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EDITOR'S NOTE

The juxtaposition of the past and the present is often jarring—at times for sheer incompatibility, but mostly out of choice. Decisions made in the past and present, if not rarely questioned, are less revisited in fear of destabilizing the confidence reposed in majoritarian actions. If anything, however, it is only by judging the present with the eyes of retrospect are future actions secured with certainty—the most that can be asked out of the standard of good governance.

Volume 47, Issue 1 of the IBP Journal contains pieces that contribute to this effort. They look at historical roots of present governmental processes, test their continuing viability, and formulate proposed approaches to improve.

In *Different Angles, Similar Outlooks: Revisiting Legislative Veto*, Hon. Senator Francis Tolentino revisits the philosophical and political roots of a legislative veto as a power emanating from the people and whether or not it has reached the status of a super-statute.

In *Would La Solidaridad be Given a Broadcast Franchise? A Review on the Government's Authority to Act Upon Broadcast Media Franchises Relative to the Constitutional Right to Freedom of Expression*, Julia Pineda and Charles de Belen critique the current process by which a broadcast media's franchise is granted, renewed, amended, or repealed under the lens of the societal role of La Solidaridad in the past.

In *Terrorism Financing: A New Battleground*, DCP Benjamin Samson, invests explanations into daily banking processes and places them side by side with the powers of the Anti-Money Laundering Council in an attempt to find out the sufficiency and legality of current government processes in combatting the financing of terrorism.

In *Of Common and Private Carriers by Sea*, Julius Yano takes a deep dive into the nature of charter parties, the chartering process as a whole, and the limitations on liability regarding the classification of vessels on charter as common or private carriers.

In *Saving the Bay: A Review of the Law on Environmental Impact Assessments (EIA) and a Proposed Framework for the Philippines in Light of the Manila Bay Rehabilitation Project Issue*, Camille Cruz plants the seeds of reform in the seemingly inaccurate categorization of environmental projects, such as the Manila Bay Rehabilitation Project, based primarily on party disclosures and not independent determinations.

The hope is that these contributes to the Philippine Legal Profession's growth in wisdom from the past, critical assessments in the present, and prepared planning for the future.

DIFFERENT ANGLES, SIMILAR OUTLOOKS: REVISITING LEGISLATIVE VETO

Hon. Sen. Francis N. Tolentino[*]

"*Those who never change their minds, never change anything.*"

– Winston S. Churchill [Darkest Hour (A 2017 Film)]

I. THE STARTING LINE

The question on legislative veto will always seek an answer in all societies through the ages, whether democratic or not. As the government and the governed pursue a continuing dialogue in providing fundamental human needs to a structured society and all its bureaucratic layers, the need to provide accountability and societal responses through the rule of law will always focus on the legislature. But where does it ultimately emanate from? Laws and institutions are derived from the people themselves, expressing their collective will through their duly elected representatives. Through the ages, this philosophical conclusion was not achieved solely through a simple dialectic

[*] Senator Francis N. Tolentino was elected as Senator of the Republic in the May 2019 National Elections. As Senator for the 18th Congress, he became Chairman of the Senate Committee on Local Government and Urban Planning, Housing, and Resettlement. He was also the Vice-Chairman of the Senate Committee on Foreign Relations. Previously, he was appointed as Presidential Adviser on Political Affairs of former President Rodrigo Roa Duterte. Senator Tolentino was also formerly the MMDA Chairman from 2010 to 2015 and was the City Mayor of Tagaytay for consecutive terms starting in 1995 up to 2004.

discourse of thinkers and legal visionaries. It is also historically intertwined with bloody struggles, wars, and revolutions. Now, through legislative assemblies - in whatever form and however imperfect - the people continue to search for solutions to address present and future needs of society. Thus "vox populi, vox dei"[1] is an article of faith.
This Article will attempt to weave the various philosophical and legal foundations of why the people, through their duly elected Legislature, assume this primordial position in modern-day society by focusing on the seminal case of Immigration and Naturalization Service v. Chadha.[2] Justice White noted in his dissent that the Chadha ruling struck down "in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."[3]

The Chadha Case

The Immigration and Nationality Act[4] (the "INA") authorizes the Attorney-General to suspend the deportation of non-US citizens, but also permits house of Congress to override the Attorney General's decision.[5] Previously, the Alien Registration Act of 1940[6] had reserved the right to exercise a two-house legislative veto. The legislative veto is a device by which Congress attempts to reconcile its obligation to limit the law-making authority delegated to agencies with its inability to establish, in advance, specific standards to control the agencies.[7] The legislative veto, as a tool used by

[1] Latin for "The voice of the people is the voice of God."
[2] INS v. Chadha, 462 US. 919 (1983).
[3] Id. at 1002.
[4] Immigration and Nationality Act, Ch. 477, 66 Stat. 163 (1952).
[5] The new one-House veto allowed either House to override the Attorney-General's suspension of deportation.
[6] Alien Registration Act of 1940, Ch. 439, 54 Stat. 670 (1940).
[7] Robert F. Nagel, The Legislative Veto, the Constitution, and the Courts, 3 Const. Comment. 61 (1986).

Congress to exercise oversight and control over the Executive while maintaining a balance of power, was initiated by President Hoover in 1929.

Chadha, a Kenyan foreign student, stayed in the United States after his visa expired. Upon conclusion of the deportation hearing, an immigration judge suspended Chadha's deportation pursuant to the INA's provision that allows the Attorney General to suspend a deportation at his discretion. After considering three hundred forty (340) cases, the House of Representatives passed a Resolution vetoing Chadha's suspension of deportation. When this case reached the Supreme Court,[8] it was ruled that Congress exceeded its prescribed authority and the pertinent provision of the INA was struck down as unconstitutional because it did not meet the constitutional requirements of presentment and bicameralism under Article 1 of the Constitution as an exercise of legislative power.

II. BEFORE THE STARTING LINE

Doctrinally, is Chadha a good precedent? In his Second Treatise, John Locke defines political power as the right to make laws for the protection and regulation of property or, in other words, "only for the public good."[9] Having debunked the notion of divine rights of Kings, Locke advocated for the freedom coming from a state of nature, and that the obligation to protect the interests of each other and that of a "civil government" is the proper remedy for the inconveniences of the state of nature.[10] For Locke, the rule of the majority is the most practical choice for government. He

[8] INS v. Chadha, supra note 1.
[9] John Locke, Second Treatise, https://www.britannica.com/topic/Two-Treatises-of-Government.
[10] Id. at 203.

thus called for the establishment of a strong government with a strong legislature to craft laws (underscoring supplied).

Again, we see in Locke's work the evolution of thought that man is basically free, that the monarch's claim to divine right is illusory, and that the people coming together can assert their voice through a legislature. Indeed, Chadha toned down that voice. The legislative veto power is part of legislation. It is part of the voice of the people, heard through their duly elected representatives. For the judiciary to muffle the voice of the people through this process is a denial of the basic principle that sovereignty resides in the people.

III. AN UNDIGNIFIED LEGISLATURE?

Jeremy Waldron, in his seminal work The Dignity of Legislation, suggests that the "legislature ought to be the Supreme Power in every society."[11] For him, it is the legislature that unites the people into one coherent living form; the soul that gives Form, Life, and Unity to the Commonwealth.[12] Thus legislative power is a variation of the power of the people – an expression of the majority's will as to how society and government should address their needs and collective aspirations. John Adams once claimed that a "representative legislature should be an exact portrait of the people at large."[13]

Indeed, though others may claim otherwise, it is not the Presidency nor the Supreme Court that truly represents the people but the Legislature. In our democratic society, when the Executive enforces the Chadha ruling as interpreted

[11] Jeremy Waldron, The Dignity of Legislation, 54 Maryland Law Review 633 (1995).
[12] Id. at 633.
[13] Id. at 635.

by the Judiciary through the Supreme Court, what these branches are enforcing and interpreting are not mere legislations, including legislative veto crafted by an "assemblage of men." It is the intent of the people themselves, such that to ignore the same is to ignore the people. If the legislative veto, as part of a legislative measure, springs from the direct authority of the sovereign people to change or find unacceptable the actions of the Executive, how can such measure be constitutionally impermissible if emanating from the supreme authority – the people themselves?

IV. THE SENSES OF JOHN STUART MILL AND AKHIL AMAR

John Stuart Mill's work, On Liberty,[14] talks about the nature and limits of the power that can be legitimately exercised by a society over an individual. Mill's call for the establishment of constitutional check[15] is a call for the establishment of a legislature as an indispensable requirement of governance. He stresses that the "consent of the community, or of a body of some sort supposed to represent its interests, was made a necessary condition to some of the more important acts of the governing power." Mill highlighted the role of the people in selecting these representatives: A mandate that is revocable, thus:

> A time, however, comes in the progress of human affairs, when man ceased to think it is a necessity of nature that their governors should be an independent power, opposed in interest to themselves. It appeared to them much better that the various magistrates of the State should

[14] John Stuart Mill, On Liberty, London: Longman, Roberts & Green (1869).
[15] Id. at 9.

> be their tenants or delegates, revocable at their pleasure. In that way alone, it seemed, could thy have complete security that the powers of government would never be abused to their advantage. By degrees, this new demand for elective and temporary rulers became the prominent object of the exertions of the popular party, wherever any such party existed[…][16]

While Mill speaks about the danger of the "tyranny of the majority" as a defect, the same can be remedied through a deliberative process in a legislative assembly and, perhaps, by the people through an electoral process. The legislative veto has been in place since 1929 and has existed in more than two hundred statutes, from energy conservation to foreign affairs. By electing and re-electing their representatives, the people themselves have affirmed legislative veto through several electoral cycles. One cannot imagine how the legislative veto scheme can be voided without a recognition that it is, in the first place, sanctioned by the people themselves for the purpose of preventing the abuses that the Executive might commit, as John Stuart Mill may have envisaged.

A similar short discussion of Akhil Reed Amar's The Bill of Rights: Creation and Reconstruction,[17] may be relevant. Amar focuses on the "the people" as a recipient and source of fundamental rights. He stresses that "all government power derives from the people, but these grants are limited."[18] Again, worth stressing are the first three (3) words of the United States Constitution: We the People. The institution representing the American people in

[16] Id. at 10.
[17] Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction, New Haven, CT: Yale University Press (1998).
[18] Id. at 123.

constitutional structure is the US Congress (US Senate and the House of Representatives) – as it actually occupies the pre-eminent position of representing the people. But while it is evident that Congress or the Legislature represents the voice of the people, sometimes in the evolving dynamics of the separation of powers, as the Chadha case would show (including the consequent legislative veto invalidation), the "agency problem of the government[…] rooted in the sovereignty of We the People of the United States"[19] is highlighted. In light of Amar's recantation of old cases now labeled as historical mistakes, such as Dred Scott,[20] the Barron case,[21] the Slaughter-House cases,[22] the Plessy case,[23] and even the Lochner case,[24] this author believes that the Chadha case will eventually be revisited and overruled.

V. THE MODERN LEGISLATION/REGULATION STATE

Having discussed the vital role of the Legislature in a democratic society, it is likewise appropriate to tackle the by-products of the law-making process, statutes, and regulations to include the legislative veto as well. This is in cognizance with the pragmatic environment as to how legislators work while maintaining the people's confidence, bearing in mind the next election cycle.

William Eskridge's Super Statutes[25] is authoritative on the primacy of the legislature, viz:

[19] Id. at 127.
[20] Scott v. Sandford, 60 U.S. 393 (1856).
[21] Barron v. Baltimore, 32 U.S. 243 (1833).
[22] Slaughter-House Cases, 83 U.S. 36 (1872).
[23] Plessy v. Ferguson, 163 U.S. 537 (1896).
[24] Lochner v. New York, 198 U.S. 45 (1905).
[25] William N. Eskridge and John Ferejohn: 50 Duke Law Journal 5 (2001).

> First, the Constitution committed the Federal government to people sovereignty – "We the People" are the governors as well as the governed. People sovereignty is hostile to a judge-created common-law as the only basis for the rule of law, and the principle suggests that there ought to be some role for popular feedback in the process by which certain legal motions become fundamental law. Second, the Constitution committed national government to lawmaking by elected representatives deliberating for the public good. (underscoring supplied). Articles I's vesting legislative authority in Congress and Article III's vesting the Supreme Court and inferior federal courts with jurisdiction to interpret federal statutes (and only implicit jurisdiction to hear federal common law claims) suggest the principle that the primary source of law at the federal level would be statutes – a striking contrast to England and the states, where Blackstonian common law precedents remained the main source of law. That members of Congress were accountable directly to the people (House) and the States (Senate) meant that laws would be subjected to popular influence.[26]

For Eskridge and Ferejohn, a super-statute has the hallmark of stability and permanency as being part of the public culture in itself. Super-statutes are products of the legislative process which have been transformed as normative and institutional culture because of the acceptance and legitimization by the people. They are

[26] Id. at 1221.

considered "fundamental law."[27] Super-statutes endure criticism and find useful application over time and across different administration. An example is the Civil Rights Act of 1964, which, according to Eskridge, has been influenced by social movement ideas and popular pressure on the political powers.

Apparent in the foregoing is not just a mere legislative reaction of Congress to the needs of the People, but the People accepting the norms they established through Congress and developing into what is essentially part of the "normative consciousness" or quasi-constitutional.[28]

This author poses the question – since the legislative veto provision has been enshrined in more than two hundred statutes since 1929, can we now consider the legislative veto provision, by itself, as a super-statute or super-provision?

During the 1940s, legislative veto provisions appeared in reorganization acts, immigration acts, and defense appropriations. President Harry S. Truman and Dwight D. Eisenhower signed bills containing legislative vetoes.[29]

In the 1970s, the legislative veto was included in statutes involving the war powers, national emergencies, impoundment, presidential papers, federal salaries, and selected agency regulations. During this time, the Congress used the legislative veto with increasing frequency in an effort to control the ever increasing promulgation of regulations of government agencies.[30]

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[27] Id. at 1216.
[28] Id. at 1217.
[29] Louis Fisher, The Legislative Veto: Invalidated, It Survives, 56 Law and Contemporary Problems 27 (1993).
[30] Id. at 406.

It is noteworthy that several State legislatures are utilizing the legislative veto, such as Kentucky, Alaska, and Missouri, to name a few. Considering that it does have the people's imprimatur, has the legislative veto since acquired such a normative acceptance to be treated as a super-provision worthy of respect by institutions outside of the sovereign will?

The Constitution divides the legislative, executive, and judicial powers of the federal government into three branches of government and beyond. Not even the Framers expected the division to be fenced in tightly, as flexibility and collaboration are called for. The system of checks and balances has evolved wherein the three separate branches share or participate in functions that are assigned by the Constitution. Hence, Mistretta v. United States[31] reminds us that "the greatest security against tyranny – the accumulation of excessive authority in a single Branch – lies not in a hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch."

One of the issues emanating from Chadha refers to the details of the INA with respect to its "gaps," the filling in of which Congress delegated to the Executive Board. However, we should note that the naturalization process is a key specific function of Congress under Article I, Section 8 – an enumerated function to establish a uniform rule of naturalization. Thus, while Congress may have delegated the administrative realm of this function to the Executive, its constitutional prerogative as contained in the Great Document serves as a nexus to claim a "reserved power" through legislative veto, which the blurred lenses of Chadha

[31] Mistretta v. United States, 488 U.S. 361 (1989).

may have overlooked and seen as mere statutory enforcement.

Carl Sunstein's After the Rights Revolution: Reconceiving the Regulatory State[32] chronicled the rise of statutory rights during the New Deal under President Roosevelt that are separate from the rights at the time of the drafting of the U.S. Constitution and its Amendments. While said rights emanated from legislative enactments, the consequent regulations saw the rise of bureaucracy and the strengthening of the Presidency. At that time, Congress deferred to the expertise of the other executive agencies in the day-to-day application of statutes in a constantly changing society, subject to the standards imposed by Congress. Regulation was permitted only if it fell within the police power – an "imperfectly defined authority that included the prevention of harms to the public as a whole."[33] Unfortunately, this upsetting of the original set-up of three branches has resulted in problems, even to the mindset of the Judiciary, producing such a result as the Chadha ruling. While a deregulation program eventually ensued that paved the way for the rise of the Legislature as the primary source of statutes, as envisioned by John Locke and John Dewey, the threats remain – as manifested by the Chadha ruling.

VI. ADMINISTRATIVE THREAT, AGAIN?

Philip Hamburger's Administrative Threat[34] emphasized the separation of powers doctrine. The Constitution allocates legislative power to Congress and the

[32] Carl R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State, Cambridge, MA: Harvard University Press (1990).
[33] Id. at 20.
[34] Philip A. Hamburger: The Administrative Threat, New York Encounter (2017).

judicial power to the judiciary. According to him, the growth of legal obligation by administrative measures transfers both legislative and judicial powers to appointed officials serving in the executive branch. This is contrary to the text of the Constitution and the intention of the Framers. While Hamburger acknowledged that administrative agencies have the power because Congress gives it to them, there should be a distinction between administrative measures that distribute benefits rather than create legal obligations. The latter is a form of usurpation. For Hamburger, such administrative threat is unconstitutional. If Hamburger's theory is applied to the Chadha case, the legislative veto is appropriate as it forms a shield protecting the Legislature and the people from continuing incursions by the Executive in an area where the people should have a say whether to veto or give its concurrence. The Constitution, as Hamburger notes, does not permit the existence of some administrative power. According to Hamburger:

> This sort of administrative rule-making is justified on the fiction that when Congress states and "intelligible principle," agencies that follow the principle are merely specifying what Congress has enacted. But this is fantasy. The rude reality, as recognized long ago by James Landis (a prominent advocate of legislative power) is that the agencies are exercising legislative power.[35]

Jeremy Kessler's The Struggle for Administrative Legitimacy[36] stresses that American people remain perennially unconvinced that administrative decision-making is "appropriate, proper, and just," entitled to respect and obedience by virtue of who made the decision (executive

[35] Id. at 7.
[36] Jeremy Kessler, The Struggle for Administrative Legitimacy, 129 Harvard Law Review 718 (2016)

officials) and how it was made (the administrative powers). Citing Justice Clarence Thomas and Philip Hamburger, he reiterates that the very existence of the modern administrative state is illegitimate because it departs from the founding-era conceptions of good government, which include a highly formalistic separation of powers and rigorous procedural protections for regulated parties.[37]

VII. BACK TO CHADHA

The rise of the modern regulatory state has led to vast delegations of authority from Congress to the Executive branch. Even with standards such as "just and reasonable" or "to act in the public interest," the administrative or regulatory agencies roll like a runaway train. The legislative veto is thus a device by which Congress has attempted to reconcile its obligation to limit the law-making authority delegated to agencies with its inability to establish in advance specific standards to control the agencies.[38] Thus, the most obvious importance or consequence of the Court's invalidation of the legislative veto in Chadha is its potential for altering the power relationships within the regulatory state.[39]

What will now happen to the more than two hundred (200) statutes with legislative veto provisions? Sans separability questions, will the rights vested by virtue of said statutes be recognized as well as their concomitant obligations? Will it affirm the centrality of judicial power similar to the era after Marbury v. Madison[40] or even

[37] Id. at 721.
[38] Nagel, supra note 7, at 62.
[39] Id. at 62.
[40] Marbury v. Madison, 5 U.S. 137 (1803).

Lochner?[41] Again, Professor Nagel is of the view that Chadha will prove hostile to the democratic process and destructive of popular accountability.[42] This author subscribes to the view that the legislative being, for centuries, the real collective voice of the people, should be supreme. Philip Hamburger's Administrative Threat might as well be re-entitled as "Administrative Damage."

An argument for legislative veto that supports the error of the Court requiring bicameralism and presentment requirements came from the Kentucky case of City of Newport v. Gugel,[43] in which a test for determining whether a particular procedure is administrative or legislative was formulated. Under the Gugel test, a legislative procedure prescribes a new policy while an administrative procedure merely implements a policy. Since the legislative veto is arguably policy-implementing, the legislative veto would not constitute a legislative act under the Gugel test.[44]

Chadha rearranges once again the role of the Supreme Court in the allocation of constitutional powers, diminishing the rightful stellar position of the people through Congress. Some thoughts from Justice Scalia on this view are in order.

VIII. SCALIA INSIGHTS

In his Essay A Matter of Interpretation (Federal Courts and Laws)[45], Justice Antonin Scalia is quite revealing:

[41] Lochner, supra note 24.
[42] Nagel, supra note 7, at 63-64.
[43] City of Newport v. Gugel, 342 S.W.2d 517 (1960).
[44] The Legislative Veto: Is it Legislative? 38 Wash. & Lee L. Rev. 172 (1981).
[45] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law, Princeton, NJ; Princeton University Press (1997).

> Judge-made law is the post facto, and therefore unjust. An act is not forbidden by the statute law but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power.[46]

Even James Madison is against law-making by Judges: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator."[47]

Justice Scalia, being a textualist, would probably look for the provisions of the Constitution, whether the legislative veto is prohibited or not, as well as the intent of the Legislature; when the text of the statute is clear, that is the end of the matter.[48] Further, Justice Scalia sees constitutional interpretation assumed by common law judges as a threat to basic democratic principles. Recalling these words of Justice Scalia, this author cannot but imagine how new Supreme Court Justice Amy Barrett will follow his footsteps in the years ahead.

The aforementioned Essay of Justice Scalia was written in 1997 while the Chadha decision was pronounced by the Supreme Court in 1983. It should be noted that in 1979, four years before the Chadha decision and seven years prior to his appointment to the Supreme Court, Justice Scalia wrote The

[46] Id. at 10.
[47] Id. at 10.
[48] Id. at 16

Legislative Veto: A False Remedy for a System Overload[49] where he stressed the often forgotten rule:

> Congress has an authority and indeed a responsibility to interpret the Constitution that are no less solemn and binding that the similar authority and responsibility of the Supreme Court – because they spring from the same source, which is the obligation to take no action that would contravene that document. Moreover, congressional interpretations are of enormous importance - greater importance, ultimately that those of the Supreme Court. (underscoring supplied)[50]

Towards the end of his Essay, Justice Scalia proposed a letter from members of Congress, to their constituents, viz:

> Fellow Citizens:
>
> There is abroad in our land the feeling that we no longer control our government, but it controls us, though thousands of law-making functionaries in every field of life who are effectively beyond popular control. That feeling, I am sorry to tell you, is well founded. And the cause is quite simply that your Congress has over the years delegated so many policy judgments of the sort once made by your elected representatives to the executive agencies that by now neither the

[49] Antonin Scalia, The Legislative Veto: A False Remedy for System Overload, AEI Journal on Government and Society (1979).
[50] Id. at 20.

