

REPUBLIC OF THE PHILIPPINES
SANDIGANBAYAN
Quezon City

FOURTH DIVISION

Minutes of the proceedings held on August 8, 2016.

Present:

Hon. JOSE R. HERNANDEZ..... Associate Justice
Hon. ALEX L. QUIROZ Associate Justice
Hon. GERALDINE FAITH A. ECONG..... Associate Justice

The following resolution was adopted:

SB-11-CRM-0468 and 0469 - People vs. Ma. Gloria M. Macapagal Arroyo

This resolves the Demurrer to Evidence¹ filed by accused **Ma. Gloria M. Macapagal Arroyo** in these two cases, together with the Opposition² filed by the prosecution, through the Office of the Special Prosecutor.

Accused Ma. Gloria Macapagal Arroyo, ("accused PGMA"), then President of the Republic of the Philippines, was charged with violation of Section 3(i) of R.A. No. 3019, which is docketed as SB-11-CRM-0468, as well as violation of Section 7(d) of R.A. No. 6713, which is docketed as SB-11-CRM-0469. The two separate Informations are quoted as follows:

¹ Demurrer to Evidence [For Case No. 0468; Violation of Section 3 (i) of R.A. No. 3019], dated July 7, 2016 and filed on even date and Demurrer to Evidence [For Case No. 0469; Violation of Section 7(d) of R.A. No. 6713], dated July 7, 2016 and also filed on even date.

² Opposition (To the Demurrer to Evidence filed by accused Gloria Macapagal-Arroyo dated 7 July 2016), dated July 15, 2016 and filed on July 18, 2016.

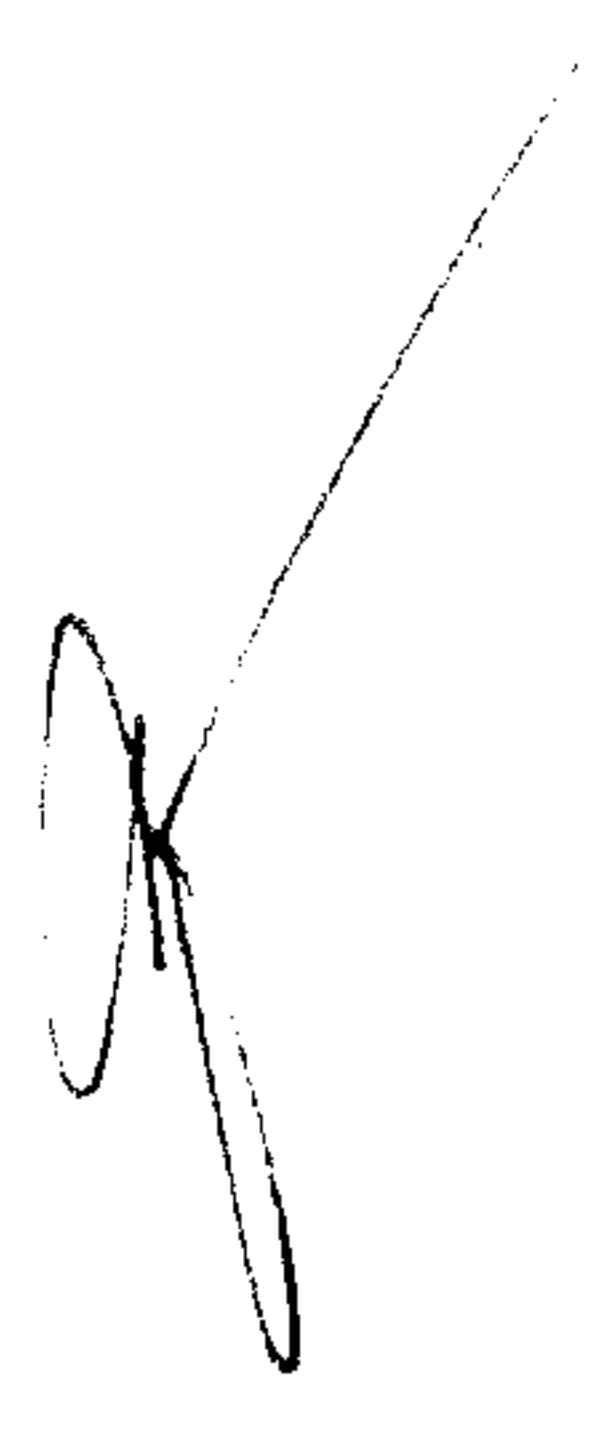
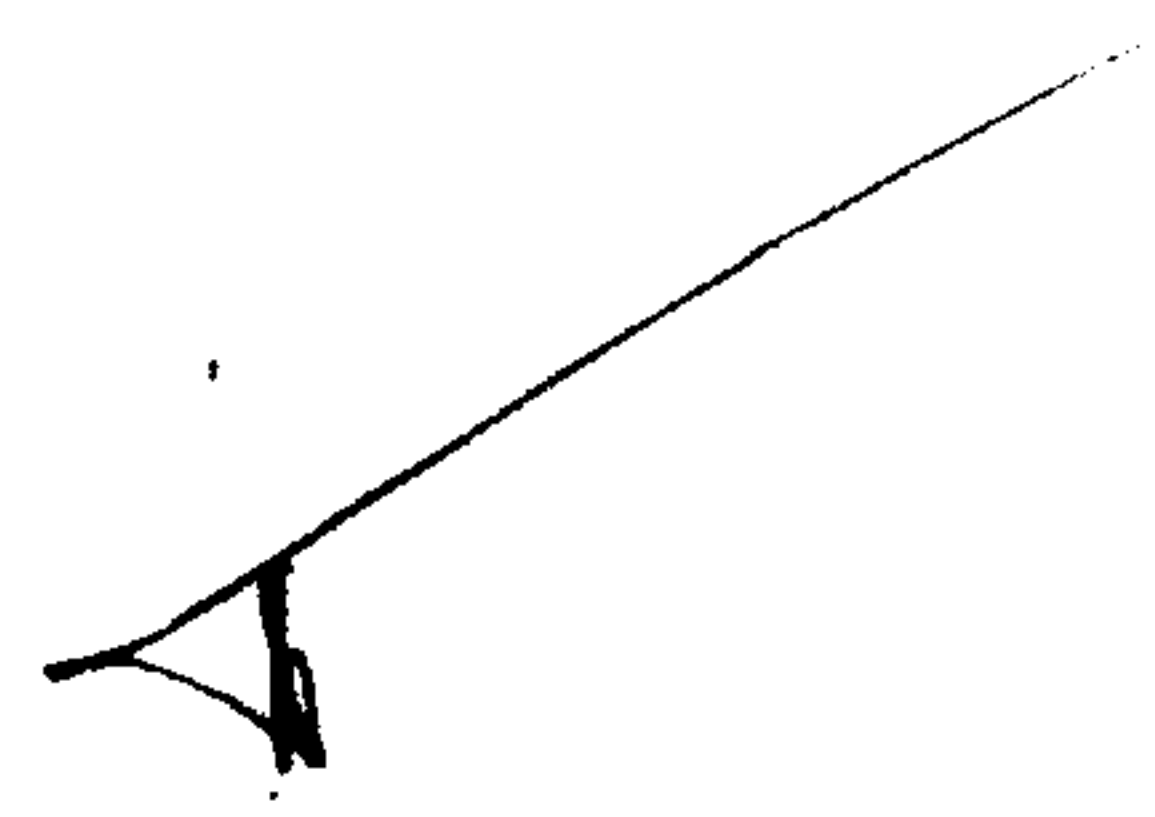
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SB-11-CRM-0468

(For violation of Section 3(i) of
R.A. No. 3019)

“That in(sic) or about February-April 2007, in Malacañang, Manila, Philippines, or sometime prior or subsequent thereto, and within the jurisdiction of this Honorable Court, accused Gloria Macapagal Arroyo, a high ranking public officer, being then the President of the Republic of the Philippines, committing the offense in relation to her office and while in the performance of her official functions as such, did then and there willfully, unlawfully and criminally become interested, for personal gain, in the approval of the National Broadband Network Project, a contract or transaction that requires the approval of National Economic and Development Authority (NEDA) of which she is the Chairperson of the Board, as proposed by Zhong Xing Telecommunications Equipment International Investment Limited (ZTE), despite knowledge of the irregularities and anomalies that attended its approval, such as but not limited to the following:

- a) Attempt by Commission on Elections Chairman Benjamin Abalos Sr. to bribe Secretary Romulo Neri with P200 million to immediately approve the ZTE proposal;*
- b) Lack of public bidding;*
- c) Absence of DOJ opinion whether the contract is exempted from the coverage of public bidding;*
- d) The unnecessary presence of accused Gloria Macapagal Arroyo during the signing of the contract despite delegating the signing, for and in behalf, to Sec. Leandro Mendoza the “Contract for the Supply of Equipment and Services for the National Broadband Network Project” dated April 21, 2007, a contract that is grossly and manifestly disadvantageous to the government; and*
- e) The haste with which the ZTE contract was processed and approved by the government.*

CONTRARY TO LAW.”



