EN BANC

G.R. No. 218388 – MANILA INTERNATIONAL AIRPORT AUTHORITY, *Petitioner,* **v. COMMISSION ON AUDIT,** *Respondent.*

Promulgated:
October 15, 2019

x----------x

SEPARATE OPINION

LEONEN, *J.*:

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

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

Among the service contracts entered into under Loan Agreement No. PH-136 was an agreement for consulting services (Consultancy Agreement) between the Manila International Airport Authority and the Aeroports de Paris-Japan Airport Consultants, Inc. Consortium (the Consultant).[4] The Consultancy Agreement covered 795 man-months[5] of consulting services with the total costs of around ¥1.04 billion and ₱64 million.[6]

Due to delays in the project, the Manila International Airport Authority and the Consultant extended the Consultancy Agreement four (4) times through Supplementary Agreements,[7] increasing the total man-months to

---

1 *Rollo*, pp. 438–467.
2 Ponencia, p. 7
3 Id. at 6–7.
4 Id. at 2. The contract was executed on April 15, 1994.
5 Under the Agreement for Consulting Services, a man-month of service means "services rendered by one person for a period of one (1) calendar month consisting of an average of 176 working hours." See *rollo*, p. 74.
6 Ponencia, p. 11.
7 *Rollo*, pp. 37–38.

1,221.65 and the total costs of services to around ¥1.46 billion and ₱110.3 million.[8]

Later, the Commission on Audit issued Notices of Disallowance, finding that because of the added costs under the four (4) Supplementary Agreements, the total amount paid to the Consultant exceeded the five percent (5%) ceiling contingency limit provided under the National Economic and Development Authority Guidelines for the Procurement of Consultancy Services for Government Projects (NEDA Guidelines).[9]

The breakdown is as follows:

	Japanese Yen (¥)	**Philippine Peso (₱)**
Actual amounts disbursed for Supplementary Agreements 1-4 and charged to contingency	451,820,155.00	48,755,898.04
Contingency amount per Agreement	107,394,300.00	6,430,535.00
5% Contingency limit per NEDA Guidelines	53,697,150.00	3,215,267.50
Excess amount disbursed	398,123,005.00	45,540,630.54[10]

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

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

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

---

8 Ponencia, pp. 2–3 and 15, and *rollo*, p. 48.
9 Id. at 4–5. *See also rollo*, p. 44 for NEDA Guidelines' full name.
10 *See rollo*, p. 40.
11 Ponencia, p. 6.
12 Id. at 8–9.

Loan Agreement No. PH-136 will be contrary to the doctrine of *pacta sunt servanda* and the intention of the parties.[13]

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

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

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

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

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

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

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

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

---

13 Id. at 16.
14 Id. at 16–17.
15 Id. at 17.
16 *See David v. Senate Electoral Tribunal,* 795 Phil. 529 (2016) [Per J. Leonen, En Banc].
17 *See Tañada v. Angara*, 338 Phil. 546 (1997) [Per J. Panganiban, En Banc].
18 *See David v. Senate Electoral Tribunal*, 795 Phil. 529 (2016) [Per J. Leonen, En Banc].
19 Id.

> Treaties are "international agreement[s] concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Under Article VII, Section 21 of the 1987 Constitution, treaties require concurrence by the Senate before they become binding:
>
> > SECTION 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.
>
> The Senate's ratification of a treaty makes it legally effective and binding by transformation. It then has the force and effect of a statute enacted by Congress. In *Pharmaceutical and Health Care Association of the Philippines v. Duque III, et al.*:
>
> > Under the 1987 Constitution, international law can become part of the sphere of domestic law either by transformation or incorporation. *The transformation method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation.* The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.
> >
> > *Treaties become part of the law of the land through transformation pursuant to Article VII, Section 21 of the Constitution. . . . Thus, treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts. . . .*
>
> Following ratification by the Senate, no further action, legislative or otherwise, is necessary. Thereafter, the whole of government — including the judiciary — is duty-bound to abide by the treaty, consistent with the maxim *pacta sunt servanda.*[20] (Emphasis in the original)

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

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

---

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

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

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

ARTICLE VII
EXECUTIVE DEPARTMENT

SECTION 11. . . .

. . . .

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

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

ARTICLE VIII
THE NATIONAL ASSEMBLY

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

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

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

ARTICLE XIV
THE NATIONAL ECONOMY AND THE PATRIMONY OF THE NATION

. . . .

