

Equity and Fairness in Public-Private Partnerships:  
The Case of Airport Infrastructure Development in the Philippines  
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**Abstract:** Public-private partnerships (PPP) are special features of governance today. Many governments throughout the world have used these schemes not only to shift the boundaries between government and market, but also to redefine governing and governance, and the role of the state, market and civil society in development. These proffer a spectrum of possibilities, particularly in infrastructure development in the country, which may be fair to one party but disadvantageous to another stakeholder, or vice versa, all in serving or not serving public interest.

This paper explores the elements of fairness in the PPP policy in the Philippines focusing on the airport development of the Ninoy Aquino International Airport (NAIA) 3, using the Build-Operate-Transfer (BOT) scheme. It provides the macro context in adopting BOT as a mechanism for PPP in the case at hand and examines the processes, pros and cons, issues, challenges and prospects in serving or not serving public interest. It concludes with a review of some possible recommendations to improve fairness and equity in the PPP/BOT policy and practice in the country.

**Keywords:** public-private partnership, build-operate-transfer, fairness, equity, just compensation

A. Public-Private Partnership (PPP) Policy: A Review

1. *The PPP Global Perspective.* Unlike in the past, governments today have increasingly engaged the help of business (and other sectors in the society, e.g., non-government organizations (NGOs)), in order to provide ‘womb-to-tomb’ goods and services they themselves traditionally delivered.

This engagement is usually called public-private partnership or PPP. It could be defined in seven senses, including among others: as a management reform or an innovative tool that changes the way government functions; as problem conversion or trouble shooting to commercialization to bait the marketplace; as risk shifting and a means to respond to fiscal stringency on the part of government, and of getting the private sector to sign on; or, as restructuring public service and power sharing to include ethos of cooperation and trust, mutual beneficial sharing of responsibility, knowledge or risk, and give-and-take and negotiating differences (Linder, 1999). Thus, it is touted as a sea change in public service delivery.

PPP is built on “the expertise of each partner that best meets clearly defined public needs through the most appropriate allocation of resources, risks, responsibilities and rewards.” (Nijkamp et al., 2002; UNESCAP, 2002, p. 4). Here, the public sector maintains an oversight and quality assessment roles while the private sector is more

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closely involved in actually delivering (financing, operating, maintaining, etc.) the public good or service (World Bank, 2000).

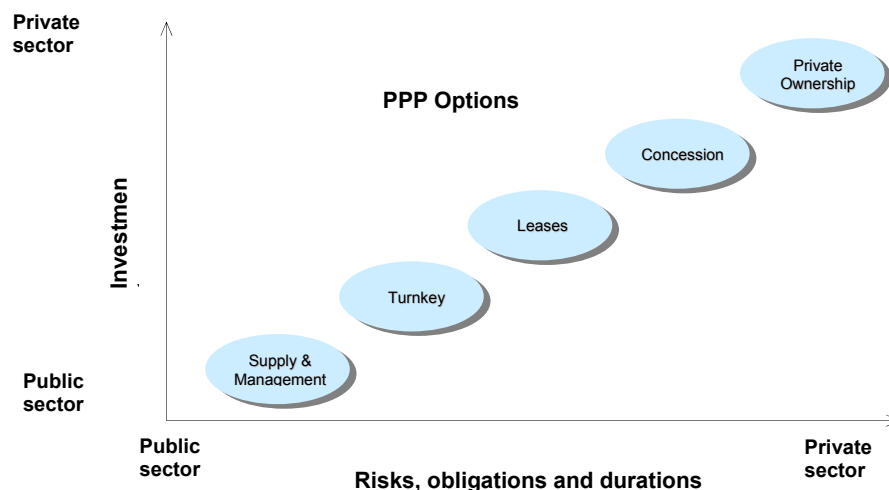
PPP is adopted in recognition of the parties' own limitations or of the other sectors' contributions, or both. This may be because the tasks of governing and governance are too complex to leave on the hands of one sector alone. Thus, there is a need for sectors to combine their efforts in order to deliver public services and add value to development efforts.

The government of the Philippines is no exemption to this strategic movement. As early as the mid-80's, it has embarked on initiatives to draw in the participation of the private sector (and NGOs) more aggressively in development efforts. Though it has recognized early on the role of the private sector as the main engine of (economic) growth, it was only during the time of the (first) Aquino government when the neoliberal approaches of privatization, deregulation and liberalization were the major policies of the day.

Though PPP is not equivalent to privatization, both have threads in common. They were introduced during the regime of New Public Management (NPM) when private sector thinking was used (and misused) in the public sector and market-based criteria were applied to the delivery of public products and services (Pierre, 1997). Both were resorted to in instances where a fiscal crisis seemed to be experienced in the public sector, and therefore a search for other sources of financing pointed to the private sector (Savas, E., 2000)

PPP has variants that include supply and management, turnkey, lease, concession and private ownership (Fig. 1). It may also include other varieties depending on the extent of private sector risk and involvement.