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SB-11-CRM-0469

(For violation of Section 7(d) of
R.A. No. 6713)

“That in(sic) or about February-April 2007, in Malacañang, Manila, Philippines, or sometime prior or subsequent thereto, and within the jurisdiction of this Honorable Court, accused Gloria Macapagal Arroyo, a high ranking public officer, being then the President of the Republic of the Philippines, committing the offense in relation to her office and while in the performance of her official functions as such, did then and there willfully, unlawfully and criminally accept or receive entertainment, gift or favor from Zhong Xing Telecommunications Equipment International Investment Limited (ZTE) or from its officials in the form of a round of golf and lunch, in connection with the proposal being considered by the NEDA and DOTC for approval and eventual approval on April 21, 2007, of the National Broadband Project of the ZTE, a contract or transaction that is directly affected by the office of the accused GMA, being the NEDA Chairperson and President of the Republic of the Philippines.

CONTRARY TO LAW.”

On January 3, 2012, the Court directed the prosecution to afford the accused with the opportunity to file a motion for reconsideration of the resolution issued by the Office of the Ombudsman. If the accused already filed a motion for reconsideration, the prosecution was ordered by the Court to resolve the motion and to submit the resolution to the Court.³

The pre-trial was declared terminated on August 22, 2012. The parties failed to enter into any joint stipulation of facts.⁴ On November 7, 2012, the prosecution started the presentation of its witnesses, namely:

1. Andrea Maila A. Ordañez⁵,

³ Minute Resolution, dated January 3, 2012.

⁴ Pre-trial Order, dated October 19, 2012.

⁵ TSN, dated November 7, 2012.



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2. Teodoro A. Casiño⁶,
3. Antonia P. Barros⁷
4. Fabian S. Fabian⁸,
5. Jose C. De Venecia, Jr.⁹,
6. Liza L. Maza¹⁰,
7. Fortunato R. Abrenilla¹¹,
8. Romulo L. Neri¹²,
9. Jocelyn P. Reyes¹³,
10. Santiago O. Testor¹⁴,
11. Simeon L. Sanchez¹⁵,
12. Joel A. Ocay¹⁶,
13. Flordeliza P. Delos Santos¹⁷,
14. Jose P. De Venecia III¹⁸, and
15. John Adrian M. Narag¹⁹.

On March 23, 2015, the prosecution filed a Motion to Present Three (3) Witnesses Not Listed in the Pre-Trial Order in Lieu of the Thirty (30) Witnesses Listed Therein and To Present Documents Not Marked During Pre-Trial Proceedings²⁰. Of the three (3) witnesses sought to be included, the Court allowed the presentation of Aniceto Maghirang from the Office of the President and the marking of documents to be identified and testified to by him and disallowed the presentation of Rommel Herrera from the Department of Finance and Rosalia T. Vista from the Department of Transportation and Communication.²¹ In a resolution dated September 11, 2015, the Court, however, partially reconsidered its former issuance and allowed the prosecution to present a representative from the Department of Finance to substitute Secretary Margarito Teves, a listed prosecution witness in the

⁶ *Ibid.*

⁷ TSN, dated July 1, 2013.

⁸ *Ibid.*

⁹ TSN, dated August 5, 2013.

¹⁰ TSN, dated September 9, 2013.

¹¹ TSN, dated January 22, 2014.

¹² TSN, dated February 24, 2014.

¹³ TSN, dated April 21, 2014.

¹⁴ TSN, dated June 9, 2014. This witness was not allowed to testify since he was not in the Pre-trial Order. The prosecution only made an offer of proof of evidence.

¹⁵ TSN, dated November 10, 2014.

¹⁶ *Ibid.*

¹⁷ *Ibid.* Witness Delos Santos was not able to testify because the defense made an objection which the Court sustained. The prosecution then made an offer of proof.

¹⁸ TSN, dated March 16, 2015.

¹⁹ TSN, dated September 14, 2015.

²⁰ Motion to Present Three (3) Witnesses Not Listed in the Pre-Trial Order in Lieu of the Thirty (30) Witnesses Listed Therein and to Present Documents Not Marked During Pre-Trial Proceedings, dated March 19, 2015 and filed on March 23, 2015.

²¹ Minute Resolution, dated May 20, 2015.

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Pre-Trial Order.²² On October 28, 2015, the Court noted the prosecution's Offer of Proof/Tender of Excluded Evidence dated September 16, 2015 regarding the proposed testimony of Rosalia T. Vista which was disallowed by the Court.²³

The testimony of witness Ordañez, Director IV of the Human Resource Management Office of the Office of the President, was dispensed with considering that the Court took judicial notice of the fact that the accused was the President of the Republic of the Philippines, at the time material to these cases.

The testimony of witness Barros, Service Chief of the Legislative Records and Archives Service of the Senate, was dispensed with after the parties stipulated on the following:

1. She brought with her Exhibits L²⁴, M²⁵ and N²⁶;
2. These documents were in her official custody being the Service Chief of the Legislative Records and Archives Service Office of the Senate of the Philippines;
3. She reproduced the exhibits she brought to the Court from the original copies on file and certified them;
4. If these exhibits will be presented to her for identification, she will be able to identify the same; and
5. The due execution and genuineness of the subject documents.²⁷

When witness Maza was presented, the prosecution offered for stipulation the following which were admitted by the accused:

1. The witness is one of the three complainants in the Joint Complaint Affidavit which was filed with the Office of the Ombudsman on September 8, 2011;
2. The complainants filed the complaint relative to the advocacies of the Gabriela Women's Party List for Good Governance;

²² From the Minute Resolution, dated September 11, 2015.

²³ From the Minute Resolution, dated October 28, 2015.

²⁴ Transcript of Stenographic Notes of the Senate Blue Ribbon Committee Hearings on the NBN ZTE Investigation, dated September 18, 2007.

²⁵ Transcript of Stenographic Notes of the Senate Blue Ribbon Committee Hearings on the NBN ZTE Investigation, dated September 26, 2007.

²⁶ Transcript of Stenographic Notes of the Senate Blue Ribbon Committee Hearings on the NBN ZTE Investigation, dated February 8, 2008.

²⁷ Based on the Order, dated July 1, 2013.

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3. She will be able to identify the copy of the complaint marked as Exhibit E.²⁸

The testimony of witness Oca, Administrative Officer V of the Records Management Section of the Department of Justice, was dispensed with after the parties stipulated on the Opinion and Letter (Exhibits PP and QQ, Exhibits 142 and 143) being the genuine and authentic copies of their originals.²⁹

The testimony of witness Narag, Division Chief of the International Finance Group of the Department of Finance, was also dispensed with since the parties agreed that it will be similar to his earlier testimony in SB-11-CRM-0467 which is likewise pending before the Court.³⁰ In other words, his testimony in SB-11-CRM-0467 was adopted by the parties and their respective counsels.

The prosecution rested its case on November 25, 2015. To prove its case, it marked and offered³¹ in evidence Exhibits "C", "D", "E", "F", "G" inclusive of its sub-markings, "H", "J", "K", "L", "M", "N", "P", "Q", "R", "S", "T", "U", "V", "W", "X", "Y", "Z", "AA", "BB", "CC", "DD", "EE", "FF", "GG", "JJ-1", "JJ-2", "JJ-25", "JJ-26", "JJ-27", "KK" inclusive of its sub-markings, "LL", "MM", "MM-1", "NN", "OO" and "OO-1" inclusive of its submarkings, "PP", "QQ", "RR", "SS", "TT" inclusive of its sub-markings, and "UU". These were admitted by the Court on May 30, 2016.³²

Facts

On September 8, 2011, a Joint Complaint Affidavit was filed against former President Ma. Gloria M. Macapagal Arroyo ("accused PGMA"), then First Gentleman Jose Miguel Arroyo, Benjamin Abalos, Sr. and Leandro Mendoza by Representatives Teddy Casiño, Liza Maza and Maria Carolina Pagaduan-Araullo before the Office of the Ombudsman. The private complainants alleged that the respondents were guilty of illegal acts leading to the anomalous and graft-laden government transaction, commonly known as the NBN-ZTE deal.

