Procurement of Foreign-Funded Projects Through Executive Agreements as Potential Sources of Corruption in Government: Going Beyond the Case of Abaya vs. Ebdane

Myrish T. Cadapan-Antonio[1]
Ramon Antonio de Asis Ruperto[2]
Silliman University College of Law

The enactment of the first comprehensive law on public procurement in the Philippines, Republic Act No. 9184, was regarded as a significant feat to the fight against corruption. Only five years after its enactment and while the Implementing Rules on foreign-assisted projects is still being formulated, a public procurement scandal erupted involving key government officials including the President herself and the First Gentleman. This infamous NBN-ZTE scandal was exposed shortly after the Philippine Supreme Court decided the case entitled Abaya vs. Ebdane which exempted procurement contracts made through executive agreement from the realm of RA 9184. During the Senate investigation of the controversy, reference to Abaya vs. Ebdane was numerously made. This jurisprudence and the said usage in this scandal creates legal and moral issues that the authors wish to dissect in the hope of awakening significant policy initiatives related thereto.

KEYWORDS: transparency, public procurement, contracts governed by executive agreements, potential sources of corruption, policy initiatives, Senate inquiry, exempt from Senate concurrence, overprice

INTRODUCTION

"The accomplice to the crime of corruption
is frequently our own indifference."

Bess Myerson

Over the past few years, allegations of corruption have been hounding our country. Corruption scandals involving prominent figures in the government have become common. Consequently, the Philippines has been cited as one of the most corrupt nations in Asia.[3]

In the country, corruption is usually seen in relation to government contracts, more specifically those involving public procurement.[4] The prevalence of this kind of corruption can be traced to the government's function of purchasing supplies, infrastructure and consulting services to fulfill its mandate of providing goods and services to the public. This kind of corruption has allegedly become a practice among contractors for certain government agencies where procurement is a routine event, even to the extent of attaining a fixed markup over costs.[5] The law applicable then was Executive Order No. 40.[6]

Admitting the defects of our government procurement system, Republic Act No. 9184 (RA 9184), known as the Government Procurement Reforms Act[7], was enacted on January 26, 2003, with the primary goal of curbing corruption. The law was intended to streamline all government procurement and had as guiding principles: transparency, competitiveness, a streamlined procurement process, system of accountability, and public monitoring.[8]

On paper, the law seems praiseworthy. However, the National Broadband Network-ZTE controversy investigated by the Philippine Senate last year has brought into attention some inconsistencies in the law, more specifically as regards the applicability of RA 9184 to the procurement of projects coming from foreign funding under an executive agreement. During one of the Senate hearings[9], reference to "Abaya vs. Ebdane" was mentioned more than once. The said case involves a Supreme Court decision[10] which judgment in part indicated that a contract purporting to be a result of an executive agreement is exempt from the bidding requirements of RA 9184. The implication of that ruling is significant in the NBN-ZTE controversy

since government officials involved in the deal insist that the ZTE contract is part of an executive agreement, and thus, not subject to public bidding under the procurement law.

This paper examines the implications and possible repercussions of the doctrine laid down by the Court in the case of Abaya vs. Ebdane on future government projects involving foreign funding through executive agreements. It is the authors' theory that the ruling in the case, unless timely modified or at least clarified, could be abused by unscrupulous executive officials who may have their own interpretations to give way to their selfish interests. Clothing foreign loans in the guise of executive agreements (which some of our leaders posit are valid even without Senate concurrence) in order to take them out of the realm of RA 9184, will most likely propagate, rather than prevent, corruption.

THE CASE OF ABAYA VS. EBDANE[11]

Facts of the Case

Based on an agreement between the Governments of Japan and the Philippines, as expressed in the Exchange of Notes between their representatives, the Philippines was able to obtain from the Japan Bank of International Cooperation (JBIC) a loan to finance a road project. The Department of Public Works and Highways (DPWH), the agency tasked to implement the project, published the Invitation to Prequalify and to Bid for the implementation of the project on November and December, 2002. Meanwhile, on January 26, 2003, RA 9184 took effect.