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

This Court, in the recent case of *Saguisag v. Executive Secretary*, characterized this exception as having "left a large margin of discretion that the President could use to bypass the Legislature altogether." This Court noted this as "a departure from the 1935 Constitution, which explicitly gave

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

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

> In discussing the power of the Senate to concur with treaties entered into by the President, this Court in *Bayan v. Zamora* remarked on the significance of this legislative power:
>
> > For the role of the Senate in relation to treaties is essentially legislative in character; the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act. *In this sense, the Senate partakes a principal, yet delicate, role in keeping the principles of* ***separation of powers*** *and of* ***checks and balances*** *alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty-concurring power of the Senate, a healthy system of checks and balances indispensable toward our nation's pursuit of political maturity and growth.* True enough, rudimentary is the principle that matters pertaining to the wisdom of a legislative act are beyond the ambit and province of the courts to inquire.[23] (Emphasis in the original)

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

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

---

22 Id. at 343–345.

23 Id. at 345.

. . . .

> Article VII, Section 21 does not limit the requirement of senate concurrence to treaties alone. It may cover other international agreements, including those classified as executive agreements, if: (1) they are more permanent in nature; (2) their purposes go beyond the executive function of carrying out national policies and traditions; and (3) they amend existing treaties or statutes.
>
> As long as the subject matter of the agreement covers political issues and national policies of a more permanent character, the international agreement must be concurred in by the Senate.[24] (Emphasis supplied)

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

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

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

> [Article VII, Section 21 of the Constitution] covers both *"treaty and international agreement."* Treaties are traditionally understood as international agreements entered into between states or by states with international organizations with international legal personalities. The deliberate inclusion of the term "international agreement" is the subject of a number of academic discussions pertaining to foreign relations and international law. Its addition cannot be mere surplus. Certainly, Senate concurrence should cover more than treaties.
>
> That the President may enter into international agreements as chief architect of the Philippines' foreign policy has long been acknowledged. However, whether an international agreement is to be regarded as a treaty or as an executive agreement depends on the subject matter covered by and

---

24 Id. at 345–346.

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

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

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

the temporal nature of the agreement. *Commissioner of Customs v. Eastern Sea Trading* differentiated international agreements that require Senate concurrence from those that do not:

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

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

> *From the standpoint of Philippine constitutional law, a treaty is to be distinguished from an executive agreement,* as the Supreme Court has done in *Commissioner of Customs v. Eastern Sea Trading* where it declares that "the concurrence of [the Senate] is required by our fundamental law in the making of 'treaties' . . . which are, however, distinct and different from 'executive agreements,' which may be validly entered into without such concurrence."
>
> *Thus, the distinction rests on the application of Senate concurrence as a constitutional requirement.*
>
> *However, from the standpoint of international law, no such distinction is drawn.* Note that for purposes of the Vienna Convention on the Law of Treaties, in Article 2(1)(a) the term "treaty" is understood as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." . . . The Philippines is a party to the Convention which is already in force. In the use of the term "treaty," Article 2(1)(a) of the Vienna Convention on the Law of Treaties between States and International Organizations, which is not yet in force, the designation or appellation of the agreement also carries no legal significance. Provided the instruments possess the elements of an agreement under international law, they are to be taken equally as "treaty" without regard to the descriptive names by which they are designated, such as "protocol," "charter," "covenant," "exchange of notes," "*modus vivendi*," "convention," or "executive agreement." . . .

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

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

> As stated above, an executive agreement is outside the coverage of Article VII, Section 21 of the Constitution and hence not subject to Senate concurrence. However, the demarcation line between a treaty and an executive agreement as to the subject-matter or content of their coverage is ill-defined. The courts have not provided reliable guidelines as to the scope of executive-agreement authority in relation to treaty-making power.
>
> *If executive-agreement authority is un-contained, and if what may be the proper subject-matter of a treaty may also be included within the scope of executive-agreement power, the constitutional requirement of Senate concurrence could be rendered meaningless. The requirement could be circumvented by an expedient resort to executive agreement.*
>
> *The definite provision for Senate concurrence in the Constitution indomitably signifies that there must be a regime of national interests, policies and problems which the Executive branch of the government cannot deal with in terms of foreign relations except through treaties concurred in by the Senate under Article VII, Section 21 of the Constitution. The problem is how to define that regime, i.e., that which is outside the scope of executive-agreement power of the President and which exclusively belongs to treaty-making as subject to Senate concurrence. . . .*

Thus, Article VII, Section 21 may cover some but not all types of executive agreements. Definitely, the determination of its coverage does not depend on the nomenclature assigned by the President.