²⁸ Order, dated September 9, 2013.

²⁹ Order, dated November 10, 2014.

³⁰ Order, dated September 14, 2015.

³¹ Formal Offer of Documentary Exhibits with Ex-Parte Motion for Re-Marking of Some of Prosecution's Exhibits, dated February 1, 2016 and filed on February 19, 2016.

³² Minute Resolution, dated May 30, 2016.

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This NBN-ZTE deal includes the controversial "Contract for the Supply of Equipment and Services for the National Broadband Network Project" (NBN Contract)³³ dated April 21, 2007 which was proposed by Zhong Xing Telecommunications Equipment International Investment Limited (ZTE), a company owned by the government of China. This project was approved by the National Economic Development Authority (NEDA) Board on March 29, 2007 being in accord with the Medium Term Development Plan (MTDP) of the Philippines.

The National Broadband Project (NBN) was envisioned to inter-connect and provide a unified telecommunications system for the national government and data telecommunications to all government offices throughout the country.

The body or agency accorded by law with the power to approve projects such as the NBN is the NEDA Board. Under Section 5 of E.O. No. 230, known as the Reorganization Act of the National Economic Development Authority, the powers and functions of the Authority reside in the NEDA Board, acting as a collegial body.

The NEDA Board is composed of the President of the Republic, then accused PGMA, as Chairperson and the Secretary of Socio-Economic Planning and NEDA Director General as Vice-Chairperson. The other members are: the Executive Secretary and Secretaries of Finance (DOF), Trade and Industry (DTI), Agriculture (DA), Environment and Natural Resources (DENR), Public Works and Highways (DPWH), Budget and Management (DBM), Labor and Employment (DOLE), and Interior and Local Government (DILG). Pursuant to Section 4 of E.O. No. 230, the following members were added, namely: Secretaries of Health (DOH)³⁴, Foreign Affairs (DFA)³⁵, Agrarian Reform (DAR)³⁶, Science and Technology (DOST)³⁷, Transportation and Communications (DOTC)³⁸, Energy (DOE)³⁹ and the Deputy Governor of the *Bangko Sentral ng Pilipinas* (BSP)⁴⁰. In the performance of its functions, the NEDA Board is

³³ Exhibit "J".

³⁴ Memorandum Order No. 164, dated March 21, 1988.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Memorandum Order No. 235, dated May 19, 1989.

³⁸ Memorandum Order No. 321, dated September 26, 1990.

³⁹ R.A. No. 7638, approved on December 9, 1992.

⁴⁰ Section 124 of R.A. No. 7653, approved on June 14, 1993.

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assisted by seven (7) cabinet level inter-agency committees,
namely:

1. Development Budget Coordination Committee (DBCC),
2. Infrastructure Committee (InfraCom),
3. Investment Coordination Committee (ICC),
4. Social Development Committee (SDC),
5. Committee on Tariff and Related Matters (CTRM),
6. Regional Development Committee (RDC),
7. National Land Use Committee (NLUC).

In the instant cases, it was the InfraCom that reviewed the NBN project which was submitted by the DOTC.

Based on a letter of then DOTC Secretary Leandro R. Mendoza to then NEDA Secretary Romulo L. Neri, accused PGMA authorized the DTI Secretary, Peter J. Favila, to negotiate and sign a Memorandum of Understanding (MOU) between the Philippine government and ZTE, for and on behalf of the government. According to this letter, the MOU was signed on July 12, 2006 which provided that ZTE will make available all the required funds for the project while the Philippine government will provide the necessary assistance for the development and implementation of the project.⁴¹

On August 7, 2006, ZTE submitted its NBN Proposal to the Philippine government through the DOTC and Commission on Information and Communications Technology (CICT). The ZTE proposal included the technical proposal, engineering proposal, managed service proposal, and bill of quantity and financial proposal which will be submitted at a later date.⁴²

On October 23, 2006, Ramon Sales, Chairperson of the Commission on Information and Communications Technology (CICT), formally endorsed to NEDA the NBN Project proposal which *"aims to build a fully integrated single platform nationwide wireless broadband network, and bundled with interactive distant-learning and selected e-Government application modules...[and] ...will implement a broadband network that will allow for a seamless connectivity among all government agencies for Voice, Data, Internet and Video Conferencing complemented*

⁴¹ Exhibit "W".

⁴² Exhibit "FF". It is important to note that this Exhibit submitted by the prosecution to the Court is merely a cover letter without a copy of the Proposal.

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with a state-of-the-art central IDC (Information Data Center) for hosting multiple government applications".⁴³

In November of 2006, while in Hongkong, witness, then Speaker of the House of Representatives, Jose C. De Venecia, Jr. received a phone call from accused PGMA who invited him to play golf.⁴⁴ The next morning, witness De Venecia, Jr. was surprised that they (accused PGMA, First Gentleman Jose Miguel Arroyo and some staff members) travelled around one and a half hours to Shenzhen, China on a coaster.⁴⁵ There were no Malacañang press corps, accompanying ambassador, consul-general or appointment secretary.⁴⁶ When they arrived, they were met by then COMELEC Chairperson Benjamin Abalos, Sr., officials of the golf course and some government officials of the Shenzhen Province and they ate breakfast, which consisted mainly of *lugaw* (hot porridge) and dimsum.⁴⁷ Protocol officers were also present at the golf course.⁴⁸ After the game, the party of accused PGMA went to the ZTE office in downtown area with Chairperson Abalos and executives of ZTE.⁴⁹ They had lunch inside an executive room with accused PGMA, First Gentleman, Chairperson Abalos, most senior official of ZTE, senior banker of a Chinese government bank in Beijing and other ZTE executives. The senior banker said that the Chinese government will be prepared to finance the cost of the project.⁵⁰ Present also were officers from the national and local governments of China.⁵¹ After lunch, the party of accused PGMA went back to Hongkong on board the same coaster where PGMA told de Venecia Jr. that she favored the Build-Operate-Transfer (BOT) vehicle in implementing the NBN project because there will be no expense or capital outlay on the part of the government, no government guarantee and the cost will be undertaken by the private sector.⁵² To prove his testimony, witness De Venecia, Jr. presented the pictures⁵³ taken of their golf game and lunch, which is already part of the witness' biography written by a former editor of the Wall Street

⁴³ Exhibit "GG".

⁴⁴ TSN, dated August 5, 2013, p. 10.

⁴⁵ *Ibid*, pp. 11-12.

⁴⁶ *Ibid*, p. 13.

⁴⁷ *Ibid*, p. 15.

⁴⁸ *Ibid*, p. 34.

⁴⁹ *Ibid*, p. 16.

⁵⁰ *Ibid*, p. 17.

⁵¹ *Ibid*, p. 32.

⁵² *Ibid*, p. 20.

⁵³ Exhibit "V".

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Journal.⁵⁴ He also testified that the ZTE contract was signed by the Philippine government in China on April 21, 2007 with accused PGMA as witness.⁵⁵

According to the letter of then DOTC Secretary Mendoza to then NEDA Secretary Neri, the Ambassador Li Jinjun of the People's Republic of China wrote then Presidential Chief of Staff Michael T. Defensor on December 2, 2006 stating that the Chinese government will provide preferential buyer's credit financing support through the Export-Import Bank of China (Eximbank) for the NBN Project. It was also mentioned in Mendoza's letter that the Ambassador stated that a buyer's credit loan agreement will be executed between the Philippine government and Eximbank, and the latter, who has the choice of who the contractor will be, chooses ZTE to be the prime contractor of the project.⁵⁶

In the meantime, another company, Amsterdam Holdings, Inc. (AHI), also submitted a proposal to the DOTC and CICT on December 5, 2006.⁵⁷ AHI was incorporated on July 29, 2002 with an authorized capital stock of Php 5 million.⁵⁸ According to witness Jose P. De Venecia III, who is the beneficial owner of the corporation, its paid-up capital was and remains to be Php 62,500. From its incorporation until its submission of the proposal, AHI never had any business activity.⁵⁹

From December 2006 to February 2007, the NEDA Board did not hold meetings. This was confirmed by Atty. Jocelyn P. Reyes, Director IV, NEDA Legal Staff.⁶⁰

On February 20, 2007, NEDA Secretary of Socio-Economic Planning and Director General, Romulo Neri, sent a letter to the DOTC requesting the latter to submit or endorse a reconciled project proposal on the Cyber Education Project of the Department of Education (DepEd) and the project proposals of ZTE and AHI for NBN.⁶¹

⁵⁴ TSN, dated August 5, 2013, pp. 23-24.