Of the contractors who responded to the invitation, eight were considered eligible to bid in accordance with the established prequalification criteria as concurred by the JBIC. Prior to the opening of the respective bid proposals, it was announced that the Approved Budget for the Contract (ABC) was in the amount of Seven Hundred Thirty-Eight Million Pesos (738,000,000 Php).

Private respondent China Road & Bridge Corporation (CRBC) was the lowest complying bidder with its proposal of P952 million or higher than the ABC. Thus, the DPWH issued a resolution recommending the award of the contract in favor of CRBC. Subsequently, a Contract of Agreement was entered into by and between the DPWH and CRBC for the implementation of the project.

Petitioners, as taxpayers, filed a suit seeking to nullify the DPWH resolution and to annul the contract of agreement for allegedly violating RA 9184. They invoked Section 31[12] of the said law which provides that bid prices exceeding the ABC shall be **disqualified** outright from participating in the bidding. *Since the bid of private respondent exceeded the ABC by more than P200 million, they should have been disqualified.* Consequently, the petitioners contended that the resolution was issued with grave abuse of discretion and the contract should be deemed void.

In arguing that RA 9184 was applicable, they reasoned out that while the loan agreement was executed prior thereto, the actual procurement or award of the contract was done after the effectivity of RA 9184.

On the other hand, the respondents argued that RA 9184 cannot be applied since the loan agreement was executed prior to the effectivity of said law. They added that the Invitation to Prequalify and to Bid was published before the effectivity of RA 9184.

They further characterized the loan agreement as an executive agreement and should be observed pursuant to the fundamental principle in international law of *pacta sunt servanda*.[13]

Respondents insisted that it is the prior law governing government purchases, Executive Order No. 40[14], and not RA 9184, that should be applied. Under EO 40, the procurement should be governed by the terms and conditions of the loan agreement. Hence, the JBIC Procurement Guidelines, which prohibit the setting of ceilings on bid prices, should apply.

Respondents also invoked Memorandum Circular No. 108 which provides that in projects supported in whole or in part by foreign assistance awarded through international or local competitive bidding, when the loan/grant agreement so stipulates, the government agency concerned may award the contract to the lowest bidder even if his/its bid exceeds the approved agency estimate.

THE NBN-ZTE CONTROVERSY

The NBN-ZTE controversy involved allegations of corruption in the awarding of a multi-million dollar construction contract to Chinese telecommunications firm ZTE for the proposed government-managed National Broadband Network (NBN) that would improve government communications capabilities.

On 20 April 2007, Department of Transportation and Communications (DOTC) Secretary Leandro Mendoza and ZTE Vice President Yu Yong entered into a US$329.5 million contract for the NBN. The said contract was alleged to be grossly overpriced based on controversial information from Jose 'Joey' de Venecia III that First Gentleman Mike Arroyo received $70M and NEDA Secretary Romulo Neri $200M in alleged bribe money. When the controversy broke out, the government was quick to reason that the contract was subject of an executive agreement which under the case of Abaya vs. Ebdane, must be complied with in good faith.

Following the rise of additional irregularities, President Gloria Macapagal-Arroyo cancelled the project in October 2007. On July 14, 2008, the Supreme Court dismissed all petitions questioning the constitutionality of the NBN-ZTE agreement, saying the petitions became moot when the project was cancelled.[15]

The Abaya vs. Ebdane case was decided before the NBN-ZTE controversy, however, the case was brought up several times during the Senate investigation of said controversy.[16]

Supreme Court's Ruling in Abaya

The bone of contention is the applicability of RA 9184 to the project in the case at bar in particular and to foreign-funded government projects in general.

The Supreme Court affirmed the stand of the respondents and held that the assailed resolution and the subsequent contract were valid since EO 40, not RA 9184, was the applicable law.

1. RA 9184 cannot be given retroactive application.

The Court noted that the Invitation to Prequalify and to Bid for the implementation of the project was published in two leading national newspapers before the effectivity of RA 9184. Thus, at that time, the law in effect was still EO 40. The Court held that RA 9184 cannot be applied retroactively because it is well-settled that a law or regulation has no retroactive application unless it expressly provides for retroactivity.[17]

Moreover, under the implementing rules (IRR-A)[18] of said law[19]:

In all procurement activities, if the advertisement or invitation for bids was issued prior to the effectivity of the Act, the provisions of EO 40 and its IRR, PD 1594 and its

IRR, RA 7160 and its IRR, or other applicable laws, as the case may be, shall govern. xxx.

