law given in the course of the proceedings is not binding on the party on whose behalf it is made, because the question of law is best left to the determination of the court.

Besides, the interpretation that the TRB could not contract out the rehabilitation and expansion of existing government-owned public works, particularly our national roads and

highways, is unacceptable, because it will wreak havoc to the operations and maintenance not only of the NLEX, but also of other and future public constructions and developments. Similarly unacceptable is an interpretation that the expiration of the franchise of PNCC *vis-à-vis* the NLEX operated to bar PNCC or any other participating private entity from collecting toll fees from the operations of the NLEX, because it would unfairly outlaw the current operation of the MNTC, a joint-venture company between PNCC and the Metro Pacific Group, which had spent substantially for the rehabilitation and expansion works of the NLEX.

At any rate, the majority's interpretation will hinder the efforts of the National Government, through the TRB, of effecting improvements in existing national highways through the private sector, which will surely hesitate to involve itself in projects in which it will not be permitted to recoup or recover the substantial costs entailed in construction and development.

Lastly, Sison's plea for the nullification of the *compromise agreement,* on the ground of the invalidity of the assignment to Radstock of the share of PNCC in the toll operation for the NLEX, has no basis. The right of PNCC, through MNTC, to the revenues from the operation of the tollways is to be deemed settled for purposes of these cases. We cannot delve into whether or not the TOC issued to PNCC for the years from 2007 until 2035 was valid or not, because that is not a proper issue for the Court to consider and decide herein. We should not forget that the issue was not presented to the CA at the time it considered and approved the *compromise agreement*. Besides, PNCC continued to have the right to the revenues from the toll operation by authority of the TOC.

Another submission of Sison is that the disposition of PNCC's assets through the *compromise agreement* would be in fraud of the National Government, because Radstock would be thereby preferred to the National Government in relation to the assets of PNCC, in violation of the credit preference provided in the *Civil Code*. He avers that "*the satisfaction of the PNCC obligation to the State or the National Government clearly takes preference and has priority over the satisfaction of the obligation to RADSTOCK"*; and that *"the terms of the compromise agreement which call for the transfer of PNCC assets xxx to Radstock is in contravention of the order and preference of credits under the New Civil Code, hence void.*"[85]

However, Sison's submission does not really show how the *compromise agreement* would contravene the credit preference in favor of the National Government.

To begin with, the credit preference set by the *Civil Code* may not be invoked herein to assail the *compromise agreement*, considering that these cases were neither proceedings for bankruptcy or insolvency, nor general judicial liquidation proceedings. Cogently, the Court explained when preference of credit may be invoked in *Development Bank of the Philippines v. Secretary of Labor*,[86] thus:

> xxx A preference of credit bestows upon the preferred creditor an advantage of

> having his credit satisfied first ahead of other claims which may be established against the debtor. Logically, it becomes material only when the properties and assets of the debtor are insufficient to pay his debts in full; for if the debtor is amply able to pay his various creditors in full, how can the necessity exist to determine which of his creditors shall be paid first or whether they shall be paid out of the proceeds of the sale of the debtor's specific property? Indubitably, the preferential right of credit attains significance only after the properties of the debtor have been inventoried and liquidated, and the claims held by his various creditors have been established.
>
> In this jurisdiction, bankruptcy, insolvency and general judicial liquidation proceedings provide the only proper venue for the enforcement of a creditor's preferential right xxx for these are *in rem* proceedings binding against the whole world where all persons having interest in the assets of the debtors are given the opportunity to establish their respective credits.[87]

Nor will it be automatic for the National Government to be preferred as to the assets of any individual or corporation in financial straits. In *In Re: Petition for Assistance in the Liquidation of the Rural Bank of Bokod (Benguet), Inc., Philippine Deposit Insurance Corporation v. Bureau of Internal Revenue*,[88] the Court clarifies:

> xxx The Government, in this case, cannot generally claim preference of credit, and receive payments ahead of the other creditors of RBBI. Duties, taxes, and fees due the Government enjoy priority only when they are with reference to a specific movable property, under Article 2241 (1) of the Civil Code, or immovable property, under Article 2242 (1) of the same Code. However, with reference to the other real and personal property of the debtor, sometimes referred to as "free property," the taxes and assessments due the National Government, other than those in Articles 2241(1) and 2242 (1) of the Civil Code will come only in ninth place in the order of the preference.[89]

Verily, any creditor who may feel aggrieved by the *compromise agreement* (such that his rights over PNCC's assets may be prejudiced by the *compromise agreement*) should initiate the *proper* proceedings to protect his rights. Yet, no bankruptcy, insolvency, or general judicial liquidation proceedings have been initiated or filed by any of PNCC's creditors. With none, including the Government, having done so as yet, it is improper and premature for Sison to cry *fraud against the Government*.

Secondly, Sison insists that PNCC was "technically insolvent."[90]

Sison's insistence cannot be given any significance in relation to the *compromise agreement.* The meanings of the terms *insolvent* and *insolvency* have not been fixed, their definitions being dependent upon the business or factual situation to which the terms are applied.[91] Ordinarily, a person is *insolvent* when all his properties are not sufficient to pay

all of his debts.[92] This definition is the general and popular meaning of the term *insolvent*. In this jurisdiction, the state of insolvency is governed by special laws to the extent that they are not inconsistent with the *Civil Code*.[93] In other words, the state of insolvency is primarily governed by the *Civil Code* and subsidiarily by the *Insolvency Law* (Act No. 1956, as amended).[94]

Under Act No. 1956, there are two distinct proceedings by which to declare a person insolvent, namely: a) the voluntary or debtor-initiated proceedings;[95] and b) the involuntary or creditor-initiated proceedings, which require that the petition be filed by three or more creditors.[96] The judicial declaration that a person (either natural or juridical) is insolvent produces legal effects, particularly on the disposition of the debtor's assets.[97] Until and unless there is an insolvency proceeding or a judicial declaration that a person is insolvent, however, any state of insolvency of a debtor remains legally insignificant as far as his capacity to dispose of his properties is concerned. This capacity to dispose is not in itself iniquitous or questionable, for the creditor is not meanwhile left without recourse. There are remedies for the creditor in case any disposition of the debtor's assets is in fraud of creditors.

Should the creditors not feel that an insolvency or even rehabilitation proceeding (in the case of corporations like PNCC) is appropriate or beneficial for them, their decision to desist from commencing such proceeding is a business judgment that fully lies within their discretion. Without any proceeding being initiated by either the debtor or the creditors, no court has the power to declare that a debtor is insolvent and to bring to bear upon the debtor the legal consequences of the *Insolvency Law*. A court that does so risks meddling in business affairs or policies that are best left to those who know the appropriate actions to take and decide what action or actions to take. A unilateral court intervention can result in a premature cessation of business that can produce untoward and unexpected effects on either or both the debtor and the creditors.

The Court may not even try to determine whether PNCC was insolvent or not, considering that the original jurisdiction to take cognizance of such issue does not pertain to the Court. Neither was such issue properly raised in the lower courts. For sure, the term *technically insolvent* as applied to PNCC cannot be competently ascertained in these cases. It is relevant to note, however, that only the COA report has been made available to show the financial condition of PNCC to the Court, but even said report favored the approval of the *compromise agreement*.[98]

Thirdly, Sison argues that with the *compromise agreement*, PNCC's business would wind down to "merely the operation of the South Luzon Expressway, the holding of shares in investee subsidiaries and affiliates, and the minor participation in the gross receipt of the tollway development and operation contractors."[99] He then concludes that the *compromise agreement* would amount to transferring or disposing of substantially all of the assets of PNCC, in violation of the requirement under Section 40 of the *Corporation Code*

for stockholders' approval thereof.

The argument is fallacious, because it is based on a mistaken premise.