⁵⁵ *Ibid*, pp. 22-23.

⁵⁶ Exhibit "W".

⁵⁷ Exhibit "DD".

⁵⁸ Exhibit "K".

⁵⁹ TSN, dated March 16, 2015, pp. 36-38.

⁶⁰ TSN, dated April 21, 2014, p. 15, Exhibit "MM".

⁶¹ Exhibit "LL".

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On February 28, 2007, the Technical Working Group (TWG) for Information and Communications Technology (ICT) issued a Memorandum addressed to the Bids and Awards Committee (BAC) Chairman regarding the evaluation of the ZTE and AHI project proposals for the National Broadband Network of the DOTC and the Cyber Education Project of the DepEd. The TWG recommended to the BAC the indorsement of a single national broadband project subject to the following conditions:

1. The project should satisfy the network requirements of government agencies for VOIP, e-Government and e-Education.
2. The system should be designed and implemented considering the demands in areas not covered by existing services. Corollarily, the system shall take into account and utilize and integrate if possible existing private and public telecommunications infrastructure.
3. The funding shall fully cover all requirements of the project including those for the initial operation and maintenance.⁶²

On March 1, 2007, then DOTC Secretary Leandro R. Mendoza and CICT Chairperson Ramon P. Sales replied to Secretary Romulo Neri's letter stating that the BAC for the ICT through its TWG composed of members from the National Telecommunications Commission (NTC), Commission on Information and Communications Technology (CICT), Telecommunications Office (Telof) and DOTC reviewed the proposals. They said that the BAC adopted the recommendations of the TWG which they are now submitting to Secretary Neri for appropriate action.⁶³

On the same date, ZTE Corporation wrote Elmer Soneja, Assistant Secretary for Planning and Development of the DOTC, submitting its revised proposal. It enumerated the major changes and features of the proposal.⁶⁴

On March 18, 2007, before the NEDA Board approved the ZTE proposal, AHI wrote the DOTC that it has already been more than sixty (60) days since it submitted its proposal and

⁶² Exhibit "NN".

⁶³ Exhibit "CC".

⁶⁴ Exhibit "EE".



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DOTC has not conducted the initial evaluation. It asked the DOTC to comply with the rules on unsolicited proposals and to commence evaluation on the AHI proposal on the NBN Project.⁶⁵

On March 22, 2007, then DOTC Secretary, Leandro R. Mendoza endorsed to NEDA the approval and implementation of the ZTE proposal in a letter to Assistant Director General Rolando G. Tungpalan.⁶⁶

The following day or on March 23, 2007, then DOTC Secretary Leandro R. Mendoza sent a letter to Secretary Romulo Neri of NEDA stating that the DOTC has evaluated the NBN Proposal submitted by ZTE and based on the documents submitted, it was found to be capable of catering to the needs of the Government in VOIP (Voice Over Internet Protocol), e-Governance and e-Education. He said that in the evaluation, the financial and technical capability of ZTE was also verified. He then endorsed for approval and implementation the ZTE proposal subject to further refinement of specifications and other technical requirements during the detailed engineering stage of the project.⁶⁷

On March 27, 2007, the NEDA Board held a meeting at the Aguinaldo State Dining Room, Malacañang Palace, which was attended by its members, other cabinet officials, official and employees of NEDA, NEDA Board Secretariat and Presidential Management Staff.⁶⁸ During that meeting, the Cyber Education Project, the Biñan-Sucacat 230 kV Transmission Line Upgrading Project, Pinatubo Hazard Urgent Mitigation Project, Local Governance Support Program-Local Economic Development, Hospital Equipment Assistance Project, National Broadband Network were discussed. Accused PGMA directed CICT Chairperson Ramon P. Sales to *“technically modify the NBN proposal by removing the overlapping component, reducing the project cost and for economic managers to look into the terms of financing of the NBN Project by aligning it with the Cyber Education Project”*.⁶⁹ Accused PGMA gave that instruction in order to reduce the project cost.⁷⁰ Thus, the NBN project was not approved on this meeting.

⁶⁵ Exhibit “AA”.

⁶⁶ Exhibit “W”.

⁶⁷ Exhibit “BB”.

⁶⁸ Minutes of the NEDA Board Meeting on 27 March 2007, Exhibit “JJ”.

⁶⁹ *Ibid.*

⁷⁰ TSN, dated January 22, 2014, p. 31

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On March 29, 2007, the NEDA Board conducted a joint meeting with the Investment Coordination Committee (ICC) Cabinet Committee. This was a continuation of the previous meeting held last March 27, 2007 purposely to resume consideration of the two (2) projects relating to the government of China. CICT Chairperson Ramon P. Sales made an initial presentation of the NBN Project stating that with the consent of the proponent and after consultation with DOTC, changes were made to the proposal. The e-Education and Distance Learning aspects of the NBN projects have been removed and the funding requirement has been reduced from US\$379million to US\$330million. In other words, the overlapping components were removed which led to the reduction of the cost.⁷¹ This amounts to a savings of \$49,000,000. During the meeting, the grace period for the loan repayment was also extended from 3 years to 5 years and the repayment period was extended from 7 years to 10 years, while the loan interest rate was reduced from 4% to 3% per annum.⁷²

Assistant Secretary Lorenzo G. Formoso from the DOTC discussed before the NEDA Board the benefits of the NBN Project, namely:

- 1) Savings from operation and maintenance of old government communications network,
- 2) Savings on VOIP (Voice Internet Protocol) expenses,
- 3) Savings on internet connection,
- 4) Savings on centralized integrated data center,
- 5) Benefits to Local Government Units (LGUs), and
- 6) Savings from avoided travels.⁷³

It was during this meeting that the NEDA Board unanimously approved the NBN project. No one raised any objections.⁷⁴ Based on the minutes of the meeting, the following NEDA Board members were present and unanimously approved the project:

⁷¹ *Ibid*, p. 35.

⁷² *Ibid*, pp. 46-47.

⁷³ *Ibid*, pp. 38-39.

⁷⁴ *Ibid*, pp. 40-42.

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1. President Gloria Macapagal Arroyo -Chairperson
2. Hon. Romulo L. Neri -Vice- Chairperson
3. Hon. Margarito B. Teves - Member
4. Hon. Manuel M. Bonoan - Member
5. Hon. Peter B. Favila - Member
6. Hon. Leandro R. Mendoza - Member
7. Hon. Estrella F. Alabastro - Member
8. Hon. Bayani F. Fernando - Member
9. Hon. Ramon P. Sales - Member
10. Hon. Diwa C. Guinigundo - Member
11. Hon. Arthur C. Yap (represented by Usec. Bernie G. Fondevilla) - Member
12. Hon. Joseph H. Durano (represented by Usec. Oscar P. Palabyab) - Member
13. Hon. Angelo T. Reyes (represented by Usec. Demetrio L. Ignacio) - Member
14. Hon. Raphael P.M. Lotilla (represented by Usec. Melinda L. Ocampo) - Member
15. Hon. Rolando G. Andaya, Jr. - Member
16. Hon. Zaldy Uy Ampatuan (represented by Exec. Dir. Moslemin Bansuan) - Member
17. Hon. Enrico B. Aumentado (represented by Exec. Dir. Patricio S. De Quiros) - Member