**Figure 1. Basic features of PPP models**



Source: UNESCAP, 2002, p. 5

For the purposes of this paper, PPP will focus on concession agreements as a variant of the build-operate-transfer policy.

2. *PPP in the Philippines*. PPP in the Philippines is basically any one of the variants of permitted schemes under the Private Sector Participation (PSP) Program anchored on the Build-Operate-and- Transfer (BOT) Law. A BOT scheme is defined under RA 6957 as a contractual arrangement whereby the contractor undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The contractor operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges<sup>2</sup> sufficient to enable the contractor to recover its operating and maintenance expenses and its investment in the project plus a reasonable rate of return thereon. The contractor transfers the facility to the government agency or local government unit concerned at the end of the fixed term, which shall not exceed fifty (50) years (BOT Center, 2008; RA 6957).

RA 6957 is envisioned to generally mobilize local and foreign private capital, technology and expertise in order to develop and implement major and capital-intensive infrastructure projects, and reduce the fiscal burden of the government by making the private sector an effective partner in infrastructure building.

RA 6957 initially presented two project schemes: build-operate-transfer (BOT) and build-and-transfer (BT). In 1994, RA 7718, which amended RA 6957, introduced and defined new variants of private sector infrastructure participation schemes. These include: build-own-and-operate (BOO); build-lease-and-transfer (BLT); build-transfer-and-operate (BTO); contract-add-and-operate (CAO); develop-operate-and-transfer (DOT); rehabilitate-own-and-transfer (ROT); and rehabilitate-own-and-operate (ROO) (Sec. 1). Other PSP/BOT modalities include service contracts, management contracts, lease, or concession agreements (Ricote, 2006; RA 7718).

In terms of risk sharing in the different variants of the BOT Law, Fig. 2 posits that the sooner the transfer period (from the private to the public sector), the lower the risks involved. Lower risks may however spell lower payments or returns on investments.

The expanded BOT Law or RA 7718 reiterates its recognition of the role of the private sector in development, provides incentives to mobilize private resources and provides a climate of minimum government intervention on business undertakings. It allowed the framework for rate setting and adjustments to mirror market conditions to ensure reasonable rates of return to equity investors. It also included the provision of government support, cost sharing, enhancements and incentives to make projects bankable and attractive to the private sector. However, the law does not allow direct government guarantees on loans of private proponents. Corollary legal frameworks, e.g., investment code or treaty, also require compliance with existing laws of the country like the 40-60% rule on ownership of companies, anti-dummy law, and others.

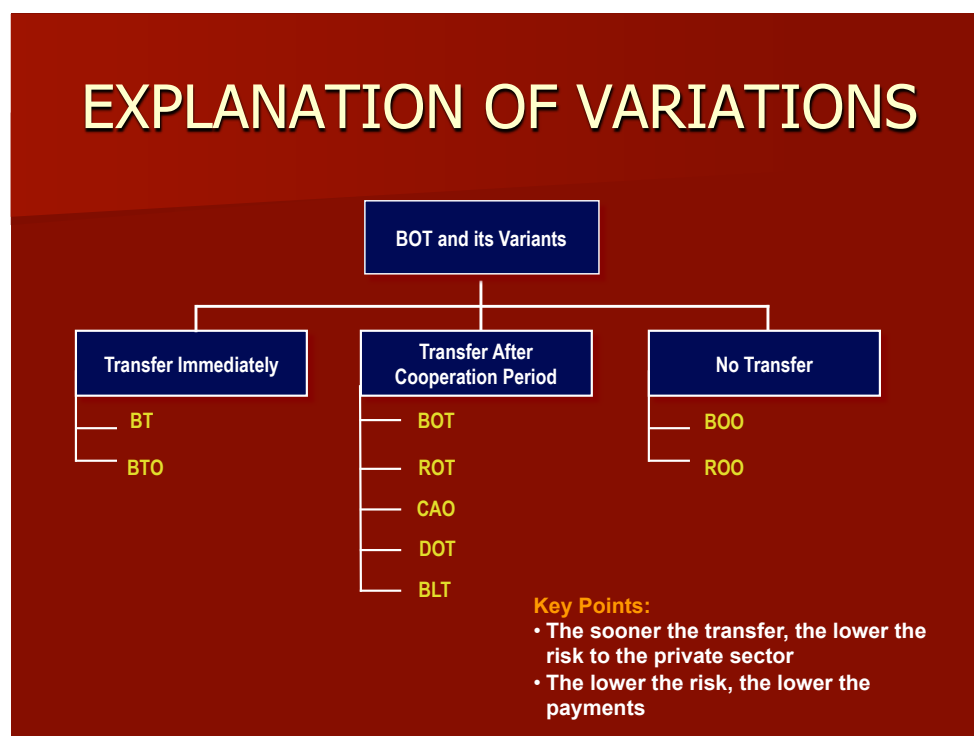
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<sup>2</sup> An external regulator sets fees and prices for natural monopolies and public services though, under existing laws.

