

MANILA INTERNATIONAL AIRPORT AUTHORITY, PETITIONER, VS. COMMISSION ON AUDIT, RESPONDENT.

G.R. No. 218388. October 15, 2019

Ponente: BERSAMIN, C.J.

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BERSAMIN, C.J.:

A loan agreement executed in conjunction with an exchange of notes between the Republic of the Philippines and a foreign government shall be governed by international law, with the rule on *pacta sunt servanda* as the guiding principle. Any subsequent agreement adjunct to the loan agreement shall be similarly governed.

The Case

We consider and resolve the petition for certiorari brought to nullify and set aside Decision No. 2012-268 dated December 28, 2012[1] and Resolution dated January 26, 2015,[2] both issued in COA CP Case No. 2011-294, whereby respondent Commission on Audit (COA) affirmed Decision No. 2008-067 dated November 21, 2008 of the Legal and Adjudication Office (LAO)-Corporate[3] upholding Notice of Disallowance (ND) No. (FMT) 99-00-04 dated November 24, 1999[4] and Notice of Disallowance (ND) No. (FMT) 2008-018 dated November 21, 2008.[5]

Antecedents

The COA summarized the factual and procedural antecedents as follows:

As narrated in the assailed decision, the MIAA and the Aeroports de Paris-Japan Airport Consultants, Inc. Consortium (Consultant for brevity) entered into an Agreement for Consulting Services (Agreement for, brevity) for the NAIA Terminal 2 Development Project on April 15, 1994. The Agreement, covering 795 man-months of consulting services, commenced on July 1, 1994. It originally assumed a total duration of 53 months that included a 14-month post construction services up to November 30, 1998. The construction of the Project was originally estimated to take 26 months from August 1, 1995 to September 30, 1997, followed by a 12-month defect liability period.

However, the duration of the services was extended and the number of man-months increased, due to a prolonged process of pre-qualification, bidding and awarding stages; delayed Department of Environment and Natural Resources approval and Contractor's site possession, as well as numerous additional construction works.

The total duration of the consulting services was, thus, extended from 53 to 69 months or a total of 1,083.81 man-months. The extension was covered by three (3) Supplementary Agreements (SAs) entered into by the MIAA and the Consultant.

On November 24, 1999, the then Corporate Auditor of MIAA issued ND No. (FMT) 99-00-04 finding the Agreement's remuneration cost of P41,784,850.00 (excluding expatriates) excessive because it was 19.80% above the corresponding COA estimated remuneration cost of P34,876,915.00. Then General Manager Antonio P. Gana of MIAA in his undated letter to COA, requested reconsideration of the ND based on the

following grounds:

- That the cost of Consulting Services was obtained after detailed negotiations, embodied in an Agreement and the same was approved by the Office of the Government Corporate Counsel (OGCC) and concurred in by Japan Bank of International Cooperation (JBIC); and
- That under Section 9.3 of the NEDA Guidelines, the ceiling for contingency can be negated by any existing and future commitments with respect to the selection of consultants financed partly or wholly with funds from international financial institutions. Thus, considering that the consulting services were 100% funded by JBIC and in view of other previous JBIC projects, the 10% contingency was accepted by MIAA and the OGCC and concurred in by the JBIC; that the provision of the Overseas Economic Cooperation Fund (OECF) Loan Agreement should govern the expenditure of contingency and that the contingency is not a committed payment to the consultant upon execution of the Agreement, but may be used wholly or partially, or not at all depending on the circumstances.

Consequently, the MIAA Corporate Auditor referred, through the former Director of the then Corporate Audit Office (CAO) II, this Commission, the above request to the COA Technical Services Office (TSO), for further evaluation.

In the meantime, on January 25, 2000, MIAA and the Consultant entered into a fourth SA for the extension of another 8 months, for a total of 77 months or up to November 30, 2000. The corresponding number of professional man-months increased to 1,221.65.

The COA-TSO, in response to the request for reconsideration, conducted a re-evaluation of the Agreement and thereafter reversed its earlier stand on the excessive remuneration cost, but as regards to the issue of the contingency, the COA-TSO requested the then MIAA Corporate Auditor to validate the payments charged to contingency.

Thereafter, on August 17, 2000, the then MIAA Corporate Auditor lifted and settled the disallowed amount of P6,907,935.00 after the same was found reasonable based on the COA-TSO Re-evaluation Report dated June 29, 2000.

On October 18, 2001, the then MIAA Corporate Auditor re-submitted the request for reconsideration, together with the COA-TSO validation and opined that the sum of payments charged to contingency was within the ceiling equivalent to 5% of the amount of the contract as prescribed under the NEDA Guidelines. He stressed that of ¥1,493,497,905.00 and P113,061,248.01 actually paid by MIAA to the Consultant, ¥36,349,705.00 and P2,752,610.77 representing 2.49% and 2.495%, respectively, or a total of 4.985% of the contract cost was charged to contingency. Moreover, the then MIAA Corporate Auditor averred that all four SAs entered into by MIAA and the Consultant were reviewed and found in order as to their technical aspects by the COA-TSO.

Thereafter, pursuant to COA Memorandum No. 2002-039 dated July 11, 2002, the former Assistant Director of then Cluster IV-Industrial and Area Development and Regulatory, Corporate Government Sector (CGS), this Commission, forwarded the instant request to COA LAO--Corporate for appropriate action.

On November 21, 2008, COA LAO-Corporate issued the assailed decision denying the remaining disallowance of ¥53,697,150.00 foreign portion and P3,215,267.50 local portion under ND No. (FMT) 99-00-04 dated November 24, 1999.

It likewise issued the ND No. 2008-018 dated November 21, 2008 for the additional disallowance of ¥344,425,855.00 and P42,325,363.04 as mentioned in the decision.[6]

To assail the NDs, the petitioner appealed to the COA by petition for review, which ultimately denied the appeal

upon the following ratiocination, viz.:

The exemption mentioned in Section 9.3 of the NEDA Guidelines is only in respect to the selection of consultants and does not include exemption from the 5% ceiling on contingency. Also, a careful reading of Section 6.10 of the NEDA Guidelines would show that the 5% ceiling of contingency was written in a mandatory manner by the use of the verb "shall," to wit:

6.10 Contingency

6.10.1 Payments in respect of costs which would exceed the estimates set forth in Section 6.1 may be chargeable to the contingency amounts in the respective estimates only if such costs are approved by the agency concerned prior to its being incurred and provided, further, that they shall be used only in line with the unit rates and costs specified in the contract and in strict compliance with the project needs. Contingency amount shall not exceed 5% of the amount of the contract. (emphasis added)

It should be noted that the contingency amount is included in the contract cost for the purpose of facilitating the availability of funds for future requirements during the lifetime of the contract (e.g. per Section 2.04 of the Agreement, for performance of additional work to be covered by an SA). For such budgetary purposes, the NEDA Guidelines provide a ceiling of 5% of the Cost of Services.

It is shown that the total actual amount charged to the contingency and paid to the Consultant exceeded the 5% ceiling, thus:

Actual amounts disbursed for SA 1 to SA 4 and charged to contingency

Contingency amount per Agreement

5% Contingency limit per NEDA Guidelines

Excess amount disbursed

¥451,820,155.00

¥107,394,300.00

¥53,697,150.00

¥398,123,005.00

P48,755,898.04

P6,430,535.00

P3,215,267.50

P45,540,630.54

Petitioner's claim that the actual disbursements from the contingency amount were only ¥36,349,705.00 and P2,752,610.77 which are 2.49% and 2.495% of the Revised Cost of Services in Yen and Pesos, respectively, does not appear factual since he did not include the portion of the cost of the SA Nos. 1 to 4. It was made to appear that the remuneration cost and reimbursement cost for the extension were part of the original Cost of Services instead of the amount being charged to contingencies as provided for in Section 2.04 of the original Agreement for Consulting Services of the parties. Section 2.04 states that:

Extension of Services Under Supplemental Agreement

The Services of Consultant may be extended for the performance of additional work as provided for in Sections 7.05 and 7.07 hereof. For each extension of the Services, a supplemental agreement shall be executed stipulating the scope and remuneration for the extended services.