2. The award of the contract to private respondent was valid under EO 40.

Like RA 9184[20], Section 25 of EO 40 also provides that bid prices which exceed the ABC shall be disqualified from further participating in the bidding. However, EO 40 also expressly recognizes as an exception to its scope and application those government commitments with respect to bidding and award of contracts financed partly or wholly with funds from international financing institutions as well as from bilateral and other similar foreign sources.[21]

Moreover, Section 4 of RA No. 4860[22] provides that in such cases, "the method and procedure in the comparison of bids shall be the subject to the agreement between the Philippine Government and the lending institution." Thus, the procurement of goods and services for the project in the case at bar is governed by the loan agreement entered into by the government and the JBIC. Said loan agreement stipulated that the procurement is to be governed by the JBIC Procurement Guidelines, which in turn, provides that any procedure under which bids above or below a predetermined bid value assessment are automatically disqualified is not permitted[23] or to state simply, no bid ceilings shall be imposed. Hence, what will matter is simply the pronouncement of the lowest bid as the winning bidder.

Consequently, since these terms form part of the loan agreement, the government should observe the same. Hence, private respondent's bid, although significantly higher than the ABC, was nevertheless the lowest evaluated bid.

3. The JBIC Guidelines of the loan agreement govern the procurement.

At any rate, even if RA 9184 were to be applied retroactively, the Court held that the terms of the Exchange of Notes and Loan Agreement would still govern the procurement. Such terms are embodied in the JBIC Procurements Guidelines.

In support of this, it cited Section 4 of RA 9184, which provides that any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.

The JBIC Procurements Guidelines forbids any procedure under which bids above or below a predetermined bid value assessment are

automatically disqualified. Otherwise stated, it absolutely prohibits the imposition of ceilings on bids.

4. The loan agreement taken in conjunction with the Exchange of Notes between the Japanese Government and the Philippine Government is an executive agreement.

The petitioners asserted that the loan agreement was neither a treaty, an international agreement nor an executive agreement. They argued that the parties to it were the Philippine Government and JBIC, a private entity which has a separate juridical personality from the Japanese Government.

However, the Supreme Court ruled that the loan agreement was pursuant to the Exchange of Notes executed by and between the Ambassador of Japan to the Philippines, and then Foreign Affairs Secretary Siazon, in behalf of their respective governments. The loan agreement was an integral part of the Exchange of Notes as it cannot be properly taken independent thereof. Under international law, 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.[24]

ANALYSIS

It is important to note that the ruling of the Supreme Court in *Abaya* found RA 9184 inapplicable to the project primarily because the Invitation to Prequalify and to Bid for its implementation was conducted prior to the effectivity of said law. In the case, the Supreme Court further enunciated that even if such law was applied retroactively, it would still be the terms of the loan agreement—the JBIC guidelines that is, and not RA 9184, that would govern. This ruling seems to connote that RA 9184 will not cover procurement of goods, services or infrastructure for foreign-funded projects subject to international executive agreements.

This same theory in *Abaya* was also mentioned in a subsequent decision, DBM-PS vs. Kolonwel Trading[25:]

Under the fundamental international principle of pacta sunt servanda, the RP, as borrower bound itself to perform in good faith the duties and obligations under Loan No. 7118-PH. Applying this postulate, the DBM IABAC, was legally obliged to comply with, or accord primacy to the WB guidelines on the conduct and implementation of

the bidding/procurement process in question.

Foreign loan agreements with international financial institutions, such as Loan No. 7118-PH, partake of an executive or international agreement within the purview of Sec. 4 of RA 9184. Significantly, whatever was stipulated in the loan agreement, shall primarily govern the procurement of goods necessary to implement the main project.