Section 40 of the *Corporation Code* provides:

> Sec. 40. *Sale or other disposition of assets.* - Subject to the provisions of existing laws on illegal combinations and monopolies, a corporation may, by a majority vote of its board of directors or trustees, sell, lease, exchange, mortgage, pledge or otherwise dispose of all or substantially all of its property and assets, including its goodwill, upon such terms and conditions and for such consideration, which may be money, stocks, bonds or other instruments for the payment of money or other property or consideration, as its board of directors or trustees may deem expedient, when authorized by the vote of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or in case of non-stock corporation, by the vote of at least to two-thirds (2/3) of the members, in a stockholder's or member's meeting duly called for the purpose. Written notice of the proposed action and of the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder may exercise his appraisal right under the conditions provided in this Code.
>
> A sale or other disposition shall be deemed to cover substantially all the corporate property and assets if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated.
>
> After such authorization or approval by the stockholders or members, the board of directors or trustees may, nevertheless, in its discretion, abandon such sale, lease, exchange, mortgage, pledge or other disposition of property and assets, subject to the rights of third parties under any contract relating thereto, without further action or approval by the stockholders or members.
>
> Nothing in this section is intended to restrict the power of any corporation, without the authorization by the stockholders or members, to sell, lease, exchange, mortgage, pledge or otherwise dispose of any of its property and assets if the same is necessary in the usual and regular course of business of said corporation or if the proceeds of the sale or other disposition of such property and assets be appropriated for the conduct of its remaining business.
>
> In non-stock corporations where there are no members with voting rights, the vote of at least a majority of the trustees in office will be sufficient authorization for the corporation to enter into any transaction authorized by this section. (28

1/2a) [100]

The law defines a *sale or disposition of substantially all assets and property* as one by which the corporation "would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated." Any disposition short of this will not need stockholder action.[101] The text and tenor of Section 40, *supra*, are clear and do not require interpretation, that the Court must not read any other meaning to the law.

Sison himself admitted that even after the *compromise agreement* was approved, PNCC still had assets by which to continue its businesses.[102] Thus, because the assets to be covered by the *compromise agreement* were not substantially all the assets of PNCC within the context of Section 40, *supra*, the stockholders' approval was not required. The disposition through the *compromise agreement*, although involving a substantial portion of the total assets, would not amount to the sale or disposition of substantially all assets and property as to render PNCC incapable of continuing the business or accomplishing the purpose for which it was incorporated.

Fourthly, Sison contends that PNCC would be reduced to a holding company, which would constitute an abandonment of the business for which it was organized.

The contention is unfounded.

For one, the records before us show that PNCC is not abandoning the business for which it was organized. PNCC sought a legislative franchise to operate the NLEX, but it was not granted the franchise. PNCC was granted the TOC by TRB, which authorized PNCC, through MNTC, to operate the rehabilitated and extended NLEX.[103] PNCC currently operates tollways and plans to enter into other tollways development projects.[104]

It is noteworthy that the COA, in its *compliance* submitted to the Court,[105] recognized the efforts of PNCC to improve the latter's operations:

> It is the assessment of the Government Corporate Counsel that PNCC has only a 50-50 chance of winning the case, thus, entering into a *compromise agreement* will spare the corporation from losing at least P13 billion of its assets. COA shares the view that with this settlement, the PNCC, armed with its remaining assets can start anew and pursue its plans to revitalize its operations. [106]

Also, the investing corporation assumes risks in every business venture. There may be many factors affecting the business that may force the corporation to reduce or downsize its operations in the meanwhile. Nonetheless, the downsizing of the operations does not mean the abandonment of the business for which the corporation has been organized. Accordingly, the wisdom of the execution of the *compromise agreement* should not be questioned, absent any clear and convincing proof establishing that the *compromise agreement* would truly render PNCC incapable of continuing its business.

G
Compromise Agreement Does Not Violate Constitutional Ban on Foreign Ownership of Land

The c*ompromise agreement* between PNCC and Radstock provides:

> 2. This Compromise amount shall be paid by PNCC to RADSTOCK in the following manner:
>
> a. PNCC shall assign to a third party assignee to be designated by RADSTOCK all its rights and interests to the following real properties provided the assignees shall be duly qualified to own real properties in the Philippines:
>
> xxx

Sison holds that this provision in the *compromise agreement* would vest in Radstock, a foreign corporation, the rights of ownership over the 19 parcels of land listed in the *compromise agreement* and thereby violate the constitutional provision prohibiting ownership by foreign entities of land in the Philippines; that the right to assign rights and interests in real property is an attribute of ownership; that Radstock would be, for all intents and purposes, the beneficial owner of the real properties during the period from the execution of the *compromise agreement* until the actual transfer of the ownership of the properties to third parties designated by Radstock; and that in the meantime PNCC would be holding the properties only in trust.

Section 7, Article XII of the 1987 *Constitution* reads:

> Section 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.

Sison's submissions are unacceptable.

In interpreting the aforecited provision of the *Constitution*, the following instruction given in *J.M. Tuason & Co. Inc. v. Land Tenure Administration*[107] is useful:

> We look to the language of the document itself in search for its meaning. We do not of course stop there, but that is where we begin. It is to be assumed that the words in which constitutional provisions are couched express the objective sought to be attained. They are to be given their ordinary meaning except where technical terms are employed in which case the significance thus attached to them prevails. As the Constitution is not primarily a lawyer's document, it being essential for the rule of law to obtain that it should ever be present in the people's consciousness, its language, as much as possible, should be understood in the sense they have in common use. What it says according to the text of the

> provision construed compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say. Thus there are cases where the need for construction is reduced to a minimum.

Well-settled principles of constitutional construction are also firm guides for interpretation. These principles are reiterated in *Francisco v. The House of Representatives*,[108] to wit:

> First, *verba legis*, that is, wherever possible, the words used in the Constitution must be given their ordinary meaning except where technical terms are employed. xxx.
>
> xxx xxx xxx
>
> Second, where there is ambiguity, *ratio legis et anima*. The words of the Constitution should be interpreted in accordance with the intent of the framers. xxx.
>
> Finally, *ut magis valeat quam pereat*. The Constitution is to be interpreted as a whole.

A plain reading of the aforecited provision of the *Constitution* and the *compromise agreement* does not support the conclusion that the latter violates the former. The *compromise agreement* nowhere stated that any lands or real properties are to be transferred to Radstock, or any non-qualified person. Indeed, the transfer of any lands or real properties contemplated by the *compromise agreement* is in favor of a party duly qualified to own and hold real properties under the *Constitution*. The arrangement would not give to Radstock any right other than to designate *qualified* assignees, who should only be a Filipino citizen, or a corporation organized under the Philippine law, but with at least 60% Filipino equity. During the time that Radstock would be looking for qualified assignees, ownership over the real properties subject of the *compromise agreement* would not be transferred to it, but would remain with PNCC.

Although it may be argued that the "right to designate the qualified assignee to the property" is an attribute of ownership, it does not necessarily follow that the presence of such right already means that the person holding the right has become the owner of the property. There is more to ownership than being able to designate an assignee for the property. The attributes of ownership are: *jus utendi* (right to possess and enjoy), *jus fruendi* (right to the fruits), *jus abutendi* (right to abuse or consume), *jus disponendi* (right to dispose or alienate), and *jus vindicandi* (right to recover or vindicate).[109] An owner of a thing or property may agree to transfer, assign, or limit the rights attributed to his ownership, but this does not mean that he loses his ownership over the thing. Accordingly, one may lease his property to others without affecting his title over it; or he may enter into a contract limiting his enjoyment or use of the property; or he may bind himself to first offer a thing for sale to a particular person before selling it to another; or he may agree to

let another person designate an assignee to whom the property will be transferred or sold in consideration of an obligation. In any of such situations, there is no actual or legal transfer of ownership, for ownership still pertains, legally and for all intents and purposes, to the owner, not to the other person to whom *an* attribute of ownership has been transferred.

Nowhere in the *compromise agreement* is Radstock given any of the attributes of ownership, like the right to control and use the properties, or the right to benefit from the properties (*e.g.*, rent), or the right to exclude others from the properties, or, for that matter, any other right of an owner. Neither is Radstock thereby put in any position to demand or to ask PNCC to lease the properties to an assignee. What it has under the *compromise agreement* is only the right to designate a qualified assignee for the property.

It is also wrong for Sison to insist that the *compromise agreement* would create a trust relationship between PNCC and Radstock. Trust is the legal relationship between one person having an equitable ownership in property and another person owning the legal title to such property, the equitable ownership of the former entitling him to the performance of certain duties and the exercise of certain powers by the latter.[110] By definition, trust relations between parties are either express or implied.[111] Express trusts are created by the direct and positive acts of the parties, by some writing or deed, or will, or by words evincing an intention to create a trust.[112]

The *compromise agreement* would not vest in Radstock any equitable ownership over the property. The required performance of certain duties by PNCC (mainly the transfer of the real properties to the qualified assignees nominated by Radstock) under the *compromise agreement* would not emanate from Radstock's equitable ownership, which Radstock would not have. The performance of such duty would not arise either upon the approval of the *compromise agreement*, but upon the fulfillment by Radstock of its obligation to nominate the qualified assignees. PNCC and Radstock had no intention to create a trust, because the circumstances of the transaction negated the formation of a trust agreement between them resulting from the *compromise agreement*.