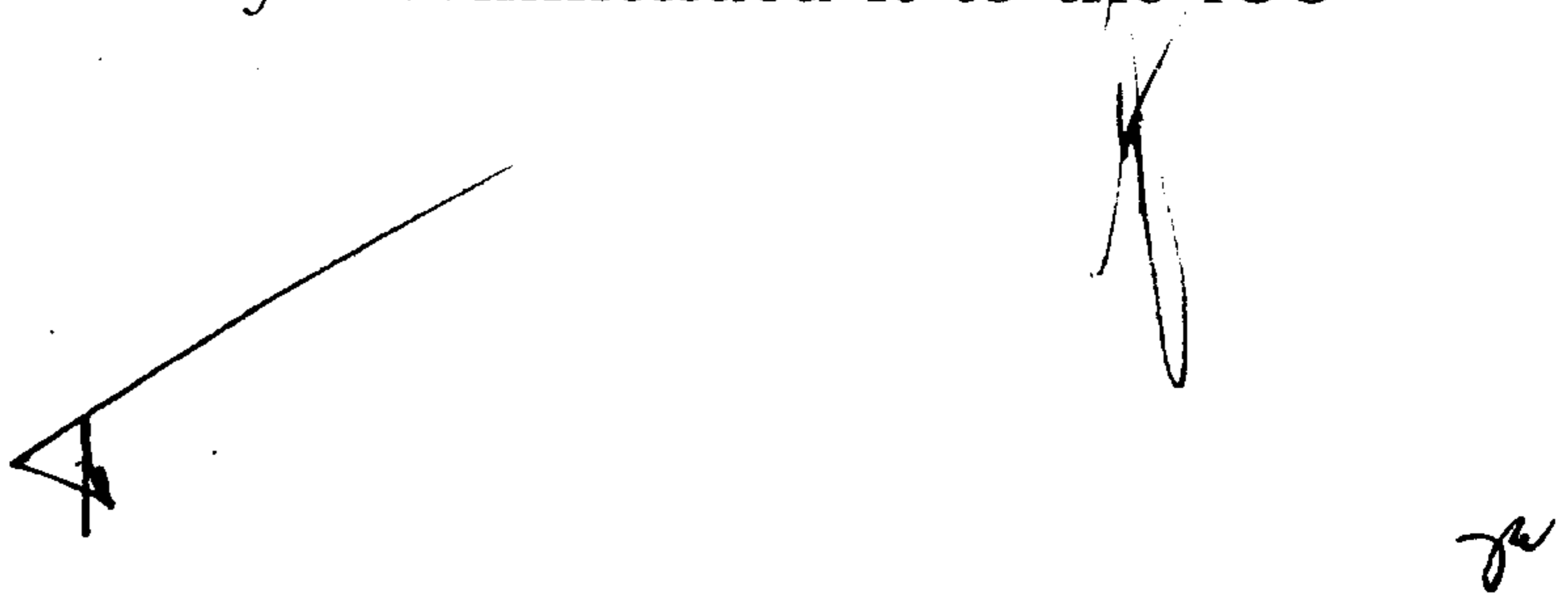
On April 3, 2007, Director Fortunato R. Abrenilla of the NEDA issued a Certification that in a meeting held on March 29, 2007 in Malacañang, the NEDA Board approved the NBN Project with the following conditions:

1. An Executive Order is necessary directing utilization of the NBN Project to realize its potential benefits;
2. DOTC has yet to secure ECC from DENR for the project; and,
3. DOTC must ensure dedicated allotment of the proposed 3.5GHz band for the NBN Network.⁷⁵

When presented as witness, Director Abrenilla testified that the Economic Internal Rate of Return (EIRR) of the NBN project is 29% against the hurdle rate of 15%. He said that this is positive, which means that the NBN Project is a reasonable investment.⁷⁶ He also said that like other projects, the NBN Project went through the three (3) stages of review and evaluation. The NBN Project was reviewed by the NEDA Technical Board which favourably recommended it to the ICC

⁷⁵ Exhibit "Z".

⁷⁶ TSN, dated January 22, 2014, p. 40.



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Cabinet Committee. The ICC Cabinet Committee in turn favourably endorsed it to the NEDA Board.⁷⁷

In a letter⁷⁸ dated April 16, 2007, then DOTC Secretary, Leandro R. Mendoza, wrote the NEDA Secretary of Socio-Economic Planning and Director General, Romulo L. Neri, seeking approval relative to the procurement of goods and related services for the NBN Project that will be undertaken through the alternative mode of procurement. He said that the project cost was USD 329,481,290.00 or the peso equivalent of Php 16,474,064,500.00.

On April 19, 2007, Secretary Romulo Neri replied to Secretary Mendoza's letter stating that that procedure under Section 4 of E.O. No. 423 is governed by Resolution No. 11-2006 issued by the Government Procurement Policy Board (GPPB).⁷⁹ In Resolution No. 11-2006, the GPPB adopted and promulgated the "Internal Rules for the Exercise by the GPPB of its Approval Power under E.O. 423".⁸⁰ These rules laid down the procedures of approving, for projects governed by E.O. 423, the use of alternative methods of procurement in accordance with R.A. No. 9184, otherwise known as the Government Procurement Reform Act and its Implementing Rules and Regulations Part A (IRR-A).

On April 20, 2007, Secretary Romulo Neri sent a letter to Bo Xilai, Minister of Commerce of China, informing the latter that the NBN proposal was already endorsed to the DOTC for loan financing of China under the Preferential Buyer's Credit Facility of Eximbank. He also informed him that the project was approved by the Philippine government, through the NEDA Board.⁸¹

The NBN Contract⁸² dated April 21, 2007 was then signed by the Government of the Republic of the Philippines through the then DOTC Secretary, Leandro R. Mendoza, and DOTC Assistant Secretary Lorenzo G. Formoso. On behalf of ZTE, the contract was signed by its Vice President, Yu Yong, and its Chairman, Hou Weigui. It is important to note that the

⁷⁷ *Ibid*, pp. 20-23.

⁷⁸ Exhibit "W".

⁷⁹ Exhibit "X".

⁸⁰ GPPB Resolution No. 011-2006, dated June 14, 2006.

⁸¹ Exhibit "Y".

⁸² Exhibit "J".

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acknowledgment page of the contract presented before the Court shows that it was not notarized. Moreover, the unauthenticated and unnotarized copy of the NBN Contract presented by the prosecution had several conditions precedent. One of these conditions was "41.12.3 *Legal opinion on the procurement process by the Department of Justice of the Government of the Republic of the Philippines*".⁸³ Hence, on May 31, 2007, then DOTC Secretary Leandro R. Mendoza sent a letter to then DOJ Secretary Raul M. Gonzalez requesting for an Opinion on:

1. Whether or not the proposed NBN Project can be considered as an Executive Agreement by virtue of the Memorandum of Understanding signed between the Philippine Government, as represented by DTI Secretary Peter J. Favila, and ZTE Int'l. and the subsequent "exchange of notes" between representatives from both the Government of the Republic of the Philippines and the Chinese Government.
2. Granting the said Project is deemed to be an Executive Agreement, in connection with the mode of procurement, would the Project fall under Executive Order No. 423 (30 April 2005) under alternative modes of procurement (Direct Contracting) since the funding source is from the China Export-Import Bank and which under the stated correspondence designates ZTE Corporation to undertake the project or would it fall under the last sentence of Section 4 of Republic Act No. 9184 (Government Procurement Reform Act) which provides: "Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine Government is a signatory shall be observed".⁸⁴

It was only on July 26, 2007 that then DOJ Secretary Raul M. Gonzalez issued DOJ Opinion No. 46, Series of 2007⁸⁵ stating that the agreements that were entered into by the Philippine Government with regard to the proposed NBN Project

⁸³ Exhibit "J", pp. 38-39.

⁸⁴ Exhibit "PP".

⁸⁵ Exhibit "QQ".



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are constitutive of an "executive agreement". He said that public bidding is not required since the Chinese Government has designated ZTE Corporation as the project's prime contractor and the project will be funded by the Chinese Government through the China Eximbank, a foreign lending institution. He said that the guidelines of Eximbank on procurement shall be followed, unless the loan agreement is silent as to the governing guidelines and in which case, the IRR-A of R.A. No. 9184 may apply. In sum, the Department opines that:

1. The exchange of correspondence between the Presidential Chief of Staff Michael Defensor and Chinese Minister of Commerce Bo XiLai/Chinese Ambassador Li Jinjun may be considered as an executive agreement pursuant to the case of *Abaya v. Ebdane*, provided that, the Loan Agreement between the Government of the Republic of the Philippines and the China Exim Bank is subsequently concluded;
2. The designation of ZTE Corporation as the project's prime contractor in the exchange of notes has to be observed pursuant to Section 4 of R.A. No. 9184 and the principle of *pacta sunt servanda*; and,
3. The guidelines of the foreign lending institution, which in this case is the China Exim Bank, on procurement shall be followed, unless the loan agreement with said institution is silent as to the governing guidelines, in which case, the IRR-A of R.A. No. 9184 may apply.⁸⁶

The NBN Contract⁸⁷ presented by the prosecution identified several attachments. It stated that these attachments are made an integral part of the contract and are equally binding with the main body of the contract. These attachments were allegedly the following:

Attachment A: Priced Bill of Quantities
Attachment B: Technical Specification
Attachment C: Scope of Work

⁸⁶ *Ibid.*

⁸⁷ Exhibit "J".