A similar assertion was made by Justice Secretary Raul Gonzales, who said that executive agreements do not fall under RA 9184 requiring all procurement activities be made through public bidding.[26]

These pronouncements by the Supreme Court and a significant member of the Executive Department will render for naught the application of the Procurement Reform Law for projects assisted by foreign loans and subject of international agreements. While the law expressly provides that RA 9184 shall apply to the "procurement of infrastructure projects, goods and consulting services, regardless of source of funds, whether local of foreign," there also includes a provision[27] which indicates that "any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is signatory shall be observed." So the crux of the matter is, does RA 9184 give more significance to international agreements over protection of its sovereignty in domestic transactions?

The dilemma here is that most foreign loans are contracted through international agreements, usually in the form of executive agreements. While certainly this would seem to be the usual way of procuring assistance for procurements especially of infrastructure projects, the inconsistency in the law will give ample allowance for government to simply invoke the defense that the transaction was subject of an executive agreement to escape from the constitutional requirements of Senate concurrence and further, from coverage of RA 9184. This was the predicament in the ZTE controversy.

Our jurisprudence has long recognized the validity of executive agreements.[28] The power of the president to contract foreign loans is also provided by the Constitution.[29]

Without subjecting it to the requirements of RA 9184 such as competitive bidding and no procurement higher than the ABC, there is a risk that foreign-funded projects will not be negotiated in accordance with what is best for the Filipino people at reasonable cost. In the *Abaya* case, the procurement of more than P200M higher than the agency's budget was declared valid. The P200M difference could already have gone into other programs of government instead of just one highway! Add the fact that such may be shielded from the

check-and-balance power of the Senate by covering the transaction under the mantle of an executive agreement, it will then seem that the people are robbed of an adequate scrutiny into how precious public funds are spent.

Then again, if the law allows, what elbow room does one have to question the transaction?

RECOMMENDATIONS

Limit the scope of executive agreements

As mentioned earlier, the authority of the president to enter into executive agreements does not necessitate the agreement or concurrence of the Senate. In Commissioner of Customs vs. Eastern Sea Trading[30], it was held that while concurrence of Senate is required in treaties, the same is distinct from executive agreements, which may be validly entered into without such agreement. Executive Order 459 issued by then President Fidel V. Ramos defines an executive agreement as one similar to treaties except that it does not require legislative concurrence.[31]

To distinguish treaties from executive agreements, the Court held in that case that while treaties generally refer to basic political issues, changes in national policy and permanent international arrangements, executive agreements, which do not require such concurrence, refer to adjustments of detail carrying out well-established national policies, and temporary arrangements.

Those attempts to delineate the scope of executive privilege would seem insufficient. To cite an example, is the contracting of foreign loans to fund a local project within the coverage of executive agreement? The government officials involved in the ZTE controversy would like to think so. However, herein authors beg to disagree.

It is posited that such an undertaking involving a monumental amount of public funds ($329 million in the case of the proposed ZTE deal) should be subjected to the checks-and-balances of our government system. One such process is Senate approval. It would then be logical to say that executive agreements should be subjected to Senate concurrence. In fact, a pending bill in the Senate by Sen. Miriam Defensor Santiago proposes just that.[32]

It is important to note that while funding may come from a foreign source, it is still very much a loan—to be shouldered by the

government through taxpayers' money in the years to come. These large disbursements of public funds should pass through the most stringent inspection. Thus, these agreements should be scrutinized thoroughly to determine its viability.

It would seem, however, that the greater problem with executive agreements is the lack of transparency. Indeed, prior to the Senate inquiry, details of the ZTE deal were practically unknown. Similarly, several other executive agreements were kept out of the public's eye until the matter was out in the open. It is even possible that there are still other executive agreements that the public may be unaware of. Who knows how many more of these kinds of agreements will be entered into in the future? The authors wish to posit that subjecting executive agreements to Senate inquiry is only one of the ways of scrutinizing these transactions. The Senate itself is marred by politics and politicians who owe allegiance to the Executive or the private corporations.

The public scrutiny of the ZTE deal after the whistle-blow of Joey de Venecia III led to a unilateral annulment by the President of the contract. This leads us to ask: If the whistle-blow was not undertaken, would the public have known? If the infamous overprized deal was not made public, would it have been annulled? Certainly a vigilant citizenry leads to a more transparent public procurement.