RA 7718 also introduced the unsolicited proposal process as a valid implementation mode. It provides that “unsolicited proposals for projects may be accepted by any government agency or local government unit on a negotiated basis: Provided, That, all the following conditions are met: (1) such projects involve a new concept or technology and/or are not part of the list of priority projects, (2) no direct government guarantee, subsidy or equity is required, and (3) the government agency or local government unit has invited by publication, for three (3) consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of sixty (60) working days: Provided, further, That in the event another proponent submits a lower price proposal, the original proponent shall have the right to match that price within thirty (30) working days (Section 12).

The BOT started in the country in 1990 as a response to a power crisis. Using the scheme, 38 power plants were built, effectively ending the supply problems in 1995. The success experienced in that sector was then replicated through an expanded BOT Law or RA 7718, in other areas of infrastructure, such as roads, airports, seaports, water, and even information technology.

Fig. 2. The BOT Variants and the Risks of the Private Sector



Source: Committee on Privatization, 2008 based on RA 7718

PPP is one of the flagship programs of the current (second) Aquino administration basically to address the need for infrastructure services and make the country more internationally competitive, sustain a healthy investment climate and propel ‘inclusive’ (economic) growth and poverty reduction (Medium Term Philippine Development Plan, 2011-2016, Chapter 4, p. 1).

B. The Case of Airport Privatization: The BOT Concession Agreement  
In the Ninoy Aquino International Airport 3 (NAIA 3)

1. *The NAIA Terminal 3 Project.* The Philippines needed an international gateway to replace the old, dilapidated half a century-old Ninoy Aquino International Airport (NAIA1). Gearing to be an emerging tiger economy at that time (early 1990s), former President Fidel Ramos sought the help of the Taipans or the rich Filipino-Chinese businessmen<sup>3</sup> to rationalize the country's infrastructure needs, more importantly, its international airport. Thus, the NAIA2 and NAIA3 projects were born.

In keeping with the NAIA master plan, NAIA3 should replace NAIA1. NAIA3 was intended to be the 3<sup>rd</sup> international passenger terminal of the country. It is a 189,000 square meter facility, which started construction in 1997 and was intended to start operations in 2002. The modern US\$640 million facility was designed by Skidmore, Owings and Merrill (SOM) to have a capacity of 13 million passengers per year or 33,000 passengers daily at peak or 6,000 passengers per hour. Based on design, it has the following features: a 4-level shopping mall connecting the terminal and parking buildings; a parking building with 2,000-car capacity and outdoor parking which can accommodate 1,200 cars; 34 air bridges and 20 contact gates with the ability to service 28 planes at any given time; 70 flight information terminals; 314 display monitors, with 300 kilometers of fiber optic I.T. cabling; 29 restroom blocks; five entrances in the departure area equipped with X-ray machines; and 7 large baggage carousels, each with individual flight display monitors ([http://en.wikipedia.org/wiki/Ninoy\\_Aquino\\_International\\_Airport](http://en.wikipedia.org/wiki/Ninoy_Aquino_International_Airport)).

2. *The Timeline of the Project.*<sup>4</sup> Figure 3 capsulizes the timeline of the BOT project under study.

Asia's Emerging Dragon Corporation (AEDP) submitted the original (unsolicited) proposal for the construction of NAIA3. Other interested parties subjected this to a challenge. The AEDP lost the bid to PairCargo and its partner, Fraport AG of Germany. Fraport AG and PairCargo then became the Philippine Air Terminals Corporation (PIATCO) and was contracted in 1997 by the Philippine government to undertake the construction and subsequent operation of the terminal. PIATCO is wholly owned by Fraport AG (the operator of Frankfurt airport in Germany), Security Bank and Trust Company, Equitable Banking Corporation, Chuah Huh Holdings Company and the Philippine Airport Ground Services. Construction of NAIA3 was begun under the administration of former president Joseph Estrada and was originally

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<sup>3</sup> In 1993, six taipans which included John Gokongwei, Andrew Gotianun, Henry Sy, Lucio Tan, George Ty and Alfonso Yuchengco offered to construct NAIA Terminal 3 under the BOT scheme. They later organized themselves into the Asia's Emerging Dragon Corporation (AEDC).

<sup>4</sup> Sources for this section include various newspaper articles on the subject, 1993-2011; ICSID Decisions 2007 and 2011; Senate Committee Reports 2000-2002; Supreme Court Decision 2004; Llanto, 2006,

scheduled to open in late 2002.