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

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

The Philippine government is duty bound to abide by its international engagements in good faith, regardless of whether the engagement is characterized as incorporated or transformed international law or whether it

---

[28] Id. at 643–648.

takes the form of an international executive agreement. This is the principle of *pacta sunt servanda*.

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

> This Court notes and appreciates the ferocity and passion by which petitioners stressed their arguments on this issue. However, while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. Unquestionably, the Constitution did not envision a hermit-type isolation of the country from the rest of the world. In its Declaration of Principles and State Policies, the Constitution "adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity, with all nations." By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda* — international agreements must be performed in good faith. "A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties . . . A state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."
>
> By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, *the regulation of commercial relations*, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. The sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations. As aptly put by John F. Kennedy, "Today, no nation can build its destiny alone. The age of self-sufficient nationalism is over. The age of interdependence is here."[32] (Emphasis in the original, citations omitted)

---

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

30 Id.

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

32 Id. at 591–593.

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

> The petitioners' arguments fail to persuade. The Court holds that Loan Agreement No. PH-P204 taken in conjunction with the Exchange of Notes dated December 27, 1999 between the Japanese Government and the Philippine Government is an executive agreement.
>
> To recall, Loan Agreement No. PH-P204 was executed by and between the JBIC and the Philippine Government pursuant to the Exchange of Notes executed by and between Mr. Yoshihisa Ara, Ambassador Extraordinary and Plenipotentiary of Japan to the Philippines, and then Foreign Affairs Secretary Siazon, in behalf of their respective governments. The Exchange of Notes expressed that the two governments have reached an understanding concerning Japanese loans to be extended to the Philippines and that these loans were aimed at promoting our country's economic stabilization and development efforts.
>
> . . . Under the circumstances, the JBIC may well be considered an adjunct of the Japanese Government. Further, Loan Agreement No. PH-P204 is indubitably an integral part of the Exchange of Notes. It forms part of the Exchange of Notes such that it cannot be properly taken independent thereof.
>
> In this connection, it is well to understand the definition of an "exchange of notes" under international law. The term is defined in the United Nations Treaty Collection in this wise:
>
> > An "exchange of notes" is a record of a routine agreement that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.
>
> It is stated that "treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi and *exchange of notes*" all refer to "international instruments binding at international law." It is further explained that —
>
> > Although these instruments differ from each other by title, they all have common features and international law has applied basically the same rules to all these instruments.

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

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

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

> Agreements concluded by the President which fall short of treaties are commonly referred to as executive agreements and are no less common in our scheme of government than are the more formal instruments — treaties and conventions. **They sometimes take the form of exchange of notes and at other times that of more formal documents denominated "agreements" or "protocols"**. The point where ordinary correspondence between this and other governments ends and agreements — whether denominated executive agreements or **exchange of notes** or otherwise — begin, may sometimes be difficult of ready ascertainment. It would be useless to undertake to discuss here the large variety of executive agreements as such, concluded from time to time. Hundreds of executive agreements, other than those entered into under the trade-agreements act, have been negotiated with foreign governments.[34] (Emphasis in the original, citations omitted)

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

---

[34] Id. at 689–692.

[35] *Rollo*, p. 106.

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

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

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

> 7.01 Laws of the Republic of the Philippines
>
> The governing law of this Agreement shall be the laws of the Republic of the Philippines. Consultant and its Staff shall conform to all applicable laws of the Republic and shall take prompt corrective action with regard to any violation called to their attention.[36]

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

> 2.04 Extension of Services under Supplemental Agreement
>
> The Services of Consultant may be extended for the performance of additional work as provided for in Sections 7.05 and 7.07 hereof. For each such extension of the Services, a supplemental agreement shall be executed stipulating the scope and remuneration for the extended services.
>
> The terms and conditions of the additional services under the supplemental agreement shall be also governed by this Agreement. Remuneration to Consultant for the additional man-months shall be chargeable against Contingencies and shall be governed by the provisions of the Agreement.[37]

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

---

[36] Id. at 93.
[37] Id. at 74.