> Congress nor the President can realistically monitor or supervise the results.[51]

Perhaps Justice Scalia is correct that, while legislative veto is proper, the Administrative State has so expanded that Congress needs to perform the legislative tasks, including the details needed, to re-assume control.

IX. JUSTICE WHITE DISSENTS IN CHADHA (BACK TO SQUARE ONE?)

Justice White's dissent in Chadha is persuasive. "Without the legislative veto, Congress is faced with a Hobson's choice – either to (a) refrain from the delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape or, in the alternative, or (b) abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policy-making by the unelected to fill that role.[52]

Justice White correctly stated: The legislative veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I of the Constitution as the nation's lawmakers. It is therefore a check upon the attempts – or threats, as Philip Hamburger would see them – upon the rule-making by administrative agencies, without the "common consent" defined by John Locke.

Justice White aptly concluded that if Congress may delegate law-making powers to independent and Executive

[51] Id. at 26.
[52] INS v. Chadha, supra note 2.

agencies, it is most difficult to understand Article I of the Constitution as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative powers may issue regulations having the force of law without any bicameral approval and without the President's signature. Thus, it is not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. In both cases, it is enough that the initial authorization comply with Article I of the Constitution.[53]

Are we back to square one? No. However, we must look beyond what we can see.

[53] Id. at 987.

WOULD LA SOLIDARIDAD BE GIVEN A BROADCAST FRANCHISE? A REVIEW ON THE GOVERNMENT'S AUTHORITY TO ACT UPON BROADCAST MEDIA FRANCHISES RELATIVE TO THE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION

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I. INTRODUCTION

The Philippine Constitution places freedom of expression and the press in such high regard, recognizing how the exercise of these rights were critical in the struggle of the Filipino for independence and freedom. In fact, crucial actors in the Philippine Revolution can directly or indirectly be connected to the humble newspaper of La Solidaridad,

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which became a principal organ for the reform movement in Spain. Since its first publication in 1895, it garnered significant reprisals from the Spanish Government due to its criticisms thereof.[1]

The government's negative response to media continued throughout Philippine history. In 22 September 1972, the late President Ferdinand Marcos' first act after declaring Martial Law was to order the take-over of ABS-CBN.[2] Fast-forward to 10 July 2020, the House Committee on Legislative Franchises voted to reject ABS-CBN's application for franchise renewal in a 70-11 vote. In its Committee Resolution, Congress alleged numerous violations by the then largest broadcasting network of the Philippines to support its decision to deny its application for renewal. However, those who were in favor of the renewal alleged that the non-renewal of ABS-CBN's broadcasting franchise was motivated not by the violations of ABS-CBN or its failure to perform its duties under its franchise, but rather it's critical stance against the government.[3]

Through the press' storied history, the Constitutionally granted press freedom has been the media's last bastion of defense against possible reprisals from the government. However, even while we have strengthened press freedom by

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[1] Encyclopedia Brittanica, *Jose Rizal*, BRITTANICA, *available at* https://www.britannica.com/biography/Jose-Rizal#ref263725.

[2] Gerry Plaza, *In Focus: Memoirs Of The 1972 ABS-CBN Shutdown*, ABS-CBN LIFESTYLE, 7 May 2020, *available at* https://lifestyle.abs-cbn.com/articles/8679/abscbn-shutdown-1972.

[3] Jason Gutierrez, *Philippine Congress Officially Shuts Down Leading Broadcaster*, NEW YORK TIMES, 10 July2020, *available at* https://www.nytimes.com/2020/07/10/world/asia/philippines-congress-media-duterte-abs-cbn.html; Melissa Lopez and Glee Jalea, *TIMELINE: ABS-CBN franchise*, CNN PHILIPPINES, 13 February 2020, *available at* https://www.cnnphilippines.com/news/2020/2/13/ABS-CBN-franchise-timeline.html.

giving it a preferred position among other freedoms and extending to it additional ancillary protections,[4] the same degree of protection and exalted position remain to be absent in an area of media protection, specifically in legislative action upon an application for broadcast media franchise.

At present, in the process of acquiring, renewing, amending, or repealing a broadcast media franchise, the government continues to have almost unbridled discretion in deciding the same. This was due to the prevailing belief that broadcast media should enjoy a lesser degree of protection compared to its counterparts in print media.[5]

In view of the foregoing, while this Article will not delve into the merits of the ABS-CBN non-renewal issue, the authors will take a closer look into the process by which a broadcast media's franchise is granted, renewed, amended, or repealed. The authors will then propose possible reforms on how actions on broadcast media franchises may be exercised while upholding the Constitution and at the same time promote public interest.

The goal of the authors is to imagine a world, similar to present day Philippines, where an entity like the La Solidaridad exists, holding the same critical stance, and examine whether it could succeed in obtaining a broadcasting media franchise under the present government.

II. REGULATION OF BROADCAST MEDIA UNDER THE STATUS QUO

[4] *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008.
[5] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.

Broadcast media is considered a public utility imbued with public interest, providing public services indispensable to the general public.[6] The power to authorize and control the operation of a public utility has been given to Congress, which can grant a franchise to operate through legislation.[7]

While not all public utilities require a franchise to operate,[8] the Supreme Court already clarified that franchises are required for the operation of broadcast stations, unless Congress pass a law repealing P.D. No. 576-A.[9] In addition to a franchise, broadcast stations must also apply for a license to operate with the National Telecommunications Commission ("NTC").[10]

The key basis for regulation of broadcasting is the scarcity of broadcast frequencies. This scarcity is, in fact, the primary, indisputable, and indispensable justification for the government's regulatory role. Franchising and licensing requirements are mainly impositions of the laws of physics.[11]

Regulation is needed to ensure broadcasters receive exclusive use of their frequencies, with the State confining all broadcasters to the use of the frequencies assigned to them.[12] The Supreme Court in *Divinagracia v. Consolidated Broadcasting System, Inc.* ("*Divinagracia*") clarified the

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[6] *Republic of the Philippines v. Manila Electric Company*, G.R. No. 141314, 9 April 2003.
[7] *Philippine Airlines, Inc. v. Civil Aeronautics Board*, G.R. No. 119528, 26 March 1997.
[8] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.
[9] *Id.*
[10] Executive Order No. 546, Series of 1979.
[11] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.
[12] *Id.*

purpose of regulation of broadcast media, citing the U.S. case of *Red Lion v. Federal Communications Commission*, to *wit*: "[w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."[13]

A franchise is a privilege to which broadcasting media owes its existence,[14] and to which the Constitution subjects to amendment, alteration, or repeal by Congress when required by the common good.[15] A broadcasting station that is granted a franchise is merely considered to be exercising a privilege that may be burdened with the performance of a public service.[16]

While this may be the case, it is submitted that any regulation thereon should be subjected to a higher level of scrutiny in light of possible infringements upon the freedoms of expression and of the press.

III. EXTENDING THE PROTECTIVE MANTLE OF THE FREE EXPRESSION CLAUSE TO BROADCAST MEDIA FRANCHISES

As compared to other public utilities such as water, electricity, and transportation, broadcast media is so interconnected with the exercise of the right to free expression that the Supreme Court has already affirmed that

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[13] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009, citing the case of *Red Lion v. Federal Communications Commission*, 395 U.S. 367 (1969).
[14] *Associated Communications & Wireless Services – United Broadcasting Networks v. National Telecommunications Commission*, G.R. No. 144109, 17 February 2003.
[15] CONST. art. XII, § 11.
[16] *ABS-CBN Broadcasting Corporation v. Philippine Multi-Media System, Inc.*, G.R. No. 175769, 19 January 2009.

it is subject to the Constitutional protection from prior restraint.[17]

The freedom of expression is guaranteed under Section IV, Article III of the Constitution: "No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."

The freedom of expression is not only a Constitutionally protected right, but a universal right recognized in Article 19 of the Universal Declaration of Human Rights ("UDHR"): "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[18]

A similarly worded guarantee is also enshrined under Article 19 of the International Covenant on Civil and Political Rights: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[19]

Notably, the UDHR considers part of the right to free expression the freedom to seek, receive and impart information and ideas through any media.[20]

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[17] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.
[18] Universal Declaration of Human Rights art. 19, 10 December 1948.
[19] International Covenant on Civil and Political Rights art. 19, December 16, 1966.
[20] Universal Declaration of Human Rights art. 19, 10 December 1948.

The importance of a free press in our democracy has been emphasized by the Supreme Court in *Chavez v. Gonzales* ("*Chavez*"):

> "It is the chief source of information on current affairs. It is the most pervasive and perhaps most powerful vehicle of opinion on public questions. It is the instrument by which citizens keep their government informed of their needs, their aspirations and their grievances. It is the sharpest weapon in the fight to keep government responsible and efficient. Without a vigilant press, the mistakes of every administration would go uncorrected and its abuses unexposed."[21]

However, among the different types of media, the Supreme Court has distinguished broadcast media from print, holding that the former enjoys a lesser degree of free expression protection due to considerations of scarcity.[22] As compared to print media, broadcast media is subject to more onerous conditions such as the legislative franchise and NTC license, because of the scarcity of airwaves. The Supreme Court has clarified that had airwaves not been scarce, then "any attempt to impose such a regulatory regime on a medium that is not belabored under similar physical conditions, such as print media, will be clearly antithetical to democratic values and the free expression clause."[23]

Still, the Court cautions that the restrictions imposed by Congress must pass the test of constitutionality. As such,

[21] *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008.
[22] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.
[23] *Id.*

the judiciary may review legislative acts in case of possible violation of the freedom of expression.[24]

The Supreme Court has already acknowledged that the freedom of the press deserves extra protection and enjoyment of certain ancillary rights. As will be discussed in this Article, the operation of broadcast media affects the freedom of expression and press. Thus, the government should extend the highest level of protection given to free expression to broadcast media in matters affecting their continuity of operation, such as renewal, amendment, alteration, or repeal of legislative franchise.

Broadcast media is the message protected by the free expression clause

Recognizing that the medium is the message is the first step in extending the highest level of protection to broadcast media in relation to their franchise.

Ever since the 1920s, the trend in jurisprudence was to recognize the broadest scope and assure the widest latitude for this constitutional guarantee.[25] Following this trend and these time-honored principles, the operation of broadcast media should, in itself, be considered an exercise of free expression, and any restriction affecting the continuity thereof should be treated as a form of content-based regulation.

The Supreme Court in *Divinagracia* has adopted the U.S. doctrine that to deny a station license because the public

[24] *Id.*
[25] *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008.

interest requires it is not a denial of free speech.[26] Nevertheless, it has also likened the cancellation of a license to operate of a broadcast station to a death sentence and a means to inhibit the exercise of the right to free speech, expression and of the press.[27]

Although *Divinagracia* involved NTC's authority to cancel licenses, it is submitted that such interpretation of cancellation be applied to legislative franchises since the denial or cancellation thereof has substantially the same effect of imposing a death sentence to a broadcasting station.

To deny the medium is to deny the message itself. The guaranty of free expression is useless if it cannot reach its intended audience. The Supreme Court in *GMA Network, Inc. v. Commission on Elections* ("GMA Network") upheld the right of press freedom and recognized that the people would ultimately be the victims should it be curtailed. Thus, it held:

> "The guaranty of freedom to speak is useless without the ability to communicate and disseminate what is said. And where there is a need to reach a large audience, the need to access the means and media for such dissemination becomes critical. This is where the press and broadcast media come along. At the same time, the right to speak and to reach out would not be meaningful if it is just a token ability to be heard by a few. It must be coupled with substantially

[26] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009, citing the case of *Red Lion v. Federal Communications Commission*, 395 U.S. 367 (1969).
[27] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.

> reasonable means by which the communicator and the audience could effectively interact."[28]

Broadcast media is the described reasonable means that allows the communicator and the audience to effectively interact. In the Philippines, broadcast media has been part of the daily lives of millions of Filipinos.

As compared to other mediums such as print, broadcast media is more accessible given the breadth and timeliness of its communication capabilities. The television set has become universally accessible to a wide audience, allowing almost simultaneous transmission and receipt of information. The expansive reach of broadcast media has been described by the Supreme Court in *Chavez*:

> "Their message may be simultaneously received by a national or regional audience of listeners including the indifferent or unwilling who happen to be within reach of a blaring radio or television set. The materials broadcast over the airwaves reach every person of every age, persons of varying susceptibilities to persuasion, persons of different I.Q.s and mental capabilities, persons whose reactions to inflammatory or offensive speech would be difficult to monitor or predict. The impact of the vibrant speech is forceful and immediate. Unlike readers of the printed work, the radio audience has lesser opportunity to cogitate analyze, and reject the utterance."[29]

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[28] *GMA Network, Inc. v. Commission on Elections*, G.R. No. 205357, 2 September 2014.
[29] *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008.

Uniquely, the messages conveyed through broadcast media have a greater probability of being heard even by an unwilling audience, increasing the effectiveness of the communicator's expression. As broadcast media is the most convenient and popular means of disseminating varying views on public issues,[30] its protection is essential to the freedom of expression. To deprive people of access to broadcast media through the interruption or stoppage of its operations would be to deny the information exchange and the exercise of expression between the communicator and the audience, leaving a void in public discourse.

The Supreme Court in *Diocese of Bacolod v. Commission on Elections*, had already recognized that the medium is, indeed, the message when it ruled that the size of the tarpaulins does matter: "The form of expression is just as important as the information conveyed that it forms part of the expression. The present case is in point."[31] Among the reasons forwarded were its enhancement of efficiency in communication, its underscoring of the importance of the message to the reader, and its allowance for more messages.[32]

Similarly, broadcast media shares the same aspects as the large tarpaulins assailed in the above-cited case. First, it enhances efficiency in communication as the content becomes readily available to a wide range of audience simultaneously and without significant geographic and economic barriers. Second, it underscores the importance of the messages conveyed. Since airtime is limited by scarcity of airwaves,[33] the content broadcasted thereon is of perceived

[30] *Id.*
[31] *Diocese of Bacolod v. Commission on Elections*, G.R. No. 205728, 21 January 2015.
[32] *Id.*
[33] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.

importance. Third, broadcast media allows for more messages, providing more opportunities to amplify, explain and argue points. The Supreme Court then ruled that limitations imposed upon the medium were in the form of a content-based regulation because the content could not be divorced from the size of its medium.[34]

The characterization of the medium as the message aligns with the intent of the Constitution's framers to treat the right to freedom of expression as a dynamic one. Fr. Joaquin G. Bernas stated that:

> "The Committee did not think it necessary or advisable to try to define these freedoms; rather, it would prefer to keep the original language which has been enriched by a large body of jurisprudence. It is a dynamic right which is very difficult to put into simple formulas, and we prefer to leave the formula this way."[35]

In fact, the Supreme Court has already adopted a similar treatment of broadcast media in *Newsounds Broadcasting Network Inc. v. Ceasar Dy* ("*Newsounds Broadcasting*"), wherein it ruled that the closure of a broadcasting station is a content-based regulation. Content-based regulations are those that concern the incidents of speech and are treated more suspect than content-neutral laws because of judicial concern with discrimination in the regulation of expression. While it may appear that closure on the basis of lack of permits is content-neutral, especially in this case wherein there was a violation of zoning laws, the Supreme Court appreciated the attendant circumstances and

[34] *Diocese of Bacolod v. Commission on Elections*, G.R. No. 205728, 21 January 2015.
[35] I RECORD CONST. COMM'N 708 (17 July 1986).

found that the subject of government action was the content itself. In the case, the restriction was imposed after criticism against the local government was aired on the radio station, and immediately before the 2004 elections. The Court, finding that the restriction was driven out of political motivation to curtail expression of criticism, characterized the closure of the radio station as content-based and subjected the said act to the strict scrutiny test.[36] The Court held:

> "The Court is of the position that the actions of the respondents warrant heightened or strict scrutiny from the Court, the test which we have deemed appropriate in assessing content-based restrictions on free speech, as well as for laws dealing with freedom of the mind or restricting the political process, of laws dealing with the regulation of speech, gender, or race as well as other fundamental rights as expansion from its earlier applications to equal protection."[37]

This submission is further supported by international jurisprudence as in the Inter-American Court of Human Rights' ("Inter-American Court") Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. The Inter-American Court recognized as inseparable from the freedom of expression the right to use whatever medium deemed appropriate to impart ideas and to have them reach as wide an audience as possible.[38] It effectively held that the medium is indeed the

[36] *Newsounds Broadcasting Network Inc. v. Ceasar Dy*, G.R. No. 170270, 2 April 2009.
[37] *Newsounds Broadcasting Network Inc. v. Ceasar Dy*, G.R. No. 170270, 2 April 2009.
[38] Advisory Opinion OC-5/85, IACHR Series A No 5, IHRL 3428 (IACHR 1985), 13 November 1985.

message, and as such a regulation thereof is a content-based restriction subject to the strictest scrutiny. The Court held: "This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely."[39]

Indeed, broadcast media is so closely intertwined with the messages carried thereon that it should be recognized and treated as part of the message itself. To abolish the medium is to abolish the message since the medium has become so intertwined with the message that the latter is lost without the former carrying it through. Therefore, any prior restraint should be considered a content-based regulation, the validity of which is measured using the clear and present danger test.[40]

This treatment of broadcast media is justified by its role as the means to promote the duality of free expression – the right to impart and the right to access information. Emphasizing the role of broadcast media as instruments of the freedom of expression, the Inter-American Court held:

> "If freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. It is the mass media that make the exercise of freedom of expression a reality."[41]

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[39] *Id.*
[40] *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008.
[41] Advisory Opinion OC-5/85, IACHR Series A No 5, IHRL 3428 (IACHR 1985), 13 November 1985.

In other words, "it is the mass media that make the exercise of freedom of expression a reality."[42]

As broadcast media is protected similarly with content-based restriction, strict scrutiny must be applied in ensuring its freedom from prior restraint

Freedom of expression includes the freedom from prior restraint in the form of official government restrictions imposed on expression in advance of actual publication or dissemination.[43] It is a broad, encompassing freedom from all forms of censorship, including that in the form of closure of operations. Similar to the denial of legislative franchises, the closure of business, printing offices of newspapers, and of private radio broadcasting stations have been classified as prior restraint.[44]

A prior restraint is subject to the appropriate Constitutional test.

In *Chavez*, the Court upheld the applicability of the clear and present danger test to prior restraints on broadcast media. However, it limited its application to content-based restrictions.

Content-based restrictions are those based on the subject matter of the speech. They bear a heavy presumption of invalidity, and are only valid when the government

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[42] *Id.*
[43] *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008*; Newsounds Broadcasting Network Inc. v. Ceasar Dy*, G.R. No. 170270, 2 April 2009.
[44] *Jose Burgos v. Chief of Staff*, G.R. No. L-64261, 26 December 1984; *Newsounds Broadcasting Network Inc. v. Ceasar Dy*, G.R. No. 170270, 2 April 2009.

discharges its burden of proving clear and present danger.[45] Under the clear and present danger test, the evil consequence of allowing the expression must be extremely serious and the degree of imminence extremely high before prior restraint is allowed.[46]

Thus, in actions that affect the continuity of operations of broadcast media, such as the denial of legislative franchise, the government has the burden of proving such denial is to avert a clear and present danger found in the medium itself.

In practical application, this simply means that when there is legislative action concerning the franchise of broadcast media, such exercise of legislative discretion must be subject to strict scrutiny. To withstand a Constitutional challenge, these requisites must be met: Compelling state interest to act, act narrowly tailored to achieve the said interest, and the said act is the least restrictive means to achieve the said interest.[47]

To demonstrate, an analysis of ABS-CBN's closure in 2020 is in order.

In 1995, under Republic Act No. 7966, ABS-CBN was granted a 25-year franchise, which was set to expire on 4 May 2020. On 5 May 2020, ABS-CBN was ordered by the NTC to stop its broadcast operations due to the expiry of its franchise.

Prior to the closure, several bills had been filed to renew the ABS-CBN franchise. However, on 10 July 2020, members

[45] *Diocese of Bacolod v. Commission on Elections*, G.R. No. 205728, 21 January 2015.
[46] *Gonzales v. Commission on Elections*, G.R. No. L-27833, 18 April 1969.
[47] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.

of the House of Representatives Committee on Legislative Franchises denied the franchise application of ABS-CBN.[48]

Prior to denying the franchise, the House of Representatives conducted several hearings and investigations, which led the House Committee to deny the ABS-CBN franchise on grounds such as the alleged dual citizenship of its Chairman Emiritus Mr. Eugenio Lopez III, issuance of Philippine Depositary Receipts to foreigners, unlawful return of assets to the Lopez family after martial law, violation of previous franchise by operating a pay-per-view channel without NTC approval, questionable labor practices and tax avoidance schemes, biased reporting, inappropriate program content, and political meddling.[49]

In the absence of a clear and present danger sought to be averted by the denial of the franchise, it is difficult to appreciate a compelling state interest served. In *Newsounds Broadcasting*, because a violation of a regulation was not sufficient basis to uphold the closure of radio broadcast stations,[50] more so should the alleged and unproven violations be disregarded in the ABS-CBN case. Congress appears to have acted based on conjectures and presumptions, and not in response to a danger that is clear and present. Even assuming there was compelling state interest, the means employed by the government resulted in

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[48] Melissa Lopez and Glee Jalea, *TIMELINE: ABS-CBN franchise*, CNN PHILIPPINES, 13 February 2020, *available at* https://www.cnnphilippines.com/news/2020/2/13/ABS-CBN-franchise-timeline.html.

[49] Anna Malindog-Uy, *Why Did Congress Deny ABS-CBN A Franchise?*, THE ASEAN POST, 16 July 2020, *available at* https://theaseanpost.com/article/why-did-congress-deny-abs-cbn-franchise.

[50] *Newsounds Broadcasting Network Inc. v. Ceasar Dy*, G.R. No. 170270, 2 April 2009.

the full closure of the broadcast station, and did not provide any opportunity to rectify infractions, if any. Finally, the denial of the franchise was not the least restrictive means to achieve the state interest, if any. Instead of denying the franchise bill at the committee level, it could have elevated the bill to the plenary to thresh out the discussion on the propriety of denying ABS-CBN's franchise. Should there be a need to hold ABS-CBN accountable for the raised infractions, proper court or administrative proceedings could have been initiated by those seeking redress.

While there are no definitive standards to consider in acting upon an application for legislative franchise, it is suggested that Congress be guided by those set out already in the Constitution and in law as those reflect objective criteria and minimize the exercise of subjectivity. These standards include nationality, anti-competition,[51] sufficient capitalization, public service programs, and number of stations.[52] The Congress need not look beyond these standards since other administrative agencies such as the NTC and Movie and Television Review and Classification Board ("*MTRCB*") already regulate other admittedly important aspects of broadcast operations. Should Congress still adopt other standards in the exercise of discretion, it should nevertheless be guided by the requirements of strict scrutiny. Failing to meet the test of strict scrutiny, the legislative action upon a franchise is arguably Constitutionally infirm as it violates the freedom of expression and the press.[53]

[51] CONST. art. XII, § 11.
[52] Pres. Dec. No. 576-A (1974), §1-3.
[53] *Diocese of Bacolod v. Commission on Elections*, G.R. No. 205728, 21 January 2015.