On the assumption, for the sake of argument, that the *compromise agreement* gives Radstock a right that is an attribute of ownership, such grant may still be justified nonetheless by the totality of the circumstances as the end result of the whole operation of the *compromise agreement*; and, as such, it would still be consistent with, not violative of, the constitutional ban on foreign ownership of lands. In *La Bugal-B'Laan Tribal Association, Inc. v. Ramos*,[113] the Court ratiocinated:

> Petitioners sniff at the citation of *Chavez v. Public Estates Authority*, and *Halili v. C.A.*, claiming that the doctrines in these cases are wholly inapplicable to the instant case.
>
> *Chavez* clearly teaches: "Thus, **the Court has ruled consistently that where a Filipino citizen sells land to an alien who later sells land to a Filipino, the**

invalidity of the first transfer is corrected by the subsequent sale to a citizen. Similarly, where the alien who buys the land subsequently acquires Philippine citizenship, the sale is validated since the purpose of the constitutional ban to limit land ownership to Filipinos has been achieved. In short, **the law disregards the constitutional disqualification of the buyer to hold land if the land is subsequently transferred to a qualified party, or the buyer himself becomes a qualified party."**

In their Comment, petitioners contend that in *Chavez* and *Halili*, the object of the transfer (the land) was not what was assailed for alleged unconstitutionality. Rather, it was the transaction that was assailed; hence subsequent compliance with constitutional provisions would cure its infirmity. In contrast, the instant case it is the FTAA itself, the object of the transfer, that is being assailed as invalid and unconstitutional. So, petitioners claim that the subsequent transfer of a void FTAA to a Filipino corporation would not cure the defect.

Petitioners are confusing themselves. The present Petition has been filed, precisely because the grantee of the FTAA was a wholly owned subsidiary of a foreign corporation. It cannot be gainsaid that anyone would have asserted that the same FTAA was void if it had at the outset been issued to a Filipino corporation. The FTAA, therefore, is not per se defective or unconstitutional. It was questioned only because it has been issued to an allegedly non-qualified, foreign-owned corporation.

We believe that this case is clearly analogous to *Halili*, in which the land acquired by a non-Filipino was re-conveyed to a qualified vendee and the original transaction was thereby cured. **Paraphrasing *Halili*, the same rationale applies to the instant case: assuming arguendo the invalidity of its prior grant to a foreign corporation, the disputed FTAA - being now held by a Filipino corporation - can no longer be assailed; the objective of the constitutional provision - to keep the exploration, development and utilization of our natural resources in Filipino hands - has been served.**

More accurately speaking, **the present situation is one degree better than obtaining in *Halili*, in which the original sale to a non-Filipino was clearly and indisputably violative of the constitutional prohibition and thus *void ab initio*. In the present case, the issuance/grant of the subject FTAA to the foreign-owned WMCP was not illegal, void or unconstitutional at the time.** The matter had to be brought to court, precisely for adjudication as to whether the FTAA and the Mining Law had indeed violated the Constitution. Since up to this point, the decision of this Court declaring the FTAA void has yet to become final, to all intents and purposes, the FTAA must be deemed valid and constitutional.

The situation herein is even more favorable than that in *La Bugal*. *Firstly*, the *compromise*

agreement does not attempt to transfer any of the subject real properties to any non-qualified person. The title or ownership of the lands is to be transferred only upon designation by Radstock of a qualified assignee, and the transfer is to be effected by PNCC directly to the assignee, without the title passing to Radstock in the interim. *Secondly*, the *compromise agreement* does not attempt to create any kind of title over the properties in favor of Radstock. It simply allows Radstock to designate a qualified assignee to whom the properties may be assigned or transferred. It does not give any other right to Radstock. *Thirdly*, the arrangement may even be more beneficial to PNCC, considering that PNCC gets to settle its much lessened obligation for a definite and sure amount of 75% of the assessed values of the subject properties, regardless of the price that Radstock gets from its designated assignee. Incidentally, this is a better bargain for PNCC (and ultimately for the Government), compared to a bidding out of the properties in which there are ever-present risks of recovering a much lower value). *Fourthly*, the arrangement transfers from PNCC to Radstock the obligation and task of looking for a qualified assignee of the properties. And, *lastly*, the present case involves a series of interrelated and dependent transactions that will always result in a situation not inconsistent with the *Constitution,* considering that the assignee will always be a qualified person or entity.

H
The Obligation of PNCC to Marubeni Was Established

In the RTC, PNCC urged the following grounds as affirmative defenses, namely: 1) that the plaintiff had no capacity to sue; 2) that the loan obligation had already prescribed, because no valid demand had been made; and 3) that the letter of guarantee had been signed by a person not authorized by a valid board resolution.

On appeal (C.A.-G.R. SP No. 66654), PNCC raised the same grounds, to wit: 1) that the cause of action was barred by prescription; 2) that the pleading asserting the claim stated no cause of action; 3) that the condition precedent for the filing of the instant suit had not been complied with; and 4) that the plaintiff had no legal capacity to sue.

As the excerpts of the Court's decision in G.R. No. 156887 show,[114] the defense of prescription of the claim and the other defenses of PNCC were passed upon, and the Court upheld the CA's affirmance of the RTC's denial of PNCC's *motion to dismiss* based on such defenses. The ruling in G.R. No. 156887 bars the re-litigation in these consolidated cases of the same issues, particularly a bar by prescription, because of the application of the doctrine of *law of the case*.

Law of the case is defined as the opinion delivered on a former appeal. More specifically, it means that whatever is once irrevocably established as the controlling legal rule between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be facts of the case before the court,[115] notwithstanding that the rule laid

down may have been reversed in other cases.[116] Indeed, after the appellate court has issued a pronouncement on a point presented to it with a full opportunity to be heard having been accorded to the parties, that pronouncement should be regarded as the law of the case and should not be reopened on a remand of the case.[117]

The concept of the *law of the case* is explained in *Mangold v. Bacon*,[118] thus:

> The general rule, nakedly and badly put, is that legal conclusions announced on a first appeal, whether on the general law or the law as applied to the concrete facts, not only prescribe the duty and limit the power of the trial court to strict obedience and conformity thereto, but they become and remain the law of the case in all after steps below or above on subsequent appeal. The rule is grounded on convenience, experience, and reason. Without the rule there would be no end to criticism, re-agitation, re-examination, and reformulation. In short, there would be endless litigation. It would be intolerable if parties litigant were allowed to speculate on changes in the personnel of a court, or on the change of our rewriting propositions once gravely ruled on solemn argument and handed down as the law of a given case. An itch to reopen questions foreclosed on a first appeal would result in the foolishness of the inquisitive youth who pulled up his corn to see how it grew. Courts are allowed, if they so choose, to act like ordinary sensible persons. The administration of justice is a practical affair. The rule is a practical and a good one of frequent and beneficial use.

Resultantly, the liability of PNCC to Radstock was established, rendering the decision to enter into a compromise agreement a wise move on the part of PNCC. The same result cannot be contemplated if the nullification of the *compromise agreement* were decreed herein, because PNCC would probably lose by an adjudgment against it of a larger liability.

I
The Resolution of PNCC's Board Recognizing Its Obligation to Marubeni Bound PNCC

Board Resolution No. BD-092-2000 dated October 20, 2000 proves that PNCC incurred an obligation in favor of Marubeni. PNCC's Board of Directors would not have issued the resolution if the obligation was unfounded, considering that the resolution admitted its liability, to wit:

> RESOLUTION NO. BD-09202000
>
> RESOLVED, That the Board recognizes, acknowledges and confirms PNCC's obligations as of September 30, 1999 with the following entities, exclusive of interests and other charges that may subsequently accrue and still become due therein, to wit:

a). the Government of the Republic of the Philippines in the amount of P36,023,784,751.00; and

b). **Marubeni Corporation in the amount of P10,743,103,388.00.**

Yet, the majority would have the Court strike down the resolution, and not give it effect, because it was null and void. They opine that the PNCC Board approved a transaction that was manifestly and grossly disadvantageous to the National Government, and that such transaction was even a corrupt and unlawful act. They conclude that the resolution, being unlawful and a criminal act, was void *ab initio* and could not be implemented or in any way given effect by the Executive or Judicial Branch of the Government.

I am not persuaded.

That its issuance might have been unwise or disadvantageous to PNCC, which I do not concede, did not invalidate Resolution No. BD-092-1000. The resolution, being simply a recognition of a prior indebtedness in favor of Marubeni and the Government, was clearly issued within the corporation's powers; hence, it was neither illegal nor *ultra vires*. Indeed, had PNCC remained a purely private corporation, no issue would be raised against the propriety of its Board of Directors thereby recognizing an indebtedness.

The majority rely heavily on the transcripts of the Senate Committee hearings to buttress the imputation of bad faith behind the passage of the board resolution that recognized PNCC's debts to Marubeni. They copiously quote the privilege speech of Senator Franklin Drilon delivered during the plenary session of December 21, 2006; and the transcripts of the Senate Committee hearings held on December 14, 2006.