Another proposed solution would be to redefine procurements subject of international agreements as covered by RA 9184 and amend Section 4 of the same law.

Thus, while the authors agree that executive agreements are not invalid per se, the same should only cover, as mentioned in *Commissioner of Customs* and *Adolfo*, consular relations and other adjustments of detail carrying out well-established national policies, and temporary arrangements. Contracting a foreign loan, especially of such magnitude as the one in the ZTE deal, should not be considered subject of a mere executive agreement.

At any rate, the authors believe that this should be settled once and for all, perhaps through policy initiatives delineating in express terms the undertakings that can be subject of an executive agreement.

RA 9184 should be made applicable to foreign-funded projects contracted to international agreements

The effectiveness of RA 9184 is seriously hampered by the ruling in Abaya. As stated earlier, this doctrine would make RA 9184 practically

useless when it involves projects assisted by foreign loans through international agreements. RA 9184 is clear but is rendered ineffective by the ruling of the Supreme Court in the *Abaya* case.

Going beyond *Abaya*, an examination of RA 9184 actually creates an apparent confusion. Section 4 thereof states:

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

Hence, although the scope or RA 9184 includes procurement from foreign sources of funds, the aforementioned provision seems to yield such application to procurements covered by any treaty or international or executive agreement, thereby exempting these kinds of agreements from the requirements of RA 9184 albeit due to the responsibility of fulfilling our obligations to a treaty in good faith under the pacta sunt servanda rule. What procurements would need to be subject of a treaty or executive agreement anyway?

The ruling of the Supreme Court in *Abaya* if taken in the spirit of the law seems to defeat the objectives of the law of transparency and competitiveness. It is unquestionable that the intention of the framers of this law was to include foreign funded contracts.[33] Yet, by virtue of the principle of *pacta sunt servanda*, the Philippines must honor obligations under international law—sources thereof which include a treaty, international or executive agreement.[34]

Under international law, an executive agreement is the law between the two contracting parties. Meanwhile, RA 9184 is the municipal law of the Philippines concerning procurement.

When a municipal law conflicts with international law, the first thing to do is to reconcile the two to give effect to both.[35] At first glance, it may seem impossible to do that, considering the two apparent conflicting statements in Section 4. However, it is important to note that they actually contain no direct contradiction to each other. What the provision merely states is that foreign-funded projects are within the scope of RA 9184, unless the agreement facilitating the same states otherwise. In this case, the latter's terms and conditions

as agreed by the government and the foreign party will be controlling and the government, as its duty under international law, should abide by these. Nevertheless, all other provisions of RA 9184 not in conflict with the terms and conditions set forth in the agreement on the matter of procurement procedures are still applicable. To put it differently, RA 9184 remains applicable no matter what, save for specific provisions thereof which would conflict with the terms stipulated in the agreement.

In *Abaya*, Sections 31 of RA 9184 and 5.06(e) of the JBIC guidelines contained contradictions. The former (Section 31 of RA 9184) provided that bid prices that exceed the ABC ceiling shall be disqualified outright from further participating in the bidding while that latter (JBIC Guidelines) categorically stipulated that no bid ceilings are permitted. This clear conflict would result in the latter prevailing over the former.

If RA 9184 would be applied, there would be failure of bidding because no bidder submitted a bid within or below the ABC. In the JBIC Guidelines, however, the lowest bidder regardless of the ABC will have to be proclaimed the winning bid.

The authors take note of a bill introduced by Senator Mar Roxas that seeks "the amendment of Section 4, RA 9184 by making it categorically clear that executive agreements involving foreign loans are expressly covered by the procurement rules and processes laid down under RA 9184."[36] This proposed legislation, if enacted, would definitely help resolve the aforementioned issue related to Section 4.

Finally, it is imperative that the implementing rules and regulations for foreign-funded procurement activities, the so-called "IRR-B"[37], be completed soonest. To date, only IRR-A[38] covering fully domestically-funded projects is available. Meantime, projects funded from foreign sources are governed by the guidelines of the International Financing Institution (IFI) pending the issuance of IRR-B. Unless and until IRR-B is issued, RA 9184 will probably not cover foreign-funded procurement activities especially those covered by executive agreements.