Fig. 3. The Timeline of the NAIA3 BOT Project, 1993-2011

- 1993-Six taipans offered to construct NAIA Terminal 3 under the build-operate-transfer (BOT) scheme. The taipans- John Gokongwei, Andrew Gotianun, Henry Sy, Lucio Tan, George Ty and Alfonso Yuchengco--organize Asia's Emerging Dragon Corp. (AEDC).
- Oct. 5, 1994-The AEDC submitted to the Department of Transportation and Communication an unsolicited proposal to undertake the NAIA 3 project.
- 1995-DOTC endorsed the proposal to Investment Coordinating Council (ICC) in March and in a meeting requested by AEDC in November, president Fidel Ramos approved the 10-million passenger capacity new terminal.
- Feb. 13, 1996-The NEDA Board granted first pass approval of project.

Sept. 20, 1996- A lone challenge was submitted by the consortium of People's Air Cargo (Cheng Yong's company) and Warehousing Co. Inc., Philippine Air Ground Services, and Security Bank.

Oct. 16, 1996-The DOTC/Manila International Airport Authority (MIAA) Prequalification, Bids and Awards Committee (PBAC) for the NAIA 3 opened the third envelope submitted by AEDC and Paircargo and Associates which contained their respective financial proposals to government.
- Feb. 27, 1997-The Securities and Exchange Commission issued a Certificate of Registration of Philippine International Air Terminals Co. Inc. (PIATCO) to PairCargo and its partner Fraport of Germany.

April 18, 1997-AEDC filed a suit with Pasig City RTC against members of DOTC/MIAA PBAC and the head of PBAC Technical Committee.

July 12, 1997-Concessionaire contract was signed between the DOTC and MIAA represented by then secretary Arturo Enrile, and PIATCO represented by Henry Go.

Nov. 26, 1998-President Joseph Estrada amended the contract, which was later supplemented twice (on August 1999 and September 2000).
- Aug. 19, 1999-NEDA Board granted second pass approval of project.

March 7, 2000-Committee on Transportation and Communications of the House of Representatives found PIATCo contract regular and aboveboard.
- In 2003, 2004, 2005, the Supreme Court (SC) declared that the contract was null and void based on the following:
  - The predecessor of PIATCO, Paircargo, at the time of the pre-bidding

in 1996, did not have the financial capacity to bid (P558M or only 6% of the estimated project cost of \$350M or P9.1B, way below the 30% requirement); thus was not a qualified bidder in the first place

- The 1997 contract and its subsequent amendments contain material and onerous provisions contrary to public policy and disadvantageous to the government and public interest. These include provisions stating that
  - a) “In the event PIATCO defaulted in paying debts and other charges, the government shall pay;
  - b) the latter shall also pay P180M to PIATCO, in the event the (Pasig) RTC nullified the construction contract of NAIA3”,
  - c) “PIATCO shall be the sole collector of fees for aircraft parking, tacking, check-in and passenger fees and other services, and payments in the airport”,
  - d) allowing the immense savings to PIATCO in building an access road at a lesser cost, instead of an access tunnel from NAIA 2 to NAIA3
    - These are direct guarantees expressly prohibited by the law
    - NAIA3 is a public utility subject to government regulation and constitutional prohibition against foreign ownership
    - Alterations to the agreement (from time to time) materially destroy the essence of fair competition in the public bidding process
  
- In 2004-2010, PIATCO and Fraport AG filed compensation claims before international parties, particularly, (a) the Singapore-based International Chamber of Commerce Court of Arbitration for PIATCO’s US\$564 million claim against the Philippine Government and (b) the World Bank’s International Center for the Settlement of Investment Disputes (ICSID) in Washington, D.C., United States of America for Fraport AG’s counterpart claim amounting to US\$425 million.
  - In 2007, the ICSID ruled in favor of the Philippine government disregarding the claim of Fraport and PIATCO on the grounds that they violated Philippine laws and their concessionaire contracts were declared null and void ab initio by the highest bodies of the three branches of the Philippine government: Supreme Court; the Blue Ribbon Committee and the Committees on Trade and Finance of the Philippine Senate; and the Executive, the President (Arroyo) of the Republic.
  - In 2010, ICSID annulled its earlier ruling and allowed the parties concerned to start negotiating (for amicable settlement) again
  
- In 2004 and 2011, upon the order of the Pasay Regional Trial Court which was instructed by the Supreme Court to determine the just compensation due PIATCO before the Philippine Government may take over the ownership and operations of the NAIA3, the Philippine government paid PIATCO \$66M initial payment and promised to pay the balance from the total set in May 2011 at \$175M, in June 2011.