To me, the reliance on the privilege speech and the transcripts of the Senate Committee hearings is unwarranted and misplaced.

The speeches of legislators delivered on the floor and the testimonies of resource persons given in Congressional committee hearings, like those quoted in the majority opinion, have no probative value in judicial adjudication, for they are not recognized as evidence under the *Rules of*

Court. Even the rule on judicial notice embodied in Section 1,[119] Rule 129, of the *Rules of Court* does not accord probative value to such speeches and testimonies, because the rule extends only to the *official acts* of the Legislative Department. The term *official acts*, in its general sense, may encompass all activities of the Congress, like the laws enacted and resolutions adopted, but the statements of the legislators and testimonies cannot be regarded, by any stretch of legal understanding, as the "official act of the legislative department." At best, the courts can only take judicial notice of the fact that such statements or speeches were made by such persons, or that such hearings were conducted.

Although this Court can take cognizance of the proceedings of the Senate, as acts of a department of the National Government, the testimonies or statements of the persons during the hearings or sessions may not be used to prove disputed facts in the courts of law. They cannot substitute actual testimony as basis for making findings of fact necessary for the determination of a controversy by the courts. In other words, they are incompetent for purposes of judicial proceedings.

Moreover, in *Bengzon, Jr. v. Senate Blue Ribbon Committee*, [120] the Court defined the limitation on the power of the Legislative Department to investigate a controversy exclusively pertaining to the Judicial Department, and regarded as an *encroachment* into the exclusive domain of judicial jurisdiction any probe or inquiry by the Senate Blue Ribbon Committee into the same justiciable controversy already before the Sandiganbayan, declaring:

> In fine**, for the respondent [Senate Blue Ribbon] Committee to probe and inquire into that same justiciable controversy already before the Sandiganbayan, would be an encroachment into the exclusive domain of judicial jurisdiction** that had much earlier set in. In *Baremblatt v. United States*, it was held that:
>
> > Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the government. **Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary.** Neither can it supplant the Executive in what exclusively belongs to the Executive. xxx.

Indeed, the distinctions between court proceedings, on one hand, and legislative investigations in aid of legislation, on the other hand, derive from their different purposes. Courts conduct hearings to settle, through the application of law, actual controversies arising between adverse litigants and involving demandable rights.[121] In court proceedings, the person's rights to life, liberty and property may be directly and adversely affected. The *Rules of Court* prescribes procedural safeguards consistent with the principles of due process and equal protection guaranteed by the *Constitution*. The manner in which disputed matters can be proven in judicial proceedings as provided in the *Rules of Court* must be followed. In contrast, the legislative bodies conduct their inquiries under less safeguards and restrictions, because inquiries in aid of legislation are undertaken as tools to gather information, in order to enable the legislators to act wisely and effectively, and in order to determine whether there is a need to improve existing laws, or to enact new or remedial legislation.[122]

In particular, the Senate is not bound by the *Rules of Court*. Its inquiries permit witnesses to relate matters that are hearsay, or to give mere opinion, or to transmit information

considered incompetent under the *Rules of Court*. The witnesses serve as resource persons, often unassisted by counsel, and appear before the legislators, who are the inquisitors. The latter have no obligation to act as impartial judges during the proceedings. The inquiries do not include direct examinations and cross-examinations, and leading questions are frequent.

Cogently, the proper treatment of the findings of congressional committees by courts of law became the subject of the following observations made in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*:[123]

> Finally, the respondent Congressmen assert that at least two (2) committee reports by the House of Representatives found the PIATCO contracts valid and contend that this Court, by taking cognizance of the cases at bar, reviewed an action of a co-equal body. They insist that the Court must respect the findings of the said committees of the House of Representatives. With due respect, we cannot subscribe to their submission. **There is a fundamental difference between a case in court and an investigation of a congressional committee. The purpose of a judicial proceeding is to settle the dispute in controversy by adjudicating the legal rights and obligations of the parties to the case. On the other hand, a congressional investigation is conducted in aid of legislation**. Its aim is to assist and recommend to the legislature a possible action that the body may take with regard to a particular issue, specifically as to whether or not to enact a new law or amend an existing one. **Consequently, this Court cannot treat the findings in a congressional committee report as binding because the facts elicited in congressional hearings are not subject to the rigors of the Rules of Court on admissibility of evidence.** The Court in assuming jurisdiction over the petitions at bar simply performed its constitutional duty as the arbiter of legal disputes properly brought before it, especially in this instance when public interest requires nothing less.

V
Asiavest's Intervention Had No Leg to Stand On

Asiavest was a judgment creditor of PNCC by virtue of the Court's judgment in G.R. No. 110263. After 5 years from the issuance of a writ of execution in its favor, Asiavest's judgment award is yet to be satisfied.[124]

In G.R. No. 178158, Asiavest filed its *urgent motion for leave to intervene and to file the attached opposition and motion-in-intervention*, claiming that it had a legal interest as an unpaid judgment creditor of PNCC, nay a superior right, over the properties subject of the *compromise agreement*.[125] It prayed, if allowed to intervene, that the *compromise agreement* be nullified because, otherwise, PNCC might no longer have properties sufficient to satisfy the judgment in favor of the former.

The Court granted the *urgent motion* of movant-intervenor Asiavest for *leave to intervene and to file opposition and motion in intervention [re: judgment based on compromise]*.[126] However, Asiavest was not required to file a *comment*.

The position of Asiavest cannot be sustained.

To start with, Asiavest has no direct and material interest in the approval (or disapproval) of the *compromise agreement* between PNCC and Radstock.

Secondly, Asiavest's request to intervene was made too late in the proceedings. Under Section 2, Rule 19, 1997 *Rules of Civil Procedure*, an intervention, to be permitted, must be sought prior to the rendition of the judgment by the trial court.

Thirdly, the avowed interest of Asiavest in PNCC's assets emanated from its being a creditor of PNCC by final judgment, and was not related to the personal obligations of PNCC in favor of Marubeni (that is, the guarantees for the loans) that were the subject of the *compromise agreement*. Such interest did not entitle Asiavest to attack the *compromise agreement* between PNCC and Radstock. The interest that entitles a person to intervene in a suit already commenced between other persons must be in the matter in litigation and of such character that the intervenor will either gain or lose by direct legal operation and effect of the judgment.[127] The conditions for a proper intervention in relation to Asiavest simply did not exist. Moreover, sustaining Asiavest's posture may mean allowing other creditors to intervene in an action involving their debtor brought by another creditor against such debtor upon the broad pretext that they were thereby prejudiced. The absurdity of Asiavest's posture, being plain, can never be permitted under the rules on intervention. [128]

Fourthly, that Asiavest is yet to recover from PNCC under the final judgment rendered in G.R. No. 110263 gave the former *no* standing to intervene in the action Radstock brought against PNCC to enforce the latter's guarantees. Asiavest was an absolute stranger to the juridical situation arising between Radstock and PNCC. The proper recourse of Asiavest was, instead, to pursue the execution of the judgment until satisfaction, a remedy that is amply provided for in Rule 39 of the Rules of Court.

Lastly, Asiavest's argument that the *compromise agreement* might be in fraud of it as a judgment creditor of PNCC, in support of which newspaper reports are cited,[129] is unpersuasive. The allegation of fraud remains unsupported by admissible and credible evidence presented by Asiavest, considering that mere newspaper reports are incompetent and inadmissible hearsay.[130]

IN VIEW OF ALL THE FOREGOING CONSIDERATIONS, I vote to dismiss the petitions in G.R. No. 178158 and G.R. No. 180428; to disallow the intervention of Asiavest Merchant Bankers Berhad; to affirm the decision dated January 25, 2007, the resolution

dated May 31, 2007 promulgated in C.A.-G.R. CV No. 87971, and the resolution dated June 12, 2007 promulgated in C.A.-G.R. SP No. 97982.

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[1] *Philippine National Construction Corporation v. Hon. Amalia F. Dy, et al.*, G.R. No. 156887, October 3, 2005, 472 SCRA 1, 5. Penned by Associate Justice Azcuna and concurred in by Chief Justice Davide, Jr., Associate Justice Quisimbing, Associate Justice Ynares-Santiago, and Associate Justice Carpio.

[2] *Rollo*, G.R. No. 178158, pp. 31- 43 (CA decision dated January 25, 2007; penned by Associate Justice Del Castillo (now a Member of the Court) and concurred in by Presiding Justice Reyes (now retired Member of the Court) and Associate Justice Romilla-Lontok.