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Attachment D: Implementation Schedule

*Attachment E: Testing Items of Provisional
Acceptance Test*

Attachment F: Training Plan

Attachment G: Service Level Agreement

Attachment H: Scope of Work for Managed Services

Attachment I: SLA and KPI for Managed Services

*Attachment J: Responsibility Matrix for Managed
Services*

*Attachment K: Part Services Maintenance and Some
Products Maintenance Transfer*

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However, the prosecution was not able to present these attachments to the Court which included the Priced Bill of Quantities, Technical Specification and Scope of Work.

On September 26, 2007, then NEDA Secretary, Romulo Neri, presented himself before the Senate Blue Ribbon Committee Hearing on the NBN ZTE investigation. During that hearing, he recalled a meeting with Chairman Abalos relative to the ZTE proposal on the NBN Project prior to the March 27 and 29, 2007 meetings. He remembered that he asked questions on whether or not it will just be another TELOF (a failed telecommunications project). He also stated that Chairman Abalos bribed him with Php 200million and then reported this incident to accused PGMA who told him not to accept the bribe.⁸⁸

On October 2, 2007, accused PGMA cancelled the NBN Project. The Supreme Court took judicial notice of such cancellation in *Suplico vs. NEDA*⁸⁹ considering that such act by accused PGMA of cancelling the ZTE-NBN contract constitutes an official act⁹⁰.

⁸⁸ Exhibit "M", pp. 42-45.

⁸⁹ G.R. Nos. 178830, 179317, 179613, July 14, 2008.

⁹⁰ Sec. 1 of Rule 129 provides that "A court shall take judicial notice, without introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, the official acts of the legislative, executive and judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions. (Underscoring provided).

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Discussion

Demurrer to Evidence

The Court, through the Demurrer to Evidence filed by accused PGMA, is called upon to examine the sufficiency or insufficiency of the testimonial and documentary evidence presented by the prosecution.

Accused PGMA's right to file a demurrer to evidence rests on Section 15, Rule 119 of the Revised Rules on Criminal Procedure, which provides:

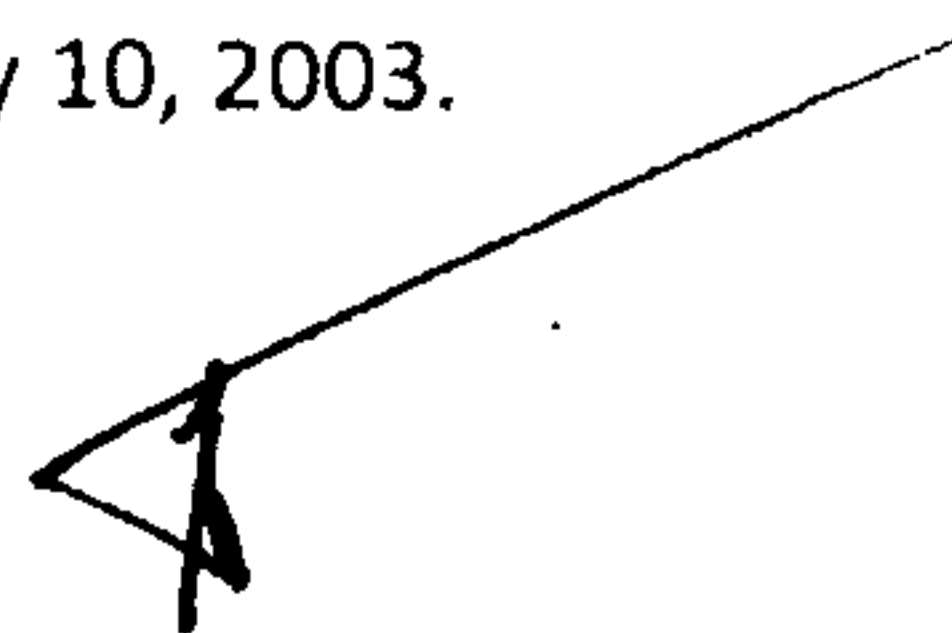
After the prosecution has rested its case, the court may dismiss the case on the ground of insufficiency of evidence: (1) on its own initiative after giving the prosecution an opportunity to be heard; or (2) on motion of the accused filed with prior leave of court.

If the court denies the motion for dismissal, the accused may adduce evidence in his defense. When the accused files such motion to dismiss without express leave of court, he waives the right to present evidence and submits the case for judgment on the basis of the evidence for the prosecution.

The Supreme Court explained the purpose of a demurrer to evidence in this wise:

A demurrer to evidence is an objection by one of the parties in an action to the effect that the evidence his adversary produced is insufficient in point of law, whether true or not, to make out a case or sustain the issue. The party demurring challenges the sufficiency of the whole evidence to sustain a verdict. For its part, the court, in passing upon the sufficiency of the evidence raised in a demurrer, is merely required to ascertain whether there is competent or sufficient evidence to sustain the indictment or to support a verdict of guilt.⁹¹

⁹¹ Katigbak v. Sandiganbayan, G.R. No. 140183, July 10, 2003.



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On the other hand, the Supreme Court explains sufficiency of evidence in the case of *Gutib vs. Court of Appeals*⁹². It said:


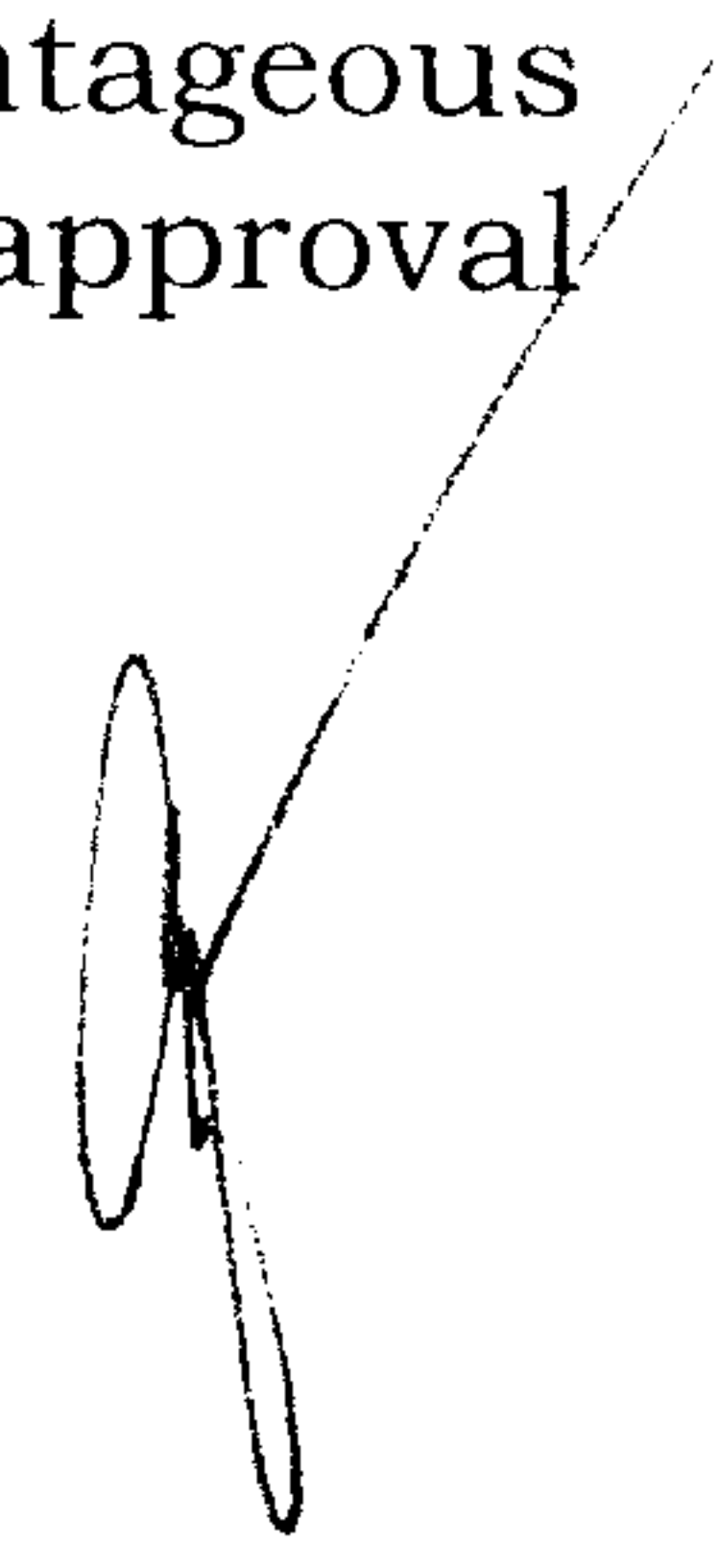

Sufficient evidence for purposes of frustrating a demurrer thereto is such evidence in character, weight or amount as will legally justify the judicial or official action demanded according to the circumstances. To be considered sufficient therefore, the evidence must prove: (a) the commission of the crime, and (b) the precise degree of participation therein by the accused.