IV. ALIGNMENT WITH THE CONSTITUTION

In light of the doctrine of *ut magis valeat quam* pereat, the proposed interpretation aligns with the Constitution since the legislative power to grant franchises under Section 11, Article XII cannot be read in isolation from the freedom of expression clause under Section 4, Article III. Recognizing the need to protect free expression and free press from an unbridled exercise of legislative power over franchises, the status quo needs to be re-examined with considerations of public interest.

Ut magis valeat quam pereat

The grant of legislative franchise is governed by Section 11, Article XII of the Constitution, which provides:

> "No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their

> proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines."

While there is no other Constitutional provision that deals with franchises, it is submitted that applying the doctrine of *ut magis valeat quam pereat*, the power of Congress to grant franchises should be subject to other Constitutional provisions including the free expression clause under Section 4, Article III of the Constitution. Thus, contrary to the present application thereof, Section 11, Article XII does not provide absolute discretion to Congress; Congress must exercise its power in conjunction with all other Constitutional provisions.[54]

This is not the only situation wherein the free expression clause is read together with other Constitutional provisions. In *National Press Club v. Commission on Elections*, the Supreme Court harmonized the application of Article IX(C)(4) and the free expression clause, holding that the power granted to the Commission on Elections ("Comelec") was limited by the rights of free speech and free press.[55]

Thus, the free expression clause applies in conjunction with Section 11, Article XII on legislative franchise. Although Section 11, Article XII is provided under the Constitution, its application cannot serve as a restriction on the exercise of free expression in the absence of a clear and present danger. Constitutional framer Mr. Napoleon G. Rama cautioned that "what is dangerous is to write into the Constitution some kind

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[54] *Francisco v. House of Representatives*, G.R. No. 160261, 10 November 2003.
[55] *National Press Club v. Commission on Elections*, G.R. No. 102653, 5 March 1992.

of objectives, regulations or conditions of this freedom of the press."[56]

Outdated precept of scarcity, pervasiveness, and accessibility of broadcast media

In *Chavez*, the court guided by U.S. jurisprudence explained that the lesser scope of protection given to broadcast media as opposed to print is due to the unique aspects of broadcast media, namely the scarcity of the frequencies, pervasiveness as a medium, and accessibility to children.[57] However, present day advances in technology and applicable regulations call for a re-examination of this precept, and an interpretation that is more suitable to the times.

First, scarcity of frequencies[58] which has been cited as the rationale for the differentiated treatment of broadcast media since its inception in *National Broadcasting Corporation v. United States*,[59] has become outdated as cable and satellite television have already increased the number of actual and potential channels, the same being further increased in the advent of digital technology.[60]

Second, on pervasiveness as a medium, a present day look into pervasiveness of print, broadcast, and technological media, would show that similar to the trend in print media, broadcast media is also experiencing a downward trend in relevance compared to its technological counterparts.

[56] II RECORD CONST. COMM'N 926 (23 September 1986).
[57] *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008.
[58] *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. Commission on Elections*, G.R. No. 132922, 21 April 1998.
[59] *National Broadcasting Corporation v. United States*, 319 U.S. 190 (1943).
[60] *Chavez v. Gonzales*, G.R. No. 168338, 15 February 2008.

According to a 2019 survey by the Social Weather Stations,[61] while television remains the most pervasive source of news in the Philippines with 60 percent of Filipino adults or 40 million users, social media platform Facebook has since taken the second spot with 21% of Filipino adults or 13.9 million users.[62]

The pervasiveness of technological media is just beginning. From 2018 to 2019, social media users in the Philippines grew from 67 million to 76 million.[63] This adoption has been further accelerated due to the Coronavirus disease 2019 pandemic where 54% of Filipinos reported that they spent more time in social media due to it.[64] The trend in consumer behavior and internet usage indicates that technological media is set to become the most pervasive information source of Filipinos in the near future. Thus, the pervasiveness of broadcast media is a concern of less significance as social media establishes itself as the dominant news source.

Third, while protection of the child from harmful content on broadcast media is a State interest, it does not

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[61] Social Weather Stations, *First Quarter 2019 Social Weather Survey: 1 of 5 adult Pinoys use Facebook daily as a source of* news, SOCIAL WEATHER STATIONS, 29 June 2020, *available at* https://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20190629182313&mc_cid=023b1e53fe&mc_eid=31b9d30a85.

[62] Social Weather Stations, *First Quarter 2019 Social Weather Survey: 1 of 5 adult Pinoys use Facebook daily as a source of* news, SOCIAL WEATHER STATIONS, 29 June 2020, *available at* https://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20190629182313&mc_cid=023b1e53fe&mc_eid=31b9d30a85.

[63] Gelo Gonzales, *Filipinos spend more time online, on social media worldwide - report*, RAPPLER, 31 January 2019, *available at* https://rappler.com/technology/philippines-online-use-2019-hootsuite-we-are-social-report.

[64] *COVID-19 accelerates digital adoption in PH*, PHILIPPINE DAILY INQUIRER, 13 May 2020, *available at* https://technology.inquirer.net/99340/covid-19-accelerates-digital-adoption-in-ph.

justify the exercise of unbridled congressional authority to grant, renew, appeal, or amend a broadcast media's franchise when there are least intrusive means to prevent such feared harm. The protection of the child should not be of such consideration in actions upon franchise applications considering that the MTRCB under P.D. No. 1986[65] already ensures that broadcast media content is conducive for younger audience.

Thus, in light of the outdatedness of the precept, the fears sought to be addressed by restrictions upon broadcast media franchise are no longer clear and present as to warrant a broad exercise of legislative discretion in actions upon franchise applications.

Necessity of upholding public interest

Recent events, especially the case of the closure of ABS-CBN, illustrate the dangers of allowing Congress unbridled discretion in acting upon legislative franchises. To allow the status quo to prevail and Congress to remain unchecked is to countenance the infringement of free expression and the restriction on free press. Thus, it is submitted that the proposed interpretation best upholds the public interest.

In *Ashbacker Radio Corp. v. F.C.C.*,[66] the U.S. court recognized the need to maintain reasonable stability in the broadcast media industry so that broadcasters would not be dissuaded from participating in the industry. This would encourage activity within the industry, which would lead to maximum dissemination of information to the public, thereby promoting plurality of views. Extending a broader protection to the franchises of broadcast media would create reasonable

[65] Pres. Dec. No. 1986 (1985).
[66] *Ashbacker Radio Corp. v. F.C.C,* 326 U.S. 327 (1945).

stability in the industry since they are more assured that the fate of their franchises will not be determined by the whimsical intentions of the government but in adherence to Constitutional standards. Comparatively, an unstable environment where there can be unanticipated shifts in the franchise would cause hardships not just for the broadcasters but also for the public whom they promised to serve since potential or existing broadcasters are deterred from participating in a volatile industry.[67] Thus, narrowing the platforms that can disseminate information to the public.

Moreover, the regulatory environment under the status quo creates some chilling effect on broadcast media, as compared to print media, as the former needs a legislative franchise to operate. Broadcasters operate with the possibility of closure in mind, and the Supreme Court has held that such circumstance, in itself, ineluctably restraints its content.[68] Press freedom would be nothing more than a conceptual ideal if broadcast media remains bound by the shackles of a political process not subject to strict scrutiny. The status quo puts broadcast media at the mercy of the government, subject to the whims of those in power.

The proposed interpretation protects broadcast media from government retaliation and thus allows it to perform its role as a watchdog of the government on behalf of the people. This role was discussed in *GMA Network*, wherein the Supreme Court citied Justice Black's concurring opinion in the landmark Pentagon Papers case:

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[67] Timothy Dyk, *Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer*, 5 YALE J. ON REG. (1988).
[68] *Divinagracia v. Consolidated Broadcasting System, Inc.,* G.R. No. 162272, 7 April 2009.

> "Finally on this matter, it is pertinent to quote what Justice Black wrote in his concurring opinion in the landmark Pentagon Papers case: 'In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.'"[69]

The Supreme Court has illustrated the protective mantle of the constitutional guaranty of a free press in the case of *People v. Danny Godoy*:

> "The liberty of the press consists in the right to publish with impunity the truth, with good motives and for justifiable ends, whether it respects governments or individuals; the right freely to publish whatever the citizen may please and to be protected against any responsibility for so doing, except in so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of

[69] *GMA Network, Inc. v. Commission on Elections*, G.R. No. 205357, 2 September 2014.

> society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity."[70]

An essential part of a free press is the freedom to publish whatever one pleases and to be protected against any responsibility for doing so, except when there is a clear and present danger. To allow Congress to regulate the grant of legislative franchise without subjecting its action to Constitutional scrutiny would be inimical to a free press and against the public interest. This would necessarily impose an implied restriction on broadcasting media stations to exercise caution in the content published so as not to compromise its continuous operations for fear of government retaliation upon its legislative franchise.

Thus, under the status quo, with franchises subject to Congress' amendment, alteration, repeal, and non-renewal as seen in the recent closure of ABS-CBN, the expression of broadcast stations is curtailed to maintain good graces with government officials to whom it is beholden to and upon whom its fate ultimately rests. Should the status quo remain unchanged, and even aggravated by the recent closure of ABS-CBN, then the vision of a free and unrestrained press that can effectively expose deception in government,[71] is effectively reduced to a press forced to yield to government interests, if only to remain in existence.

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[70] *People v. Danny Godoy*, G.R. No. 115908-09, 29 March 1995.
[71] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The proposed interpretation, which reads the free expression clause in conjunction with Section 11, Article XII, should be adopted in order to serve the public interest.

V. CONCLUSION

It is not our submission that broadcast stations should not be regulated or that every case of closure be deemed unconstitutional, but it bears emphasis that in pursuing action such as the denial of ABS-CBN's franchise application, the government should subject its actions to the strictest scrutiny through the application of the clear and present danger, lest it find itself subject to judicial review for infringement of the esteemed and protected right to free expression and free press.

A judicial interpretation of Constitution or law becomes part of the legal system only when embodied in judicial decisions.[72] Should a proper action be filed and found to be properly subject of judicial review, we submit that the Supreme Court should act upon the same especially considering the capability of repetition and transcendental importance of the matter.[73]

The Court has, in the past, not shielded away from its duty in using judicial interpretation to protect public interest and uphold the mandate of the Constitution. Instead of being treated as an ordinary franchise, a broadcast media franchise should enjoy the protection of strict scrutiny and the presumption of constitutionality when the government acts upon franchise applications. By adopting the proposed interpretation, the Court can preserve the vitality of our civil

[72] Rep. Act No. 386 (1949), §8.
[73] *Kilusang Mayo Uno v. Aquino*, G.R. No. 210500, 2 April 2019.

and political institutions by protecting it from dubious intrusions.[74]

As learned from precedent and historical experience, the public interest and the intent of the Constitution is best upheld only when a broad, rather than a lower, degree of protection is afforded to broadcast media. As a society, it is only through adapting to the advances and unique challenges of technology that we can uphold the democratic aspirations of the Constitution and facilitate the role of the media in disseminating public information—and especially acting as a watchdog against the government.

Assuming full protection of the free expression clause is afforded to broadcast media in actions involving their franchises, maybe La Solidaridad would have been granted a franchise today. Not because the government wanted its existence but rather because broader Constitutional protection would render a decision to grant a franchise based on the political caprices of the government difficult.

[74] *Diocese of Bacolod v. Commission on Elections*, G.R. No. 205728, 21 January 2015.

TERRORISM FINANCING: A NEW BATTLEGROUND

DCP Benjamin R. Samson, MBA[*]

Monies, property, and funds are weapon systems. When used legitimately, they spur economic growth and support the needs of societies, but when they fall into the hands of rogue elements, they could wreak havoc and destroy lives and property—endangering the safety of every citizen of the world and the peace and security of all nations.

Acts of terrorism are not creations of the 21st Century. Incidents of terrorism happened even before that; and deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations and considering that the financing of terrorism is a matter of grave concern to the international community as a whole[1], the General Assembly of the United Nations, in resolution 54/190 of

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[1] 2nd and 9th Preamble of the International Convention for the Suppression of the Financing of Terrorism.

December 9, 1999, adopted the International Convention for the Suppression of the Financing of Terrorism (Convention). The Convention notes, in its 10th Preamble that it is a widely accepted notion that terrorists cannot perform their illegal acts without obtaining financing.

Being a signatory to the Convention, the Philippines agreed to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social, or cultural goals. These also include those who engage in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities. Particularly, the Philippines is to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist activities without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds.[2] Hence, the passage of Republic Act No. 10168 in 2012 or almost a decade since the country's assent to the Convention.

Terrorism financing is an offense committed by any person who, directly or indirectly, willfully and without lawful excuse, possesses, provides, collects or uses property or funds or makes available property, funds or financial service or other related services, by any means, with the unlawful and willful intention that they should be used or with the knowledge that they are to be used, in full or in part: (a) to carry out or facilitate the commission of any terrorist

[2] As contained in General Assembly resolution 51/210 of December 17, 1996.

act; (b) by a terrorist organization, association or group; or (c) by an individual terrorist. It is likewise committed by any person who organizes or directs others to commit financing of terrorism.[3] The law also prohibits the dealing of property or funds of designated persons.[4]

Considered a transnational organized crime, terrorism financing has become a hybrid weapon used by terrorists here and abroad. With the advent of technology and the ease with which people from across the globe access the global banking and remittance systems, the need to combat terrorism financing has become a pressing concern among nations. With this in mind, the Philippine Congress has spawned a counter-weapon to abet and combat terrorism financing by granting the country's financial intelligence unit, the Anti-Money Laundering Council (Council), with special powers previously not given to any of our law enforcement agencies.

The Council was expressly given by law the express power to inquire into or examine bank[5] deposits and investments without the need of securing an order from a court of competent jurisdiction. Quite revolutionary considering that the Philippines is known for its strict adherence to the secrecy of bank deposits. So, why the need of giving such extraordinary power to the Council? To

[3] Section 4, Republic Act No. 10168.
[4] Section 8, Ibid.
[5] Under Section 3 of Republic Act No. 8791, banks shall refer to entities engaged in the lending of funds obtained in the form of deposits. They are classified into: (a) universal banks; (b) commercial banks; (c) thrift banks, composed of: (i) savings and mortgage banks, (ii) stock savings and loan associations, and (iii) private development banks, as defined in the Republic Act No. 7906; (d) rural banks, as defined in Republic Act No. 7353; (e) cooperative banks, as defined in Republic Act No. 6938; (f) Islamic banks as defined in Republic Act No. 6848; and (g) other classifications of banks as determined by the Monetary Board of the Bangko Sentral ng Pilipinas.

address this question, it is apt to give an illustration of what is happening on the ground, in particular, on how our banks and remittance centers do business with their clients.

Transactions with banks are more intricate than those made through remittance centers. This is due not only to the screening processes conducted involved but also because banks have personnel who are well-trained to flag suspicious transactions. Banks, without exception, are subject to stringent reportorial requirements from the Bangkok Sentral ng Pilipinas (BSP). At this point, it must be emphasized that the Council is an independent institution from BSP.

Another reason is convenience. Remittance centers are also under the supervision of the BSP, but owing to their accessible locations making them ubiquitous fixtures in every town or city, sending and receiving monies through remittance centers have practically chipped into the dominance of mainstream banking transactions.

For example, a client goes to Remittance Center A. The client will then be asked about the nature of the transaction whether it is for sending or receiving. In both cases, the client will be given a 1/4-size bond paper form. The front page contains the following sets of information, to wit: Name of sender and receiver, their respective contact numbers, purpose of transaction, amount, and the portion where the name and signature of the client appears. The dorsal portion contains the usual fine prints which our law considers as a contract of adhesion. The transaction will then be over in less than a minute, depending on the number of clients being served by the remittance center.

During the times that the author made legitimate transactions with Remittance Centre A, no questions were asked about the purpose of the transaction. As advertised,

the transaction was processed and the receiver was able to receive the amount within minutes. The same scenario happened with Remittance Center B. The sending of money through our BSP-registered remittance centers was so seamless and hassle-free that money, whether it comes from legitimate or illegitimate sources, changes hands in a matter of minutes.

Here lies the problem.

At which point in time should the government abet or combat financing of terrorism? What is the better policy? Is it nipping the problem in the bud or should we wait for proper investigation to be made before actions could be taken?

The spotlight was then given to the Council. Originally created in 2001 under Republic Act No. 9160[6], the Council's broad powers had been enhanced to make it more effective against money laundering and, now, the financing of terrorism. Principally, the Council was designated as the Philippines' financial intelligence unit. Since 2001, the laws against money laundering have been amended several times to include recent trends in transnationally organized crimes and to enhance the Council's authority to prevent the Philippines from being blacklisted by the Financial Action Task Force. All of these were done to prevent the country from becoming a haven for money launderers. Hence, the passage of Republic Act No. 9194[7], Republic Act No. 10167[8],

[6] Anti-Money Laundering Act of 2001.
[7] An Act Amending Republic Act No. 9160.
[8] An Act to Further Strengthen the Anti-Money Laundering Law.

Republic Act No. 10168[9], Republic Act No. 10365[10], and, lastly, Republic Act No. 10927.[11]

The first Philippine law against money laundering emphatically stated that it is the policy of the State to protect and preserve the integrity and confidentiality of bank accounts and to ensure that the Philippines shall not be used as a money laundering site for the proceeds of any unlawful activity. Consistent with its foreign policy, the State shall extend cooperation in transnational investigations and prosecutions of persons involved in money laundering activities whenever committed.[12] Hence, the Council, composed of the Governor of the Bangko Sentral ng Pilipinas as chairman and the Commissioner of the Insurance Commission and the Chairman of the Securities and Exchange Commission as members, was tasked to discharge, among others, the following functions[13], to wit:

> "xxx.
>
> (3) To institute civil forfeiture proceedings and all other remedial proceedings through the Office of the Solicitor General;
>
> (4) To cause the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offenses;

[9] The Terrorism Financing Prevention and Suppression Act of 2012.
[10] An Act Further Strengthening the Anti-Money Laundering Law.
[11] An Act Designating Casinos as Covered Persons.
[12] Section 2, Republic Act No. 9160.
[13] Section 7, Republic Act No. 9160.

> (5) To initiate investigations of covered transactions, money laundering activities and other violations of this Act;
>
> (6) To freeze any monetary instrument or property alleged to be proceed of any unlawful activity;
>
> xxx."

By law[14], financing of terrorism under Section 4 and the offenses punishable under Sections 5[15], 6[16], and 7[17] of this Act shall be predicate offenses to money laundering, as defined in Republic Act No. 9160, as amended, and subject to the suspicious transaction reportorial requirement.

When the Council was created in 2001, it already had the power to inquire into and examine bank deposits. However, it was not a carte blanche authority. As the law put it:

> "Notwithstanding the provisions of Republic Act No. 1405, as amended; Republic Act No. 6426, as amended; Republic Act No. 8791, and other laws, the AMLC may inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon order of any competent court in cases of violation of this Act when it has been established that there is probable cause that the deposits or investments involved are in any way related to a money

[14] Section 17, Republic Act No. 10168.
[15] Attempt or Conspiracy to Commit the Crimes of Financing of Terrorism and Dealing with Property or Funds of Designated Persons.
[16] Liability of Accomplice.
[17] Liability of Accessory.

> laundering offense: Provided, That this provision shall not apply to deposits and investments made prior to the effectivity of this Act".[18] (Underlining supplied)

When Republic Act No. 9160 was amended in 2003 by Republic Act No. 9194, the Council's authority to inquire into and examine bank deposits was amplified as follows:

> "Notwithstanding the provisions of Republic Act No. 1405, as amended, Republic Act No. 6426, as amended, Republic Act No. 8791, and other laws, the AMLC may inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon order of any competent court in cases of violation of this Act, when it has been established that there is probable cause that the deposits or investments are related to an unlawful activities as defined in Section 3(I) hereof or a money laundering offense under Section 4 hereof, except that no court order shall be required in cases involving unlawful activities defined in Sections 3(I)1, (2) and (12).
>
> "To ensure compliance with this Act, the Bangko Sentral ng Pilipinas (BSP) may inquire into or examine any deposit or investment with any banking institution or non-bank financial institution when the examination is made in the course of a periodic or special examination, in accordance with the rules of examination of the BSP."[19] (Underlining supplied)

[18] Section 11.
[19] Section 8, Republic Act No. 9194.

Here, the power of the BSP to inquire into and examine any deposit or investment can only be made in the course of a periodic or special examination, but this is only for compliance with our anti-money laundering law. Glaringly, there is no mention whatsoever about the Council's power to do it, much less in connection with the illegal activities of terrorists. To the extent that even if the BSP would find out that a particular account or investment was used for the benefit of a terrorist, no immediate action can be made about it other than conducting an investigation and filing a complaint before the Department of Justice or seeking remedy before the courts of competent jurisdiction, if warranted. As mentioned above, the Council is independent from BSP.

In 2012, Republic Act No. 9194 was amended by Republic Act No. 10167 further clarifying the Council's authority to inquire into bank deposits as follows:

> "Notwithstanding the provisions of Republic Act No. 1405, as amended; Republic Act No. 6426, as amended; Republic Act No. 8791; and other laws, the AMLC may inquire into or examine any particular deposit or investment, including related accounts, with any banking institution or non-bank financial institution upon order of any competent court based on an ex parte application in cases of violations of this Act, when it has been established that there is probable cause that the deposits or investments, including related accounts involved, are related to an unlawful activity as defined in Section 3(i) hereof or a money laundering offense under Section 4 hereof; except that no court order shall be required in cases involving activities defined in Section 3(i)(1), (2), and (12) hereof, and felonies or offenses of a nature similar to those

mentioned in Section 3(i)(1), (2), and (12), which are Punishable under the penal laws of other countries, and terrorism and conspiracy to commit terrorism as defined and penalized under Republic Act No. 9372.

xxx.

xxx.

"A court order ex parte must first be obtained before the AMLC can inquire into these related Accounts: Provided, That the procedure for the ex parte application of the ex parte court order for the principal account shall be the same with that of the related accounts.

"The authority to inquire into or examine the main account and the related accounts shall comply with the requirements of Article III, Sections 2 and 3 of the 1987 Constitution, which are hereby incorporated by reference[20]."