[3] *Rollo*, G.R. No. 178158, pp. 259-271 (the resolution in G.R. No. 156887 dated November 22, 2006).

[4] *Id*., pp. 31- 43.

[5] *Id*., pp. 3-26.

[6] *Id*.

[7] *Rollo*, G.R. No. 180428, pp. 3-42.

[8] *Id.*, pp. 107-140.

[9] *Id.*, pp. 45-46 (CA decision in CA-G.R. SP No. 97982, penned by Justice Pizarro, and concurred in by Justice Cruz and Justice Lampas-Peralta).

[10] The narrative contained in the section *Common Antecedents* is partly derived from the background facts rendered in *Philippine National Construction Corporation v. Hon. Amalia F. Dy, et al.*, G.R. No. 156887, October 3, 2005, 472 SCRA 1.

[11] Rollo, G.R. No. 178158, p. 416.

[12] *Id*., pp. 259-271.

[13] *Id.,* p. 270.

[14] *Id*., pp. 31-43.

[15] *Id.*, pp. 113-117.

[16] *Id.*, p. 48.

[17] *Id.*, pp. 46-54.

[18] *Rollo*, G.R. No. 180428, pp. 107-140.

[19] *Rollo*, G.R. No. 180428, at pp. 45-46 (penned by Justice Pizarro, and concurred in by Justice Cruz and Justice Lampas-Peralta).

[20] *Id.*, pp. 47-49.

[21] *Rollo*, G.R. No. 178158, pp. 3-26.

[22] *Id.*, pp. 142-145.

[23] *Id.,* pp. 237-241.

[24] *Rollo*, G.R. No. 180428, pp. 3-42.

[25] *Rollo*, G.R. No. 178158, p. 358.

[26] *Id.*, p. 8.

[27] *Id.*, p. 11.

[28] *Id.*, pp. 9-10.

[29] *Id.*, p. 11.

[30] *Id.*, pp. 11-13.

[31] *Id.*, pp. 55-69.

[32] *Id.*, pp. 113-134.

[33] *Rollo*, G.R. 180428, p. 17.

[34] *Rollo*, G.R. 178158, pp. 402-443; pp. 444-540.

[35] *Id.,* between pp. 393 and 394.

[36] *Rollo*, G.R. No. 178158, pp. 265-269 (CA decision dated January 25, 2007).

[37] *Garcia v. David*, 67 Phil. 279.

[38] *Nieto, Jr. v. Court of Appeals*, G.R. No. 166984, August 7, 2007, 529 SCRA 285; citing *Garcia v. David*, 67 Phil. 279, 282-283.

[39] *Big Country Ranch Corporation v. Court of Appeals,* G.R. No. 102927, October 12, 1993, 227 SCRA 161, 165.

[40] *Garcia v. David*, *supra*, note 37, pp. 282-283.

[41] Sec. 1, Rule 19, 1997 *Rules of Civil Procedure*.

[42] *Rollo*, G.R. No. 178158, p. 266.

[43] *Rollo*, G.R. No. 180428, pp. 45-46 (CA Resolution in CA-GR SP No. 97982).

[44] *Id*., pp. 3-44.

[45] *Id*., p 46.

[46] G.R. No. 148456, September 15, 2006, 502 SCRA 67, 70.

[47] G.R. No. 70443, September 15, 1986, 144 SCRA 144.

[48] *Id*., pp 148-151.

[49] *Id*., p. 149.

[50] *Rollo*, G.R. 18042, p. 7.

[51] Sec. 2, *Corporation Code*; *Solidbank Corporation v. Mindanao Ferroalloy Corporation*, G.R. No. 153535, July 28, 2005, 464 SCRA 409, 420.

[52] Section 1. *Derivative action.*- A stockholder or member may bring an action in the

name of a corporation or association, as the case may be, provided, that:

(1) He was a stockholder or member at the time the acts or transactions subject of the action occurred and at the time the action was filed;

(2) He exerted all reasonable efforts, and alleges the same with particularity in the complaint, to exhaust all remedies available under the articles of incorporation, by-laws, laws or rules governing the corporation or partnership to obtain the relief he desires;

(3) No appraisal rights are available for the act or acts complained of; and

(4) The suit is not a nuisance or harassment suit.

In case of nuisance or harassment suit, the court shall forthwith dismiss the case.

[53] *Yu v. Yukayguan*, G.R. No. 177549, June 18, 2009.

[54] *PNCC v. Dy*, G.R. No. 156887, October 3, 2005, 472 SCRA 1, 8-9.

[55] *Revised Administrative Code of* 1987.

[56] TSN, January 13, 2009, pp. 269-278.

[57] G.R. No. 87710 & G.R. No. 96087, March 31, 1992, 207 SCRA 659, 667-668.

[58] G.R. No. L-19891, July 31, 1964, 11 SCRA 634.

[59] Villanueva, C., *Philippine Corporate Law*, Rex Bookstore, Inc., p. 18 (2003).

[60] I Campos and Lopez-Campos, *The Corporation Code*, Central Lawbook Publishing, Co., Inc., p. 2 (1990).

[61] G.R. No. 131715, December 8, 1999, 320 SCRA 188.

[62] Section 36, *Corporation Code*, enumerates *some* of the powers of a private corporation:

Sec. 36. *Corporate powers and capacity.* - Every corporation incorporated under this Code has the power and capacity:

1. To sue and be sued in its corporate name;

2. Of succession by its corporate name for the period of time stated in the articles of incorporation and the certificate of incorporation;

3. To adopt and use a corporate seal;

4. To amend its articles of incorporation in accordance with the provisions of this Code;

5. To adopt by-laws, not contrary to law, morals, or public policy, and to amend or repeal the same in accordance with this Code;

6. In case of stock corporations, to issue or sell stocks to subscribers and to sell stocks to subscribers and to sell treasury stocks in accordance with the provisions of this Code; and to admit members to the corporation if it be a non-stock corporation;

7. To purchase, receive, take or grant, hold, convey, sell, lease, pledge, mortgage and otherwise deal with such real and personal property, including securities and bonds of other corporations, as the transaction of the lawful business of the corporation may reasonably and necessarily require, subject to the limitations prescribed by law and the Constitution;

8. To enter into merger or consolidation with other corporations as provided in this Code;

9. To make reasonable donations, including those for the public welfare or for hospital, charitable, cultural, scientific, civic, or similar purposes: Provided, That no corporation, domestic or foreign, shall give donations in aid of any political party or candidate or for purposes of partisan political activity;

10. To establish pension, retirement, and other plans for the benefit of its directors, trustees, officers and employees; and

11. To exercise such other powers as may be essential or necessary to carry out its purpose or purposes as stated in the articles of incorporation.

[63] Section 2, *Corporation Code*, provides:

Sec. 2. *Corporation defined.* - A corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes and properties expressly authorized by law or incident to its existence.

[64] *Manila International Airport Authority v. Olongapo Maintenance Services, Inc.*, G.R. No. 146184-85, January 31, 2008, 543 SCRA 269, 275.

[65] *Rollo*, G.R. No. 178158, pp. 265-269.

[66] Underline supplied for emphasis.

[67] Underline supplied for emphasis.

[68] IV Tolentino, *Civil Code of the Philippines*, p. 293 (1997).

[69] G.R. No. 1115444, July 6, 2004, 433 SCRA 424,

[70] Entitled *Amending the Franchise of the Philippine National Construction Corporation to Construct, Maintain and Operate Toll Facilities in the North Luzon and South Luzon Expressways to include the Metro Manila Expressway to serve as an Additional Artery in the Transportation of Trade and Commerce in Metro Manila*.

[71] Underline supplied for emphasis.

[72] Section 4, Rule 129, *Rules of Court*; 5 Herrera, *Remedial Law*, Rex Book Store, p. 107 (1999).

[73] *PNCC v. Pabion, supra*, at footnote 61; also *National Shipyard & Steel v. Court of Industrial Relations*, 118 Phil. 782, 789.

[74] *National Shipyard & Steel v. Court of Industrial Relations, supra.*

[75] *Philippine National Bank v. Court of Industrial Relations*, G.R. No. L-32667, January 31, 1978, 81 SCRA 314, 319.

[76] *Rollo*, G.R. No. 178185, p. 511.

[77] Entitled *Authorizing the Establishment Of Toll Facilities On Public Improvements, Creating A Board For The Regulation Thereof And For Other Purposes*.

[78] Underlines supplied for emphasis.

[79] G.R. No. 119528, March 26, 1997, 270 SCRA 538, 550-551.

[80] Underlines supplied for emphasis.

[81] G.R. No. 168914, July 4, 2007, 526 SCRA 465, 476.

[82] Underlines supplied for emphasis.