Sources: Various newspaper articles on the subject, 1993-2011; ICSID Decisions 2007 and 2011; Senate Committee Reports 2000-2002; Supreme Court Decisions 2003, 2004, 2005

The BOT Contracts for said terminal include the (a) Concession Agreement signed on July 12, 1997, (b) the Amended and Restated Concession Agreement dated November 26, 1999, (c) the First Supplement to the Amended and Restated Concession Agreement dated August 27, 1999, (d) the Second Supplement to the Amended and Restated Concession Agreement dated September 4, 2000, and (e) the Third Supplement to the Amended and Restated Concession Agreement dated June 22, 2001.

The original agreement was one in which PairCargo and Flughafen Frankfurt Main AG (Fraport AG) would operate the airport for several years after its construction and then after 25 years of operation, hand it over to the Philippine Government. However, the government offered to buy out Fraport AG for \$400 million, to which Fraport agreed. Before the terminal could be fully completed, President Gloria Macapagal-Arroyo formed a committee to evaluate the agreement to buy out Fraport AG. The Arroyo administration eventually abrogated PIATCO's BOT Contract for allegedly having been anomalous in certain important respects. President Arroyo believed that ousted President Estrada illegally negotiated certain provisions of the BOT Contracts to the disadvantage of the government.

In a subsequent decision, the Philippine Supreme Court upheld the Philippine Government's position on the matter and declared the BOT contract "null and void" for, among other things, having violated certain provisions of the Philippine Constitution, the BOT Law, its Implementing Rules and Regulations, the Pre-Bidding Bids and Bulletins. In particular, the decision nullified the Concession Agreement and all subsequent Agreements because of the following:

1. Absence of the requisite financial capacity of the PairCargo Consortium, (predecessor of PIATCO) of at least 10% of the bid amount, which is required under the BOT Law,
2. Material and substantial amendments to the 1997 Concession Agreement, which deviated from the original contract bid upon, which is contrary to public policy,
3. Breach in the Constitutional requirement of Filipino majority ownership in corporations dealing with natural monopolies and public services and the Anti-Dummy Law
4. Amendments in the 1997 Concession Agreement provided for a direct government guarantee, which is expressly prohibited by the BOT Law and its Implementing Rules and Regulations.

The Supreme Court found that the original contract was revised to allow for a Philippine Government guarantee of PIATCO's obligations to its creditors, contractors and suppliers. The BOT law disallows the granting of such sovereign guarantees. The project in question is an unsolicited project and thus, it does not qualify to receive government guarantees. PIATCO maintains that the provisions cited by the Supreme Court do not amount to a prohibited sovereign guarantee by the Philippine Government.



On December 2004, the Office of the Solicitor General filed in the Pasay City Regional Trial Court a case to expropriate NAIA3 in an effort to have it working at the soonest time possible. The RTC issued a Writ of Possession to the government, but ordered it to pay PIATCO proffered amount of three billion pesos (US\$66 million at Pesos 45:US\$1). The Philippine Government paid PIATCO the said amount on the second week of September 2006. This paved the way for the government to take over the terminal and for MIAA to continue work on the facility for its opening.

Note, however, that the Supreme Court, in its 2003 and 2004 ruling, is not unmindful of the reality that the structures comprising the NAIA3 facility are almost complete and that funds have been spent by PIATCO in their construction. For the government to take over the said facility, it has to compensate respondent PIATCO as builder of the said structures. The compensation must *be just and in accordance with law and equity* for the government cannot unjustly enrich itself at the expense of PIATCO and its investors.<sup>5</sup>

With the Writ of Possession and the receipt of payment of a proffered value of P3B to PIATCO, the government may be then authorized to perform acts that are essential to the operation of the NAIA 3 as an international airport terminal. As prescribed by the Supreme Court in 2004, such authority encompasses "the repair, reconditioning and improvement of the complex, maintenance of the existing facilities and equipment, installation of new facilities and equipment, provision of services and facilities pertaining to the facilitation of air traffic and transport, and other services that are integral to a modern-day international airport."<sup>6</sup>

Fraport accused the government of breaking the law when it took over the terminal, dismissing the government's offered down payment as insufficient. Fraport and PIATCO brought its case of compensation to the World Bank's International Center for Settlement of Investment Disputes (ICSID) and with the Singapore-based International Chamber of Commerce Court of Arbitration (ICCCA). PIATCO was demanding US\$564 million claim against the Philippine Government and (b) Fraport AG's counterpart claim amounted to US\$425 million.

This is pursuant to a Bilateral Investment Treaty in which the Philippines and Germany agreed to have recourse to ICSID in case German investors suffer losses due to the government's failure to honor treaty obligations. ICSID is a forum created by the World Bank to settle investment disputes among its member-states like Germany and the Philippines.<sup>7</sup>

In August 2007, after hearing the parties, ICSID dismissed Fraport AG's claims, ruling that Fraport AG's alleged investments in NAIA3 were entered into in violation of the Philippines' Anti-Dummy and other laws. Specifically, the documents submitted to it point to PIATCO and Fraport violating the sovereign laws of the

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<sup>5</sup> Supreme Court Decision 2003 and 2004 (G.R. No. 144618, 15 August 2003, 206 SCRA 409.) Italics supplied.