(Underlining supplied)

Republic Act No. 10167 was then amended in 2013 by Republic Act No. 10365. However, the amendatory law did not touch the provision on the Council's authority to inquire into bank deposits. Instead, the new law inserted a new provision[21] in the original law, thus:

"The authority to inquire into or examine the main account and the related accounts shall

[20] Section 2, Republic Act No. 10167
[21] Section 21, Republic Act No. 9160.

> comply with the requirements of Article III, Sections 2 and 3 of the 1987 Constitution, which are hereby incorporated by reference. Likewise, the constitutional injunction against ex post facto laws and bills of attainder shall be respected in the implementation of this Act."[22]

It must be noted that the first sentence of the new provision is the same as the last paragraph of Section 2 of Republic Act No. 10167. The second sentence, however, is a new provision highlighting Section 22, Article III of the Constitution.

Republic Act No. 10365 was then amended in 2016 by Republic Act No. 10927 designating casinos as covered persons. Nevertheless, this new law did not amend Section 11 of Republic Act No. 9160.

Then came Republic Act No. 10168. Unlike the previous laws on money laundering, the law on terrorism only captioned the Council's authority to inquire into or examine bank deposits as an "Authority to Investigate Financing of Terrorism"[23]. As the saying goes, however, the devil is in the details.

The authority of the Council to investigate financing of terrorism can be found in Section 10 thereof, which is divided into three parts.

> The first part expressly states that the Council, either upon its own initiative or at the request of the Anti-Terrorism Council (ATC), is hereby authorized to investigate: (a) Any property or funds that are in any way

[22] Section 11, Republic Act No. 10365
[23] Section 10, Republic Act No. 10168.

related to financing of terrorism or acts of terrorism and (b) property or funds of any person or persons in relation to whom there is probable cause to believe that such person or persons are committing or attempting or conspiring to commit, or participating in or facilitating the financing of terrorism or acts of terrorism as defined herein.

Meanwhile, the second part authorizes the Council to enlist the assistance of any branch, department, bureau, office, agency or instrumentality of the government, including government-owned and -controlled corporations in undertaking measures to counter the financing of terrorism, which may include the use of its personnel, facilities and resources.[24] A plain reading of the first two (2) powers given to the Council is par for the course. However, the last paragraph of Section 10 is worthy of a judicious examination as it revolutionizes the entire system of financial investigation and prosecution. The aforementioned paragraph[25] is quoted in full as follows:

> "For purposes of this section and notwithstanding the provisions of Republic Act No. 1405, otherwise known as the "Law on Secrecy of Bank Deposits", as amended; Republic Act No. 6426, otherwise known as the "Foreign Currency Deposit Act of the Philippines", as amended; Republic Act No. 8791, otherwise known as "The General Banking Law of 2000" and other laws, the AMLC is hereby authorized to inquire into or examine deposits and investments with any banking institution or non-bank financial

[24] Paras. 1 and 2, Ibid.
[25] Para. 3, Section 10, Ibid.

> institution and their subsidiaries and affiliates without a court order".
>
> (Underlining supplied)

The novel provision introduced by Republic Act No. 10168 raises serious legal questions regarding its constitutionality. In essence, said provision threw away the legal safeguards provided by laws on the secrecy of bank deposits.

The Constitution states that no person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.[26] The Constitution also mandates that no ex post facto law or bill of attainder shall be enacted.[27] Finally, the Constitution declares that no person shall be held to answer for a criminal offense without due process of law.[28]

Let us take a look at the laws concerning bank deposits.

The pioneering law protecting bank deposits is Republic Act No. 1405. It became law in 1955 or 61 years before the passage of Republic Act No. 10168. Quoted in full is Section 2 of Republic Act No. 1405, viz:

> "All deposits of whatever nature with banks or banking institutions in the Philippines including investments in bonds issued by the Government of the Philippines, its political subdivisions and its instrumentalities, are hereby considered as of an absolutely confidential nature and may not be examined, inquired or looked into by any person,

[26] Section 1, Article III, Constitution.
[27] Section 22, Ibid.
[28] Para. 1, Section 14, Ibid.

> government official, bureau or office, except upon written permission of the depositor, or in cases of impeachment, or upon order of a competent court in cases of bribery or dereliction of duty of public officials, or in cases where the money deposited or invested is the subject matter of the litigation."

The law further stated that:

> "It shall be unlawful for any official or employee of a banking institution to disclose to any person other than those mentioned in Section two hereof any information concerning said deposits[29]."

Section 2 and Section 3 were both amended by Presidential Decree No. 1792 (P.D. No. 1792) issued on January 16, 1981. In turn, P.D. No. 1792 was expressly repealed by Section 13 of Republic Act No. 7653 which became law in 1993.

The original Sections 2 and 3 of R.A. No. 1405 are hereby reproduced for reference, as follows:

> "Sec 2 All deposits of whatever nature with banks or banking institutions in the Philippines including investments in bonds issued by the Government of the Philippines, its political subdivisions and its instrumentalities, are hereby considered as of an absolutely confidential nature and may not be examined, inquired or looked into by any person, government official, bureau or office, except upon written permission of the depositor, or in cases of impeachment, or upon order of a competent court in cases of bribery or dereliction of duty of public

[29] Section 3, Republic Act No. 1405.

officials or in cases where the money deposited or invested is the subject matter of the litigation xxx.

"Sec. 3. It shall be unlawful for any official or employee of a banking institution to disclose to any person other than those mentioned in Section two hereof any information concerning said deposits."

(Underlining supplied)

Then came Republic Act No. 6426 or the Foreign Currency Deposit Act of the Philippines which became law in 1974. The law expressly declared the secrecy of foreign currency deposits as follows:

"All foreign currency deposits authorized under this Act, as amended by PD No. 1035, as well as foreign currency deposits authorized under PD No. 1034, are hereby declared as and considered of an absolutely confidential nature and, except upon the written permission of the depositor, in no instance shall foreign currency deposits be examined, inquired or looked into by any person, government official, bureau or office whether judicial or administrative or legislative, or any other entity whether public or private; Provided, however, That said foreign currency deposits shall be exempt from attachment, garnishment, or any other order or process of any court, legislative body, government agency or any administrative body whatsoever. (As amended by P.D. No. 1035, and further amended by P.D. No. 1246, prom. Nov. 21, 1977)[30]

[30] Section 8, Republic Act No. 6426, as amended.

(Underlining supplied)

To enhance the efficacy of our laws enshrining the secrecy of bank deposits, including deposits of foreign currencies, Section 55 of Republic Act No. 8791 enumerates the prohibited transactions as follows:

> "55.1. No director, officer, employee, or agent of any bank shall -
>
> xxx.
>
> (b) Without order of a court of competent jurisdiction, disclose to any unauthorized person any information relative to the funds or properties in the custody of the bank belonging to private individuals, corporations, or any other entity: Provided, That with respect to bank deposits, the provisions of existing laws shall prevail;
>
> xxx.
>
> "55.3 No examiner, officer or employee of the Bangko Sentral or of any department, bureau, office, branch or agency of the Government that is assigned to supervise, examine, assist or render technical assistance to any bank shall commit any of the acts enumerated in this Section or aid in the commission of the same."

(Underlining supplied)

The right to substantive due process, simply stated, is the right to be heard. Questions might then arise anent the power of the Council to inquire into and examine bank

deposits without the permission of the depositor or without any order from a court of competent jurisdiction.

Due process is a guaranty against any arbitrariness on the part of the government, whether committed by the legislature, the executive, or the judiciary. If the law itself unreasonably deprives a person of his life or his property, he is denied the protection of due process. If the enjoyment of his rights is conditioned on an unreasonable requirement, due process is likewise violated.[31]

The Constitution provides that the legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives.[32]

Legislative power is the authority to make laws and to alter or repeal them.[33] What is generally meant, when it is said that a question is political, and not judicial, is that it is a matter which is to be exercised by the people in their primary political capacity, or that it has been specifically delegated to some other department or particular officer of the government, with discretionary power to act.[34]When political questions are involved, the Constitution limits the determination to whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned. If grave abuse is not established, the court will not substitute its judgment for that of the official concerned and decide a matter which by its nature or by law is for the latter alone to decide.[35]

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[31] Cruz, Constitutional Law, 2000 ed, p. 99.
[32] Section 1, Article VI, 1987 Constitution.
[33] Bernas, The 1987 Philippine Constitution: A Comprehensive Reviewer, 2006 ed., p. 224.
[34] Tañada v. Cuenco, 103 Phil. 1051, 1067 (1957).
[35] Marcos v. Manglapus, 258 Phil. 479, 506-507 (1989).

When the Council finds during its preliminary administrative investigation that the property or funds of a person, organization, or association is being used or is related to the offense of terrorism financing, the Council could immediately file a case against the respondent before the prosecutor's office either for inquest or preliminary investigation.[36] It must be stressed that preliminary administrative investigation is markedly different from preliminary investigation. The former solely belongs to the Council while the latter properly pertains to the function of prosecutors either from the Department of Justice or the Office of the Ombudsman.

As it stands, the power of the Council to inquire into or examine deposits and investments with any banking institution or non-bank financial institution and their subsidiaries and affiliates remain valid in the absence of any judicial pronouncement declaring the same as unconstitutional.

So, the question is whether Republic Act No. 10168 passes the test of reasonableness. The answer is in the affirmative.

Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. In one case decided by the United States Supreme Court, it was held that the determination of reasonableness of any search involves a two-fold inquiry:

[36] An inquest is a summary proceeding involving a person arrested without a warrant of arrest to determine the validity of the arrest and whether there is probable cause to hold him for trial, while a preliminary investigation is an inquiry or proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial.

First, one must consider whether the action was justified at its inception; and, second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.[37]

When Congress passed Republic Act No. 10168, it had in mind a valid reason of combating the financing of terrorism. Indeed, a half-baked law would be ineffective against the threats of modern crimes, financing of terrorism being one of them. The revolutionary authority given to the Council is not unreasonable considering the seriousness of the offense and its existential threat to our national security. It is submitted that an act only becomes unreasonable when it goes beyond the limits of acceptability or fairness.

When the law was passed in 2012, Congress clearly announced the policies behind the passage of the law. Thus:

> "It is the policy of the State to protect life, liberty, and property from acts of terrorism and to condemn terrorism and those who support and finance it and to recognize it as inimical and dangerous to national security and the welfare of the people, and to make the financing of terrorism a crime against the Filipino people, against humanity, and against the law of nations.
>
> "The State, likewise, recognizes and adheres to international commitments to combat the financing of terrorism, specifically to the International Convention for the Suppression of the Financing of Terrorism, as well as other binding

[37] O'Connor v. Ortega, 480 U.S. 709 (1987).

> terrorism-related resolutions of the United Nations Security Council pursuant to Chapter 7 of the Charter of the United Nations (UN).
>
> "Toward this end, the State shall reinforce its fight against terrorism by criminalizing the financing of terrorism and related offenses, and by preventing and suppressing the commission of said offenses through freezing and forfeiture of properties or funds while protecting human rights."[38]

Since the Council is the only authorized agency to inquire into and examine bank deposits and investments, it needs to act fast, doubly fast, to prevent the commission of the offenses punished by law. It is submitted that a person cannot be reasonably expected to hold on to his right to privacy over the State's obligation to ensure the security of its people.

Besides, the authority given to the Council is merely to inquire into and examine bank deposits and investments. It does not in any way impede the flow of legitimate capital movements. Neither does it automatically lead to prosecution. In this regard, our prosecution system and the courts are not in any way powerless to address grave abuse of discretion on the part of the Council. More importantly, the Council's power is not even all-encompassing. In fact, it is limited, not unbridled. Aside from conducting an initial inquiry and examination of the bank deposits and investments, the Council's authority over said deposits and investments stops right there. The Council cannot do more than that.

[38] Section 2, Republic Act No. 10168.

If the Council finds ground to file a criminal complaint against the accountholder or investor, it has to file a case before the Department of Justice or the Office of the Ombudsman, as the case may be, whose prosecutors must determine whether probable cause exists to hold the respondent liable for the offense. The determination of the existence of probable cause lies within the discretion of the prosecuting officers after they have conducted a preliminary investigation (or an inquest) upon complaint of an offended party[39] and in order to engender the well-founded belief that a crime has been committed, the elements of the crime charged should be present. This rule is based on the principle that every crime is defined by its elements, without which there should be – at the most – no criminal offense.[40]

With respect to the deposits or investments of any person, the Council, except for inquiring and examining bank deposits and investments, was not given by law any power to touch the same. As the law put it:

> "The AMLC, either upon its own initiative or at the request of the ATC, is hereby authorized to issue an ex parte order to freeze without delay: (a) property or funds that are in any way related to financing of terrorism or acts of terrorism; or (b) property or funds of any person, group of persons, terrorist organization, or association, in relation to whom there is probable cause to believe that they are committing or attempting or conspiring to commit, or participating in or facilitating the

[39] Cam v. Casimiro et al., G.R. No. 184130, 29 June 2015, citing Kalalo v. Ombudsman, G.R. No. 158189, 23 April 2010, 619 SCRA 141 and Ang-Abaya v. Ang, 593 Phil. 530, 541 (2008).
[40] Ibid., citing Ang-Abaya v. Ang, supra note 40 at 542.

commission of financing of terrorism or acts of terrorism as defined herein.

"The freeze order shall be effective for a period not exceeding twenty (20) days. Upon a petition filed by the AMLC before the expiration of the period, the effectivity of the freeze order may be extended up to a period not exceeding six (6) months upon order of the Court of Appeals: Provided, That the twenty-day period shall be tolled upon filing of a petition to extend the effectivity of the freeze order.

"Notwithstanding the preceding paragraphs, the AMLC, consistent with the Philippines' international obligations, shall be authorized to issue a freeze order with respect to property or funds of a designated organization, association, group or any individual to comply with binding terrorism-related Resolutions, including Resolution No. 1373, of the UN Security Council pursuant to Article 41 of the Charter of the UN. Said freeze order shall be effective until the basis for the issuance thereof shall have been lifted. During the effectivity of the freeze order, an aggrieved party may, within twenty (20) days from issuance, file with the Court of Appeals a petition to determine the basis of the freeze order according to the principle of effective judicial protection.

"However, if the property or funds subject of the freeze order under the immediately preceding paragraph are found to be in any way related to financing of terrorism or acts of terrorism committed within the jurisdiction of the

> Philippines, said property or funds shall be the subject of civil forfeiture proceedings as hereinafter provided."[41]

Entrenched in our jurisprudence is the principle that the general welfare of the majority prevails over the individual privacy of the few and the secrecy of their bank deposits and investments—the same a mere statutory privilege granted by Congress whose power is plenary and whose wisdom is deemed a political question save in cases of proven transgression of our Constitutional provisions. This is not the case for Republic Act No. 10168.

Indeed, the challenges of modern times require a reasonable proactive approach that ensures the safety of the citizenry. This is the intent of Republic Act No. 10168, which is neither an ex post facto law nor a bill of attainder, hence, the constitutionality of its provisions must be upheld.

[41] Section 11, Republic Act No. 10168.

OF COMMON AND PRIVATE CARRIERS BY SEA

Julius A. Yano, J.D., L.L.M.[*]

I. INTRODUCTION

Carriage for compensation is either common or private. Owing to the nature of their business, common carriers are expected to observe extra-ordinary diligence and shall be liable even for slight neglect in the performance of their functions toward the public in general. On the other hand, private carriers serving a particular person are merely expected to observe ordinary diligence and cannot be liable for anything below ordinary neglect.

In the admiralty jurisdiction of the United States and England whence the concept of common (and private) carriers originated, carriage by sea under charterparty agreements has for centuries consistently been deemed a form of private carriage. Under such negotiated agreements the shipowner carries goods of and for only a particular person. Given that the parties bargain on equal terms, freedom of contract is observed and the private carriage is governed by the stipulation of the parties in their charterparty agreement.

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Philippine jurisprudence on this issue is, however, unclear and far from satisfactory. It is most respectfully submitted that this matter should be reviewed; the nature of charterparties as well as the chartering process has to be revisited.

II. COMMON CARRIERS

The concept of common carriers became part of Philippine laws with the enactment of the Civil Code of the Philippines in 1949. It is of common law origin, which the Philippines took from the jurisprudence of the United States of America. As defined in Philippine law:

> Common carriers are persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water, or air, for compensation, offering their services to the public.[1]

> Common carriers, from the nature of their business and for reasons of public policy, are bound to observe extraordinary diligence in the vigilance over the goods and for the safety of the passengers transported by them, according to all the circumstances of each case. […][2]

The history of common carriers as a form of bailment was explained by Chief Justice Holt in the 18th century case of Coggs v Bernard[3] thus:

[1] Art 1732, Civil Code of the Philippines.
[2] Ibid., Art 1733.
[3] [1703] 2 Ld Raym 909.

In order to shew the grounds upon which a man shall be charged with goods put into his custody, I must shew the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a depositum, and it is that sort of bailment which is mentioned in Southcote's case. The second sort is, when goods or chattels that are useful are lent a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, vadium, and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case.

x x x

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts;

> either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c.: which case of a master of a ship was first adjudged, 26 Car. 2, in the case of Mors v. Slue, Raym. 220, 1 Vent. 190, 238.

Across the Atlantic, Justice Story explained that "[t]o bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation, pro hac vice. A common carrier has, therefore, been defined to be one, who undertakes for hire or reward to transport the goods of such, as choose to employ him, from place to place."[4] This idea would be adopted in The Propeller Niagara v Cordes,[5] where it was explained that "a common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey."

Owing to the public character of the services rendered by common carriers, extraordinary responsibility is exacted

[4] J Story, Commentaries on the Law of Bailments (Hillard and Brown 1832) 322.
[5] 62 US 7 (1858).

from them by the Common Law. As explained in Coggs v Bernard:[6]

> The law charges this person thus entrusted to carry goods, against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c, and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.

In the words of Lord Mansfield in Forward v Pittard,[7] common carriers are "insurers" of the delivery of goods intrusted to them. However, despite the high standard of care expected of common carriers, the law has permitted common carriers to "limit their common law liability by special acceptance or special contract. This is usually done by public notices or advertisements, or by cards or handbills, or by the bill of lading."[8] This devise to modify the scope and extent of a common carrier's liability would be sanctioned by statute in England (and later in the United

[6] Coggs (n 3).
[7] 1 Term Rep 27 (1785).
[8] T Chitty and L Temple, The Law of Carriers (T. & J. W. Johnson & Co 1857) 245.

States) such that, in England, "[t]he legal principle [on common carriers] still exists, although in practice it has been superseded by legislation."[9] As Lord Sumption in Volcafe Ltd v Compania Sud Americana de Vapores SA[10] remarked, common carriers have for many years been an almost extinct category. For all practical legal purposes, the common law liability of a carrier, unless modified by contract, is the same as that of bailees for reward generally.

III. PRIVATE CARRIERS

In Coggs v Bernard[11] Chief Justice Holt recognized two sorts of bailment for carriage for a reward: public (or common) and private:

> As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person.

Indeed, if there is common or public carriage, it is but logical that there be a non-common or non-public sort as well, ie private. Thus, it has been written that '[o]f this description of carriers, there are known in the Common Law two kinds, viz., private carriers, and public carriers; the latter being usually denominated common carriers […]'[12].

[9] Halsbury's Laws (5th edn, 2020) vol 7, para 3.
[10] [2018] UKSC 61, [2019] AC 358.
[11] Coggs (n 3).
[12] JK Angell, A Treatise on the Law of Carriers of Goods and Passengers by Land and by Water (Charles C Little and James Brown 1849) 1-2.

Under English law, a private carrier is described to be 'a person who, in the course of business or occasionally, undertakes the carriage of passengers or of other people's goods, but who does not hold himself out as exercising the public employment of a common carrier. A carrier who, while inviting all and sundry to employ him, reserves to himself the right to accept or reject their offers of goods for carriage, irrespective of whether his vehicles are full or empty, and who is guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements, is a private carrier.' (Citation omitted)[13]

In distinguishing private carriers from common carriers, Justice Story explained that:

> It is not (as we have seen) every person, who under takes to carry goods for hire, that is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of any ordinary bailee for hire, that is to say, the responsibility of ordinary diligence.[14]
>
> When it is said, that the owners and masters of ships are deemed common carriers, it is to be understood of such ships, as are employed as general ships, or for the transportation of merchandise for persons in general; such as vessels employed in the coasting trade, or in foreign trade, for all persons offering goods for the port of destination. But if the owner of a ship employs it on his own account generally, or if he

[13] Halsbury's Laws (n 9) para 10.
[14] Story (n 4) 322.

> lets the tonnage with a small exception to a single person, and then for the accommodation of a particular individual he takes goods on board for freight, (not receiving them for persons in general,) he will not be deemed a common carrier; but a mere private carrier; for he does not hold himself out as engaged in a public business or employment."[15]

It has been consistently held that letting the tonnage to accommodate the freight of a particular individual is not engaging in a public business or employment. In the event the carrier is deemed private and not common:

> But to render the master and owners of a ship liable as common carriers, it must appear that the ship is a general ship, or one employed for the carriage of goods for all persons indiscriminately, who offer goods for carriage to the place of destination, such as vessels employed in the coasting trade or in a foreign trade. Where the owner of a ship usually employs it on his own account, or if he lets the tonnage with a small exception to a single person, and then for the accommodation of a particular individual he takes goods on board for freight (not receiving them for persons in general,) he will be deemed a mere private and not a common carrier, inasmuch as he does not hold himself out as engaged in a public business or employment.[16]

[15] Story (n 4) 325.
[16] Chitty and Temple (n 8) 223-224.

Unlike common carriers, private carriers are deemed bailees for a reward, and bound merely to exercise ordinary diligence. In Coggs v Bernard[17] Chief Justice Holt explained:

> The second sort are bailies, factors, and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can; and if he be robbed, &c, it is a good account.

Thus, in England it has been the law since the 18th century that "a private carrier of goods is a bailee. As such, his obligation at common law is to take reasonable care of the goods and to refrain from converting them."[18] This view is similarly and consistently held in the United States:

> […] [W]hen the liability of a carrier arises from his reward, and he is not a common carrier, he is bound to "ordinary" diligence, and is responsible for "ordinary" neglect, which is the fixed mode or standard of diligence and of neglect. (Citation omitted) The latter sort of bailment, it has appeared, is called Locatum or hiring, which is always for reward; and is that branch of it denominated Locatio operis mercium vehendarum; (Citation omitted) and the trust being reciprocally beneficial to the bailor and the bailee, the law exacts ordinary diligence on the part of the latter, and makes him responsible for ordinary neglect, and for that only. (Emphasis suppled)[19]

[17] Coggs (n 3).
[18] Halsbury's Laws (n 9) para 11.
[19] Angell (n 12) 48.