4.05 Use of Contingency Amount

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

The contingency amount also covers additional costs incurred from possible extensions caused by delays due to circumstances beyond the Consultant's control:

7.07 Delay in Services

> In the event that Consultant encounters delay in obtaining the required services or facilities under this Agreement, it shall promptly notify MIAA of such delay and may request an appropriate extension for completion of the Services.
>
> In the event of delay caused by circumstances beyond the control of Consultant, an extension shall be granted by MIAA subject to the concurrence by OECF, and any additional cost incurred by such extension shall be expended out of the Contingency in accordance with the procedures stipulated under Section 4.05 – Use of Contingency Amount.[39]

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

7.05 Changes

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

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

---

38 Id. at 79.
39 Id. at 95.
40 Id. at 94.

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

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

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

> 4.05 Use of Contingency Amount
>
> Payments in respect of costs which exceeds the estimates set forth in Annex D hereof may be chargeable to the Contingency amounts in the respective estimates, provided that such costs are approved by MIAA and concurred by OECF prior to their being incurred, and provided further that they shall be paid only at the unit rates and costs specified in Annex D of the Agreement or such as amended and in strict compliance with the Project needs.[41]

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

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

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

Section 9.3 of the NEDA Guidelines states:

> The above notwithstanding, these IRR shall not negate any existing and future commitments with respect to the selection of Consultants financed partly or wholly with funds from international financial

---

41 *Rollo*, p. 79.
42 Id. at 40.

institutions, as well as from bilateral and other similar sources as stipulated in the corresponding agreements with such institutions/sources.[43]

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

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

> WHEREAS, MIAA desires to implement the Terminal 2 Development Project of Ninoy Aquino International Airport, hereinafter referred to as the "Project":
>
> WHEREAS, the Overseas Economic Cooperation Fund (OECF) of Japan has extended a loan (OECF Loan Agreement No. PH – 136) to MIAA for the purpose;
>
> WHEREAS, [Aeroports de Paris] has successfully completed the engineering design of the Terminal 2 under the French loan assistance program;
>
> WHEREAS, the implementation of the Project requires competent consulting services for additional study, assistance in bidding, construction management and post construction services;
>
> WHEREAS, [Aeroports de Paris] and [Japan Airports Consultants, Inc.] are willing to work together as an ad hoc association named ADP-JAC CONSORTIUM, and jointly represent that they are qualified, desirous and willing to render such consulting services;
>
> WHEREAS, both [Aeroports de Paris] and [Japan Airports Consultants, Inc.] declare that they shall be jointly and severally responsible for the services of the Project and that [Aeroports de Paris] shall act as a leader of Consultant; and further that, as such leader, shall be solely and fully responsible for any document which [Aeroports de Paris] previously made and submitted to MIAA prior to the formation of the consortium and which is related to the detailed architectural and engineering design contract for NAIA Terminal 2;
>
> WHEREAS, MIAA has agreed to engage Consultant for the consulting services for the Project and *OECF has concurred with such intention of MIAA*;
>
> WHEREAS, Consultant represents that it has made arrangements to associate itself, in undertaking the Services covered under this Agreement,

---

[43] Id. at 39.

> with four (4) local firms acting as local sub-consultants[.][44] (Emphasis supplied)

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

> Procurement Procedure
>
> Section 1. Guidelines to be used for procurement under the Loan
>
> . . . .
>
> (2) Employment of consultants to be financed out of the proceeds of the Loan shall be in accordance with Guidelines for the Employment of Consultants by OECF Borrowers dated November, 1987[.][46]

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

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

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

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

> Likewise, it bears stressing that the TOR, an integral part of the Agreement, stipulates under Item I.2 thereof, the adoption of the OECF as well as NEDA Guidelines in the procurement of consultants in the instant

---

44 Id. at 70–71.
45 Id. at 116.
46 Id.
47 Id. at 52. The COA-LAO Decision dated November 2, 2008 was penned by Director IV Janet D. Nacion of the COA Legal & Adjudication Office - Corporate.

case; made no mention that the ceiling for contingency prescribed under the NEDA Guidelines shall not be applied.[48]

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

> 1.01 Agreement – means this contract for consulting services for the Project between MIAA and ADP and JAC working together, including Annexes A, B, C and D as listed hereunder and forming an integral part hereof:
>
> Annex A Terms of Reference
> Annex B Consortium Documentation
> Annex C Technical Description
> Annex D Agreed Cost Breakdown[49]

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

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

MARVIC M.V.F. LEONEN
Associate Justice

---

48 Id.
49 Id. at 71.
50 This possibly refers to the 1987 Guidelines for the Employment of Consultants by OECF Borrowers.