The terms and conditions of the additional services under the supplemental agreement shall be also governed by this Agreement. Remuneration to Consultant for the additional man-months shall be chargeable against Contingencies and shall be governed by the provisions of the Agreement. (emphasis added)

After having ruled that the Agreement is not exempted from the 5% ceiling on contingency prescribed by the NEDA Guidelines, and that in fact the amount expended out of the contingency exceeded the 5% ceiling in the amount already disallowed, there is no reason to overturn the assailed decision.

RULING:

IN VIEW OF THE FOREGOING, the petition for review is hereby DENIED. Accordingly, COA LAO-Corporate Decision No. 2008-067 dated November 21, 2008 is hereby SUSTAINED. Consequently, ND Nos. (FMT) 99-00-04 and 2008-018, dated November 24, 1999 and November 21, 2008, respectively are hereby AFFIRMED.[7]

The petitioner moved for reconsideration, but the COA denied the motion for reconsideration on January 26, 2015.[8]

Issues

The petitioner now submits the following grounds in support of its petition for certiorari, namely:

1)

Respondent Commission on Audit acted with grave abuse of discretion amounting to lack or excess of jurisdiction in sustaining COA-LAO Corporate Decision No. 2008-067 dated November 21, 2008, thereby affirming ND Nos. (FMT) 99-00-04 and 2008-018 dated November 24, 1999 and November 21, 2008 respectively.[9]

2)

Respondent Commission on Audit failed to establish the direct participation of the persons held liable in the disallowance, as well as their evident malice and bad faith in relation to the disallowed transaction.[10]

The petitioner argues that the COA gravely abused its discretion in sustaining Decision No. 2008-067;[11] that the Agreement for Consulting Services was financed by Loan Agreement No. PH-136 executed by and between the Government of the Philippines and the Overseas Economic Cooperation Fund (OECF), the implementing agency for loan aid of the Japanese Government;[12] that the loan agreement was equivalent to an executive agreement based on the ruling in *Abaya v. Ebdane* (G.R. No. 167919, February 14, 2007, 515 SCRA 720); that as an executive agreement, the loan agreement should control the determination of payments charged to contingency;[13] that the 5% ceiling for payments charged to contingency under the NEDA[14] Guidelines did not apply because the normal practice of international financial institutions was to provide a 10% contingency;[15] that the COA adjudged the officers personally liable for the disallowance without supplying any reasons for holding them personally liable;[16] and that the additional works and expenditures were incurred in good faith and utilized for legitimate purposes.[17]

The COA counters that the NEDA guidelines providing for the 5% contingency applied in the absence of any

provision in the agreement that the Philippine laws should not apply;[18] that the loan agreement involved herein did not mention of international laws, regulations or practices with respect to the payments of the consultants;[19] that the exemption under Section 9.3 of the NEDA Guidelines pertained only to the selection of consultants and did not include exemption from the 5% ceiling on contingency;[20] and that the petitioner's officials were held accountable for the government funds and property as the heads of agencies.[21]

Ruling of the Court

We find merit in the petition for certiorari.

Generally, deference is given by the Court to the decisions and resolutions of the COA as a matter of general policy, not only on the basis of the doctrine of separation of powers but also in recognition of the COA's expertise on the laws it was entrusted to enforce. The Court also acknowledges the role that the COA assumes as guardian of public funds and properties pursuant to the 1987 Constitution under which the COA has been granted exclusive authority to disallow irregular, unnecessary, excessive, extravagant, or unconscionable expenditures or uses of government funds and properties.[22] The Court may only intervene to correct an assailed decision or resolution when the COA, in the exercise of its authority, acted without or in excess of jurisdiction, or with grave abuse of discretion.[23]

Upon review of the records, we find and hold that the COA gravely abused its discretion in affirming and issuing the questioned NDs.

We expound.

This case involved six instruments, namely: (1) the Exchange of Notes dated August 16, 1993 entered into by and between the Government of the Philippines and the Government of Japan;[24] (2) the Loan Agreement No. PH-136 executed by and between the Government of the Philippines and the OECF;[25] (3) the Agreement for Consulting Services entered into by and between the petitioner and the ADP-JAC Consortium dated April 15, 1994; (4) the Supplemental Agreement No. 1 (December 1995) executed by and between the petitioner and the ADP-JAC Consortium;[26] (5) the Supplemental Agreement No. 2 (June 1998) entered into by and between the petitioner and the ADP-JAC Consortium;[27] and (6) the Supplemental Agreement No. 3 (September 1999) concluded by and between the petitioner and the ADP-JAC Consortium.[28]

The petitioner submits that following our ruling in *Abaya v. Ebdane*, supra, Loan Agreement No. PH-136 should be treated as an executive agreement, and, as such, the parties' intention as to how the payments would be charged to contingency should govern. On its part, the COA insists that the loan agreement did not carry any stipulation referencing the provisions to international law; hence, domestic law, particularly the NEDA Guidelines, should apply as to the 5% ceiling on contingency.

The submission of the petitioner is upheld.

Pursuant to the pronouncement in *Abaya v. Ebdane*, supra, a loan agreement executed in conjunction with the Exchange of Notes between the Philippine Government and a foreign government is an executive agreement, and should be governed by international law. This pronouncement has been consistently applied in succeeding rulings, including those in *DBM Procurement Service v. Kolonwel Trading*,[29] *Land Bank of the Philippines v. Atlanta Industries, Inc.*,[30] and *Mitsubishi Corporation-Manila Branch v. Commissioner of Internal Revenue*. [31]

Consequently, we see no justification to treat Loan Agreement No. PH-136 differently, particularly as its pre-ambular paragraph expressly made reference to the Exchange of Notes between the Philippines and Japan on August 16, 1993, to wit:

Loan Agreement No. PH-136, dated August 19, 1993, between THE OVERSEAS ECONOMIC COOPERATION FUND and THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES

In the light of the contents of the Exchange of Notes between the Government of Japan and the Government of the Republic of the Philippines dated August 16, 1993, concerning Japanese loans to be extended with a view to promoting the economic development and stabilization efforts of the Republic of the Philippines,

THE OVERSEAS ECONOMIC COOPERATION FUND (hereinafter referred to as "the Fund") and THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES (hereinafter referred to as "the Borrower") herewith conclude the following Loan Agreement (hereinafter referred to as "the Loan Agreement", which includes all agreements supplemental hereto).[32]

We point out that Loan Agreement No. PH-136, which financed the NAIA Terminal 2 Development Project, stemmed from the August 16, 1993 Exchange of Notes whereby the Government of Japan agreed to extend loans in favor of the Philippines to promote economic development and stability. Thusly, the loan agreement was the adjunct of the Exchange of Notes and should thus be treated as an executive agreement. In other words, international law should apply in the implementation and construction of the terms and conditions of Loan Agreement No. PH-136. Accordingly, the Philippine Government was bound to faithfully comply with the provisions of the loan agreements in accordance with the doctrine of *pacta sunt servanda*. Needless to indicate, the doctrine has been incorporated in the 1987 Constitution pursuant to Section 2 of its Article II, which declares:

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

Logically, the Agreement for Consulting Services (ACS) executed by and between the petitioner and the ADP-JAC Consortium, being a mere accessory of Loan Agreement No. PH-136, should likewise be treated as an executive agreement, and construed and interpreted in accordance with the doctrine of *pacta sunt servanda*. The Court elucidated on the nature of the intimate relationship between the principal loan agreement and the accessory agreement in *Land Bank of the Philippines v. Atlanta Industries, Inc.*, [33] opining:

As may be palpably observed, the terms and conditions of Loan Agreement No. 4833-PH, being a project-based and government- guaranteed loan facility, were incorporated and made part of the SLA that was subsequently entered into by Land Bank with the City Government of Iligan. Consequently, this means that the SLA cannot be treated as an independent and unrelated contract but as a conjunct of, or having a joint and simultaneous occurrence with, Loan Agreement No. 4833-PH. Its nature and consideration, being a mere accessory contract of Loan Agreement No. 4833-PH, are thus the same as that of its principal contract from which it receives life and without which it cannot exist as an independent contract. Indeed, the accessory follows the principal; and, concomitantly, accessory contracts should not be read independently of the main contract. Hence, as Land Bank correctly puts it, the SLA has attained indivisibility with the Loan Agreement and the Guarantee Agreement through the incorporation of each other's terms and conditions such that the character of one has likewise become the character of the other.[34]

A similar treatment should be extended to the three Supplemental Agreements entered into by the petitioner and the ADP-JAC Consortium.