<sup>6</sup> Ibid.

<sup>7</sup> Artemio V. Panganiban (January 9, 2011), "Making Sense of the NAIA Mess", *Philippine Daily Inquirer*, A11

Philippines, including among others, its Constitutional prohibition against more than 40% share in corporations engaged in public services (like airports), Anti-Dummy Law, and sovereign guarantees in the BOT law. The ICSID held it had no jurisdiction because illegal “investments” were not entitled to treaty protection.

For its part, PIATCO filed a separate arbitration suit before the International Chamber of Commerce (ICC) praying for the recovery of \$425 million for alleged violation by the Philippines of the five voided contracts and for “seizing” the airport terminal PIATCO had built. This arbitral suit was filed pursuant to the contracts allowing the parties to arbitrate under ICC rules.

Again after due hearing, the ICC Arbitration Tribunal in Singapore dismissed PIATCO’s claim due to the illegality of the five contracts. In other words, PIATCO suffered not because of PH’s malfeasance but because of PIATCO’s own violations of Philippine laws.<sup>8</sup>

On the other hand, Fraport AG and PIATCO have indicated that it remains open to reaching an amicable settlement with the Philippine Government.

According to the Philippine Government, NAIA3 is 98% complete and will require at least an additional US\$6 million to complete. The Arroyo government was in the process of negotiating a contract with the builder of the terminal, Takenaka of Japan. Another factor that continued to delay the terminal's opening was the ongoing investigation of the collapse of a 100 square meter area of the terminal's ceiling. Proposed test runs for NAIA3 have been postponed indefinitely pending the results of the investigation and the inspection of the airport terminal.

In a strange twist, ICSID—via a new body called “Ad-Hoc Committee on Annulment”—issued on December 23, 2010 the new ruling voiding the earlier ICSID decision on the ground that PIATCO/Fraport AG was denied due process allegedly because the earlier ICSID arbitral tribunal did not allow the latter to comment on the evidence (proffered by the government before the Department of Justice) that PIATCO and Fraport had violated our Constitution and Anti-Dummy Law, which prohibits foreign intervention in the management, control and operation of public utilities like NAIA3.

The Ad Hoc Committee of the ICSID gave Fraport and the Philippines another chance to present their sides on the issue of claims and compensation. The Philippine government was also in the view that the “annulment decision does not validate any of Fraport AG’s claims and does not result in any liability against the Republic.”

“Rather the decision provides Fraport the opportunity to commence a new arbitration and to present its claims again. Likewise, the Republic is entitled to present the evidence against Fraport again”<sup>9</sup>

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<sup>8</sup> Ibid.

<sup>9</sup> Panesa, Edmer F. (January 4, 2011) “New legal battle over NAIA3 looms”, Manila Bulletin online (mb.com.org.ph).

In May 2011, the Pasay City Regional Trial Court ordered the Philippine government to pay \$175.79 million as “just compensation” to PIATCO. The Court said the government could deduct its initial P3-billion payment made to PIATCO in 2006. This amount is only a fraction of the \$846.4 million claim of PIATCO and Fraport because as the ruling states: “It is worthy to emphasize that the determination of just compensation is limited to the acquisition of the building/facilities or the improvements of on the land at the time of filing. It does not include any right or franchise to operate the airport or a right to be paid an increased value due to the inflation rate or any entitlement to interest since the Supreme Court declared PIATCO’s concession agreement with the Republic null and void.”<sup>10</sup>

In filings before the RTC, PIATCO estimated that the government owed the company \$846.43 million—representing the total construction cost and interest due them from “the taking of the property on December 21, 2004, until the due amount shall have been paid.”<sup>11</sup>

The Ninoy Aquino International Airport Passenger Terminal III (NAIA 3) was conceived, designed and constructed to serve as the country's show window to the world. Regrettably, it has spawned controversies. Regrettably too, despite the apparent completion of the terminal complex way back in 2002, it has not yet been operated fully. This has caused immeasurable economic damage to the country, not to mention its deplorable discredit in the international community. This has also raised concerns on the fairness and equity of the supposed partnership between the government and PIATCO/Fraport, and of the attendant decisions of various regulators and arbitration courts, locally and internationally.

### C. Towards Fairness or Fair-y Tale-ness in Public-Private Partnerships: Reforms and Suggestions

#### 1. *Fairness and Equity Defined.* The National Academy of Public Administration (NAPA) Social Equity Panel (2000) defines (social) equity as:

The fair, just and equitable management of all institutions serving the public directly or by contract, and the fair, just and equitable distribution of public services, and implementation of public policy, and the commitment to promote fairness, justice, and equity in the formation of public policy.