Guided by the parameters set in the above-cited case, the Court shall now proceed to make a determination on whether the prosecution was able to present sufficient evidence to establish the (a) commission of the crimes charged—i.e., violation of Section 3(i) of R.A. No. 3019 and Section 7 of R.A. No. 6713; and (b) the participation of accused PGMA.

Violation of Section 3(i), R.A. No. 3019

The information indicted PGMA for violation of Section 3 (i), R.A. No. 3019. In the course of the trial, the prosecution sought to prove that she had direct or indirect interest, for her personal gain, in the NBN Project, a project that required the approval of the NEDA Board, of which she was the Chairperson, and a project which was to be implemented by ZTE as the contractor. The prosecution sought to prove that the accused had interest in the approval of the NBN-ZTE contract, despite knowledge of certain irregularities and anomalies such as the following: a.) attempt by COMELEC Chairperson Benjamin Abalos, Sr. to bribe NEDA Director General Neri with Php200,000,000.00 for the immediate approval of the ZTE proposal; b.) lack of public bidding; c.) absence of a DOJ opinion whether the contract is exempted from the coverage of public bidding; d.) unnecessary presence of PGMA during the signing between the Philippine Government and ZTE on April 21, 2007 of a contract which is grossly and manifestly disadvantageous to the former; and e.) the haste in the processing and approval of the NBN project.

⁹² 371 Phil. 293, (1999).



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Section 3 (i), R.A. No. 3019 provides:

Section 3. Corrupt practices of public officers. — In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

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(i) Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel or group.

Based on Section 3 (i) of R.A. No. 3019, it can be gleaned that the following are the elements of the crime:

1. Accused is a public officer;
2. There is a transaction or act requiring the approval of a board, panel or group;
3. The board, panel or group exercises discretion in the approval of the transaction or act;
4. Accused is a member of such group;
5. Accused has a direct or indirect interest in the transaction or act for reasons of personal gain or material interest.

The participation or non-participation of the accused in the action of the board, panel or group is immaterial for purposes of conviction, if his/her material interest or personal gain in the transaction is established.

Moreover, interest for personal gain is presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transactions or acts by the board, panel or group to which they belong.

Stated differently, the crime under this provision of law is committed whenever the public official, who is a member of the board, panel or group having the discretion to approve a transaction or action, becomes interested for personal gain or material interest in the said transaction or action, regardless of

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whether the public official votes against the said transaction or action or abstains from participating in the board, panel or group's action.

In the instant case, the prosecution sufficiently established the following facts that satisfy the elements of violation of Section 3 (i), R.A. No. 3019:

1. That accused PGMA is a public officer under the purview of the law on graft and corrupt practices;
2. The NBN project of the government requires the approval of the NEDA Board;
3. As a public official, being then the President of the Republic of the Philippines, PGMA participated in approving the NBN project, through the NEDA Board;
4. The NEDA Board is clothed with the discretion and authority to approve the said NBN project.

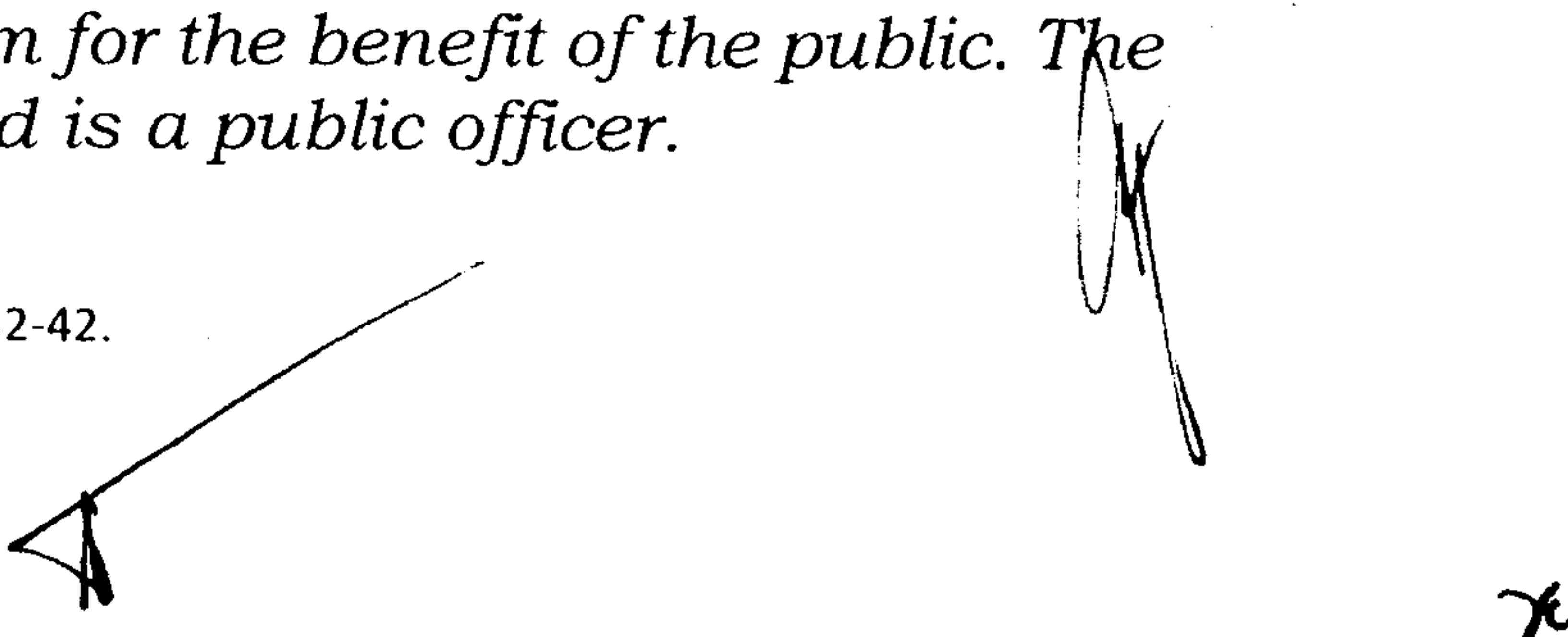
The discussion of the fifth (5th) element—i.e., that accused PGMA had direct or indirect interest in the transaction because of personal gain or material interest, is key in the determination of sufficient evidence and will be discussed at length in the succeeding pages, after the discussion of the first four (4) elements.

In Section 2, paragraph b of R.A. No. 3019, a public officer *“includes elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government”*.

In defining a public officer, the Supreme Court more often quotes Mechem, a recognized authority. Thus, in *Khan, Jr. vs. Office of the Ombudsman*⁹³, the Supreme Court cited Mechem, to wit:

A public office is the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.

⁹³ G.R. No. 125296, July 20, 2006, 528 Phil 32-42.



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The characteristics of a public office, according to Mechem, include the delegation of sovereign functions, its creation by law and not by contract, an oath, salary, continuance of the position, scope of duties, and the designation of the position as an office.

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Mechem describes the delegation to the individual of the sovereign functions of government as "[t]he most important characteristic" in determining whether a position is a public office or not.