Accordingly, the COA could not validly insist that the NEDA Guidelines, particularly that on applying a 5% interest on contingency, should find application because the contracting parties did not stipulate on the applicable law. The pronouncement in *Abaya v. Ebdane*, *supra*, and its progeny that international law applies in interpreting and implementing contracts executed in conjunction with executive agreements was controlling. No express stipulation by the contracting parties to that effect was necessary.

Having settled the issue of the governing law in interpreting and implementing the agreements, we next determine whether or not the COA properly disallowed the amounts disbursed for the additional man-months for the consulting services as provided in the supplemental agreements.

Let us first review the background on how the supplemental agreements came about, and look at the significance of each in the completion of the NAIA Terminal 2 Development Project.

The petitioner and ADP-JAC Consortium executed the ACS for the NAIA Terminal 2 Development Project on April 15, 1994. The ACS pertinently stipulated as follows:

Article II

SERVICES

x x x x

2.03

Estimated Man-Months

Notwithstanding any contrary provision herein, the parties hereto agree that Consultant shall perform the Services in accordance with the Work Plan contained in Annex C attached hereto and made an integral part hereof. For the performance of its obligation under this Agreement, Consultant shall render a total of seven hundred and ninety five (795) man-months of services in the Philippines, x x x x.

x x x x

x x x x

2.04

Extension of Services Under Supplemental Agreement

The Services of Consultant may be extended for the performance of additional work as provided in Sections 7.05 and 7.07 hereof. For each such extension of the Services, a supplement agreement shall be executed stipulating the scope and remuneration for the extended services.

The terms and conditions of the additional services under the supplemental agreement shall also be governed by this Agreement. Remuneration to Consultant for the additional man-months shall be chargeable against Contingencies and shall be governed by the provisions of the Agreement.[35]

ARTICLE IV

PAYMENTS TO CONSULTANT

x x x x

4.02.

Ceiling Amount

Except as may otherwise be agreed upon under Section 7.05 - Changes, and subject to Section 4.05 - Use of Contingency, and notwithstanding any other provision of this Agreement, payments due to Consultant under this Agreement shall not exceed Japanese Yen ONE BILLION ONE HUNDRED EIGHTY ONE MILLION

THREE HUNDRED THIRTY-SEVEN THOUSAND THREE HUNDRED (¥1,181,337,300) and Philippine Pesos ONE HUNDRED SEVEN MILLION THREE HUNDRED FORTY-TWO THOUSAND NINE HUNDRED SIX (P107,342,906).

The above ceiling amounts of payment shall comprise Japanese Yen ONE BILLION FORTY-ONE MILLION SIX HUNDRED SEVENTY-SEVEN THOUSAND SEVEN HUNDRED FIFTY (¥1,041,677,750) and Philippine Pesos SIXTY FOUR MILLION THREE HUNDRED FIVE THOUSAND THREE HUNDRED FIFTY (P64,305,350) as Total Cost of Services; x x x x; Japanese Yen ONE HUNDRED SEVEN MILLION THREE HUNDRED NINETY FOUR THOUSAND THREE HUNDRED (¥107,394,300) and Philippine Pesos SIX MILLION FOUR HUNDRED THIRTY THOUSAND FIVE HUNDRED THIRTY FIVE (P6,430,535) set aside for Contingencies; x x x x.

x x x x

x x x x

4.05

Use of Contingency Amount

Payments in respect of costs which exceeds the estimates set forth in Annex D hereof may be chargeable to the Contingency amounts in the respective estimates, provided that such costs are approved by MIAA and concurred by OECF prior to their being incurred, and provided further that they shall be paid only at the unit rates and costs specified in Annex D of the Agreement or such as amended and in strict compliance with the Project needs.[36]

x x x x

ARTICLE VII

GENERAL CONDITIONS

7.01

Laws of the Republic of the Philippines

The governing law of this Agreement shall be the laws of the Republic of the Philippines. Consultant and its Staff shall conform to all applicable laws of the Republic and shall take prompt corrective action with regard to any violation called to their attention.[37]

x x x x

7.07

Delay in Services

In the event that Consultant encounters delay in obtaining the required services or facilities under this Agreement, it shall promptly notify MIAA of such delay and may request an appropriate extension for completion of the Services.

In the event of delay caused by circumstances beyond the control of Consultant, an extension shall be granted by MIAA subject to the concurrence by OECF, and any additional costs incurred during the extension shall be expended out of the Contingency in accord with the procedures stipulated under Section 4.04 - Use of

Contingency Amount.[38]

x x x x

Owing to delays occasioned during the prequalification and bidding stages,[39] the parties entered into Supplemental Agreement No. 1, the relevant portions of which follow:

SUPPLEMENTARY AGREEMENT NO. 1 BETWEEN MANILA INTERNATIONAL AIRPORT AUTHORITY AND ADP-JAC CONSORTIUM

x x x x

WHEREAS, an Agreement for Consulting Services for the Terminal 2 Development Project of Ninoy Aquino International Airport, hereinafter referred to as the Project, was executed on 15 April 1994 at Manila, Philippines, by and between MIAA and the Consultant, said agreement hereinafter referred to as the Original Agreement;

x x x x

WHEREAS, the Consultancy Agreement allows, in its Clause 2.04, that Services of Consultant not covered under the Agreement to be extended through Supplementary Agreement.

WHEREAS, MIAA and the Consultant agreed on the extension of the period of the Consultants Services and the associated additional cost during the extended Pre-Construction period.

NOW, THEREFORE, for and in consideration of the foregoing premises and mutual covenants and undertakings hereinafter provided, the parties have agreed as follows:

ARTICLE II - SERVICES

Clause 2.03 - Estimated Man-Months

The revised total of man-months shall be 807.99 as specified in Attachment A.

x x x x

ARTICLE IV - PAYMENT TO CONSULTANT

x x x x

Clause 4.02 - Ceiling Amount

The ceiling Amount shall remain unchanged but the amounts comprising the Ceiling Amount shall be charged as follows:

Total cost of services:

Japanese Yen - One Billion, Seventy-Eight Million, Five Hundred and Twenty-Six Thousand and Fifty (¥1,078,526,050)

Philippine Peso - Sixty-Six Million, Three Hundred and Thirty-Two Thousand, Seven Hundred and Sixty-Five (P66,332,765)

x x x x

Contingency

Japanese Yen - Seventy Million, Five Hundred and Forty-Six Thousand (¥70,546,000)

Philippine Peso - Four Million, Four Hundred and Three Thousand, One Hundred and Twenty (P4,403,120)[40]

x x x x

The project still experienced additional delays from the belated issuance by the Department of Environment and Natural Resources (DENR) of tree cutting certificates and additional tree baling requirements, among others.[41] As a result, the parties had to execute Supplemental Agreement No. 2 in order to revise the man-months, as well as to adjust the total cost of services for the consulting services, viz.:

ARTICLE II - SERVICES

Clause 2.03 - Estimated Man-Months

The revised total of man-months shall be 893.23 as specified in Attachment A. x x x x

ARTICLE IV - PAYMENT TO CONSULTANT

x x x x

Clause 4.02 - Ceiling Amount

The ceiling Amount shall become:

Japanese Yen - One Billion, Three Hundred and Five Million, Seven Hundred and Seventy-nine Thousand Two Hundred (¥1,305,779,200)

Philippine Peso - Eighty-four Million, Eight Hundred and Seventy Thousand, Five Hundred and Eighty-nine and Thirty-one centavo (P84,870,589.31)