[83] DOJ Opinion No. 122, s. 1995.

[84] Underlines supplied for emphasis.

[85] *Rollo*, G.R. No. 178158, p. 247.

[86] G.R. No. 79351, November 28, 1989, 179 SCRA 630, 634-635.

[87] Underlines supplied for emphasis.

[88] G.R. No. 158261, December 18, 2006, 511 SCRA 123, 147.

[89] Underlines supplied for emphasis.

[90] *Rollo,* G.R. No. 180428, p. 248.

[91] 21A *Words and Phrases*, p. 397; citing *Howell v. Knox,* Tex.Civ.App., 211 S.W.2d 324, 328.

[92] *Id*., p. 396; citing *Sturgill v. Lovell Lumber Co*., 67 S.E. 2d 321, 323, 13 W. Va. 259.

[93] Article 2237, *Civil Code*.

[94] De Leon, *The Law on Insurance (with Insolvency Law)*, p. 254 (2003).

[95] Section 14, Act No. 1956.

[96] Section 20, Act No. 1956.

[97] Section 52, Act No. 1956, provides in part that:

SECTION 52. *Corporations and sociedades anonimas; Banking*. -- The provisions of this Act shall apply to corporations and *sociedades anonimas* x x x. Whenever any corporation is declared insolvent, its property and assets shall be distributed to the creditors; x x x

[98] *Rollo*, G.R. No. 178158, pp. 265-269.

[99] *Rollo*, G.R. 180428, p. 249.

[100] Underlines supplied for emphasis.

[101] II Campos and Lopez-Campos, *The Corporation Code*, p. 464 (1990).

[102] *Rollo*, G.R. No. 180428, p. 249.

[103] *Rollo*, G.R. No. 178185, p. 511.

[104] *Rollo*, G.R. No. 180428, p. 423 (COA's *Audit Report on PNCC For the Year End[ing] 31 December 2005).* The report summarizes PNCC's ongoing and projected projects, thus:

TOLLWAYS DEVELOPMENT CONTRACTS

The company has entered into Joint Venture Partnerships with internationally notable engineering companies and other reputable local corporations, under the Build-Operate-Transfer scheme, for the construction, rehabilitation, refurbishment, modernization, and expansion of the existing Expressways.

A product of this partnership is the Metro Manila Skyway Project, the first elevated tollway in the country built in joint partnership with the Indonesian firm P.T. Citra Gung Persada (CITRA). Another project of the joint undertaking efforts is the Manila North Tollway Project with First Philippine Infrastructure Development Corporation (FPIDC), which involves the rehabilitation of the North Luzon Tollway and its expansion to the special economic zones in Zambales, Clark Pampanga, Bataan, and Subic, Olongapo City. The rehabilitation and extension of the South Luzon Tollway has been entered into by the Company through a Joint Venture Agreement (JVA) and subsequently an amended JVA with Hopewell Crown Infrastructure, Inc. (HCII). The objective of which is to refurbish the Alabang to Calamba, Laguna segment of the South Luzon Expressway and extend the same to Lucena City in Quezon Province.

An Alternative to the JVA with HCII, if the same does not materialize, is an on-going negotiation with the NDC to develop design, construct, finance, operate, and maintain the SLEX Project. The proposed Project involves the rehabilitation of the Alabang Viaduct and the extension of the SLEX from Calamba, Laguna to Sto. Tomas, Batangas. This will be documented likewise by a JVA.

[105] *Rollo*, G.R. No. 178158, p. 256.

[106] Underlines supplied for emphasis.

[107] G.R. No. L-21064, February 18, 2970, 31 SCRA 413, 422-423.

[108] G.R. Nos. 160261, 160262, 160263, 160277, 160292, 160295, 160310, 160318, 160342, 160343, 160360, 160365, 160370, 160376, 160392, 160397, 160403, and 160405,

November 10, 2003; 415 SCRA 44.

[109] *Samartino v. Raon*, 433 Phil. 173, 189 (July 3, 2002).

[110] *Morales v. Court of Appeals,* G. R. No. 117228, June 19, 1997, 274 SCRA 282, 297-300; IV Tolentino, *Civil Code of the Philippines*, p. 669 (1997).

[111] Article 1441, *Civil Code*.

[112] *Ramos v. Ramos*, No. L-19872, December 3, 1974, 61 SCRA 284.

[113] G.R. No. 127882, December 1, 2004, 445 SCRA 1, 91-93.

[114] *Supra*, at pp. 22-23.

[115] 21 C.J.S. 330.

[116] *Zarate v. Director of Lands*, 39 Phil. 747.

[117] *Bachrach Motor Co.v. Esteva*, 67 Phil 16.

[118] 237 Mo. 496; cited in *Zarate v. Director of Lands*, *supra*

[119] Section 1. *Judicial notice, when mandatory*. - A court shall take judicial notice, without the introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, the official acts of the legislative, executive and judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions. (1a)

[120] G.R. No. 89914, November 20, 1991, 203 SCRA 767, 784.

[121] *Romero v. Senator Estrada*, G.R. No. 174105, April 2, 2009.

[122] *Id*.

[123] G.R. No. 155001, January 21, 2004, 420 SCRA 575, 606.

[124] *Rollo*, G.R. No. 178158, pp. 237-238.

[125] *Id.*, pp. 238-239.

[126] *Rollo*, G.R. No. 178158, p. 291.

[127] *Nordic Asia Limited v. Court of Appeals*, 451 Phil. 482, 492-493.

[128] *Batama Farmer's Cooperative Marketing Association, Inc. v. Hon. Rosal*, 149 Phil. 514, 524.

[129] *Rollo*, G.R. 178158, pp. 254-258.

[130] *People v. Fajardo*, 373 Phil. 915, 925.

CONCURRING OPINION

CARPIO MORALES, *J.*:

I join the majority in granting the petition in G.R. No. 180428.

In **G.R. No. 178159**, petitioner Strategic Alliance Development Corporation (Stradec) assails the appellate court's Resolutions of January 25, 2007 and May 31, 2007 in CA-G.R. CV No. 87971 approving the Compromise Agreement of August 17, 2006 between Radstock Securities Limited (Radstock) and Philippine National Construction Corporation (PNCC), and denying Stradec's motion for reconsideration, respectively. In **G.R. No. 180428**, petitioner Luis Sison (Sison) assails the appellate court's Resolutions of June 12, 2007 and November 5, 2007 in CA-G.R. SP No. 97982 dismissing his petition for annulment of the appellate court's January 25, 2007 Resolution, and denying reconsideration thereof, respectively.

This opinion dwells only on the legal claims and defenses surrounding the execution of the Compromise Agreement, the validity of which is challenged in the present petitions.

The debt-to-equity transaction between the government and the PNCC (then CDCP) covered the assumption of ownership not only as to the assets but also as to the liabilities of CDCP to the extent of its equity.

The separate issue of defensibility of the subject liability could not be taken into account in rejecting the compromise agreement, since part of a compromise is the concession to surrender or waive the defenses against the claim. Whether such waiver subjected the

PNCC officers to personal liability is likewise a different question altogether.

Going beyond the mathematical computations in arriving at the P6.185 Billion value of the properties subject of the Compromise Agreement *vis-à-vis* the P17.04 Billion liability adjudged by the trial court, the immediate effect of approving the Compromise Agreement is pulling Radstock from the queue of PNCC creditors and placing it in front of the line in order to collect on a debt ahead of the other PNCC creditors. Yet Radstock itself was complaining and crying foul about this same scenario in its application for a writ of preliminary attachment, the subject of this Court's decision in *Philippine National Construction Corporation v. Dy.*[1] Thus Radstock alleged:

> . . . PNCC knowing that it is **bankrupt** and that it does not have enough assets to meet its existing obligations is now offering for **sale** its assets as shown in the reports published in newspapers of general circulation.[2] (emphasis and underscoring supplied)

The Court in that case did not find such allegation as constitutive of fraud to merit Radstock's prayer for the attachment of PNCC properties because

> . . . the fact that PNCC has insufficient assets to cover its obligations is no indication of fraud even if PNCC attempts to sell them because **it is quite possible that PNCC was entering into a *bona fide* . . . sale where at least fair market value for the assets will be received**. In such a situation, Marubeni**[-predecessor-in-interest of Radstock] would not be in a worse position than before as the assets will still be there but just liquidated**.[3](italics in the original; emphasis and underscoring supplied)

Finding itself in the same position it abhors, Radstock now finds no objection to PNCC "selling"[4] its assets to Radstock and placing itself in a worse position than before as the assets will be actually conveyed and not merely liquidated. Even worse, Radstock admits that PNCC is financially in distress and intimates that the creditors cannot in any manner collect the claims due them.