Indeed, it has been firmly settled that, unlike common carriers, private carriers need only exercise ordinary diligence or 'such diligence as every prudent man commonly takes of his own goods and could only be liable for ordinary negligence and nothing less.'[20]

Private carriers are not subject to the exceptional or extraordinary duties and liabilities of common carriers, and they may carry for whom they choose, and for such compensation and upon such conditions of liability as may be agreed upon. The contracting parties stand upon equal terms, and can make such a contract as they think reasonable.[21]

IV. CARRIAGE OF GOODS BY SEA AND CHARTERPARTIES

A shipowner operating his vessel may offer services in a number of ways. He may carry the goods of various persons aboard his vessel as a common carrier or he may enter into a carriage contract with a person needing the entire (or a substantial part of the) vessel, as in the case of shipping bulk cargoes. In the former, the contract between the carrier and the shipper is usually embodied in a bill of lading. In the latter, a charterparty[22] becomes necessary.

Citing authorities of the civil law tradition, Professor Agbayani defines charterparties as follows:

[20] Ibid., 50.
[21] Ibid., 58.
[22] Charterparty: in medieval Latin, carta partita, an instrument written in duplicate on a single sheet and then divided by indented edges, so that each part fitted the other, whence the term "indenture"; only now used for this particular kind of shipping document; the first use given in the N.E.D. is in 1539. TE Scrutton, Charterparties and Bills of Lading (11th edn, Sweet and Maxwell Limited 1923) 1.

> Charter party is a contract by virtue of which the owner or the agent of a vessel binds himself to transport merchandise or persons for a fixed price. It has also been defined as a contract by virtue of which the owner or the agent of the vessel leases for a certain price the whole or a portion of the vessel for the transportation of goods or persons from one port to another. [23]

Three main types of charterparty agreements are important to discuss, viz. (1) time charter, (2) voyage charter and (3) demise charter. It is crucial to emphasize that "[t]he demise charter is a demise of the ship alone, and there is no service element. […] The demise charter is really a contract for the hire of a ship, rather than a contract for the carriage of goods by sea."[24] –

(1) Under a time charter, the charterer engages for a fixed period of time a vessel, which remains manned and navigated by the vessel owner, to carry cargo wherever the charterer instructs;

(2) Under a voyage charter, the charterer engages the vessel to carry goods only for a single voyage; and,

(3) Under a demise, or bareboat charter, the charterer takes complete control of the vessel, mans it with his own crew, and is treated by law as its legal owner. Of these three varieties, the demise charter has unique characteristics. A demise is the transfer of full possession and control of the vessel for the period

[23] AF Agbayani, Commentaries and Jurisprudence on the Commercial Laws of the Philippines (AFA Publications, Inc 1987) 251-252.
[24] P Todd, Principles of the Carriage of Goods by Sea (Routledge 2016) 5.

> covered by the contract. The charterer obtains the right to run the vessel and carry whatever cargo he chooses. The ship is manned and supplied by the charterer as well. [...] For most purposes, the charterer in a demise is treated as an owner, termed pro hac vice.[25]

One may think of carriage under a bill of lading as taking someone together with other passengers on a bus plying a fixed route; carriage under a voyage charter as taking someone to a specific destination in a taxi; carriage under a time charter as providing car hire service to someone for a certain space of time; and lastly, a demise charter as renting or leasing out one's car.

"Both time and voyage charters usually envisage the carriage of goods, and are therefore […] properly categorized as contracts for the carriage of goods by sea. By contrast, a demise charterparty, which is in effect a chattel lease of a ship, and has no service element, is not."[26]

V. CHARTERPARTY CARRIAGE AS PRIVATE CARRIAGE

When a vessel is chartered for the purpose of carriage, such as in the case of time and voyage charters, "the entire ship or some principal part of it is let to a merchant for the conveyance of goods on a determined voyage to one or more places."[27] In this event, the carriage is of the goods of and for a particular person. Hence, the carriage is private in nature. Thus, "the rights, duties, and liabilities of the parties depend upon the terms of the express contract entered into

[25] TJ Schoenbaum, Admiralty and Maritime Law (6th edn, West Academic 2019) 608.
[26] Todd (n 24) 4.
[27] Chitty and Temple (n 8) 224.

between them, and the master and owners of the vessel are not viewed in the light of common carriers."[28]

As it has been consistently and uniformly held, "charterparties are contracts whose terms are almost entirely unregulated. Almost all aspects of charterparties can be altered by the parties, if so desired."[29] The principle of freedom of contract governs the relationship of the parties to a charterparty.[30] This rule is beyond doubt under the jurisprudence of the United States on carriers by sea:

> The charter appears to have contemplated carrying the goods of the freighters only. She was in no sense, therefore, a general ship; but only a ship hired for a specific voyage, to carry a particular cargo for the charterers. Such a contract does not seem to be within the definition of a common carrier. In the case of The Niagara v. Cordes, 21 How. 7, a common carrier is defined as "one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey." None of these conditions attach to a contract of affreightment in charter-parties like the present. In Lamb v. Parkman, 1 Spr. 353, it is stated by Sprague, J., that such contracts "are not those of a common carrier, but of bailees for

[28] Ibid.
[29] Todd (n 24) 5.
[30] Schoenbaum (n 25) 476-477.

> hire, bound to the use of ordinary care and skill."[31]

When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire.[32]

In 1884, Judge Brown in Sumner v. Caswell (D.C.) 30 Fed. 249, decided, following Lamb v. Parkman, 1 Spr. 343, 353, Fed. Cas. No. 8,020, that a ship hired for a specific voyage to carry a particular cargo for the charterers, is not a common carrier but a bailee for hire and bound to exercise only ordinary skill and care. This rule has recently been reasserted and affirmed by this court in the case of The Fri, 154 Fed. 333, 338, 83 C. C. A. 305, 210, where the court says:

> "When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a carrier for hire."

Mr. Moore, in his work on Carriers, says, at page 20:

> "According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment to be such that, if he refuse, without some just

[31] Sumner and others v Caswell and others 20 F 249 (NY 1884).
[32] The Fri 154 F 333 (9th Cir 1907).

> ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action."

In Fish v. Chapman, 2 Ga. 349, 353, 46 Am. Dec. 393, it was held that the liability to an action for a refusal to carry is the safest criterion of the character of the carrier.

In Allen v. Sackrider, 37 N.Y. 341, the Court of Appeals of New York says:

> "The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. 'On the whole,' says Prof. Parsons, 'it seems to be clear that no one can be considered as a common carrier, unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him liable to an action, if he should refuse to carry for any one who wished to employ him.'"[33]

Under the terms of the Barge Charter Party, Firestone, through its agent, contracted for an entire vessel with a specified capacity. Notwithstanding the fact that Firestone was to designate the point of loading, absolute possession and control of the vessel did not pass to the charterer, as it would have under a demise charter, but rather it remained with Alamo. Upon these findings the Court concludes that the vessel provided under the Charter Party was a private carrier.

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[33] The Wildenfels 161 F 864 (2nd Cir 1908).

This rule of law is concisely stated in Gilmore & Black, supra, § 4-5, at p. 207:

> Charter party carriage, moreover, is normally looked on as "private" carriage, and, as pointed out above, there are no statutory rules forbidding the adjustment of risk for goods damaged in any manner provided by the charter.[34]

For a better understanding of the private nature of carriage by vessels on charter, it is important to discuss how a charterparty of the vessel is fixed in commercial practice. Unlike in the case of common carriage where the carrier unilaterally issues a bill of lading upon receipt of goods to be carried, "[c]harters are usually concluded after multiple communications between the parties through intermediaries called ship brokers."[35] Whilst standard charterparty forms are available, the parties are free to allocate risks contractually either by express contractual provision or by allocating specific duties concerning the cargo, the voyage, and the ship as part of the negotiation process.[36]

In describing chartering practice, it has been explained:

> Shipping is an international business and a person dealing with chartering has to work with the conditions prevailing day by day in the international freight market. A number of customs and rules of the trade have been established through the years all over the world,

[34] Alamo Chem Transp v M/V Overseas Valdes 469 F Supp 203 (ED La 1979).
[35] Schoenbaum (n 25) 608.
[36] Ibid.

and strict business ethics have developed which should be observed in the professional shipping business.

Chartering work is essentially a form of exchange of information. It is really one of the trades where the right information at the right moment is essential to be successful. Everyone involved in chartering acts, to a large extent, as a collector, judge and distributor of information. A great deal of the flow of information consists of, e.g., notes on fixtures all over the world. "making a fixture" means that the parties interested in a specific sea transport, through negotiations, reach a mutual agreement on all details in a charter.

The parties involved in a charter deal are, on the one hand, someone who owns or operates a ship (owner, time chartered owner or disponent owner), and, on the other hand, someone who requires a sea transport to be carried out (normally but far from always the cargo owner – in a charter-party the counter part of the shipowner is called the charterer). Both parties normally negotiate through the intermediary of representatives called shipbrokers or booking agents. The owner of the cargo (often the shipper or the consignee) is frequently also the charterer.

x x x

Chartering negotiations are carried out day and night and nearly always under pressure of time. Frequently it does not take more than a day from the time a shipping order has been placed on the

> market until a fixture has been confirmed. The negotiations are normally conducted over telephone, telex and telefax.
>
> In practice and by law all agreements, whether given in writing or by word of mouth, are with certain exceptions of equal value. As early as the beginning of the century the expression "our word is our bond" was coined among those dealing with professional chartering in London. For the sake of evidence, however, it goes without saying that it is appropriate to have the agreements drawn up in writing.[37]

To provide an idea of how a charter deal is actually negotiated, the facts relating to the charterparty agreement in Pollux Marine Agencies v Louis Dreyfus Corp[38] are reproduced as useful reference:

> On or about July 27, 1976, Sagus Marine quoted a time charter to Dillon's office for a vessel of the size of the Captain Demosthenes for a period of two or three years. Dillon then quoted the order to a Mr. O'Reilly at Pollux, agents for the Captain Demosthenes. O'Reilly communicated a firm offer of the vessel to Dillon on July 27. Dillon then relayed the offer to Robert Jr. Spaulding at Sagus who talked to his principals and about a half hour to an hour later made a counter-offer providing in part that the vessel must be "Greek

[37] L Gorton et al, Shipbroking and Chartering Practice (4th edn, Lloyd's of London Press Ltd 1995) viii.
[38] 455 F Supp 211 (SDNY 1978).

Flag with ITF in order . . .. [S]ub details pro forma."

Dillon testified that "ITF in order" means that the vessel's crew is employed under a trade union agreement which is acceptable to the International Trade Federation. "Sub details pro forma" meant that what they were negotiating were the "main terms" and that further details were to be based on the Dreyfus pro forma (Eldece Time) charter.

This counter-offer was communicated to O'Reilly at Pollux on July 27. Later that day O'Reilly made a counter-offer repeating the owner's last offer, but agreeing to provide a Greek Flag vessel and suggesting that the use of a Greek Flag vessel obviated the need for ITF.
Sometime later, between 1:00 P.M. and 1:30 P.M. on July 27, Spaulding made a counter-offer calling in part for Greek Flag, Greek Collective Agreement and "otherwise per Dreyfus last." Dillon communicated this to O'Reilly who, about 3:30 or 4:00 P.M., repeated the owner's last offer, except changing the rate, for a reply by 10:00 A.M. on July 28. Dillon communicated this to Spaulding.

> "For reply by 10:00 A.M. next day" means, Dillon testified, that the vessel is "out firm" to those prospective charterers until 10:00 A.M. the next day.

On the morning of July 28, Dreyfus advised that it would not take a time charter without a boycott clause. Dillon explained that a boycott

clause meant that if the vessel were boycotted because of unacceptability to ITF then the vessel would be offhire during the boycott. Clause 15A pt (ii) of Eldece Time contained such a boycott clause and Clause 15A pt (iii) provided for ITF. O'Reilly told Dillon that he would discuss this with the owners, but did not think they would fix the vessel with a boycott clause. There were several discussions that day on the boycott clause. In the meantime, negotiations regarding the charter period, delivery and re-delivery areas, rate, commissions and overtime the terms on which there was still no agreement were suspended because neither side would negotiate unless they could agree on a boycott clause.

On July 29 Dreyfus made a bid which included a provision for a Greek Collective Agreement and a boycott clause. Dillon telephoned and telexed the boycott clause to O'Reilly that same day. Later that day, O'Reilly declined the bid, did not make a counter-offer, and would not proceed with the negotiations so long as Dreyfus insisted on a boycott clause. There were no further negotiations on July 29.

During the afternoon of July 30, Sagus, through David Robin Masters, rather than Spaulding, stated that Dreyfus would go ahead without the boycott clause. On that basis, O'Reilly made a fresh offer about 6:00 P.M. on July 30. Dillon telexed this offer to Sagus, which proposed a counteroffer. Negotiations continued for a couple of hours by telephone, with Dillon eventually speaking with both sides simultaneously on two telephones. The

culmination of this was a fixture on all the main terms reached at about 8:00 P.M. on that Friday evening, July 30, and memorialized in a fixture recap sent from Dillon to Sagus that same evening.

This fixture recap of July 30 provided in part: "We confirm having fixed the foll with you today subject details of Eldece Time", and provided that the

> Owners warrant that on delivery vessel will be Greek Flag Vessels [sic] crew will be of Greek Nationality and vessels [sic] crew will be members of the Greek Collective Agreement and to be so maintained throughout the term of this Charter.
> [hereinafter referred to as the "substitute clause"].

On Monday morning, August 2, O'Reilly telephoned his exceptions to the pro forma details. Sagus agreed to some, but not to others. The parties continued to negotiate the details and by August 3 all of them had been agreed upon, except pro forma clause 15A pts (ii) and (iii).

As to clause 15A pts (ii) and (iii), the Eldece Time boycott and ITF clauses, respectively, when O'Reilly telephoned in his objections on the morning of August 2, he stated that this clause should be deleted because the parties had already reached agreement on these matters on July 30. Dreyfus, however, stated around noontime on August 2 that it wanted to retain Clause 15A pts (ii) and (iii). Later that day,

O'Reilly reiterated that these matters had already been agreed to and therefore the clause should be deleted. Subsequently, on August 2, Dreyfus again commented on details and said it would "revert" in the morning regarding Clause 15A pts (ii) and (iii). Nothing further was said about the boycott clause on August 2.

On the morning of August 3 Dreyfus commented on details and as to the boycott clause stated that it would be willing to make minor alterations to it but would prefer that the owner make a proposal. In response, O'Reilly reluctantly proposed a modification to Clause 15A pts (ii) and (iii). Dreyfus then added a clause to O'Reilly's proposal and O'Reilly added a clause to Dreyfus'. Dreyfus then stated that it wanted 15A pt (ii) as printed on LDC. O'Reilly would not agree and so the negotiations on this point ceased on August 3.

On August 5, O'Reilly made a proposal with respect to a boycott clause without prejudice to his position that there had already been a fixture which covered this matter. Dillon communicated this proposal to Dreyfus on August 5.

Dreyfus responded on August 6 that the proposal would have been acceptable with minor alterations while negotiations were still going on, but it was too late now inasmuch as Dreyfus was already trading other tonnage. All negotiations then ceased.

Indeed, a charterparty agreement is freely negotiated by the parties thereto: The shipowner qua private carrier; and the charterer, for the carriage of the latter's goods. Being private in nature, such carriage is governed by the terms agreed upon by the parties.

VI. PHILIPPINE JURISPRUDENCE ON THE MATTER

Since the middle of the 20th century the question as to whether vessels on charter are common or private carriers has been addressed by the Supreme Court of the Philippines on several occasions. Despite the law having been unchanged since then, the conclusions reached by the Honorable Supreme Court on the issue have been varied.

The decisions of the Honorable Supreme Court can be categorized into two groups – one which holds that vessels under charter are private carriers and another that limits the rule to only those vessels on demise charter. In other words, per the qualification of the Honorable Supreme Court in some of its decisions, those vessels under time or voyage charters, deemed to be contracts of affreightment, are common carriers.

The case of Home Insurance Company v American Steamship Agencies, Inc[39] is the first case before the Honorable Supreme Court where a discussion on the nature of carriage undertaken by vessels under a charterparty is made. The discussion in said case reflects the rule in the United States:

[39] Home Insurance Company v American Steamship Agencies, Inc, et al, GR No L-25599, April 4, 1968.

> The provisions of our Civil Code on common carriers were taken from Anglo-American law. Under American jurisprudence, a common carrier undertaking to carry a special cargo or chartered to a special person only, becomes a private carrier. As a private carrier, a stipulation exempting the owner from liability for the negligence of its agent is not against public policy, and is deemed valid.
>
> Such doctrine We find reasonable. The Civil Code provisions on common carriers should not be applied where the carrier is not acting as such but as a private carrier. The stipulation in the charter party absolving the owner from liability for loss due to the negligence of its agent would be void only if the strict public policy governing common carriers is applied. Such policy has no force where the public at large is not involved, as in the case of a ship totally chartered for the use of a single party.

In Maritime Agencies & Services, Inc v Court of Appeals [40] the Honorable Supreme Court stated that a carriage under a voyage charter is considered private carriage:

> There are three general categories of charters, to wit, the demise or "bareboat charter," the time charter and the voyage charter.

[40] Maritime Agencies & Services, Inc v Court of Appeals, et al, GR No 77638, July 12, 1990; Union Insurance Society of Canton, Ltd v Court of Appeals, et al, GR No 77674, July 12, 1990.

> A demise involves the transfer of full possession and control of the vessel for the period covered by the contract, the charterer obtaining the right to use the vessel and carry whatever cargo it chooses, while manning and supplying the ship as well.
>
> A time charter is a contract to use a vessel for a particular period of time, the charterer obtaining the right to direct the movements of the vessel during the chartering period, although the owner retains possession and control.
>
> A voyage charter is a contract for the hire of a vessel for one or a series of voyages usually for the purpose of transporting goods for the charterer. The voyage charter is a contract of affreightment and is considered a private carriage.
>
> x x x
>
> A voyage charter being a private carriage, the parties may freely contract respecting liability for damage to the goods and other matters. The basic principle is that "the responsibility for cargo loss falls on the one who agreed to perform the duty involved" in accordance with the terms of most voyage charters.

However, this rule that carriers under a charterparty to be private carriers was qualified by the Honorable Supreme

Court in Planters Products, Inc v Court of Appeals.[41] This case, dealing with a vessel under time charter, is the genesis of the notion that there is private carriage only where the vessel is under a bareboat charter, but not time or voyage charter. The Honorable Supreme Court explained:

> A "charter-party" is defined as a contract by which an entire ship, or some principal part thereof, is let by the owner to another person for a specified time or use; a contract of affreightment by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight; Charter parties are of two types: (a) contract of affreightment which involves the use of shipping space on vessels leased by the owner in part or as a whole, to carry goods for others; and, (b) charter by demise or bareboat charter, by the terms of which the whole vessel is let to the charterer with a transfer to him of its entire command and possession and consequent control over its navigation, including the master and the crew, who are his servants. Contract of affreightment may either be time charter, wherein the vessel is leased to the charterer for a fixed period of time, or voyage charter, wherein the ship is leased for a single voyage. In both cases, the charter-party provides for the hire of vessel only, either for a determinate period of time or for a single or consecutive voyage, the shipowner to supply the ship's stores, pay for the wages of the master and

[41] Planters Products, Inc v Court of Appeals, et al, GR No 101503, September 15, 1993.

the crew, and defray the expenses for the maintenance of the ship.

x x x

It is not disputed that respondent carrier, in the ordinary course of business, operates as a common carrier, transporting goods indiscriminately for all persons. When petitioner chartered the vessel M/V "Sun Plum", the ship captain, its officers and compliment were under the employ of the shipowner and therefore continued to be under its direct supervision and control. Hardly then can we charge the charterer, a stranger to the crew and to the ship, with the duty of caring for his cargo when the charterer did not have any control of the means in doing so. This is evident in the present case considering that the steering of the ship, the manning of the decks, the determination of the course of the voyage and other technical incidents of maritime navigation were all consigned to the officers and crew who were screened, chosen and hired by the shipowner.

It is therefore imperative that a public carrier shall remain as such, notwithstanding the charter of the whole or portion of a vessel by one or more persons, provided the charter is limited to the ship only, as in the case of a time-charter or voyage-charter. It is only when the charter includes both the vessel and its crew, as in a bareboat or demise that a common carrier becomes private, at least insofar as the particular voyage covering the charter-party is concerned. Indubitably, a shipowner in a time or voyage

> charter retains possession and control of the ship, although her holds may, for the moment, be the property of the charterer.
>
> Respondent carrier's heavy reliance on the case of Home Insurance Co. v. American Steamship Agencies, supra, is misplaced for the reason that the meat of the controversy therein was the validity of a stipulation in the charter-party exempting the shipowners from liability for loss due to the negligence of its agent, and not the effects of a special charter on common carriers. At any rate, the rule in the United States that a ship chartered by a single shipper to carry special cargo is not a common carrier, does not find application in our jurisdiction, for we have observed that the growing concern for safety in the transportation of passengers and /or carriage of goods by sea requires a more exacting interpretation of admiralty laws, more particularly, the rules governing common carriers.

This notion that only carriers under bareboat charter are private carriers would be reiterated by the Honorable Supreme Court in Puromines, Inc v Court of Appeals:[42]

> If the charter is a contract of affreightment, which leaves the general owner in possession of the ship as owner for the voyage, the rights, responsibilities of ownership rest on the owner and the charterer is usually free from liability to third persons in respect of the ship.

[42] Puromines, Inc v Court of Appeals, et al, GR No 91228, March 22, 1993.

> Responsibility to third persons for goods shipped on board a vessel follows the vessel's possession and employment; and if possession is transferred to the charterer by virtue of a demise, the charterer, and not the owner, is liable as carrier on the contract of affreightment made by himself or by the master with third persons, and is answerable for loss, damage or non-delivery of goods received for transportation. An owner who retains possession of the ship, though the hold is the property of the charterer, remains liable as carrier and must answer for any breach of duty as to the care, loading or unloading of the cargo.

The third case to echo the rule in Planters Products was Coastwise Lighterage Corporation v Court of Appeals:[43]

> An owner who retains possession of the ship though the hold is the property of the charterer, remains liable as carrier and must answer for any breach of duty as to the care, loading and unloading of the cargo.
>
> Although a charter party may transform a common carrier into a private one, the same however is not true in a contract of affreightment on account of the aforementioned distinctions between the two.
>
> x x x

[43] Coastwise Lighterage Corporation v Court of Appeals, et al, GR No 114167, July 12, 1995.

> Pursuant therefore to the ruling in the aforecited Puromines case, Coastwise Lighterage, by the contract of affreightment, was not converted into a private carrier, but remained a common carrier and was still liable as such.