The above ceiling amounts of payment shall comprise Japanese Yen One Billion One Hundred Eighty-seven Million, Seventy-two Thousand (¥1,187,072,000) and Philippine Pesos Seventy Million, One Hundred and Forty Thousand, Nine Hundred and Eighty-two and Ninety Centavos (P70,140,982.90) as Total Cost of Services; Japanese Yen One Hundred and Eighteen Million, Seven Hundred and Seven Thousand, Two Hundred (¥118,707,200) and Philippine Peso Seven Million, Fourteen Thousand and Ninety-eight and Twenty-nine centavos (P7,014,098.29) set aside for Physical Contingency;[42] x x x.

x x x x

In view of the prior delays and extensions, the parties entered into Supplemental Agreement No. 3 to revise further the man-months and total cost of services, thusly:

ARTICLE II - SERVICES

Clause 2.03 - Estimated Man-Months

The revised total of man-months shall be 1083.81 as specified in Attachment A.

x x x x

ARTICLE IV - PAYMENT TO CONSULTANT

x x x x

Clause 4.02 - Ceiling Amount

The Ceiling Amount shall become:

Japanese Yen - One Billion, Three Hundred Seventy-Seven Million, Sixty Five Thousand Four Hundred Sixty Three (¥1,377,065,463)

Philippine Peso - One Hundred One Million, Nine Hundred Thirty-Eight Thousand, Seven Hundred Thirteen and Eight Six centavos (P101,938,713.86)

The above ceiling amounts shall comprise Japanese Yen One Billion Three Hundred Forty Three Million Four Hundred Seventy Eight Thousand Five Hundred (¥1,343,478,500) and Philippine Pesos Ninety Million Four Hundred Eleven Thousand Two Hundred Seventy Six and Fifteen Centavos (P90,411,276.15) as Total Cost of Services; Japanese Yen Thirty three Million, Five Hundred Eighty Six Thousand Nine Hundred Sixty Three (¥33,586,963) and Philippine Peso Two Million Two Hundred Sixty Thousand Two Hundred Eighty One and Ninety Centavos (P2,260,281.90) set aside for Contingency;[43] x x x x.

It appears, however, that in disallowing the disbursements for the additional man-months, the COA charged the disallowance against the contingency,[44] and thus concluded that the same exceeded the 5% ceiling (or ¥53 million and P3.2 million[45]) fixed under the NEDA Guidelines by ¥398 million and P45.5 million. Considering that ND No. (FMT) 99-00-44 only disallowed ¥53 million and P3.2 million, the COA ordered an additional disallowance of ¥344 million and P42 million to be charged against the liable officials of the petitioner.[46]

The Court finds the action of the COA not only erroneous but also in contravention of the doctrine of *pacta sunt servanda* and, most importantly, contrary to the intention of the parties in entering into the supplemental agreements.

To reiterate, the applicable law in interpreting and construing the agreements should be the canons of international law, particularly the doctrine of *pacta sunt servanda*. Yet, in affirming the NDs, the COA proposed that the Government negate its accession to the executive agreements without any valid justification. Obviously, this approach should not be adopted. In *Agustin v. Edu*,[47] we stressed that "[i]t is not for this country to repudiate a commitment to which it had pledged its word. The concept of *pacta sunt servanda* stands in the way of such an attitude, which is, moreover, at war with the principle of international morality."

Properly viewed, the petitioner and the ADP-JAC Consortium, by executing the supplemental agreements, intended to modify the original consultancy services agreement with respect to the estimated man-months in order to complete the project, and to institute the necessary adjustments in the total cost of services.[48] This is the only conclusion to be arrived at in view of the parties' choice of the word "revised" in Clause 2.03 found in each of the supplemental agreements[49] in their reference to the estimated total number of man-months corresponding to the delays incurred in the completion of the project. We reiterate the wise rule that the contemporaneous and subsequent acts of the parties should be considered in determining their intention.[50]

In revising the estimated man-months and total cost of services as contained in the supplemental agreements, therefore, the petitioner and the ADP-JAC Consortium intended to charge all additional man-months to the total cost of services, not against the contingency. Hence, only the extra man-months in excess of what had been finally agreed upon, and the unforeseen expenditures incurred by the parties in connection with the project should be charged against the contingency. In this regard, we remind that parties to a contract are not forever locked unto its terms, but have the right to amend their covenant by mutual consent. Thus, the parties to an existing contract may, by mutual assent, modify it, provided the modification does not contravene the law or public policy.[51]

We do not find anything irregular and unlawful in the manner that the petitioner and the ADP-JAC Consortium executed the supplemental agreements. For this purpose, we should uphold the right of the parties to alter any term of an existing contract by entering into a subsequent agreement, and the contract, as modified, becomes a new contract between the parties, and the meaning to be given the subsequent agreements depends on the intention of the parties.[52]

By going against the intention of the parties as to how the cost of man-months should be charged against, as well as the manner of charging items against contingency, and thus affirming the NDs, the COA contravened the Constitution and international law, and thereby gravely abused its discretion amounting to lack or excess of jurisdiction. By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be grave as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined by or to act at all in contemplation of law.[53] The burden is on the part of the petitioner to prove not merely reversible error, but grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the public respondent issuing the impugned order. Mere abuse of discretion is not enough; it must be grave.[54]

WHEREFORE, the Court GRANTS the petition for certiorari; and REVERSES and SETS ASIDE Decision No. 2012-268 dated December 28, 2012 and the Resolution dated January 26, 2015 by the Commission on Audit in COA CP Case No. 2011-294.

SO ORDERED.

Carpio, Peralta, Perlas-Bernabe, Caguioa, A. Reyes, Jr., Gesmundo, Hernando, Carandang, Lazaro-Javier, Inting, and Zalameda, JJ., concur.

Leonen, J., see separate opinion.

J. Reyes, Jr., J., on leave.

[1] Rollo (Vol. 1), pp. 36-41, issued by Chairperson Ma. Gracia M. Pulido Tan, Commissioner Juanito G. Espino, Jr. and Commissioner Heidi L. Mendoza.

[2] Id. at 43.

[3] Id. at 44-58.

[4] Id. at 59.

[5] Id. at 60-65.

[6] Id. at 36-38.

[7] Id. at 39-41.

[8] Id. at 43.

[9] Id. at 12.

[10] Id. at 19.

[11] Rollo (Vol. II), pp. 476-489

[12] Id. at 445.

[13] Id. at 448.

[14] National Economic Development Authority.

[15] Rollo (Vol. II), pp. 448-449.

[16] Id. at 451-461.

[17] Id. at 461-462.

[18] Id. at 634.

[19] Id. at 634-635.

[20] Id. at 639.

[21] Id. at 643-645.

[22] See Section 2 (2), Article IX, 1987 Constitution, which pertinently states:

x x x x

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.

[23] See *Miralles v. Commission on Audit*, G.R. No. 210571, September 19, 2017, 840 SCRA 108, 117.

[24] See page 1 of Loan Agreement No. PH-136 (rollo [Vol. I], p. 105).

[25] Rollo (Vol. I), pp. 103-138.

[26] Id. at 144-164.

[27] Id. at 165-181.

[28] Id. at 182-188.

[29] G.R. Nos. 175608, 175616 and 175659, June 8, 2007, 524 SCRA 591.

[30] G.R. No. 193796, July 2, 2014, 729 SCRA 12.

[31] G.R. No. 175772, June 5, 2017, 825 SCRA 332.

[32] See page 1 of Loan Agreement No. PH-136 (Rollo [Vol. I], p. 105).

[33] *Supra* note 30.

[34] Id. at 31-32;

[35] Rollo (Vol. I), pp. 73-74.

[36] Id. at 78-79.

[37] Id. at 93.

[38] Id. at 95.

[39] Id. at 145-147; see 5[th] to 17[th] Whereas clauses of Supplemental Agreement No. 1.

[40] Id. at 148-149.

[41] Id. at 166.

[42] Id. at 167.

[43] Rollo (Vol. I), p. 186. It appears also that because of the previous extensions that affected the commencement

of the later stages in the project, the parties also signed Supplemental Agreement No. 4 and agreed to cover the extension of another eight months for a total of 77 months or 1,221.65 man months.