Gooden and Meyers (2004), meanwhile equate the term tautologically as “fairness or social justice”. Except for the double use of “social,” the definition seems appropriate. The Oxford dictionary defines equity as “fairness, impartiality, even-handed dealing;” Svava and Brunet (2004) meanwhile identify four dimensions of social equity as “procedural fairness, access, quality, and outcomes”. Of these four, the first seems instructive in our discussions, to wit:

*Procedural fairness.* Provide due process, equal protection, and equal rights to all persons regardless of their personal characteristics. Each individual should

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<sup>10</sup> Ibid., B1.

<sup>11</sup> Ibid., with reports from Christine O. Avendano and Jerome Aning.

be treated fairly, and any instances of unfair treatment of individuals should be corrected. Furthermore, existing and new practices in implementation, service delivery, and management should be examined to insure that procedural fairness is not disproportionately denied to any groups of persons. Any deviations should be corrected and the factors that contribute to this behavior should be eliminated (Svara and Brunet, 2004).

Similarly, Frederickson (2005) distinguishes between equity and social equity. “Certainly, there has always been a concern for fairness in the better practices of public administration, but it was not until the 1960s that the phrase ‘social equity’ became a feature of public administration with an attendant set of concepts and a cluster of shared values” (2005, 2-3.) Still, later in his paper, Frederickson returns to a view of social equity as concerned with “fairness, justice, and equality.”

Thus, in the case at hand, fairness and equity in the NAI3-PIATCO BOT must be translated operationally into whether due process was observed; whether procedures and decisions were even-handed and whether rights of the parties involved were protected and compensated. In the end, was the PPP fair to almost all concerned?

## 2. *The Fairness in the NAI3 PPP.*

a. *Due process* is defined as “a fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable, [arbitrary](http://legal-dictionary.thefreedictionary.com/Due+Process+of+Law), or capricious (<http://legal-dictionary.thefreedictionary.com/Due+Process+of+Law>)

The NAI3-PIATCO PPP was consummated during the time when the BOT Law, its procedures and mechanics were not yet perfect. Generally though, we can say the regulatory framework laid out was clear and procedures were transparently communicated to all concerned. Recourses to remedies were available. Incentives to investors were numerous. The BOT Law (RA 6957 and 7718) was fairly reasonable on the expectations it asks of investors who are enticed to help the country in its various infrastructure and other requirements. The Bilateral Investment Treaty (BIT) the government of the Philippines enters into with other countries may be also said to be reasonable on its requirements, though the general clause of “compliant with the host country’s sovereign laws..” may not always been appreciated seriously. In addition, allegations that the process was tainted by corruption and bad intentions have been hurled in this case PPP. These may have shaped future demands for just compensation, amicable settlement and peaceful resolution of the case.

b. *Even-Handling of Procedures and Decisions.* The case PPP spanned four presidents of the Republic (Ramos, Estrada, Arroyo and Aquino) over a period of eighteen (18) years. It involved various agencies of the government, from the Executive, Legislative and Judiciary and even reaching the highest levels of authority from the President of the Republic, the Senate and the Supreme Court. It also involved other governments (Germany, USA, Singapore) and arbitration bodies

(ICCCA and ICSID). It affected the business climate in the country and the region. It convoluted an otherwise 'simple' business venture between PIATCO and the Philippine government in providing a better international airport.

Procedures and decisions by regulators and authorities, both in the Philippines and abroad, appear pretty systematic and regular. However, the long-winded wait for solicited and unsolicited proposals to be approved or disapproved appears to frustrate the whole process. In addition, the legalistic manners by which public administrators cling to the rule of law to find flaws and discontinue seemingly 'ill-conceived' projects and those tainted with corruption often douse water in open fire.

In the name of public interest, anomalies were uncovered and charges were filed: PIATCO as without financial capacity to construct and finance the construction of NAIA3; Fraport FG as the majority (61.04%) shareholder of PIATCO and main investor, using PIATCO as cover/dummy to circumvent the Anti-Dummy Law; Philippine government as unduly taking over the airport facility without paying the investors and other stakeholders just compensation.<sup>12</sup>

The NAIA3-PIATCO BOT case is a public-private partnership that is long-drawn and not yet coming, i.e., the output (terminal) is there but the partnership was abrogated and nullified. It transcends the contract and has breached the realms of law, public opinion, business, diplomacy, and public policy. As a contract, it transformed the role of the courts from "judicial statesmanship" or "judicial abstention" to "judicial activism" as main economic policymakers. The courts dictate the decisions on the case and as the German Ambassador to the Philippines once said, "at the present pace, the legal dispute could continue for years, leaving the urgently needed infrastructure project shelved by lawyers instead of being finished by engineers."<sup>13</sup>

*c. Just Compensation and Protection of Rights of Stakeholders.* With regard to just compensation, it is amazing how the different stakeholders and documents in this case value just compensation (Figure 4). This only shows differing worldviews on the problem would influence the way stakeholders value what is fair, reasonable and just compensation for the case property at hand.