CONCLUSION

Corruption remains to be a continuing problem faced by the Philippines. According to the World Bank, an average of 20 to 30 % of the value of every contract in the Philippines is lost to corruption and

inefficiency—around P30 billion a year.[39] This comes from taxpayers' hard-earned money that would have gone to infrastructure projects, education, and livelihood programs for Juan dela Cruz.

The enactment of RA 9184 is certainly a step in the right direction for our country notwithstanding certain legislative lacuna that needs to be filled. In addition, stronger implementation of these provisions is needed in order to have the most out of the good intentions of the law. The legal realm is never constant; laws have to adapt to present circumstances. In the case of RA 9184, unscrupulous individuals will always try to get around it by finding defects and loopholes in the law, probably with the collusion of corrupt government officials. New methods to curb corruption may even evolve in the future. The reality of change brings aspirations and the awakening of the grim reality of the truth. It is, however, hoped through this Article that the government, especially the Legislative Branch of government, will soon be able to make significant amendments to prevent the evils sought to be avoided.

END NOTES

[1] Faculty, Silliman University College of Law. Holds a Masters of Law in Public Procurement from The George Washington University Law School, Washington, D.C. (2007).

[2] Senior Law Student, Silliman University College of Law.

[3] According to the Political and Economic Risk Consultancy (PERC), in a grading system with zero as the best possible score and 10 the worst, the Philippines got 9.40. *See* Gil C. Cabacungan Jr. *'Most corrupt' tag on RP clarified*, Philippine Daily Inquirer, May 14, 2007, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=65696 (last accessed May 9, 2008).

[4] Myrish T. Cadapan-Antonio, *Participation of Civil Society in Public Procurement: Case Studies from the Philippines*, Public Contract Law Journal, Vol. 36, No. 4 (2007) *citing* J. Edgardo Campos & Jose Luis Syquia, *Managing the Politics of Reform: Overhauling the Legal Infrastructure of Public Procurement in the Philippines* (The World Bank, Working Paper No. 70, 2006) at 4.

[5.] Emmanuel S. de Dios and Ricardo D. Ferrer, *Corruption in the Philippines: Framework and context* (A study prepared for the Transparent and Accountable Governance Project), August 2000, at 20, *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN013133.pdf (last accessed May 9, 2008).

[6] This issuance dated October 8, 2001, consolidated procurement rules and procedures

for all national government agencies, government-owned or controlled corporations and government financial institutions.

[7] "An Act Providing for the Modernization, Standarization and Regulation of the Procurement Activities of the Government and for other Purposes."

[8] RA 9184, § 3.

[9] *See* Liveblogging of Manuel L. Quezon III and John Nery, *available at* http://blogs.inquirer.net/current/2007/09/20/liveblogging-the-cootie-grooming-session (last accessed May 9, 2008).

[10] Abaya vs. Ebdane, G.R. No. 167919, February 14, 2007.

[11] PLARIDEL M. ABAYA, COMMODORE PLARIDEL C. GARCIA (retired) and PMA '59 FOUNDATION, INC., rep. by its President, COMMODORE CARLOS L. AGUSTIN (retired), Petitioners, vs. HON. SECRETARY HERMOGENES E. EBDANE, JR., in his capacity as Secretary of the DEPARTMENT OF PUBLIC WORKS and HIGHWAYS, HON. SECRETARY EMILIA T. BONCODIN, in her capacity as Secretary of the DEPARTMENT OF BUDGET and MANAGEMENT, HON. SECRETARY CESAR V. PURISIMA, in his capacity as Secretary of the DEPARTMENT OF FINANCE, HON. TREASURER NORMA L. LASALA, in her capacity as Treasurer of the Bureau of Treasury, and CHINA ROAD and BRIDGE CORPORATION, Respondents, G.R. No. 167919, February 14, 2007.