[44] The COA arrived at the amount by extracting the difference between the actual payments made by the petitioner to ADP-JAC Consortium of ¥1.49 billion and P113 million and the ¥1.04 billion and P64 million original cost of services. The process arrived at ¥451 million and P48 million as actual additional total costs of services charged to contingency.

[45] 5% of the amount of the contract pursuant to Section 6.10 of the NEDA Guidelines.

[46] Amount of disallowance based on COA's framework:

Actual total cost of services paid

1,493,497,905.00

113,061,248.04

Less: Original total cost of services

(1,041,677,750.00)

(64,305,350.00)

Actual additional total cost of services charged
to "Contingency"

451,820,155.00

48,755,898.04

Less: Contingency ceiling per NEDA Guidelines

(53,697,150.00)

(3,215,267.50)

Amount charged in [excess of] the NEDA ceiling

398,123,005.00

45,540,630.54

Less: Amount disallowed under ND No. FMT 99-00-44

(53,697,150.00)

(3,215,267.50)

Additional disallowance

344,425,855.00

42,325,363.04

[47] G.R. No. L-49112, February 2, 1979, 88 SCRA 195.

[48] Based on Supplemental No. 4, the total cost of services from the original ¥1.04 billion and P64 million contained in the ACS increased to ¥1.46 billion and P110.3 million (See LAO Corporate Decision No. 2008-067, Rollo (Vol. I), p, 48.

[49] Rollo, p. 148. Supplemental Agreement No. 1. Clause 2.03 - Estimated Man-Months

The revised total man-months shall be 807.99 as specified in Attachment A.

[50] Article 1371, Civil Code.

[51] Am Jur 2d - Contracts § 496.

[52] Alarmax Distributors, Inc. v. New Canaan Alarm Co., Inc., 141 Conn. App. 319, 61 A.3d 1142, 80 U.C.C. Rep. Serv. 2d 258 (2013).

[53] United Coconut Planters Bank v. Looyuko, G.R. No. 156337, September 28, 2007, 534 SCRA 322, 331.

[54] Tan v. Antazo, G.R. No. 187208, February 23, 2011, 644 SCRA 337, 342.

SEPARATE OPINION

LEONEN, J.:

In this Petition for Certiorari^[1] under Rule 64 of the Rules of Court, the Manila International Airport Authority questions the Commission on Audit's ruling that disallowed added costs incurred in connection with an agreement for consultancy services for the Ninoy Aquino International Airport (NAIA) Terminal 2 Development Project.

On August 16, 1993, the Government of the Philippines and the Government of Japan entered into an Exchange of Notes, which led to the execution of Loan Agreement No. PH-136.^[2] Under this agreement, the Overseas Economic Cooperation Fund, the Japanese Government's implementing agency for loan aid, loaned amounts to the Philippine Government for the purchase of necessary and eligible goods and services to implement the NAIA Terminal 2 Development Project.^[3]

Among the service contracts entered into under Loan Agreement No. PH-136 was an agreement for consulting services (Consultancy Agreement) between the Manila International Airport Authority and the Aeroports de Paris-Japan Airport Consultants, Inc. Consortium (the Consultant).^[4] The Consultancy Agreement covered 795 man-months^[5] of consulting services with the total costs of around ¥1.04 billion and P64 million.^[6]

Due to delays in the project, the Manila International Airport Authority and the Consultant extended the Consultancy Agreement four (4) times through Supplementary Agreements,^[7] increasing the total man-months to 1,221.65 and the total costs of services to around ¥1.46 billion and P110.3 million.^[8]

Later, the Commission on Audit issued Notices of Disallowance, finding that because of the added costs under the four (4) Supplementary Agreements, the total amount paid to the Consultant exceeded the five percent (5%)

ceiling contingency limit provided under the National Economic and Development Authority Guidelines for the Procurement of Consultancy Services for Government Projects (NEDA Guidelines).[9]

The breakdown is as follows:

Japanese Yen (¥)

Philippine Peso (P)

Actual amounts disbursed for Supplementary Agreements 1-4 and charged to contingency

451,820,155.00

48,755,898.04

Contingency amount per Agreement

107,394,300.00

6,430,535.00

5% Contingency limit per NEDA Guidelines

53,697,150.00

3,215,267.50

Excess amount disbursed

398,123,005.00

45,540,630.54[10]

Before this Court, petitioner Manila International Airport Authority argues that the five percent (5%) ceiling for contingency payments under the NEDA Guidelines does not apply. It maintains that as an executive agreement, Loan Agreement No. PH-136 controls the determination of payments charged to contingency. Besides, it adds, it is normal practice for international financial institutions to provide a 10% contingency for services.[11]

The primary issue in this case is whether or not the added costs under the four (4) Supplementary Agreements should be charged as contingencies that are subject to the five percent (5%) ceiling under the NEDA Guidelines.

The ponencia ruled in petitioner's favor, finding that Loan Agreement No. PH-136 governs the payments, with the Consultancy Agreement and the Supplementary Agreements as mere accessory contracts.[12] It ruled that since Loan Agreement No. PH-136 is an executive agreement governed by international law, the Philippine Government cannot negate its concession to it without valid justification. Thus, applying the NEDA Guidelines instead of Loan Agreement No. PH-136 will be contrary to the doctrine of pacta sunt servanda and the intention of the parties.[13]

The ponencia also noted that parties have a right to amend their contract by mutual consent-as in this case, where two (2) parties entered into the Supplementary Agreements to modify the original Consultancy Agreement, such that the added costs of services are charged to the total cost of services, not to the contingency.[14] The ponencia maintained that the contingency fund is to be used only for the man-months in excess of what was agreed upon and unforeseen expenditures.[15]

I agree that Loan Agreement No. PH-136 is an executive agreement subject to the doctrine of pacta sunt servanda. However, I differ as to the characterization of the added costs provided in the Supplementary Agreements.

International law enters the sphere of Philippine domestic law because the 1987 Constitution provides two (2) ways by which the Philippines will be bound by it: (1) incorporation; and (2) transformation.[16]

Incorporation of international law is provided under Article II, Section 2 of the Constitution, which explicitly states that generally accepted principles of international law are binding in the Philippines:[17]

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

Transformation of international law is found in Article VII, Section 21 of the Constitution, which describes the process by which international agreements or treaties become part of the law of the land:[18]

SECTION 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

The transformation method was discussed in *David v. Senate Electoral Tribunal*:[19]

Treaties are "international agreement[s] concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Under Article VII, Section 21 of the 1987 Constitution, treaties require concurrence by the Senate before they become binding:

SECTION 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

The Senate's ratification of a treaty makes it legally effective and binding by transformation. It then has the force and effect of a statute enacted by Congress. In *Pharmaceutical and Health Care Association of the Philippines v. Duque III, et al.*:

Under the 1987 Constitution, international law can become part of the sphere of domestic law either by transformation or incorporation. The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.

Treaties become part of the law of the land through transformation pursuant to Article VII Section 21 of the Constitution. . . . Thus, treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts. . . .

Following ratification by the Senate, no further action, legislative or otherwise, is necessary. Thereafter, the whole of government - including the judiciary - is duty-bound to abide by the treaty, consistent with the maxim pacta sunt servanda.[20] (Emphasis in the original)

Senate concurrence is necessary before treaties and international agreements become binding as law. This is emphasized in the history of Article VII, 21 of the Constitution, as discussed in my separate concurring opinion in *Intellectual Property Association of the Philippines v. Ochoa*:[21]

Tracing the history of Article VII, Section 21 of the Constitution reveals, through the "[c]hanges or retention of language and syntax[.]" its congealed meaning. The pertinent constitutional provision has evolved into its current broad formulation to ensure that the power to enter into a binding international agreement is not concentrated on a single government department.

The 1935 Constitution recognized the President's power to enter into treaties. The exercise of this power was already limited by the requirement of legislative concurrence only with treaties, thus:

ARTICLE VII

EXECUTIVE DEPARTMENT

SECTION 11. . . .