Tides would again change two years later with the decision of the Honorable Supreme Court in Valenzuela Hardwood and Industrial Supply, Inc v Court of Appeals.[44] In the decision penned by Justice Panganiban, it was held that the shipowner that had let its vessel could rely on the charterparty stipulation because the carriage was private in nature, even as the charterparty was not of demise or bareboat. The Home Insurance case, which likewise deals with a vessel under a charterparty other than a bareboat charterparty, was also applied. Justice Panganiban explains:

> The Court is not persuaded. As adverted to earlier, it is undisputed that private respondent had acted as a private carrier in transporting petitioner's lauan logs. Thus, Article 1745 and other Civil Code provisions on common carriers which were cited by petitioner may not be applied unless expressly stipulated by the parties in their charter party.
>
> In a contract of private carriage, the parties may validly stipulate that responsibility for the cargo rests solely on the charterer, exempting the shipowner from liability for loss of or damage to the cargo caused even by the negligence of the ship captain. Pursuant to Article 1306 17 of the

[44] Valenzuela Hardwood and Industrial Supply, Inc v Court of Appeals, et al, GR No 102316, June 30, 1997.

Civil Code, such stipulation is valid because it is freely entered into by the parties and the same is not contrary to law, morals, good customs, public order, or public policy. Indeed, their contract of private carriage is not even a contract of adhesion. We stress that in a contract of private carriage, the parties may freely stipulate their duties and obligations which perforce would be binding on them. Unlike in a contract involving a common carrier, private carriage does not involve the general public. Hence, the stringent provisions of the Civil Code on common carriers protecting the general public cannot justifiably be applied to a ship transporting commercial goods as a private carrier. Consequently, the public policy embodied therein is not contravened by stipulations in a charter party that lessen or remove the protection given by law in contracts involving common carriers.

x x x

Indeed, where the reason for the rule ceases, the rule itself does not apply. The general public enters into a contract of transportation with common carriers without a hand or a voice in the preparation thereof. The riding public merely adheres to the contract; even if the public wants to, it cannot submit its own stipulations for the approval of the common carrier. Thus, the law on common carriers extends its protective mantle against one-sided stipulations inserted in tickets, invoices or other documents over which the riding public has no understanding or, worse, no choice. Compared to the general public, a

> charterer in a contract of private carriage is not similarly situated. It can — and in fact it usually does — enter into a free and voluntary agreement. In practice, the parties in a contract of private carriage can stipulate the carrier's obligations and liabilities over the shipment which, in turn, determine the price or consideration of the charter. Thus, a charterer, in exchange for convenience and economy, may opt to set aside the protection of the law on common carriers. When the charterer decides to exercise this option, he takes a normal business risk.

Later that year, in National Steel Corporation v Court of Appeals [45] the Honorable Supreme Court, speaking again through Justice Panganiban, would have the opportunity to squarely address the issue of whether carriage under a charterparty, be it on time or voyage charter, is common or private. It held that such carrier is a private carrier:

> At the outset, it is essential to establish whether VSI contracted with NSC as a common carrier or as a private carrier. The resolution of this preliminary question determines the law, standard of diligence and burden of proof applicable to the present case.
>
> Article 1732 of the Civil Code defines a common carrier as "persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water, or air, for compensation, offering

[45] National Steel Corporation v Court of Appeals, et al, GR No 112287, December 12, 1997; Vlasons Shipping, Inc v Court of Appeals, et al, GR No 112350, December 12, 1997.

> their services to the public." It has been held that the true test of a common carrier is the carriage of passengers or goods, provided it has space, for all who opt to avail themselves of its transportation service for a fee. A carrier which does not qualify under the above test is deemed a private carrier. "Generally, private carriage is undertaken by special agreement and the carrier does not hold himself out to carry goods for the general public. The most typical, although not the only form of private carriage, is the charter party, a maritime contract by which the charterer, a party other than the shipowner, obtains the use and service of all or some part of a ship for a period of time or a voyage or voyages."
>
> In the instant case, it is undisputed that VSI did not offer its services to the general public. As found by the Regional Trial Court, it carried passengers or goods only for those it chose under a "special contract of charter party." As correctly concluded by the Court of Appeals, the MV Vlasons I "was not a common but a private carrier." Consequently, the rights and obligations of VSI and NSC, including their respective liability for damage to the cargo, are determined primarily by stipulations in their contract of private carriage or charter party.

The discussion on the rule on the nature of carriage where the vessel is under charter would be re-opened in

Caltex (Philippines), Inc v Sulpicio Lines, Inc.[46] The case stems from the tragic collision between the passenger vessel mv "Doña Paz" and the tanker mt "Vector". At the time of the incident the mt "Vector" was under a voyage charterparty. The Honorable Supreme Court in this case held that the common nature of the carriage was retained despite the voyage charterparty:

> Petitioner [charterer] and Vector [shipowner] entered into a contract of affreightment, also known as a voyage charter.
>
> x x x
>
> If the charter is a contract of affreightment, which leaves the general owner in possession of the ship as owner for the voyage, the rights and the responsibilities of ownership rest on the owner. The charterer is free from liability to third persons in respect of the ship.
>
> x x x
>
> Charter parties fall into three main categories: (1) Demise or bareboat, (2) time charter, (3) voyage charter. Does a charter party agreement turn the common carrier into a private one? We need to answer this question in order to shed light on the responsibilities of the parties.
>
> In this case, the charter party agreement did not convert the common carrier into a private carrier. The parties entered into a voyage charter,

[46] Caltex (Philippines), Inc v Sulpicio Lines, Inc, et al, GR No 131166, September 30, 1999.

> which retains the character of the vessel as a common carrier.

In Loadstar Shipping Co, Inc v Pioneer Asia Insurance Corp[47] the Honorable Supreme Court would reiterate the rule that the voyage charter did not convert the carrier into a private carrier, and that private carriage was possible only in bareboat charters. Following the decision of the Honorable Supreme Court in Planters Products, it held:

> However, petitioner entered into a voyage-charter with the Northern Mindanao Transport Company, Inc. Now, had the voyage-charter converted petitioner into a private carrier?
>
> We think not. The voyage-charter agreement between petitioner and Northern Mindanao Transport Company, Inc. did not in any way convert the common carrier into a private carrier. We have already resolved this issue with finality in Planters Products, Inc. v. Court of Appeals where we ruled that:
>
> x x x
>
> Conformably, petitioner remains a common carrier notwithstanding the existence of the charter agreement with the Northern Mindanao Transport Company, Inc. since the said charter is limited to the ship only and does not involve both the vessel and its crew. As elucidated in

[47] Loadstar Shipping Co, Inc v Pioneer Asia Insurance Corp, GR No 157481, January 24, 2006.

> Planters Products, its charter is only a voyage-charter, not a bareboat charter.

The question on the nature of carriage of chartered vessels would again present itself before the Honorable Supreme Court in Federal Phoenix Assurance Co, Ltd v Fortune Sea Carrier, Inc.[48] In this case the charterparty was one of bareboat which therefore converted the carriage into a private carriage. The decision states:

> Although the agreement between Fortune Sea and Northern Transport was denominated as Time Charter Party, it found compelling reasons to hold that the contract was one of bareboat or demise.
>
> As correctly observed by the CA, the Time Charter Party agreement executed by Fortune Sea and Northern Transport clearly shows that the charter includes both the vessel and its crew thereby making Northern Transport the owner pro hac vice of M/V Ricky Rey during the whole period of the voyage, to wit:
>
> > A perspicacious scrutiny of the Time Charter Party disclosed the following provisions evincing that Northern Transport became the owner pro hac vice of M/V Ricky Rey during the whole period of the voyage-—
> >
> > x x x

[48] Federal Phoenix Assurance Co, Ltd v Fortune Sea Carrier, Inc, GR No 188118, November 23, 2015.

The above-cited testimonies of Capt. Canon undoubtedly show that Northern Transport effectively subjected not only the ship but including its crew under its own exclusive control.

Moreover, although the master and crew of the vessel were those of the shipowner, records show that at the time of the execution of the charter party, Fortune Sea had completely relinquished possession, command, and navigation of M/V Ricky Rey to Northern Transport.

As such, the master and all the crew of the ship were all made subject to the direct control and supervision of the charterer. In fact, the instructions on the voyage and other relative directions or orders were handed out by Northern Transport. Thus, the CA correctly ruled that the nature of the vessel's charter is one of bareboat or demise charter.

VII. COMMENTS ON THE SIX

It has been the rule observed for centuries in England and the United States that a carrier that does not serve the public in general but carries the goods of and for a particular person only – as in the case of carriage under a charterparty – is a private carrier. Of the ten cases discussed above four cases observe this rule. The remaining six cases were decided on the notion that there is private carriage only where the vessel is under a bareboat charter. Where the

vessel is under either time or voyage charter, being contracts of affreightment, it is a common carrier.

It is humbly submitted that the qualification made by Philippine jurisprudence in these six cases is quite unnecessary and rests on shaky grounds.[49] Philippine jurisprudence has basically and effectively produced its own definition of a private carrier. A review of the fundamental concepts on charterparties is indeed imperative.

In resolving the shipowner's claim of being a private carrier, the Honorable Supreme Court unnecessarily inquires into whether he had control and possession of the vessel in the course of the carriage. The illustrative dialogue below reflects the manner by which the issue is addressed in the six aforementioned cases:

> Cargo interests: Shipowner, the goods carried have been damaged. I hold you liable.
>
> Shipowner: I am a private carrier and as such, exercised the necessary degree of diligence in carrying the goods. Also, I carried them on terms per the charterparty agreement which govern the claim.

Faced with the above exchange where the shipowner has invoked his status as a private carrier, the Honorable Supreme Court would look into whether or not said shipowner was the one who had control and possession of the vessel in the course of the carriage:

[49] Though further comments on these cases can be made, these would be beyond the scope of this paper.

> Court: So, Shipowner, you claim to be a private carrier. But according to the charterparty, the possession and control of the vessel (and the crews) during the carriage remained with you; hence, carriage was performed by you. You are therefore not a private carrier. Only when you have relinquished control and possession of the vessel, as in the case of a bareboat charter, do you become a private carrier.

Following the decision in the six aforementioned cases, Philippine jurisprudence has come up with its own definition of a private carrier by sea: a private carrier is one that has neither control nor possession of the vessel during the relevant carriage. In other words, a private carrier under Philippine jurisprudence in these six cases is one that could not have performed the carriage (since it did not have control or possession of the vessel). Therefore, a private carrier is not a carrier. With all due respect, this fallacy easily betrays the unconvincing approach of Philippine jurisprudence to the issue of private carriers by sea.

As can be gathered from these six cases, viz: Planters Products, Puromines, Inc, Coastwise Lighterage Corporation, Caltex (Philippines), Loadstar Shipping Co, and Federal Phoenix Assurance Co, the Honorable Supreme Court would conclude that carriage under charterparty agreements that are contracts of affreightment, i.e. time and voyage charterparties, is common carriage. Such conclusion has been based on the following reasons:

i) In a demise or bareboat charterparty possession and control are given to the charterer and this converts the carriage into a private carriage;

ii) The shipowner retains possession, control, command and navigation of the vessel in a time or voyage charter; responsibility to third persons for goods shipped on board a vessel follows the vessel's possession and employment; and,

iii) American jurisprudence does not apply in Philippine jurisdiction owing to the growing concern for safety in the transportation of passengers and/or carriage of goods.

It is most respectfully submitted that the application of the foregoing reasons to the issue concerning the nature of carriage of vessels under charterparty agreements should be reconsidered.

Firstly, the inquiry of whether the carrier is private or common has to relate to some form of carriage. However, a bareboat charter does not deal with carriage of goods for compensation at all. As presented above, a bareboat charter is a lease of a vessel, hence, a form of a chattel lease. There is no carriage of goods to speak of as between a bareboat charterer and the shipowner. In a bareboat or demise charter, the charterer is essentially just leasing the ship.

Having chartered out a vessel under a demise or bareboat charterparty, the shipowner relinquishes control, operation and employment of the vessel in favor of the bareboat charterer. (Consequently, the demise charterer becomes an owner pro hac vice who can then employ the vessel as he desires: he can carry goods for the general public to whom he will issue bills of lading or he can fix a charterparty with a specific person in respect of whom the original bareboat charterer now stands as the shipowner.)

It is indeed strange to hold that there is only private carriage where a vessel is under a bareboat charter; in relation to such charter, there is no carriage of goods taking place.

Secondly, as discussed above, through a charterparty the shipowner carries the goods of and for only a particular person who is in need of the carrying capacity of an entire vessel. For this purpose negotiations are initially made and at the conclusion thereof, a charterparty agreement – time or voyage, as the case may be – is fixed by the shipowner and the charterer. They are bound thereby as their contract of carriage. It is this nature of a charterparty agreement, as a contract of carriage, that is wanting in the Honorable Supreme Court's discussion of the present issue.

By invoking his status as a private carrier, the shipowner is not saying that he did not take part in the carriage. On the contrary, it is in fact an admission of carriage. However, he is likewise saying that as a private carrier, his liability is not so extensive as that of a common carrier and that he and the charterer had freely entered into a private agreement - the charterparty – under which the subject carriage was undertaken. Thus, such terms of carriage are to be relied upon in respect of the relevant cargo dispute.

Finally, without trivializing the importance of safety in the carriage of goods, the issue as to the nature of carriage is not quite about safety but about the allocation of responsibilities and determination of the scope of liability pursuant to the agreement of the parties. Needless to say, it is grounded upon the reasonable commercial expectations of the parties. Indeed, no public interest is involved as the carriage is between two private parties who have freely negotiated the terms of carriage. Furthermore, it is difficult

to accept that in considering a person carrying goods under a charterparty as a private carrier, the United States, as well as other developed countries, is less concerned with the safety of transportation. Moreover, with enhanced safety regulations strictly imposed by international organizations led by the International Maritime Organization on vessel operators through flag state administrations and port state control authorities, the idea of reckless operation of ships has become exceptional. To be sure, compliance with these international regulations is likewise provided for and guaranteed in the charterparty agreement.

Unlike in providing services of common carriage (wherein the carrier obtains the goods for carriage from and subsequently issues a bill of lading to the shipper), in a charterparty the agreement is a result of the negotiations of the parties, the shipowner and the charterer. As private carriage, the vessel is made available by the shipowner to a particular person for his full use and not to the general public.

Indeed, it cannot be fairly said that one party is at a disadvantaged position in the negotiation process. Either party is free to introduce a term which the other party may accept or reject, as the case may be. Most importantly, the shipowner qua private carrier is not legally obligated to receive and carry the goods of a potential charterer. Corollarily, the charterer is at liberty to seek another shipowner who can provide terms acceptable to him in respect of the carriage of his goods.

Further, the charter of an entire vessel implies a serious commercial endeavor that only huge corporations can afford. Mining companies, bulk grain traders, petroleum corporations, and the like quickly come to mind. These are corporations learned in the ways of the commercial world.

In addition, it can be safely concluded that in the negotiation process of the charterparty agreement these charterers are ably assisted by consultants and brokers the services of whom they can easily afford. Any claim of the supposed disadvantaged position of these potential charterers is indeed inaccurate and unrealistic.

Considering the foregoing, it is humbly submitted that carriage under charterparty agreements as contracts of affreightment is private carriage and the carrier is expected to observe merely ordinary diligence. Consequently, the terms of the charterparty agreement can be relied upon in resolving disputes between the parties in respect of the carriage of goods.

VIII. CONCLUSION

In shipping, chartering is a means of employing a vessel to carry the goods of and for a particular person. Following the developed admiralty jurisprudence of England and the United States, such exclusive carriage is therefore one undertaken by a private carrier.

However, Philippine jurisprudence on this issue appears to be uncertain. For a period covering half a century, the opinion of the Supreme Court of the Philippines has varied. Moreover, the Philippine approach toward this matter is indeed a deviation from the law and runs contrary to the reasonable commercial expectations of the parties. It is indeed factually and legally insupportable.

The recent promulgation of A.M. No. 19-08-14-SC, otherwise known as The Rules of Procedure for Admiralty

Cases, should be viewed as a call to develop Philippine admiralty law and practice. Indeed, one aim of the rules is to "provide parties in cases in admiralty and maritime jurisdiction a fast, reliable and efficient means of recourse to Philippine courts, and to enhance the administration of justice in admiralty and maritime cases through the development of judicial expertise." Mindful of these ends, one should be able to appreciate that shipping is undeniably international and the "fast, reliable and efficient" resolution of maritime cases can only be achieved if there is some sort of uniformity in the appreciation and application of commercial and legal concepts across jurisdictions.

SAVING THE BAY: A REVIEW OF THE LAW ON ENVIRONMENTAL IMPACT ASSESSMENTS (EIA) AND A PROPOSED FRAMEWORK FOR THE PHILIPPINES IN LIGHT OF THE *MANILA BAY REHABILITATION PROJECT* ISSUE

Atty. Camille Cruz[*]

Abstract

The Manila Bay Rehabilitation Project has proven controversial because of the use of dolomite or artificial sand, which scientific experts consider harmful to the marine environment. This paper proposes that the decision-making on this project could have been supplemented by an environment impact assessment or EIA which would have determined the risks to the environment prior to the implementation of the project.

The paper examines the international and domestic law on EIAs, and assesses whether the current procedure in the Philippines is enough to adequately assess projects such as the Manila Bay Rehabilitation Project that have the potential to produce adverse effects to the environment. While domestic law contains EIA procedures, certain steps have not been emphasized or implemented to make the EIA a truly useful tool. This paper proposes a

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six-step process that would be comprehensive enough to include both assessment prior to the project and monitoring afterwards in order for an EIA to meet its purpose as a decision-making tool.

I. INTRODUCTION

Background of the Manila Bay Rehabilitation Project

> *At the core of this case is the Manila Bay, a place with a proud historic past, once brimming with marine life and, for so many decades in the past, a spot for different contact recreation activities, but now a dirty and slowly dying expanse mainly because of the abject official indifference of people and institutions that could have otherwise made a difference.*[1]

The Supreme Court aptly described the situation of Manila Bay, which was the subject matter of the case brought before it in 2008. The respondents, Concerned Residents of Manila Bay, called on the responsible government officials and agencies, who are duty-bound to "protect and preserve, at the first instance, our internal waters, rivers, shores, and seas polluted by human activities." The Court, in granting the writ of continuing mandamus, agreed with the respondents that the Metro Manila Development Authority's ("MMDA") duty of putting up a proper waste disposal system cannot be characterized as discretionary, and, by express provision of law and the Charter of Manila, the MMDA does *not* have the option to avoid performing its duties. Thus, it was

[1] Metro Manila Development Authority v. Concerned Residents of Manila Bay, G.R. No. 171947, December 18, 2008.

considered a "matter of statutory obligation, to perform certain functions relating directly or indirectly to the cleanup, rehabilitation, protection, and preservation of the Manila Bay." Thereafter, the Department of Environment and Natural Resources ("DENR") was directed to fully implement its Operational Plan for the Manila Bay Coastal Strategy for the rehabilitation, restoration, and conservation of the Manila Bay at the earliest possible time.[2]

In line with this directive, on January 2019, the DENR began the Manila Bay rehabilitation project. The large-scale project involved a massive clean-up, movement of informal settlers, and sewerage treatment plans, among others. The program was initially set to cost P42.95 billion for three years.[3]

In the beginning of September of 2019, the DENR began overlaying the area with dolomite or artificial sand. On September 19, it was temporarily opened to the public. The attraction drew crowds, with some criticizing the move as quarantine rules were not observed. The fact that many visited was considered an indication of the success of the project, according to Malacañang.[4] Government officials stated that the dumping of artificial white sand made from dolomite rock along the baywalk would "signify cleanliness."[5]

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[2] *Id.*

[3] Jhesset O. Enano, MODERN-DAY 'BATTLE FOR MANILA BAY' STARTS INQUIRER.NET (2019), https://newsinfo.inquirer.net/1077722/modern-day-battle-for-manila-bay-starts (last visited Jan 13, 2021).

[4] Katrina Hallare, THE CONTROVERSY THAT REFUSES TO DIE: MANILA BAY DOLOMITE SAND (2020), https://newsinfo.inquirer.net/1354003/the-controversy-that-refuses-to-die-manila-bay-dolomite-sand (last visited Jan 13, 2021).

[5] Michelle Abad, FAST FACTS: WHAT IS DOLOMITE SAND, AND HOW WILL IT AFFECT MANILA BAY? RAPPLER (2020),

This dolomite became the subject of controversy when several researchers came forward questioning the decision to use such sand. The University of the Philippines Marine Science Institute warned against health risks and threats to the marine environment. The Institute explained that, considering the weather conditions in the area and the sea level movement typical in tropical seas, the sand would likely erode and waves would penetrate the baywalk despite the presence of breakwaters.[6] The Department of Health ("DOH") itself warned that the inhalation of the particles of the artificial sand may lead to respiratory problems.[7] Other concerns included that the project was a mere aesthetic or beautification fix, and not a solution to the environmental problems faced by the Bay. Instead, other alternatives, including growing mangroves and seagrass, were considered to be more appropriate in solving the problem.[8]

In the same month, hundreds of dead fish were found floating in Manila Bay. While it has not been conclusively proven that the dolomite dumping caused such death of the fish, fishermen around the area intimated that such an event

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https://www.rappler.com/newsbreak/iq/things-to-know-dolomite-sand-affect-manila-bay (last visited Jan 13, 2021).

[6] CNN Philippines Staff, MARINE SCIENTISTS EXPLAIN WHY DOLOMITE SAND WON'T HELP SOLVE MANILA BAY'S ENVIRONMENTAL MESS CNN, https://cnnphilippines.com/news/2020/10/1/UP-Marine-Science-Institute-Manila-Bay-white-sand-dolomite.html (last visited Jan 13, 2021).

[7] Katrina Hallare, *supra* note 5.

[8] Krixia Subingsubing, CRITICS SEE RED IN MANILA BAY'S 'WHITE SAND' MAKEOVER INQUIRER.NET (2020), https://newsinfo.inquirer.net/1331011/critics-see-red-in-manila-bays-white-sand-makeover (last visited Jan 13, 2021).

was the first of its kind in this scale and outside of the *Amihan* season.[9]

While the government argues that the proper studies were undertaken before the implementation of the project,[10] the controversies surrounding the deployment of dolomite sand might have been avoided if the exact studies performed were disclosed, and if these were done in accordance with the procedures required by law to assess the damage to the environment. An example of such study is the environmental impact assessment or EIA. Both international and domestic law provide for the conduct of EIAs to evaluate the impact of a proposed project on the environment.

Environmental Impact Assessments

a. Definition

The International Association for Impact Assessment defines an EIA as the "process of identifying, predicting, evaluating, and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."[11]

It has also been defined as a "process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-

[9] Joseph Pedrajas, DEAD FISH IN MANILA BAY SURPRISES BASECO RESIDENTS MANILA BULLETIN (2020), https://mb.com.ph/2020/09/17/dead-fish-in-manila-bay-surprises-baseco-residents/ (last visited Jan 13, 2021).