[12] Section 31. Ceiling for Bid Prices.—The ABC shall be the upper limit or ceiling for the Bid prices. Bid prices that exceed this ceiling shall be disqualified outright from further participating in the bidding. There shall be no lower limit to the amount of the award.

[13] A basic principle of international law that "every treaty in force is binding upon the parties to it and must be performed by them in good faith" (Vienna Convention on the Law of Treaties).

[14] This issuance dated October 8, 2001, consolidated procurement rules and procedures for all national government agencies, government-owned or controlled corporations and government financial institutions.

[15] *"SC junks 3 petitions vs ZTE deal, says govt cancelled it,"* GMA News, July 14, 2008, *available at* http://www.gmanews.tv/story/106876/SC-junks-3-petitions-vs-ZTE-NBN-says-deal-was-cancelled.

[16] *Supra* note 6.

[17] Civil Code, Article 4.

[18] While IRR-A covers only domestically-funded procurement activities, the Court found no reason why such policy cannot be applied to foreign procurement projects. ("It would be incongruous, even absurd, to provide for the prospective application of RA 9184 with respect to domestically-funded procurement projects and, on the

other hand, as urged by the petitioners, apply RA 9184 retroactively with respect to foreign-funded procurement projects").

[19] Section 77—Transitory Provision.

[20] Section 31.

[21] Sec. 1. xxx Nothing in this Order shall negate any existing and future government commitments with respect to the bidding and award of contracts financed partly or wholly with funds from international financing institutions as well as from bilateral and similar foreign sources.

[22] An act authorizing the President to obtain foreign loans and credits, or to incur foreign indebtedness, as may be necessary to finance approved economic development purposes or projects, and to guarantee, in behalf of the Republic of the Philippines, foreign loans obtained or bonds issued by corporations owned or controlled by the government of the Philippines for economic development purposes.

[23] Section 5.06, Part II (International Competitive Bidding).

[24] Commissioner of Customs vs. Eastern Sea Trading, G.R. No. L-30650, July 31, 1970, citing Francis B. Sayre, *The Constitutionality of Trade Agreement Acts*, 39 Columbia L.R. 651.

[25] G.R. No. 175608, June 08, 2007.

[26] Tetch Torres, *DoJ says $330-M broadband deal legal*, Philippine Daily Inquirer, July 31, 2007, *available at* http://www.inquirer.net/specialreports/nbndeal/view.php?db=1&article=20070731-79831 (last accessed May 9, 2008).

[27] RA 9184, § 4.

[28] JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY, 2003 ed, at 903. In Adolfo vs. CFI, executive agreements are those which cover such subjects as commercial and consular relations, property relations like parent rights, trademark and copyrights, postal, navigation, settlement of private claims, tariff and trade matters.

[29] Philippine Constitution, Article VII, § 20.

[30] 3 SCRA 351 (1961).

[31] Executive Order No. 459, November 25, 1997.

[32] Senate Bill No. 1317—"An Act Mandating Concurrence to International Agreements and Executive Agreements," filed July 24, 2007.

[33] *See* Deliberations of the Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2248 and House Bill No. 4809, *as cited* in *Abaya* (G.R. No. 167919). Petitioner himself, then a member of the committee, put on record the

justification of including foreign funded contracts to the scope of RA 9184.

[34] Statute of the International Court of Justice (ICJ), Article 38(1).

[35] ISAGANI A. CRUZ, INTERNATIONAL LAW, 1993 ed., at 7.

[36] Senate Bill No. 1793—"An Act subjecting Treaties, International or Executive Agreements involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services, to be included in the Scope and Application of Philippine Procurement Laws, amending for the purpose Republic Act No. 9184, otherwise known as the Government Procurement Reform Act, and for other Purposes", filed October 22, 2007.

[37] Section 1 of IRR-A: "The IRR-B for foreign-funded procurement activities shall be the subject of a subsequent issuance."

[38] Implementing Rules and Regulations Part A, October 8, 2003.

[39] Darwin G. Amojelar, *Corruption, inefficiency cost govt P30B yearly*, The Manila Times, April 4, 2008, *available at* http://www.manilatimes.net/national/2008/apr/04/yehey/top_stories/20080404top4.html (last accessed May 9, 2008).