. . . .

(7) The president shall have the power, with the concurrence of a majority of all the Members of the National Assembly to make treaties, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers, and consuls. He shall receive ambassadors and other ministers duly accredited to the Government of the Philippines. . . .

The 1973 Constitution also requires legislative concurrence for the validity and effectiveness of a treaty, thus:

ARTICLE VIII

THE NATIONAL ASSEMBLY

SECTION 14. (1) Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the National Assembly. . . .

The concurrence of the Batasang Pambansa was duly limited to treaties.

However, the first clause of this provision, "[e]xcept as otherwise provided[,]" leaves room for the exception to the requirement of legislative concurrence. Under Article XIV, Section 15 of the 1973 Constitution, requirements of national welfare and interest allow the President to enter into not only treaties but also international agreements without legislative concurrence, thus:

ARTICLE XIV

THE NATIONAL ECONOMY AND THE PATRIMONY OF THE NATION

. . . .

SECTION 15. Any provision of paragraph one, Section fourteen, Article Eight and of this Article notwithstanding, the Prime Minister may enter into international treaties or agreements as the national welfare and interest may require.

This Court, in the recent case of *Saguisag v. Executive Secretary*, characterized this exception as having "left a large margin of discretion that the President could use to bypass the Legislature altogether." This Court noted this as "a departure from the 1935 Constitution, which explicitly gave the President the power to enter into treaties only with the concurrence of the [National Assembly]."

As in the 1935 Constitution, this exception is no longer present in the current formulation of the provision. The power and responsibility to enter into treaties is now shared by the executive and legislative departments. Furthermore, the role of the legislative department is expanded to cover not only treaties but international agreements in general as well[.][22] (Emphasis in the original, citations omitted)

Senate concurrence is required to maintain a healthy system of checks and balances, such that the power is shared by the executive and legislative branches:

In discussing the power of the Senate to concur with treaties entered into by the President, this Court in *Bayan v. Zamora* remarked on the significance of this legislative power:

For the role of the Senate in relation to treaties is essentially legislative in character; the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed

agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act. In this sense, the Senate partakes a principal, yet delicate, role in keeping the principles of separation of powers and of checks and balances alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty -concurring power of the Senate, a healthy system of checks and balances indispensable toward our nation 's pursuit of political maturity and growth. True enough, rudimentary is the principle that matters pertaining to the wisdom of a legislative act are beyond the ambit and province of the courts to inquire.[23] (Emphasis in the original)

I likewise discussed that international agreements require Senate concurrence, especially if they involve political issues or national policies of a more permanent character:

Therefore, having an option does not necessarily mean absolute discretion on the choice of international agreement. There are certain national interest issues and policies covered by all sorts of international agreements, which may not be dealt with by the President alone. An interpretation that the executive has unlimited discretion to determine if an agreement requires senate concurrence not only runs counter to the principle of checks and balances; it may also render the constitutional requirement of senate concurrence meaningless[.]

Article VII, Section 21 does not limit the requirement of senate concurrence to treaties alone. It may cover other international agreements, including those classified as executive agreements, if: (1) they are more permanent in nature; (2) their purposes go beyond the executive function of carrying out national policies and traditions; and (3) they amend existing treaties or statutes.

As long as the subject matter of the agreement covers political issues and national policies of a more permanent character, the international agreement must be concurred in by the Senate.[24] (Emphasis supplied)

Nonetheless, there are exceptions to the requirement of Senate concurrence, one (1) of which is an executive agreement.

Executive agreements are "international agreements that pertain to mere adjustments of detail that carry out well-entrenched national policies and traditions in line with the functions of the Executive. It includes enforcement of existing and valid treaties where the provisions are clear. It involves arrangements that are of a temporary nature." [25] They do not amend existing treaties, statutes, or the Constitution.

In my opinion in *Saguisag v. Ochoa, Jr.*, [26] I differentiated an executive agreement from a treaty: [27]

[Article VII, Section 21 of the Constitution] covers both "treaty and international agreement." Treaties are traditionally understood as international agreements entered into between states or by states with international organizations with international legal personalities. The deliberate inclusion of the term "international agreement" is the subject of a number of academic discussions pertaining to foreign relations and international law. Its addition cannot be mere surplus. Certainly, Senate concurrence should cover more than treaties.

That the President may enter into international agreements as chief architect of the Philippines' foreign policy has long been acknowledged. However, whether an international agreement is to be regarded as a treaty or as an executive agreement depends on the subject matter covered by and the temporal nature of the agreement. *Commissioner of Customs v. Eastern Sea Trading* differentiated international agreements that require Senate concurrence from those that do not:

International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements. . . .

Indeed, the distinction made in Commissioner of Customs in terms of international agreements must be clarified depending on whether it is viewed from an international law or domestic law perspective. Dean Merlin M. Magallona summarizes the differences between the two perspectives:

From the standpoint of Philippine constitutional law, a treaty is to be distinguished from an executive agreement, as the Supreme Court has done in Commissioner of Customs v. Eastern Sea Trading where it declares that "the concurrence of [the Senate] is required by our fundamental law in the making of 'treaties' . . . which are, however, distinct and different from 'executive agreements,' which may be validly entered into without such concurrence."

Thus, the distinction rests on the application of Senate concurrence as a constitutional requirement.

However, from the standpoint of international law, no such distinction is drawn. Note that for purposes of the Vienna Convention on the Law of Treaties, in Article 2(1)(a) the term "treaty" is understood as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." . . . The Philippines is a party to the Convention which is already in force. In the use of the term "treaty," Article 2(1)(a) of the Vienna Convention on the Law of Treaties between States and International Organizations, which is not yet in force, the designation or appellation of the agreement also carries no legal significance. Provided the instruments possess the elements of an agreement under international law, they are to be taken equally as "treaty" without regard to the descriptive names by which they are designated, such as "protocol," "charter," "covenant," "exchange of notes," "modus vivendi," "convention," or "executive agreement."

. . . .

Under Article 2 (2) of the Vienna Convention on the Law of Treaties, in relation to Article 2 (1) (a), the designation and treatment given to an international agreement is subject to the treatment given by the internal law of the state party. Paragraph 2 of Article 2 specifically safeguards the states' usage of the terms "treaty" and "international agreement" under their internal laws.

Within the context of our Constitution, the requirement for Senate concurrence in Article VII, Section 21 of the Constitution connotes a special field of state policies, interests, and issues relating to foreign relations that the Executive cannot validly cover in an executive agreement:

As stated above, an executive agreement is outside the coverage of Article VII, Section 21 of the Constitution and hence not subject to Senate concurrence. However, the demarcation line between a treaty and an executive agreement as to the subject-matter or content of their coverage is ill-defined. The courts have not provided reliable guidelines as to the scope of executive-agreement authority in relation to treaty-making power.

If executive-agreement authority is un-contained, and if what may be the proper subject-matter of a treaty may also be included within the scope of executive-agreement power, the constitutional requirement of Senate concurrence could be rendered meaningless. The requirement could be circumvented by an expedient resort to executive agreement.

The definite provision for Senate concurrence in the Constitution indomitably signifies that there must be a regime of national interests, policies and problems which the Executive branch of the government cannot deal with in terms of foreign relations except through treaties concurred in by the Senate under Article VII, Section 21 of the Constitution. The problem is how to define that regime, i.e., that which is outside the scope of executive-agreement power of the President and which exclusively belongs to treaty-making as subject to Senate concurrence. . . .

Thus, Article VII, Section 21 may cover some but not all types of executive agreements. Definitely, the

determination of its coverage does not depend on the nomenclature assigned by the President.

Executive agreements are international agreements that pertain to mere adjustments of detail that carry out well-entrenched national policies and traditions in line with the functions of the Executive. It includes enforcement of existing and valid treaties where the provisions are clear. It involves arrangements that are of a temporary nature. More importantly, it does not amend existing treaties, statutes, or the Constitution.