Furthermore, Executive Order No. 292 or the Administrative Code of 1987 requires congressional approval on the compromise of claims valued at more than P100,000, thus the pertinent section provides:

> Section 20. *Power to Compromise Claims.* - (1) When the interest of the Government so requires, the Commission [on Audit] may compromise or release in whole or in part, **≥any settled claim or liability to any government**

> **agency** not exceeding ten thousand pesos arising out of any matter or case before it or within its jurisdiction, and with the written approval of the President, it may likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos. **In case the claim or liability exceeds one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the President, with their recommendations, to the Congress** x x x.[5] (emphasis and underscoring supplied)

At the outset, it bears clarification that the phrase "any settled claim or liability *to* any government agency" includes not just liabilities *to* the government but also claims *against* the government. Although the two relevant cases (*infra*) so far decided by this Court involved only liabilities *to* the government, there is nothing in the law that prohibits the government from amicably settling its own liability to a person, subject to the same stringent qualifications and conditions. That the State has the whole government machinery to contest any alleged liability and protect the release of government funds to pay off such claim is not in consonance with the avowed State policy expressed by law[6] that encourages settlement of civil cases.

In *Benedicto v. Board of Administrators of Television Stations RPN, BBC and IBC*,[7] the Court ruled that the requirement of prior congressional approval for the compromise of an amount exceeding P100,000 applies only to a **settled** claim or liability.

In his dissent, Justice Lucas Bersamin states that the liability of PNCC to Radstock was not yet settled at the time of the execution of the Compromise Agreement since the case was still the subject of litigation, in which PNCC resisted liability by pleading various defenses. He expounds:

> The exception of a compromise or release of a claim or liability yet to be settled from the requirement for presidential or congressional approval is realistic and practical. In a settlement by compromise agreement, the negotiating party must have the freedom to negotiate and bargain with the other party. Otherwise, tying the hands of the Government representative by requiring him to submit each step of the negotiation to the President and to Congress will unduly hinder him from effectively entering into any compromise agreement. (italics in the original omitted)

The majority opinion, meanwhile, declares that the claim was already settled upon recognition of the obligation in the books of PNCC via the Board Resolution.

> [It] was precisely enacted to prevent government agencies from admitting

> liabilities against the government, then compromising such "settled" liabilities. The present case is exactly what the law seeks to prevent, a compromise agreement on a creditor's claim settled through admission by a government agency without the approval of Congress for amounts exceeding P100,000.00. What makes the application of the law even more necessary is that the PNCC Board's twin moves are manifestly and grossly disadvantageous to the Government. x x x (emphasis in the original omitted)

I submit that a claim or liability is settled once it has been liquidated or determined and no issue remains as to the amount or identity of the liability.

In *Benedicto*, the Court explained that "[t]he Government's claim against Benedicto is not yet settled, and the ownership of the alleged ill-gotten assets is still being litigated in the Sandiganbayan, hence, the PCGG's Compromise Agreement with Benedicto need not be submitted to the Congress for approval." In *Benedicto*, there was yet no determination as to the ownership of the sequestered properties.

The determination, if it be a judicial one, need not be final and executory. Since the aim of a compromise is to "avoid a litigation or put an end to one already commenced," there is no rhyme or reason to end a litigation that is already terminated and to wait for a final and executory decision before discussing a possible compromise.

In *The Alexandra Condominium Corporation v. Laguna Lake Development Corporation*,[8] the subject of compromise was the P1,062,000 fine imposed by the Laguna Lake Development Authority against a condominium corporation as compensation for damages resulting from failure to meet established water and effluent quality standards. The Court therein ruled that the condominium corporation should have first pursued the administrative recourse to the Department of Environment and Natural Resources Secretary before filing the petition in court. On the issue of the alleged pending amicable settlement *vis-à-vis* the claim of non-exhaustion of administrative remedies, the Court ruled that congressional approval of a compromise agreement is "not administrative but legislative [in nature], and need not be resorted to before filing a judicial action."

In the scheme of things, the congressional approval acts as a safeguard in reviewing the soundness of the business judgment. It is not for the Court to preempt the legislative branch and say that "under the circumstances, the compromise agreement could not be considered as disadvantageous to PNCC and the National Government."

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[1] G.R. No. 156887, October 3, 2005, 472 SCRA 1.

[2] Id. at 10.

[3] Id. at 11, where the Court affirmed the denial of the motion to dismiss but reversed the denial of the motion to set aside and discharge the order and writ of preliminary attachment.

[4] Civil Code, Art. 1245 provides that the law of sales governs dation in payment whereby property is alienated to the creditor in satisfaction of a debt in money. Admittedly, the Compromise Agreement is essentially a *dacion en pago*.

[5] EXECUTIVE ORDER No. 292, Book V, Title I, Subtitle B, Chapter IV, Sec. 20, par. 1.

[6] CIVIL CODE, Arts. 2028-2029.

[7] G.R. No. 87110, March 31, 1992, 207 SCRA 659.

[8] G.R. No. 169228, September 11, 2009.

CONCURRING OPINION

LEONARDO-DE CASTRO, *J.*:

I concur in the *ponencia* of the Honorable Justice Antonio T. Carpio, subject to the following qualifications:

First, I do not believe that Section 36 of the Government Auditing Code grants government agencies any power to compromise, and thereby admit, any indebtedness of the government to another party. Section 36, as amended by Section 20, Chapter 4, Title I-B, Book V, E.O. No. 292 (the Administrative Code of 1987), provides:

> Section 36. *Power to compromise claims.* - (1) When the interest of the Government so requires, the Commission may compromise or release in whole or in part, **any settled claim or liability to any government agency** not exceeding ten thousand pesos arising out of any matter or case before it or within its jurisdiction, and with the written approval of the President, it may likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos. In case the claim or liability exceeds one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the President, with their recommendations, to the Congress; and

> (2) The Commission may, in the interest of the Government, authorize the charging or crediting to an appropriate account in the National Treasury, small discrepancies (overage or shortage) in the remittances to, and disbursements of, the National Treasury, subject to the rules and regulations as it may prescribe. (emphasis supplied)

Plainly, pursuant to the above-quoted provision, the power to compromise or release involves a claim or liability **to** a government agency, *i.e.* an indebtedness **to** a government agency, which term by definition under E.O. No. 292 includes "government owned or controlled corporations." The language of Section 36 does not authorize the compromise of an indebtedness **of** the government or a liability of the government to any party.

The aforesaid meaning or import of the term "claim or liability" used in Section 36 is reinforced by the immediate preceding Section 35 which reads:

> Section 35. *Collection of Indebtedness Due to the Government.* - The Commission shall, through proper channels, assist in the collection and enforcement of all debts and claims, and the restitution of all funds or the replacement or payment as a reasonable price of property, **found to be due the Government, or any of its subdivisions, agencies or instrumentalities, or any government-owned or controlled corporation** or self-governing board, commission or agency of the Government, in the settlement and adjustment of its accounts. If any legal proceeding is necessary to that end, the Commission shall refer the case to the Solicitor General, the Government Corporate Counsel, or the Legal Staff of the Creditor Government Office or agency concerned to institute such legal proceeding. The Commission shall extend full support in the litigation. All such moneys due and payable shall bear interest at the legal rate from the date of written demand by the Commission. (emphasis supplied)

Previous jurisprudence applying Section 36 confirms that this provision authorizes the compromise of a liability or indebtedness **to** the government.[1] This is true even in *Benedicto v. Board of Administrators of Television Stations,*[2] which was cited in the dissent. The *Benedicto* case ruled upon the power of the PCGG to compromise **actions for recovery of ill-gotten wealth**. In such actions, it is the government who has a claim against third persons and not the other way around.

Now, one might ask: Is there compelling reason to treat a compromise of an indebtedness **to** the government differently from a compromise of an indebtedness **of** the government?

The answer is undeniably in the affirmative. First, when there is a compromise of an indebtedness **to** the government, it generally presupposes that the government's claim will

be paid, albeit at a lower amount than the actual liability. It involves funds going into the coffers of the government. On the other hand, when there is a compromise of an indebtedness **of** the government, this means that public funds will be disbursed from the treasury to answer for such debt. The former type of compromise makes practical sense since in that situation, the State is condoning a portion of an actual or settled or definite obligation in order to collect some amount for a good or meritorious ground rather than risk the non-payment of all of its claim.