[10] CNN Philippines Staff, *supra* note 7.

[11] International Association for Impact Assessment, Principles of Environmental Impact Assessment Best Practice, (1999), https://www.iaia.org/pdf/IAIAMemberDocuments/Publications/Guidelines_Principles/Principles%20of%20IA.PDF.

economic, cultural and human-health impacts, both beneficial and adverse."[12]

The United Nations Environment Programme ("UNEP") defines it as follows:

> [It is] a tool used to identify the environmental, social and economic impacts of a project prior to decision-making. It aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local environment, and present the predictions and options to decision-makers. By using EIA, both environmental and economic benefits can be achieved, such as reduced cost and time of project implementation and design, avoided treatment/clean-up costs and impacts of laws and regulations.[13]

From the foregoing definitions, EIAs are processes or tools undertaken to evaluate or identify the potential impacts or effects of a project to aid in decision-making. Its objective is to assist decision-makers, including States, in arriving at an informed decision on whether to pursue the project, and to ensure projects are environmentally sound.[14]

b. Background

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[12] UN Environment Programme, What is Impact Assessment?, https://www.cbd.int/impact/whatis.shtml.

[13] *Id.*

[14] Lyle Glowka, Francois Burhenne-Gulmin, et al., A Guide on the Convention on Biological Diversity (1999), ["CBD Commentary"] 73.

The UNEP traces the history of the EIA to the 1970s, when it was introduced in the USA through the National Environment Policy Act (NEPA) of 1969. The spread to the rest of the world followed in both high income and developing countries.[15] While still new in certain parts of the world, the UNEP noted that "virtually all countries have it as a legal or administrative requirement."[16]

In 1996, an extensive review and analysis of the effectiveness of the EIA was conducted. It found that no country has "abandoned EIA or weakened its EIA procedures." In fact, measures were undertaken to strengthen the processes in the conduct of an EIA, including broadening its application. The UNEP thus concluded that the EIA been "tried and tested" at the project level. Some of the advantages for conducting EIAs include "increased accountability and transparency," "more informed decision-making," and of course, less damage to the environment.[17]

Given these advantages, the proper conduct of an EIA might have addressed the controversies surrounding the Manila Bay Rehabilitation Plan issue. In the Philippines, both international law and domestic law provide for general and specific requirements that relate to EIAs.

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[15] Centre for Science and Environment, Understanding EIA, https://www.cseindia.org/understanding-eia-383#:~:text=EIA%20as%20a%20mandatory%20regulatory,NEPA)%201969%20in%20the%20US.&text=However%2C%20there%20were%20some%20developing,)%2C%20Philippines%20(1978).

[16] Hussein Abaza, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach (2004), https://wedocs.unep.org/bitstream/handle/20.500.11822/8753/Environmental_impact_assessment.pdf?sequence=3&amp%3BisAllowed=.

[17] *Id.*

II. EIA OBLIGATIONS UNDER INTERNATIONAL LAW

International environmental law typically contains obligations couched in broad terms. This is because States are accorded a margin of appreciation depending on their individual capabilities to undertake these obligations. States thus have common but differentiated responsibilities under international environmental law.[18] This recognizes that while each State shares responsibility in preserving the environment, there is at the same time an acknowledgment of the disparity in the levels of contribution to the problem, and financial resources of each State.[19]

These broad obligations were the subject of several issues in the *MOX plant* case,[20] where Ireland sought to hold the United Kingdom liable under the United Nations Convention on the Law of the Sea ("UNCLOS"). However, the obligation to "protect and preserve the marine environment" was not specific enough to determine what would be considered a violation. Thus, Ireland turned to specific procedural requirements found in the UNCLOS which the United Kingdom allegedly failed to comply with, such as notification and consultation. One of the arguments of Ireland was that the United Kingdom failed to comply with its duty to conduct an EIA in accordance with its obligations

[18] Rio Declaration on Environment and Development, Jun. 14 1992, 31 I.L.M. 874, Principle 7 ["*Rio Declaration*"].

[19] *Id.*

[20] MOX Plant Case (Ire. V. U.K.) Order, Request for Provisional Measures, ITLOS Case No. 10 (2001) ["*MOX Plant"*].

under international law.[21] This case illustrates the importance of the inclusion of specific duties, such as EIAs in treaties related to the environment. They provide standards by which a State's conduct may be measured. However, as can be seen from the different Conventions, the EIA requirements, while more specific than the other obligations under these treaties, are generally still ambiguous.[22]

Conventional International Law

a. United Nations Convention on the Law of the Sea

The general obligation to protect and preserve the marine environment under the UNCLOS is found in Article 192.[23] Furthermore, Article 194, paragraph 2 requires States to "take all necessary measures to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment."[24] In line with these overarching obligations, the specific obligation for the duty to conduct an EIA is found in Article 206, which is entitled "assessment of potential effects of activities." It provides that:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess

[21] *Id.*, see also Neil Craik, The International Law of Environmental Impact Assessment: Process, Substance and Integration (2008), 115-118.

[22] Neil Craik, *supra* note 22, at 88.

[23] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3 ["UNCLOS"], art. 193.

[24] UNCLOS, art. 194(2).

> the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.[25]

While the stated provision does not specifically use the term "environmental impact assessment," there is still an obligation requiring the "collection and dissemination of information" before the planned activities take place.[26] This provision is related to Article 204, which provides a duty of monitoring the risks of effects of pollution,[27] but is different because the duties in Article 206 are performed *before* instead of *during* the said activities.

The language used by the provision affords the State some discretion in complying with this obligation. However, while there is the use of language such as "as far as practicable," this does not mean that the obligation is not binding.[28] This simply is another indication the obligation falls under the concept of common but differentiated responsibilities under international environmental law,[29] which is likewise found throughout several provisions in the UNCLOS. Furthermore, the term "assess" has been described as ambiguous in order to allow domestic legislation to be implemented, and thus permits a more appropriate and specific application in accordance with the capacity of each Party. Although also implying discretion, there is still a

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[25] UNCLOS, art. 206.

[26] Myron H. Nordquist, et al., UNCLOS 1982 Commentary (2012), ["UNCLOS Commentary"], 122.

[27] UNCLOS, art. 204

[28] Neil Craik, *supra* note 22, at 99.

[29] *Id.*

standard, however, that shall be complied with, which is that *reasonable grounds* exist that activities will cause harm.

Overall, the rationale behind this provision is to control the activities, and to inform other States of the "potential risks and effects of such activities."[30] Notably, the obligation to communicate reports of the results of the assessments is absolute.[31]

This specific provision was the subject of a case by ITLOS, *Case Concerning Land Reclamation in and Around the Straits of Johor.*[32] Malaysia believed that the reclamation project threatened its marine environment, and thus invoked Singapore's obligation to conduct an EIA, including the necessity of notifying Malaysia. While Singapore initially argued that that the requisites for the application of Article 206 did not apply, it agreed to consult with Malaysia. Afterwards, under a Provisional Measures Order, the parties agreed to form a group of experts who would study the effects of the project. While not called an EIA, it "in many respects conformed to the requirements of an EIA."[33] Notably, this required a degree of consultation between the two States, another requirement found in EIAs.

b. Convention on Biological Diversity

The Philippines is a Party to the Convention on Biological Diversity ("CBD") which specifically mentions EIAs.

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[30] UNCLOS Commentary, *supra* note 27, at 122.

[31] *Id.,* at. 124.

[32] Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), 27 UNRIAA 133, (2005).

[33] Neil Craik, *supra* note 22, at 118.

Article 14 on Impact Assessment and Minimizing Adverse Impacts provides:

> (1) Each Contracting Party, as far as possible and as appropriate, shall:
>
> (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;
> (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account;
> (c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional, or multilateral arrangements, as appropriate;[34]

[34] Convention on Biological Diversity, Jun. 5, 1992, 1760 U.N.T.S. 79, ["CBD"] art. 14.

The obligations under Article 14 are qualified by limiting language, including "as far as possible and appropriate," which again shows the discretion that states are granted.[35] Therefore, the CBD by itself does not provide a specific procedure that must be followed by each State, but it nevertheless requires the State to provide for EIAs through domestic legislation. Each state has the leeway to choose the type of projects, whether public or private, that would require an EIA.[36] The necessity for further domestic action is highlighted in Article 14(1)(c) which shows that additional rules will be made in another instrument.[37]

Notably, only Parties who do not have EIAs in place for projects that are likely to have significant adverse effects on biological diversity are required to "introduce" these EIAs. Those who already have these procedures, however, still have to ensure that these EIAs take into account the impacts on biodiversity.[38]

In order for an EIA to be successful and useful as a tool, it should be done at the early stages of the design of the project, and should be done even when the adverse effects to biodiversity are not apparent. [39] For instance, one of the more important aspects of the decision-making process is site selection, because after such decision is made, the impacts on biodiversity will be difficult to reverse.[40] Thus, Parties should ensure that a part of the EIA addresses the identification and assessment of project sites. Other portions

[35] Neil Craik, *supra* note 22, at 100.

[36] CBD commentary, *supra* note 15, at 71.

[37] Neil Craik, *supra* note 22, at 100.

[38] CBD commentary, *supra* note 15, at 71.

[39] *Id.,* at 72.

[40] *Id.*

of the CBD should be taken into account when beginning a project, which include obligations on identification and monitoring, research, and exchange of information.[41]

Article 14(1)(a) specifically includes public participation as an aspect of EIAs. This is not limited to private parties who may be interested in the project, but also government agencies that may provide useful insights for the proposed project given the expertise that they have on specific subject matters.[42]

Similar to the obligation of consultation with other states found in the UNCLOS, the CBD likewise addresses the promotion of reciprocity, notification, and consultation in Article 14(1)(c). These are procedural requirements that should be complied with when the activities within the jurisdiction or control of a party are likely to significantly produce adverse effects to another Party or "potential transboundary effects."[43] Compared to the UNCLOS, however, the need for supplemental domestic legislation is even more apparent here as the provision only provides for the need to *promote* the activities of notification, consultation, and exchange of information.[44]

CBD EIA Guidelines

While the CBD itself is not specific as to the requirements of an EIA, several CBD decisions supply voluntary guidelines that Parties may follow in conducting

[41] CBD, arts. 7, 17, 12(b), see also CBD Commentary, *supra* note 15, at 72.

[42] CBD Commentary, *supra* note 15, at 71.

[43] *Id.,* at 74.

[44] *Id.*

their EIAs. CBD Decision VIII/28 explicitly references Article 14(1)(a) of the CBD by urging Parties, other Governments, and relevant organizations to apply the voluntary guidelines on biodiversity-inclusive environmental impact assessment as appropriate to the context of their implementation of the said provision.[45] Significantly, the Decision recognizes that even if legislation around the world differs, there are fundamental components of an EIA, which are:

> (a) Screening to determine which projects or developments require a full or partial impact assessment study;
>
> (b) Scoping to identify which potential impacts are relevant to assess (based on legislative requirements, international conventions, expert knowledge and public involvement), to identify alternative solutions that avoid, mitigate or compensate adverse impacts on biodiversity (including the option of not proceeding with the development, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or providing compensation for adverse impacts), and finally to derive terms of reference for the impact assessment;
>
> (c) Assessment and evaluation of impacts and development of alternatives, to predict and identify the likely environmental impacts of a proposed project or development,

[45] CBD CoP, Decision VIII/28, UNEP/CBD/COP/DEC/VIII/28, ["CBD Decision VIII/28"] prmbl. A.5.

> including the detailed elaboration of alternatives;
> (d) Reporting: the environmental impact statement (EIS) or EIA report, including an environmental management plan (EMP), and a non-technical summary for the general audience;
> (e) Review of the environmental impact statement, based on the terms of reference (scoping) and public (including authority) participation;
> (f) Decision-making on whether to approve the project or not, and under what conditions; and
> (g) Monitoring, compliance, enforcement, and environmental auditing. Monitor whether the predicted impacts and proposed mitigation measures occur as defined in the EMP. Verify the compliance of proponent with the EMP, to ensure that unpredicted impacts or failed mitigation measures are identified and addressed in a timely fashion.[46]

An important aspect of the framework appended to this Decision is the inclusion of monitoring, which shows that the process of the EIA is not limited to the stages prior to the implementation of a project. A more comprehensive assessment would include this stage, because they provide information for periodic review, and unforeseen negative effects are addressed.[47]

c. United Nations Framework Convention on Climate Change

[46] CBD Decision VIII/28, Annex A ¶ 5.

[47] *Id.,* at ¶ 45-47.

The United Nations Framework Convention on Climate Change (UNFCCC) also makes reference to the role of EIAs, but similarly does not lay down specific rules or processes on how to conduct one. Article 4(1)(f) of the UNFCCC provides:

> (1) All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives, and circumstances, shall:
>
> (f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic, and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.[48]

The foregoing provision further highlights the importance of domestic law to supplement EIAs, expressly recognizing that the method is to be "formulated and determined nationally."

Customary International Law

The development of environmental obligations under customary international law is related to the obligation to

[48] United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107, ["UNFCCC"], art. 4(1)(f).

conduct EIAs. The close link between these customary obligations and EIAs is apparent because due diligence would entail that a state should be aware of activities that will have the potential to cause adverse effects to the environment.

A. Duty to Prevent Transboundary Harm

The duty to prevent transboundary harm provides that states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states.[49] The International Court of Justice ("ICJ") has recognized this duty as part of the corpus of international law relating to the environment.[50]

In line with this customary obligation, Principle 17 of the Rio Declaration provides that an environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.[51] Related to this is Article 7 of the International Law Commission's ("ILC") Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities. This states that any decision in respect of the authorization of an activity within the scope of the present Articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.[52] The ILC states that a State should conduct an

[49] Rio Declaration, Principle 15.

[50] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 40.

[51] Rio Declaration, Principle 17.

[52] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries adopted by the International Law

assessment that will "determine the extent and nature of the risk involved in an activity and consequently the type of preventive measures it should take."[53]

Notably, the ILC states this requirement has become very prevalent and is found in many international instruments,[54] yet the ILC repeats that domestic law is still necessary to supply the details including guidelines, and the bodies or persons who will conduct the assessment itself.[55] The evaluation of the "possible transboundary harmful impact," however should be contained in such assessment.[56] In relation to the duty to prevent transboundary harm, the assessment should evaluate the effects on the environment of other States.[57]

B. Duty to Cooperate

Related to the duty to prevent transboundary harm is the duty to cooperate. This duty is found in numerous instruments, including the UNCLOS[58] and CBD.[59] States have the broad "obligation to cooperate in good faith and in the spirit of partnership,"[60] and the specific obligation to

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Commission at its fifty-third session, UN Doc. A/56/10, 53rd Sess. (2001), ["Draft Articles on Transboundary Harm"], art. 7.

[53] *Id.,* at p. 158

[54] *Id.,* at p. 159

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] UNCLOS, art. 197.

[59] CBD, art. 5

[60] Rio Declaration, Principle 27.

"provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."[61] This has been accepted as customary law by numerous bodies, including the ICJ.[62] Notably, however, the ICJ clarified that the obligation does not require the parties to reach an agreement.[63]

With regard to EIAs, the duty to cooperate requires a State to notify and consult the other State which will potentially be affected.[64] This requirement is found in treaties mentioning EIAs, including the CBD.[65] The timing of the participation of another State, however, is not clear. While it has been established that a state is granted the discretion in determining the scope and procedure of the EIA, limiting the participation of the other State to receiving the results of the EIA may not be enough to satisfy the requirement of good faith. For instance, if the state conducting the EIA has knowledge that the proposed activity will affect another State, it is inconsistent with good faith to exclude the other

[61] Rio Declaration, Principle 19.

[62] Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) 2015 I.C.J. 665 ("*Construction of a Road*"), ¶ 106.

[63] North Sea Continental Shelf (Ger./Den.; Ger./Ned.) (Merits) 1969 I.C.J. 3, ¶ 87.

[64] Case Concerning Pulp Mills On The River Uruguay (Argentina v. Uruguay) (Merits), 2010 I.C.J. 113 (April 20) ["*Pulp Mills"*], ¶ 127.

[65] CBD, art. 14(1)(c).

State in the process. [66] Early consultation, therefore, is considered as a best practice.[67]

C. Precautionary Principle

There are differing views on the status of the precautionary principle as customary international law. One author stated that, "the precautionary principle may well be the most innovative, pervasive, and significant new concept in environmental policy over the past quarter century. It may also be the most reckless, arbitrary, and ill-advised."[68] The fact that the principle is widespread, however, cannot be disputed. Versions of the precautionary principle are found in over 50 multilateral instruments, including the UNFCCC and CBD.[69] The issue arises, however, with regard to state practice, as the application of this principle among states has varied, which puts into question whether this has indeed ripened into a binding obligation.[70]

The precautionary principle provides that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[71]

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[66] Neil Craik, *The Duty to Cooperate in the Customary Law of Environmental Impact Assessment,* British Institute of International and Comparative Law, 13 (2019).

[67] *Id.,* at 14.

[68] Jonathan B. Wiener, The Oxford Handbook of International Environmental Law (2008), 599.

[69] *Id.*

[70] *Id.*

[71] Rio Declaration, Principle 15.

The EIA is related to this principle, because it is a measure of "informing decision-making and influencing environmental outcomes." The precautionary principle also aligns with the rationale behind conducting EIAs, as these assessments are "precautionary in a minimal sense because they are predicated on addressing uncertainty about future environmental effects."[72]

Decisions by the International Court of Justice

Aside from the International Tribunal on the Law of the Sea, the International Court of Justice ("ICJ") has discussed the duty to conduct an environmental impact assessment in several cases. Although most of these cases were dismissed on procedural grounds or were treaty-based,[73] the cases are useful in demonstrating the development of the obligation, and its obligatory nature.

A) Case Concerning Pulp-Mills on the River Uruguay (Argentina v. Uruguay)

In this 2010 decision of the ICJ, Argentina raised the issue of the adequacy of the environmental impact assessment undertaken by Uruguay. The subject matter of the dispute was the construction of two pulp and paper mills on the River Uruguay. The Parties did not dispute the need to conduct an EIA, as they both agreed that the obligation existed. The disagreement was with regard to the scope and content of such EIA. Argentina believed that the EIA that Uruguay conducted was inadequate under international law.

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[72] Warwick Gullett, *Environmental impact assessment and the precautionary principle: legislating causation in environmental protection,* 5 AUSTRALIAN JOURNAL OF ENVIRONMENTAL MANAGEMENT 146, 147-148 (1998).

[73] Neil Craik, *supra* note 22, at 111.

Uruguay, however, was of the position that the EIA preparations are a national, as opposed to an international, procedure. [74]

Significantly, the ICJ stated that the obligation to protect and preserve the environment, if it is interpreted according to practice in recent years, "gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, a shared resource." Furthermore, due diligence and vigilance would not be complied with if a party undertaking a project which may have adverse effects on the environment has not undertaken an EIA on such potential effects.[75] These statements by the Court are an express recognition of the EIA as a requirement under international law.

However, the ICJ also clarified that while the EIA is a requirement, the scope and content of an environmental impact assessment is not specified by general international law. The Court reiterates that the other instruments cited by Argentina, such as the UNEP Goals and Principles, are not binding as they are only guidelines. In any case, Principle 5 also does not specify the specific requirement needed. The ICJ concluded that "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to

[74] *Pulp Mills,* ¶ 203.

[75] *Id.,* at ¶ 204.

exercise due diligence in conducting such an assessment."[76] Thus, as a general rule, States are allowed to define the limits of the EIA through their respective domestic legislation.

This does not mean, however, that there are no general rules to be followed with regard to EIAs procedures. The ICJ clarified that EIAs are conducted prior to the implementation of the project. However, "once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken." Similar to the requirements under the CBD, therefore, the obligation to conduct an EIA does not end simply by performing the assessment prior to the implementation of the project. The effects on the environmental must be monitored throughout the life of the project.[77]

B) Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

This 1997 ICJ case concerned a joint dam and electrical power generation project between Hungary and Slovakia. Due to concerns on the effect on the environment, Hungary decided to discontinue, while Czechoslovakia decided to proceed. There was again no dispute with regard to the necessity of an EIA. The Court elaborated on the nature of environmental obligations, and the role of EIAs in protecting the environment:

> The Court is mindful that, in the field of environmental protection, vigilance and prevention

[76] *Id.,* at ¶ 205.

[77] *Id.*

> are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. **Owing to new scientific insight**s and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and **such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun** in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[78] (Emphasis supplied)

Looking at the facts, the Court elaborated that "it was clear that the project's impact upon, and its implications for, the environment are of necessity a key issue." Despite the contradictory findings in the scientific reports of both States, it was clear that there was enough evidence to suggest that there will be considerable implications to the environment. [79] The Court stated that the Parties should jointly take into account the effect to the environment of the power plant, and

[78] Gabčíkovo-Nagymaros Project (Hungary v Slovakia) 1997 I.C.J. Rep 7 ["*Gabčíkovo-Nagymaro*s"] , ¶ 140.

[79] *Id.*

find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.[80] However, it was not the Court's duty to determine what the result of these joint efforts are. In line with the duty to cooperate, the Court cited the *North Sea Continental Shelf cases*, in stating that "the Parties are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[81]

C) Certain Activities carried out by Nicaragua in the Border Area / Construction of a Road in Costa Rica along the San Juan River (Costa Rica v. Nicaragua and Nicaragua v. Costa Rica)

This 2015 judgment consisted of two cases. In the *Certain Activities Carried out by Nicaragua in the Border Area (Costa Riva v. Nicaragua)* case, Costa Rica alleged that the dredging in the San Juan River conducted by Nicaragua affected the former's territory. Similar to the previous cases, there was no dispute that there was an obligation to conduct an EIA. They agreed on the existence, in general international law, of such obligation for activities "carried out within a State's jurisdiction that risk causing significant harm to other States, particularly in areas or regions of shared environmental conditions."[82]

Nicaragua in this case performed an Environmental Impact Study. Costa Rica, however, contended that this did

[80] *Id.*

[81] *Id.* at, ¶141.

[82] *Construction of a Road,* ¶141.

not support the conclusion that the dredging project would not cause harm, nor did it assess the impact of the project to the wetlands.