- 1) Fraport would insist that an investment was made in good faith and if the Philippine government would change the rules and not honor the previous contract it entered into, Fraport will have no recourse but "to bring the

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<sup>12</sup> Just compensation is 1) in general a fair and reasonable amount of money to be paid for work performed or to make one "whole" after loss due to damages. 2) the full value to be paid for property taken by the government for public purposes guaranteed by the Constitution, which states: "...nor shall private property be taken for public use without just compensation." If the amount offered by the governmental agency taking the property is not considered sufficient, the property owner may demand a trial to determine just compensation (<http://law.com>. accessed 11 June 2011)

<sup>13</sup> German Ambassador to the Philippines Christian Lortsch as quoted in Cynthia Balana (January 15, 2011), "German envoy seeks peaceful resolution to 'expropriation' case of NAIA3." *Philippine Daily Inquirer*, A2.

Philippines back to the path and sue for damages. Not doing so will jeopardize future privatization projects and the country's international reputation as an investment location."<sup>14</sup>

- 2) PIATCO would insist it be compensated from the time it constructed the airport to the time the Philippine government took possession of the airport until full payment of just compensation defined by acceptable authorities has been made, plus interest.
- 3) The Philippine government would insist that the BOT Contract was null and void ab initio and thus, would only pay for the structure erected in its property. It would justly expropriate the property as determined by competent authorities designated by the courts. Its sense is that the PPP failed in the first place because it was entered into in bad faith, it has been tainted with fraud and irregularities, it has been disadvantageous to the government and public interest.

Fig. 4. The Valuation of Just Compensation in the NAIA3 Issue

Stakeholder/Document	Amount	Remarks
PIATCO-DOTC Concession Agreement	\$350M	
PIATCO's claim with ICCCA	\$425M-\$565M	
Fraport GA's claim with ICSID	\$380M-\$425M	
PIATCO's claim with the RTC	\$ 427-565M; \$846.4M	For investments, expenses and foregone income in building NAIA3 and operating the airport for 25 years
Philippine Government's valuation	\$150M	NAIA3 though 98% built has components that were not constructed, passenger underground tunnel from NAIA2 to NAIA3. Also, there were structural defects in the building that needed correction, reconstruction and renovation, which would cost the Philippine government some fortune.
RTC-appointed Board of Commissioner's Valuation	\$375M with 12% interest from 2004 until fully paid	
RTC Ruling	\$175,787,245.10, less the	As of May 2011. The

<sup>14</sup> Fraport's Bender Urges the Philippine Government to Honor Legal Contracts and Be a Reliable Partner. October 25, 2002. English translation of the interview published in today's edition (25.10.02) of the Frankfurter Allgemeine Zeitung (FAZ), Germany's authoritative national newspaper.

	<p>proffered value (P3,002,125) actually paid to and received by PIATCO, as just compensation for the improvements of NAIA 3</p>	<p>Court explains: “It is worthy to emphasize that the determination of just compensation is limited to the acquisition of the building/facilities or the improvements on the land at the time of filing. It does not include any right or franchise to operate the airport, or a right to be paid an increased value due to inflation rate, or any entitlement to interest since PIATCO’s concession agreement with the Republic was declared null and void by the Supreme Court. Clearly, what PIATCO actually lost was merely the value of the property condemned.”</p>
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Sources: Various newspaper articles; ICSID decisions; Supreme Court Decisions; RTC Decisions

d. *Was the PPP Fair to Almost All Concerned?* The tangled two decade-saga of the NAIA3-PIATCO BOT project may in general be not fair to all concerned. Though due process, due diligence, and the more or less even handling of procedures and decisions were evident, the overall effect to the economy, country and BOT policy was more costly, disadvantageous and disastrous. Pitfalls in the PPP could have been avoided had the parties concerned entered into a partnership and became reliable partners who would mutually look after their interests and the general public’s. The BOT policy is not after all, only a playground for big-time risks but for rewards that would include public service as well. PPP is not merely a contract; it is a covenant for sharing and helping. Unfortunately in this case, these aspirations were only figments of one’s fairy tale concoction that PPP may work for the common good.

The stakeholders’ generally good intentions were muted by greed, dealings, misconceptions and irregularities, which dwarfed the potentials of a good, theoretically sound, promising and fair policy. Fairness in PPP does not sum up only in the just compensation for property taken. It is a question not only of financial gains but more importantly, of goodwill generated by the partnership for the interest of serving and delivering public good and welfare.

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