However, the power to compromise an indebtedness to the government does not necessarily include the power to compromise an asserted claim against or liability of the government, more so if the said claim against or liability of the government is unsettled. It needs no deep logical reasoning to understand that before the government is made to part with public funds or property, the claim **against** the government must be fixed, definite or settled. Otherwise, the government may be holding itself liable for unfounded or baseless claims. This is because the power to compromise a liability of the government entails the disbursement of public funds or property which is an act subject to stringent rules in order to safeguard against loss or wastage of such funds or property that are so vital to the delivery of basic public goods and services. Not the least of these rules is Article VI, Section 29(1) of the 1987 Constitution which states that "[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law." In consonance with Section 29, Article VI, the General Auditing Code also provides:

> Section 4. *Fundamental Principles.* - Financial transactions and operations of any government agency shall be governed by the fundamental principles set forth hereunder, to wit:
>
> 1. **No money shall be paid out of any public treasury** or depository **except in pursuance of an appropriation law or other specific statutory authority.**
>
> 2. Government funds or property shall be spent or **used solely for public purposes**. xxx xxx xxx (emphasis supplied)

To my mind, neither Section 36 of the Government Auditing Code nor *Benedicto* can be used as legal basis for the vaunted validity of the Compromise Agreement subject of this case.

Second, even assuming for the sake of argument that Section 36 may be interpreted as also authorizing the compromise of government indebtedness **to** another party, it is my considered view as stated above that it must be a **settled** claim or liability.

Section 36 is very clear that the Commission on Audit (COA) may only compromise or release "any **settled** claim or liability."

The dissenting opinion characterizes Radstock's claim against PNCC as an unsettled claim

since its validity and its amount had not yet been determined with judicial finality and in fact, the Compromise Agreement was entered into by the parties during the pendency of the case with the Court of Appeals.

However, I respectfully beg to disagree with the proposition that since Radstock's claim is not yet settled, the requirement under Section 36 for Presidential or Congressional approval does not apply. On the contrary, it is precisely because the claim is still unsettled that Section 36 should not come into play at all and the concerned government agency should be deemed to have no authority to compromise such claim. Under Section 36, the authority to compromise must involve a "settled claim or liability" regardless of amount, the latter being significant only to determine the approving authority. This is the clear import of Section 36.

This interpretation of Section 36, which requires a final and executory judicial determination of the liability as a prerequisite to the exercise of the power to compromise, would reinforce the mandate of the COA to guard against illegal or negligent disbursement of public funds.

This is an opportune time for the Court to revisit and reexamine the doctrine in *Benedicto*, insofar as it rules that Presidential and/or Congressional approval may be dispensed with in the compromise of **unsettled** claims. The authority to compromise granted in cases of settled claims, under Section 36, as amended by E.O. 292, subject to the approval of the offices concerned depending on the amount of the claim cannot, by any rational reasoning, be construed as to confer absolute authority to compromise, that is, *sans* any condition or approval at all, if the claim is unsettled or not yet established. Rather, the inescapable deduction from the language of Section 36 is that no compromise is allowed if the claim is unsettled. Besides, it should be emphasized that the claim in *Benedicto* did not involve a claim **against** the government but a claim **due to** the government. Hence, it cannot be invoked as a precedent.

Section 36 requires, as indispensable conditions for a compromise, that the claim is settled and the application for relief is submitted to Congress for approval with the recommendation of the COA and the President if the "settled claim" exceeds P100,000.00. The statutory conditions of (1) a settled claim and (2) Presidential endorsement and Congressional approval of the compromise depending on the amount of the claim are entrenched as mechanisms for ensuring public accountability and fiscal responsibility.

If a settled claim (*i.e.* a claim that has been adjudged valid and has been competently computed based on evidence) that exceeds P100,000.00 requires Presidential endorsement and Congressional approval, with more reason, an unsettled claim (*i.e.* one that is still of questionable validity or legality) of any amount should require Presidential endorsement and Congressional approval before it can be compromised. This is especially true in the case of a compromise of a supposed debt of the government to another party. It seems absurd that a compromise that will require a disbursement of public funds or property will not require Congressional approval when the Constitution and the law demand legislative

action and a public purpose before such a disbursement can be made.

To be sure, in the case of a compromise of an indebtedness **to** the government, there must be a reasonable and dependable benchmark by which to ascertain whether the amount of loss or waived receivables under the compromise is acceptable or justified.

The existence of a reliable benchmark of the liability to be paid is even more imperative in the case of a compromise of an indebtedness **of** the government because it entails a payment out of public funds or property. A judicial determination of the liability would be one such standard by which we can reasonably gauge if the compromise entered into by public officials is disadvantageous to the government or inimical to interests of the Filipino people.

The benchmark most certainly cannot be what the claimant asserts the government's liability to be. I simply cannot accept the reasoning that PNCC's entering into a compromise with Radstock for P6 Billion is advantageous to the government, since the purported claim amounted to approximately P17 Billion. For if Radstock is actually not entitled to a single centavo of its claim, then our government would have lost P6 Billion for nothing. It is my firm belief that a claim against the government must be proven, or otherwise settled with finality, before the whole claim or any part of it can be paid or compromised.

If this Court approves the compromise of an unsettled claim, then we will open the floodgates to even more suits of this sort. Predictably, that kind of permissive ruling will encourage parties to file flimsy or dubious claims against the government and unscrupulous government officials can compromise such claims even during the pendency of the case and without need of any approval from higher authority. To say that this would be an anomalous outcome would be an understatement. It is an abomination that the Court should not countenance or perpetuate.

We simply cannot apply to this case the statutory provisions on compromise of cases in ordinary civil or corporate litigation. We must consider the far-reaching public interests involved herein and the special laws or rules applicable to the expenditure or disposition of public funds or property, especially proscriptions against government guarantee of debts or obligations incurred for a private purpose. Public officers entering into a compromise of an "unsettled" indebtedness **of** the government, in the absence of a definite and categorical legal authority to do so, are assuming a heavy burden of justifying such compromise in order to avoid accusations of entering into a manifestly disadvantageous agreement on behalf of the government.

Finally, it should not escape this Court's notice that PNCC became a government owned or controlled corporation (GOCC) in the first place because it was indebted to the government. Instead of paying the government in cash, it settled its obligations in shares of stock. If we approve the Compromise Agreement, the government, who itself was a creditor of PNCC, will now in effect be paying PNCC's debts. Worse, one such debt was

not even an obligation of PNCC to begin with but of its affiliate, and was incurred at a time when both PNCC and the affiliate were private corporations. The strange circumstances surrounding PNCC's recognition of the said debt and the startling facility by which that debt was recognized by a PNCC official and then bought and sued upon by Radstock all arouse suspicion. I believe the Court is right to disapprove the Compromise Agreement and should allow all issues to be fully ventilated in the proceedings on merits.

There are still a number of important legal issues to be settled here, such as, the legal basis of a GOCC assuming the indebtedness incurred by a private entity for a private purpose, the validity of the enforcement of a guarantee by a GOCC of a private corporation's foreign debt which did not pass through the usual controls, restrictions, and the conditions imposed by law and the rules of the monetary authority for the validity of a government guarantee of such foreign borrowing or indebtedness considering the change in the situation of the parties, and so on.

I likewise cannot agree with the dissenting opinion that the Court, in *PNCC v. Dy*,[3] had already substantially denied PNCC's affirmative defenses, such as prescription, among others. Indeed, all the Court held in that earlier case was that the alleged errors of the trial court in its resolution of PNCC's Motion to Dismiss were not correctible by *certiorari* but this did not preclude PNCC from proving its affirmative defenses during trial. To quote the relevant portion of that decision:

> If error had been committed by the trial court, it was not of the character of grave abuse that relief through the extraordinary remedy of *certiorari* may be availed. **Indeed, the grounds relied upon by PNCC are matters that are better threshed out during the trial since they can only be considered after evidence has been adduced and weighed.**[4] (emphasis supplied)

Subject to the foregoing discussions, I agree with the conclusions reached in the *ponencia* of Justice Carpio and vote to (1) grant the petition in G.R. No. 180428 and (2) to set aside (a) PNCC Board Resolution Nos. BD-092-2000 and BD-099-2000 and (b) the Compromise Agreement for being null and void.

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[1] *Landbank of the Philippines v. Commission on Audit*, G.R. Nos. 89679-81, September 28, 1990, 190 SCRA 154; *The Alexandra Condominium Corporation v. Laguna Lake Development Authority*, G.R. No. 169228, September 11, 2009. See also, *Development Bank of the Philippines v. Court of Appeals*, G.R. No. 49410, January 26, 1989, 169 SCRA 409 (where the Court sustained the authority of DBP, as a government owned or controlled corporation, to compromise **claims due to the government**).

[2] G.R. Nos. 87710 and 96087, March 31, 1992, 207 SCRA 659.

[3] G.R. No. 156887, October 3, 2005, 472 SCRA 1.

[4] Id. at 9.