In contrast, international agreements that are considered treaties under our Constitution involve key political issues or changes of national policy. These agreements are of a permanent character. It requires concurrence by at least two-thirds of all the members of the Senate.[28](Emphasis in the original, citations omitted)

The Philippine government is duty bound to abide by its international engagements in good faith, regardless of whether the engagement is characterized as incorporated or transformed international law or whether it takes the form of an international executive agreement. This is the principle of *pacta sunt servanda*.

Pacta sunt servanda, among "the oldest and most fundamental rules in international law[.]"[29] means that "international agreements must be performed in good faith[.]"[30] A state is expected to make the necessary modifications in its laws to ensure that its valid international obligations are fulfilled. In *Tañada v. Angara*:[31]

This Court notes and appreciates the ferocity and passion by which petitioners stressed their arguments on this issue. However, while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. Unquestionably, the Constitution did not envision a hermit-type isolation of the country from the rest of the world. In its Declaration of Principles and State Policies, the Constitution "adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity, with all nations." By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda*-international agreements must be performed in good faith. "A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties . . . A state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."

By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, the regulation of commercial relations, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. The sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations. As aptly put by John F. Kennedy, "Today, no nation can build its destiny alone. The age of self-sufficient nationalism is over. The age of interdependence is here."[32] (Emphasis in the original, citations omitted)

I agree that Loan Agreement No. PH-136 is an executive agreement. The circumstances by which it was executed are the same as those for the loan agreement in *Abaya v. Ebdane, Jr.*,[33] which this Court classified as an executive agreement. It held:

The petitioners' arguments fail to persuade. The Court holds that Loan Agreement No. PH-P204 taken in

conjunction with the Exchange of Notes dated December 27, 1999 between the Japanese Government and the Philippine Government is an executive agreement.

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

. . . Under the circumstances, the JBIC may well be considered an adjunct of the Japanese Government. Further, Loan Agreement No. PH- P204 is indubitably an integral part of the Exchange of Notes. It forms part of the Exchange of Notes such that it cannot be properly taken independent thereof.

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

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

It is stated that "treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi and exchange of notes" all refer to "international instruments binding at international law." It is further explained that -

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

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

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

negotiated with foreign governments.[34] (Emphasis in the original, citations omitted)

The same circumstances are present in this case. Japan's Overseas Economic Cooperation Fund and the Philippine Government entered into Loan Agreement No. PH-136 in light of the governments' Exchange of Notes concerning Japanese loans to promote the economic development and stabilization efforts of the Philippines.[35]

Thus, I agree that the Philippine Government is bound to comply with its stipulations in Loan Agreement No. PH-136, in accordance with the doctrine of *pacta sunt servanda*.

However, I differ as to the characterization of the added costs under the Supplementary Agreements. *Pacta sunt servanda* cannot simply be applied to these agreements at the expense of the express provisions in the Consultancy Agreement.

The Consultancy Agreement expressly states that it will be governed by Philippine law:

7.01

Laws of the Republic of the Philippines

The governing law of this Agreement shall be the laws of the Republic of the Philippines. Consultant and its Staff shall conform to all applicable laws of the Republic and shall take prompt corrective action with regard to any violation called to their attention.[36]

Unlike Loan Agreement No. PH-136, the Consultancy Agreement explicitly contains provisions for delays, extensions, and added costs of the consulting services. It provides that: (1) consulting services for additional work may be extended through supplemental agreements; (2) the Consultancy Agreement governs the terms and conditions of the additional services and payment to the Consultant for additional man-months under supplemental agreements; and (3) such payments shall be chargeable against contingencies. The pertinent provision states:

2.04

Extension of Services under Supplemental Agreement

The Services of Consultant may be extended for the performance of additional work as provided for in Sections 7.05 and 7.07 hereof. For each such extension of the Services, a supplemental agreement shall be executed stipulating the scope and remuneration for the extended services.

The terms and conditions of the additional services under the supplemental agreement shall be also governed by this Agreement. Remuneration to Consultant for the additional man-months shall be chargeable against Contingencies and shall be governed by the provisions of the Agreement.[37]

The Consultancy Agreement also expressly provides what are chargeable to the contingency amount:

4.05

Use of Contingency Amount

Payments in respect of costs which exceeds the estimates set forth in Annex D hereof may be chargeable to the Contingency amounts in the respective estimates, provided that such costs are approved by MIAA and concurred by OECF prior to their being incurred, and provided further that they shall be paid only at the unit rates and costs specified in Annex D of the Agreement or such as amended and in strict compliance with the Project needs.[38]

The contingency amount also covers additional costs incurred from possible extensions caused by delays due to

circumstances beyond the Consultant's control:

7.07

Delay in Services

In the event that Consultant encounters delay in obtaining the required services or facilities under this Agreement, it shall promptly notify MIAA of such delay and may request an appropriate extension for completion of the Services.

In the event of delay caused by circumstances beyond the control of Consultant, an extension shall be granted by MIAA subject to the concurrence by OECF, and any additional cost incurred by such extension shall be expended out of the Contingency in accordance with the procedures stipulated under Section 4.05 - Use of Contingency Amount.[39]

The Consultancy Agreement also provides for change in the services, which shall be subject to terms and conditions mutually accepted by petitioner and the Consultant:

7.05

Changes

MIAA may at any time, by written notice to Consultant, and subject to the concurrence of OECF where appropriate, issue additional instructions, require extra work or services, changes or alterations in the work, or direct the omission of works of Services covered by this Agreement. Any such change in the Services shall be subject to terms and conditions mutually acceptable to MIAA and Consultant.[40]

Under Article 1159 of the Civil Code, "[o]bligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith." Furthermore, under Article 1370, "[i]f the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control."

In this case, nothing in the Supplementary Agreements states that the added costs will be charged to the original costs of the contract. Neither were express amendments made to the Consultancy Agreement's provisions on extensions, delays, and contingencies.

It is clear, therefore, that the express provisions of the Consultancy Agreement govern the agreement of the parties. Consequently, per the Consultancy Agreement, the added costs under the Supplementary Agreements ought to be charged to the contingency fund.

Nonetheless, the Consultancy Agreement does not provide a five percent (5%) limit as to the amount that can be charged against the contingency fund. To reiterate, the provision states:

4.05

Use of Contingency Amount

Payments in respect of costs which exceeds the estimates set forth in Annex D hereof may be chargeable to the Contingency amounts in the respective estimates, provided that such costs are approved by MIAA and concurred by OECF prior to their being incurred, and provided further that they shall be paid only at the unit rates and costs specified in Annex D of the Agreement or such as amended and in strict compliance with the Project needs.[41]

The five percent (5%) limit on contingency is provided only in Section 6.10 of the NEDA Guidelines:

6.10.1 Payments in respect of costs which would exceed the estimates set forth in Section 6.1 may be chargeable to the contingency amounts in the respective estimates only if such costs are approved by the agency concerned prior to its being incurred and provided, further, that they shall be used only in line with the unit rates and costs specified in the contract and in strict compliance with the project needs. Contingency amount shall not exceed 5% of the amount of the contract.[42]

It is, thus, critical to determine whether this restriction in the NEDA Guidelines applies to the Consultancy Agreement.

Section 9.3 of the NEDA Guidelines states:

The above notwithstanding, these IRR shall not negate any existing and future commitments with respect to the selection of Consultants financed partly or wholly with funds from international financial institutions, as well as from bilateral and other similar sources as stipulated in the corresponding agreements with such institutions/sources.[43]

The Consultancy Agreement in this case involves the hiring of consultants for the NAIA Terminal 2 Development Project. It is financed by the loan from the Overseas Economic Cooperation Fund of Japan under Loan Agreement No. PH-136. Thus, the NEDA Guidelines cannot negate any commitments under Loan Agreement No. PH-136 with respect to the selection of consultants.