The ICJ, in ruling on this matter, cited the case of *Pulp Mills.* The Court cited its pronouncement there that it is a requirement under general law to undertake an EIA when the proposed activity may have significant adverse impact in a transboundary context, in particular, a shared resource. It further clarified that, while *Pulp Mills* referred to industrial activities, the same principle should be applied "in general to proposed activities which may have a significant adverse impact in a transboundary context."[83] The Court stated that "to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment."[84]

Still citing the case of *Pulp Mills,* the Court reiterated that there is no uniform requirement with regard to the content of an EIA, as this determination should be made in light of the specific circumstances of each case.[85] In accordance with the due diligence obligation, after there is a determination that there is a risk of significant transboundary harm, the State planning to undertake the activity is required to notify and consult in good faith with

[83] *Id.,* at ¶104.

[84] *Id.*

[85] *Id.*

the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.[86]

In ruling on this issue, the Court looked at the "principal risk" cited by Costa Rica. The 2006 study by Nicaragua of the impact of the dredging program showed that there would not be any significant impact on the flow of the Colorado River, [87] a finding that was supported by experts of both Costa Rica and Nicaragua. Looking at these findings and the records of the case, the Court concluded that the program did not give rise to a risk of significant transboundary harm. The Court, ruled, therefore, that "[i]n light of the absence of risk of significant transboundary harm, Nicaragua was not required to carry out an environmental impact assessment"[88]

This ruling is significant because it limits the obligation to conduct an EIA to only those projects that show a risk of transboundary harm. Thus, if this rationale is to be followed, the process of determining whether a project indeed poses such risk is crucial, because it will ultimately determine whether an EIA will be conducted. The basis for classifying a matter as having such a risk was not specified.

In *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Nicaragua alleged that Costa Rica breached its obligation to conduct an EIA in constructing the road before commencing it, in view of the

[86] *Id.*

[87] *Id.,* at ¶ 105.

[88] *Id.*

road's length and location.[89] The Court similarly stated that due diligence requires a State to ascertain the risk of significant harm prior to undertaking an activity. If there is such a risk, the State must conduct an EIA.[90] The Court clarified that this obligation rests on the State undertaking the activity.[91]

In this case, the Court took the opportunity to explain why the preliminary assessment by Costa Rica on the lack of risk was inadequate. In the first place, Costa Rica was unable to adduce evidence of carrying out such assessment.[92] Furthermore, looking at the evidence, including the size of the road, the planned location and geographic conditions, the road would easily harm the surrounding environment, including Nicaragua's territory.[93] The Court thus found that the threshold for triggering the obligation to conduct an EIA has been met.

The Court clarified that the reference to domestic law in *Pulp Mills* does not mean that it is up to the State whether an EIA should be undertaken.[94] Therefore, the emergency situation Costa Rica invoked cannot affect its obligation to conduct an EIA.[95]

Regarding the question of whether Costa Rica complied with its obligation to conduct an EIA, the Court recognized the studies by Costa Rica that assessed the

[89] *Id.,* at ¶146.

[90] *Id.,* at ¶153.

[91] *Id.*

[92] *Id.,* at ¶154.

[93] *Id.,* at ¶155.

[94] *Id.,* at ¶157.

[95] *Id.*

adverse effects that had already been caused, and the steps taken by the State to prevent them.[96] The Court stressed, however, that Costa Rica was required to conduct an EIA *prior* to the commencement of the construction of the road to minimize the risk of transboundary harm, but the assessments undertaken such as the Environmental Diagnostic Assessment and its other studies were *post hoc* assessments of the environmental impact of the stretches of the road that had already been built.[97] They were thus unable to evaluate the risk of future harm, the purpose of an EIA. However, the Court reiterated its ruling *Pulp Mills* that the obligation to conduct an EIA is "a continuous one, and that monitoring of the project's effects on the environment shall be undertaken, where necessary, throughout the life of the project."[98]

III. DOMESTIC LAW

Given that international law provides states with leeway in conducting EIAs, a review of domestic law is necessary to determine whether the current legal processes in relation to EIAs are adequate to determine the risks associated with projects with potential adverse effects to the environment. Notably, these requirements are mostly found in administrative and executive issuances. A review of these will assess if the current measures in place would have been able to sufficiently address the issues concerning the Manila Bay Rehabilitation Project.

[96] *Id.,* at ¶160.

[97] *Id.,* at ¶161.

[98] *Id.*

1) Overview of Existing Obligations

A) Constitution

The Constitution provides that the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.[99] This overarching policy is reflected in numerous statutes and executive issuances related to EIAs.

B) Statutes and Executive Issuances

1) **Presidential Decree 1586:** *Establishing and Environmental Impact Statement System including other environmental management related measures and for other purposes* **and Administrative Order No. 300:** *Further strengthening The Environmental Impact Statement System and clarifying the authority to grant or deny the issuance of Environmental Compliance Certificates*

Presidential Decree No. 1586 was enacted in June 1978. It established an Environmental Impact Statement System.[100] This law allowed the President, on his own initiative or upon recommendation of the National Environmental Protection

[99] CONST, art. II, §. 16.

[100] *Id.,*. § 2.

Council, to declare certain projects, undertakings, or areas in the country as environmentally critical.[101]

Once such determination is made, the law provides that "no person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate (ECC) issued by the President or his duly authorized representative." The law further allows the President to reorganize government offices, agencies, institutions, corporations, or instrumentalities including the realignment of government personnel, and their specific functions and responsibilities for the purpose of managing the critical project or area.[102]

Administrative Order No. 300, series of 1996 confirmed the power of the Secretary of the DENR and the DENR Regional Executive Directors to grant or deny the issuance of ECCs.[103]

[101] *Id.,*. § 4.

[102] *Id.*

[103] Adm. Order No. 300 (1996). Further strengthening the philippine environmental impact statement system and clarifying the authority to grant or deny the issuance of environmental compliance certificates.

2) Administrative Order No. 42: *Rationalizing the Implementation of the Philippine Environmental Impact Statement (EIS) System and Giving Authority, in addition to the Secretary of the Department of Environment and Natural Resources, to the Director and Regional Directors of the Environmental Management Bureau to Grant or Deny the Issuance of Environmental Compliance Certificates*

Administrative Order No. 42, series of 2002 recognizes the policy that economic development should not compromise the needs of future generations.[104] Thus, it adopts a "systems-oriented and integrated approach" in assessing environmental concerns.[105]

The administrative issuance streamlines the ECC application processing and approval. It first directs project proponents to conduct the required feasibility study and EIS simultaneously.[106] It limits the number of additional requests in writing from the applicant to only two official requests, and specifically indicates the timeframes for the authorities in charge of processing and approval. It also provides that

[104] Adm. Order No. 42 (2002), Environmental impact statement (EIS) system and giving authority, in addition to the secretary of the department of environment and natural resources, to the director and regional directors of the environmental management bureau to grant or deny the issuance of environmental compliance certificates, § 2.

[105] *Id.*

[106] *Id.*

the ECC is automatically approved if no decision is made within the specified time frame listed below: [107]

Type of Project	Endorsing Official	Approving Official	Processing Timeframe (not to exceed)
Environmentally critical project (Single Project)	EMB Central Office Director	DENR Secretary / EMB Director	120 working days
Non Environmentally Critical Project located in Critical areas	EIA Division chief, Regional Office	EMB Director / Regional Director	60 working days
Projects Not Covered by the EIS System	EIA Division chief, EMB Central / Regional Office	EMB Director / Regional Director	15 days

The issuance also highlights the importance of consultation with industry groups and stakeholders for improving the ECC process.[108]

3) DENR Administrative Order 2003-30: *Implementing Rules and Regulations (IRR) for the Philippine Environmental Impact Statement (EIS) System*

[107] *Id.*

[108] *Id.*, at § 3.

DENR Administrative Order No. 30 series of 2003 contains a definition of what an EIA is:

> (h) Environmental Impact Assessment (EIA) - process that involves evaluating and predicting the likely impacts of a project (including cumulative impacts) on the environment during construction, commissioning, operation, and abandonment. It also includes designing appropriate preventive, mitigating and enhancement measures addressing these consequences to protect the environment and the community's welfare. The process is undertaken by, among others, the project proponent and/or EIA Consultant, EMB, a Review Committee, affected communities and other stakeholders.[109]

The issuance is "concerned primarily with assessing the direct and indirect impacts of a project on the biophysical and human environment and ensuring that these impacts are addressed by appropriate environmental protection and enhancement measures."[110] It "aids proponents in incorporating environmental considerations in planning their projects as well as in determining the environment's impact on their project."[111]

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[109] DENR Adm. Order 30 (2003), Implementing Rules and Regulations (IRR) for the Philippine Environmental Impact Statement (EIS) System, ["DENR Adm. Order 30"] at § 3(h).

[110] *Id.*

[111] *Id.,* at § 1(a)-(b).

The requirement of ECCs is only for those projects that pose potential significant impact to the environment.[112] The criteria for determining whether a project shall fall under the coverage of the EIS include the characteristics of the project, the location of the project, and the nature of the potential impact.[113]

a. Characteristics of the project or undertaking

- Size of the project
- Cumulative nature of impacts vis-à-vis other projects
- Use of natural resources
- Generation of waste and environment-related nuisance
- Environment-related hazards and risk of accidents

b. Location of the Project

- Vulnerability of the project area to disturbances due to its ecological importance, endangered or protected status
- Conformity of the proposed project to existing land use, based on approved zoning or on national laws and regulations
- Relative abundance, quality, and regenerative capacity of natural resources in the area, including the impact absorptive capacity of the environment

c. Nature of the potential impact

[112] *Id.,* at § 4.1.

[113] *Id.,* at § 4.3.

- Geographic extent of the impact and size of affected population
- Magnitude and complexity of the impact
- Likelihood, duration, frequency, and reversibility of the impact[114]

There are four categories of projects under the EIS system. Those that fall under Category A and Category B are required to secure ECCs.[115] On the other hand, Category C project proponents are required to submit a Project Description,[116] and Category D project proponents may secure a Certificate of Non-Coverage.[117]

> **Category A.** Environmentally Critical Projects (ECPs) with significant potential to cause negative environmental impacts
>
> **Category B**. Projects that are not categorized as ECPs, but which may cause negative environmental impacts because they are located in Environmentally Critical Areas (ECA's)
>
> **Category C.** Projects intended to directly enhance environmental quality or address existing environmental problems not falling under Category A or B.

[114] *Id.*

[115] *Id.,* at § 4.4.

[116] *Id.,* at § 4.5.

[117] *Id.,* at § 4.6.

Category D. Projects unlikely to cause adverse environmental impacts.[118]

Those who initiate projects are given the responsibility of providing all the information in order to allow an adequate assessment of the project.[119] The effective review of the EIS is dependent upon such disclosures. [120]

There is also a requirement that there is informed[121] and meaningful[122] public participation. These consultations should be conducted early so that the concerns of the persons consulted may be taken into account in the assessment.[123] These consultations are required to be documented, and shall be part of the records of the EIA procedure.[124]

A review process report is prepared by the EMB Central or EMB RO to be delivered to the DENR or RD to support decision-making. The Environmental Impact Assessment Review Committee (EIARC) is a "body of independent technical experts and professionals of known probity from various fields organized by the EMB to evaluate the EIS and other related documents and to make appropriate

[118] *Id.,* at § 4.3.

[119] *Id.,* at § 1(c).

[120] *Id.,* at § 1(e).

[121] *Id.,* at § 1(d)

[122] *Id.,* at § 1(f).

[123] *Id.,* at § 5.3.

[124] *Id.*

recommendations regarding the issuance or non-issuance of an ECC report."[125]

The Decision Document is issued to the project proponent or representative.[126] It takes the form of an ECC or a Denial Letter, and it is the official communication on the decision on the application. The ECC will contain the "scope and limitation of the approved activities" and the conditions, and shall be valid for five years from its date of issuance. The Denial Letter must contain the bases for the decision.[127]

4) Environment Management Bureau Memorandum Circular 2007-001: *Environmental Impact Assessment (EIA) Review Manual*

The Manual of EIA Review serves as a supplement to the guidelines provided in DAO 2003-30 Procedural Manual. An important recommendation found in this issuance is to coordinate with other units, bureaus, offices, and agencies in the government to require the completion of the EIA prior to the issuance of documents such as permits, licenses, clearances, endorsement, or resolutions. This way, the EIA process will not be rendered ineffective.[128]

5) Environment Management Bureau Memorandum Circular 2014-005: ***Revised Guidelines for Coverage***

[125] *Id.,* at § 3(j).

[126] *Id.,* at § 5.4.3.

[127] *Id.*

[128] DENR Revised Procedural Manual for DENR Adm. Order 30 (2007), 6.

Screening and Standardized Requirements under the Philippine EIS System

Further refinements were incorporated under EMB Memo Circ. 2014-005. In particular, more detail was provided for the four categories.

> **Category A** — projects or undertakings which are classified as environmentally critical projects (ECPs) under Presidential Proclamation No. 2146 (1981), Proclamation No. 803 (1996), and any other projects that may later be declared as such by the President of the Philippines. Proponents of these projects implemented from 1982 onwards are required to secure an Environmental Compliance Certificate (ECC).

> **Category B**—projects or undertakings which are not classified as ECP under Category A, but which are likewise deemed to significantly affect the quality of the environment by virtue of being located in an Environmentally Critical Area (ECA) as declared under Proclamation No. 2146 and according to the parameters set forth in the attached guidelines. Proponents of these projects implemented from 1982 onwards are likewise required to secure an ECC.

> **Category C** — projects or undertakings not falling under Category A or B which are intended to

> directly enhance the quality of the environment or directly address existing environmental problems.
>
> **Category D** — projects or undertakings that are deemed unlikely to cause significant adverse impact on the quality of the environment according to the parameters set forth in the Screening Guidelines. These projects are not covered by the Philippine EIS system and are not required to secure an ECC. However, such non-coverage shall not be construed as an exemption from compliance with other environmental laws and government permiting [sic] requirements.

Moreover, applicants for ECC are required to provide the following requirements: EIS, Initial Environmental Examination (IEE) Checklist Report, an Environmental Performance Report and Management Plan (EPRMP), Programmatic EIS or Programmatic EPRMP.[129] Certificate of Non-Coverage (CNC) applicants, on the other hand, only need to provide a pro-forma project description.

Notably, environmental enhancement projects or projects intended to directly enhance the quality of the environment or directly address environmental projects are required to submit a project description (*see* Annex "A") in order for there to be a subsequent determination if an ECC

[129] DENR Environmental Management Bureau Memo. Circ. 2014-005, Revised Guidelines for Coverage Screening and Standardized Requirements under the Philippine EIS System, ["EMB Memo. Circ. 2014-005"] at § 2.1.

or a CNC will be required.[130] This means that these projects may fall under Categories A to C.

C) Gaps in Domestic Law in Light of the *Manila Bay Rehabilitation Project*

From the foregoing, it is clear that the classification of the project within the four categories in DENR Admin. Order No. 30, as expounded by EMB Memo. Circ. 2014-005, significantly alters the amount of review and assessment that will be undertaken prior to the implementation of the project. Thus, while the regulations may be comprehensive enough to determine the risks of a project, these will be rendered ineffectual by a simple misclassification of a project.

This is particularly applicable to the Manila Bay Rehabilitation project. The DENR stated that the Manila Bay Rehabilitation project is not covered by the country's EIA system.[131] While the DENR maintains that they had conducted studies on the usage of dolomite sand, the DENR stated that it only a granted a certificate of non-coverage, which is applicable to projects that are considered unlikely to cause adverse impact to the environment.[132]

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[130] *Id,* at Annex 4.b.ii.

[131] Gaea Katreena Cabico, NO ENVIRONMENTAL IMPACT STUDY NEEDED ON MANILA 'BEACH NOURISHMENT' - DENR PHILSTAR.COM (2020), https://www.philstar.com/headlines/2020/09/04/2040084/no-environmental-impact-study-needed-manila-beach-nourishment-denr (last visited Jan 13, 2021).

[132] *Id.*

While there may have been basis for the DENR to argue that an ECC was not required, the simple reason that it was not covered is because the EMB guidelines specifically clarify that an independent determination is still required to determine under which category the project falls under.[133] Even under the latest guidelines provided under EMB Memo. Circ. No. 2014-005, projects intended to enhance the environment do not automatically fall under Category C. The EMB explicitly recognizes that there is a possibility that these may fall under Category B or even A.

Thus, the importance of classification is apparent, because for instance, if the project was classified as Category A or B, it would have required an ECC. In turn, this would have included a more comprehensive study, and would have eased doubts on the potential harmful effects of the project.

Moreover, the project proponent itself also has a level of responsibility because regulations such as DENR Admin. Order No. 30 state that those who initiate projects are responsible for providing complete information.[134] Thus, it cannot be denied that the EIS system is also dependent on these disclosures. The project description provided by the project proponent also plays a role on the level of study that will be conducted. The latest regulations provide a form for Category C projects (*see* Annex "A"). However, given the general nature of the questions found in the form, it is likely that the information provided will be incomplete or will be insufficient to make a determination that only a CNC is required. Therefore, ultimately, even if the proponent provides the information, it is the regulator who is responsible for determining what Category the project should belong to and for gathering more information. This is

[133] EMB Memo. Circ. 2014-005, at Annex 4.b.ii.
[134] DENR Adm. Order 30, § 1(c) and (e).

true especially considering that the project proponent has a stake in foregoing the more tedious requirements covering an ECC. Considering the magnitude of the project, mere reliance on the project proponent's information is not sufficient.

Both domestic and international law have recognized the importance of the participation of the public in the EIA procedures, with domestic law even requiring the documentation of this requirement. The classification of the project also served as basis for the lack of input from the public.

IV. FRAMEWORK PROPOSED

From the foregoing, it is clear that the Philippines has regulations and laws that might have addressed the issues concerning the Manila Bay Rehabilitation Project. However, doubts still exist as to whether the current system was enough to evaluate the risks of the Project.

In order to ensure that a proposed project will not pose harm to the environment, a more comprehensive EIA should be conducted. This framework proposal aims to introduce a detailed procedure, as each step of the process is critical in the determination of the risks of a project. These steps are patterned after CBD Decision VIII/28, taking current domestic procedure into account.

A) Screening

The first step in the EIA is to determine the level of assessment, which will indicate the projects that are likely to be harmful to the environment, and to exclude those that are not.[135]

The ICJ has stated that the obligation to conduct an EIA only arises when the project is shown to pose a risk of significant harm.[136] This shows that this initial characterization is crucial, because further steps may not be undertaken after it. While the current law already provides a system of placing projects in different categories,[137] the details and processes by which these projects are designated into specific categories must be specified to avoid the situation where further studies and assessments will not be conducted because of incorrect categorization. The proper evidentiary standard should be specified and required in assessing if the threshold is met.

Much of the controversies surrounding the Manila Bay Rehabilitation Project could have been avoided if it was clear why the project was classified as not requiring a CNC. Early consultation with stakeholders on the relevant classification would be useful in order for decision-makers to gather all the information they need to make an accurate assessment. Moreover, further inquiries with the project proponent, other than reliance on the forms provided under the relevant regulations, might have prompted further study on the impact to the environment. Another way this could have been avoided is for the form to have more specific queries and

[135] CBD VIII/28, Annex A ¶ 6.

[136] *Construction of a Road*, ¶105.

[137] DENR Adm. Order 30, § 4.3.

more documentary requirements in support of the information supplied. This way, the proper evidentiary standard can be adequately met.

The CBD Decision VIII/28 states that an important part of this step is to include biodiversity measures in screening criteria.[138] This can also be included in the forms to be submitted. At this early stage, expert judgment, even on a limited scale, should be used in making the classification.[139] Another tool that can be useful at this stage are positive lists, which will help identify the types of projects that require EIAs and geographical areas that are at risk of environmental harm.[140]

B) Scoping

This step of the EIA will define the parameters of the study, including the issues that will be observed in more detail.[141] This includes the creation of terms of reference or guidelines, as well as the proposed methodology.[142]

C) Assessment and evaluation of impacts and development of alternatives

The CBD Decision VIII/28 provides that EIA should be "an iterative process of assessing impacts, re-designing alternatives and comparison."[143] This step requires an analysis of the nature, magnitude, extent, and duration of

[138] CBD VIII/28, Annex A ¶ 6.

[139] *Id.,* at ¶ 10.

[140] *Id.*

[141] *Id.,* at ¶ 20.

[142] *Id.*

[143] *Id.,* at ¶ 28.

impacts, as well as "a judgement of their significance, i.e., whether the impacts are acceptable to stakeholders and society as a whole, require mitigation and/or compensation, or are unacceptable."[144] This stage should include consultation with the public and experts.

D) Reporting

Under DENR Admin. Order 30, this step is covered by the EIS.[145] The purpose for this is to document the results of the previous steps, and to assist the decision-makers, including the Government, in deciding whether the proposal should be approved.[146] It guides the proponent in planning the project, with more focus on eliminating negative impacts.[147] It is also useful for the public as it provides the opportunity to be informed on the impact of the proposed project on the community.[148]

E) Decision-making

While decision-making is constant throughout the entire process of EIA,[149] this step ultimately determines whether the project will be conducted or not. This step is observed in DENR Admin. Order No. 30 through the Decision Document stage, wherein an ECC or Denial Letter is issued to the project proponent.[150] The CBD Decision VIII/28 highlights that the precautionary approach should be taken into

[144] *Id.,* at ¶ 29.

[145] DENR Adm. Order 30, § 3(l).

[146] CBD VIII/28, Annex A ¶ 33.

[147] *Id.*

[148] *Id.*

[149] *Id.,* at ¶ 39.

[150] DENR Adm. Order 30, § 5.4.3.

consideration when there is scientific uncertainty as to the risk of significant harm to biodiversity.[151] The decision-maker should "seek to strike a balance between conservation and sustainable use for economically viable, and socially and ecologically sustainable solutions."[152]

F) Monitoring

An EIA, while generally considered to be a procedure conducted prior to the implementation of the project, should not end with the decision-making.[153] Monitoring should be conducted to evaluate whether the project outcomes are consistent with what was assessed, and to allow adjustments to be made to the project in case unforeseen events occur that may threaten the environment.[154]

V. CONCLUSION

The EIA is a useful decision-making tool when conducted properly. International law has recognized its importance for decades, but is generally broad in describing the obligation to conduct one. Conventional and customary law allow states a wide degree of discretion in implementing EIAs within their jurisdiction in accordance with their capabilities and priorities.

The Philippines, although a developing country, has recognized the EIA system as early as 1978, when it provided

[151] CBD VIII/28, Annex A ¶ 42.

[152] *Id.*

[153] *Id.,* at ¶ 44.

[154] *Id.,* at ¶ 46.

for the EIS. Several administrative issuances followed, which provide more detail than provided under international law.

The *Manila Bay Rehabilitation Project,* however, has shown that the procedure under current domestic law is still inadequate to ensure that proposed projects won't produce adverse environmental effects upon implementation. There is thus a need to provide a more specific and involved procedure for conducting EIAs, with careful consideration on the classification of projects, monitoring, and public participation.

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