Thus, I affirm that the Consultancy Agreement is a conjunct of, or has a joint and simultaneous occurrence with, Loan Agreement No. PH-136. It is not completely unrelated to or independent of the other. The whereas clauses of the Consultancy Agreement state:

WHEREAS, MIAA desires to implement the Terminal 2 Development Project of Ninoy Aquino International Airport, hereinafter referred to as the "Project":

WHEREAS, the Overseas Economic Cooperation Fund (OECF) of Japan has extended a loan (OECF Loan Agreement No. PH-136) to MIAA for the purpose;

WHEREAS, [Aéroports de Paris] has successfully completed the engineering design of the Terminal 2 under the French loan assistance program;

WHEREAS, the implementation of the Project requires competent consulting services for additional study, assistance in bidding, construction management and post construction services;

WHEREAS, [Aéroports de Paris] and [Japan Airports Consultants, Inc.] are willing to work together as an ad hoc association named ADP-JAC CONSORTIUM, and jointly represent that they are qualified, desirous and willing to render such consulting services;

WHEREAS, both [Aéroports de Paris] and [Japan Airports Consultants, Inc.] declare that they shall be jointly and severally responsible for the services of the Project and that [Aéroports de Paris] shall act as a leader of Consultant; and further that, as such leader, shall be solely and fully responsible for any document which [Aéroports de Paris] previously made and submitted to MIAA prior to the formation of the consortium and which is related to the detailed architectural and engineering design contract for NAIA Terminal 2;

WHEREAS, MIAA has agreed to engage Consultant for the consulting services for the Project and OECF has concurred with such intention of MIAA;

WHEREAS, Consultant represents that it has made arrangements to associate itself, in undertaking the Services covered under this Agreement, with four (4) local firms acting as local sub-consultants[.][44] (Emphasis supplied)

The Consultancy Agreement arose from the commitments under Loan Agreement No. PH-136 as to the selection

of consultants. Included in these commitments is the procurement procedure under Loan Agreement No. PH-136, which states that the employment of consultants shall be in accordance with the 1987 Guidelines for the Employment of Consultants by OECF Borrowers.[45] The procedure provides:

Procurement Procedure

Section 1. Guidelines to be used for procurement under the Loan

....

(2) Employment of consultants to be financed out of the proceeds of the Loan shall be in accordance with Guidelines for the Employment of Consultants by OECF Borrowers dated November, 1987[.][46]

According to respondent Commission on Audit, the 1987 Guidelines for the Employment of Consultants by OECF Borrowers simply provided that the consultancy contract should include an amount set aside for contingencies, such as unforeseen work and rising costs:

Similarly, the JBIC (formerly [Overseas Economic Cooperation Fund]) Guidelines on the hiring of consultants contains no provision negating or exempting the process of selection and hiring of consultant in the case at bar from the ceiling for contingency prescribed under the NEDA Guidelines. Section 4.07(5) of the Consultant Guidelines relative to contingency merely stipulates that the contract should normally include an amount set aside for contingencies, such as work not foreseen and rising costs, which the consultant may not use, however, without the written approval of the Borrower.[47] (Emphasis supplied)

From this alone, however, it cannot be interpreted that the five percent (5%) contingency ceiling under the NEDA Guidelines applies.

I note that respondent also stated that under the Terms of Reference, the parties agreed to be bound by the NEDA Guidelines:

Likewise, it bears stressing that the TOR, an integral part of the Agreement, stipulates under Item I.2 thereof, the adoption of the OECF as well as NEDA Guidelines in the procurement of consultants in the instant case; made no mention that the ceiling for contingency prescribed under the NEDA Guidelines shall not be applied.[48]

Indeed, under Article 1.01 of the Consultancy Agreement, the parties agreed that the Terms of Reference is an integral part of the Consultancy Agreement:

1.01

Agreement - means this contract for consulting services for the Project between MIAA and ADP and JAC working together, including Annexes A, B, C and D as listed hereunder and forming an integral part hereof:

Annex A Terms of Reference

Annex B Consortium Documentation

Annex C Technical Description

Annex D Agreed Cost Breakdown[49]

However, the parties presented no copies of the Terms of Reference, the NEDA Guidelines, or the Overseas Economic Cooperation Fund Guidelines[50] in any of its pleadings before this Court. The case records must first be elevated and fully examined to intelligently rule on the matter, considering the large amounts involved in this case.

ACCORDINGLY, I CONCUR that the Philippine Government is bound to comply with Loan Agreement No. PH-136, in accordance with the doctrine of pacta sunt servanda. However, I opine that the added costs under the Supplementary Agreements ought to be charged to the contingency fund. As to the limit that may be charged to contingency, I vote to ELEVATE the records of this case before it is resolved.

[1] Rollo, pp. 438-467.

[2] Ponencia, p. 7

[3] Id. at 6-7.

[4] Id. at 2. The contract was executed on April 15, 1994.

[5] Under the Agreement for Consulting Services, a man-month of service means "services rendered by one person for a period of one (1) calendar month consisting of an average of 176 working hours." See rollo, p. 74.

[6] Ponencia, p. 11.

[7] Rollo, pp. 37-38.

[8] Ponencia, pp. 2-3 and 15, and rollo, p. 48.

[9] Id. at 4-5. See also rollo, p. 44 for NEDA Guidelines' full name.

[10] See rollo, p. 40.

[11] Ponencia, p. 6.

[12] Id. at 8-9.

[13] Id. at 16.

[14] Id. at 16-17.

[15] Id. at 17.

[16] See *David v. Senate Electoral Tribunal*, 795 Phil. 529 (2016) [Per J. Leonen, En Banc].

[17] See *Tañada v. Angara*, 338 Phil. 546 (1997) [Per J. Panganiban, En Banc].

[18] See *David v. Senate Electoral Tribunal*, 795 Phil. 529 (2016) [Per J. Leonen, En Banc].

[19] Id.

[20] Id. at 614-615 citing *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, 561 Phil. 386 (2007) [Per J. Austria-Martinez, En Banc].

[21] 790 Phil. 276 (2016) [Per J. Bersamin, En Banc].

[22] Id. at 343-345.

[23] Id. at 345.

[24] Id. at 345-346.

[25] J. Leonen, Dissenting Opinion in *Saguisag v. Ochoa, Jr.*, 777 Phil. 280, 648 (2016) [Per C.J. Sereno, En Banc].

[26] 777 Phil. 280 (2016) [Per C.J. Sereno, En Banc].

[27] Id. at 648. In this case, this Court ruled that the Enhanced Defense Cooperation Agreement, signed by the Secretary of Defense and the Ambassador of the United States, was an executive agreement not subject to the concurrence of the Senate. I dissented and opined that it is a "formal and official memorial of the results of the negotiations" between the Republic of the Philippines and the United States of America as concerning the allowance of United States military bases, troops, or facilities in the Philippines, "which is NOT EFFECTIVE until it complies with the requisites of Article XVIII, Section 25 of the 1987 Philippine Constitution, namely: (1) that the agreement must be in the form of a treaty; (2) that the treaty must be duly concurred in by the Philippine Senate and, when so required by Congress, ratified by a majority of votes cast by the people in a national referendum; and (3) that the agreement is either (a) recognized as a treaty or (b) accepted or acknowledged as a treaty by the United States before it becomes valid, binding, and effective." See 777 Phil. 280, 699 (2016) [Per C.J. Sereno, En Banc].

[28] Id. at 643-648.

[29] Tañada v. Angara, 338 Phil. 546, 592 (1997) [Per J. Panganiban, En Banc].

[30] Id.

[31] 338 Phil. 546 (1997) [Per J. Panganiban, En Banc].

[32] Id. at 591-593.

[33] 544 Phil. 645 (2007) [Per J. Callejo, Sr., Third Division].

[34] Id. at 689-692.

[35] Rollo, p. 106.

[36] Id. at 93.

[37] Id. at 74.

[38] Id. at 79.

[39] Id. at 95.

[40] Id. at 94.

[41] Rollo, p. 79.

[42] Id. at 40.

[43] Id. at 39.

[44] Id. at 70-71.

[45] Id. at 116.

[46] Id.

[47] Id. at 52. The COA-LAO Decision dated November 2, 2008 was penned by Director IV Janet D. Nacion of the COA Legal & Adjudication Office - Corporate.

[48] Id.

[49] Id. at 71.

[50] This possibly refers to the 1987 Guidelines for the Employment of Consultants by OECF Borrowers.

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