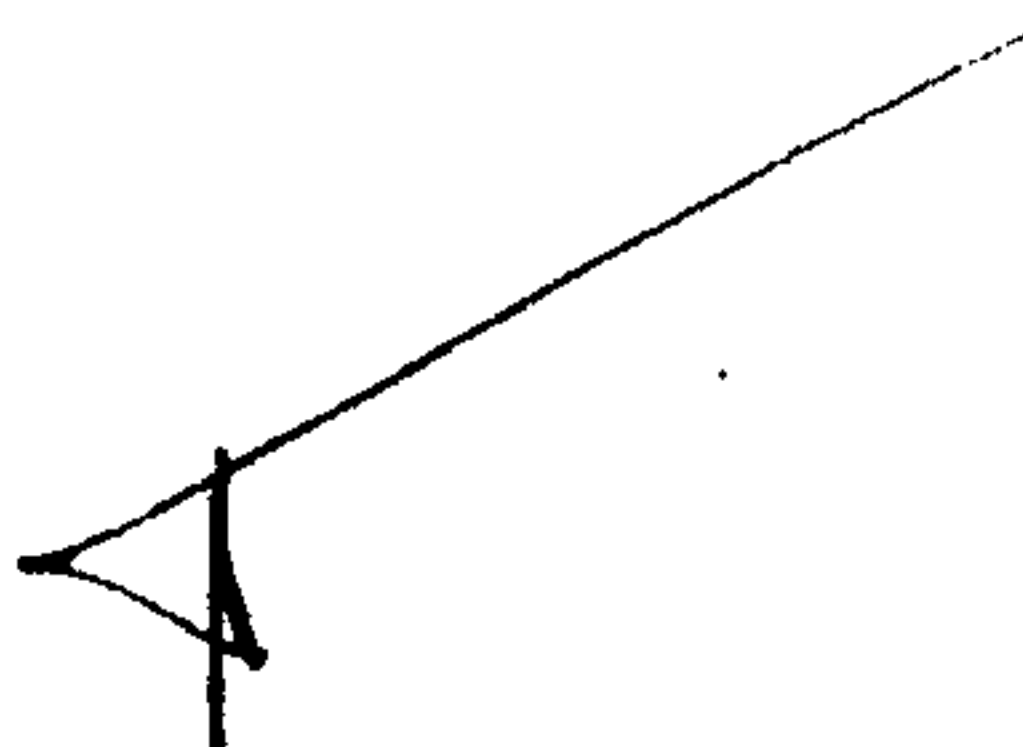
The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government to be exercised by him for the benefit of the public; — that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.

From the foregoing, it can be reasonably inferred that "public officers" are those endowed with the exercise of sovereign executive, legislative or judicial functions.

Accused PGMA, at the time material to this case, was the duly elected President of the Republic of the Philippines and clearly a public officer under the purview of R.A. No. 3019. She was elected by the Filipino electorate and tasked to discharge the functions of the Office of the President of the Republic.

Part of her duties and functions as President of the Republic is to sit as Chairperson of the National Economic Development Authority Board (NEDA Board), pursuant to Section 4 of Executive Order (E.O.) No. 280, Series of 1987 (Reorganizing the National Economic and Development Authority). Pursuant to Section 5 of E.O. No. 280, the powers and functions of the NEDA resides in the NEDA Board.

At the time material to this case, the NEDA Board is composed of the following:



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1. President Gloria Macapagal Arroyo -Chairperson
2. Hon. Romulo L. Neri -Vice-Chairperson
3. Hon. Margarito B. Teves - Member
4. Hon. Manuel M. Bonoan - Member
5. Hon. Peter B. Favila - Member
6. Hon. Leandro R. Mendoza - Member
7. Hon. Estrella F. Alabastro - Member
8. Hon. Bayani F. Fernando - Member
9. Hon. Ramon P. Sales - Member
10. Hon. Diwa C. Guinigundo - Member
11. Hon. Arthur C. Yap (represented by Usec. Bernie G. Fondevilla) - Member
12. Hon. Joseph H. Durano (represented by Usec. Oscar P. Palabyab) - Member
13. Hon. Angelo T. Reyes (represented by Usec. Demetrio L. Ignacio) - Member
14. Hon. Raphael P.M. Lotilla (represented by Usec. Melinda L. Ocampo) - Member
15. Hon. Rolando G. Andaya, Jr. - Member
16. Hon. Zaldy Uy Ampatuan (represented by Exec. Dir. Moslem B. Bansuan) - Member
17. Hon. Enrico B. Aumentado (represented by Exec. Dir. Patricio S. De Quiros) - Member

Government projects such as the National Broadband Network (NBN), by reason of the amount, nature and funding source, need the approval of the NEDA Board before it can be implemented. The development of a broadband network with a national coverage is aligned with the Medium Term Development Plan (MTPDP) and the Public Investment Program (PIP). Also, the said project is an Official Development Assistance (ODA).

The approval of the NBN project is definitely not ministerial on the part of the NEDA Board. It has to exercise discretion in determining whether the projects presented before it are aligned with government priorities and is financially and technically feasible.

The NEDA Board is aided in its decision-making by seven (7) cabinet level inter-agency committees, namely:

1. Development Budget Coordination Committee (DBCC),
2. Infrastructure Committee (InfraCom),
3. Investment Coordination Committee (ICC),

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4. Social Development Committee (SDC),
 5. Committee on Tariff and Related Matters (CTRM),
 6. Regional Development Committee (RDC),
 7. National Land Use Committee (NLUC).

In the case of the NBN project, it was the InfraCom that reviewed the submission of the DOTC and recommended to the NEDA Board the NBN project.

Prior to the action of the NEDA Board, any project will have to pass through the 3 stages of project evaluation process. The first stage is the submission of the project proposal by the government agency seeking the implementation of the project. No private individual or entity can cause the submission of the project to the technical working group. After evaluation by the technical working group and if the project is technically and financial feasible, the project is then endorsed to the Investment Coordination Committee (ICC) composed of the Finance Secretary as Chair and the NEDA Director General as Vice-Chair. Once the ICC or Cabinet Committee (also known as the CabCom) is satisfied with the feasibility and viability of the project, it submits the proposal to the NEDA Board for approval.

The events leading to the approval by the NEDA Board of the NBN Project were as follows:

1. On August 7, 2006, ZTE submitted its NBN Proposal to the Philippine government through the DOTC and Commission on Information and Communications Technology (CICT). The ZTE proposal included the technical proposal, engineering proposal, managed service proposal, and bill of quantity. The financial proposal was to be submitted at a later date.
2. On October 23, 2006, Ramon Sales, Chairperson of the Commission on Information and Communications Technology (CICT), formally endorsed to NEDA the NBN Project proposal which "aims to build a fully integrated single platform nationwide wireless broadband network, and bundled with interactive distant-learning and selected e-Government application modules... [and] ...will implement a broadband network that will allow for a seamless connectivity among all

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government agencies for Voice, Data, Internet and Video Conferencing complemented with a state-of-the-art central IDC (Information Data Center) for hosting multiple government applications”.

3. In November of 2006, while in Hongkong, then Speaker of the House of Representatives, Jose C. De Venecia, Jr. received a phone call from accused PGMA who invited him to play golf. The next morning, a surprised De Venecia, Jr. with accused PGMA and then First Gentleman Jose Miguel Arroyo together with some staff members, travelled to Shenzhen, China in a coaster. There, they were met by then COMELEC Chairperson Benjamin Abalos, Sr. and officials of the golf course together with some government officials of the Shenzhen Province. They played golf, ate breakfast, and then headed to the ZTE office in the downtown area with Chairperson Abalos and executives of ZTE. They (accused PGMA, First Gentleman, Chairperson Abalos, most senior official of ZTE, senior banker of a Chinese government bank in Beijing and other ZTE executives) had lunch inside a ZTE executive room. The senior banker said that the Chinese government will be prepared to finance the cost of the project. Present also were officers from the national and local governments of China. After lunch, the party of accused PGMA went back to Hongkong on board the same coaster where PGMA told de Venecia, Jr. that she favored the Build-Operate-Transfer (BOT) vehicle in implementing the NBN project because there will be no expense or capital outlay on the part of the government, no government guarantee and the cost will be undertaken by the private sector.
4. On December 2, 2006, China Ambassador wrote then Presidential Chief of Staff, Michael T. Defensor, that the Chinese government will provide preferential buyer's credit financing support through the Export-Import Bank of China (Eximbank) for the NBN Project and it has

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designated ZTE as the prime contractor of the project.⁹⁴

5. On December 5, 2006, Amsterdam Holdings, Inc. (AHI), incorporated on July 29, 2002 with an authorized capital stock of Php 5 million, a paid-up capital of Php 62,500.00 and with Jose (Joey) P. De Venecia III as the beneficial owner, submitted its proposal to undertake the NBN project.
6. From December 2006 to February 2007, the NEDA Board did not hold meetings as confirmed by Atty. Jocelyn P. Reyes, Director IV, NEDA Legal Staff. But on February 20, 2007, NEDA Director General, Romulo Neri, sent a letter to the DOTC requesting the latter to submit or endorse a reconciled project proposal on the Cyber Education Project of the Department of Education (DepEd) and the project proposals of ZTE and AHI for NBN.
7. On February 28, 2007, the Technical Working Group (TWG) for Information and Communications Technology (ICT) issued a Memorandum addressed to the Bids and Awards Committee (BAC) Chairman regarding the evaluation of the ZTE and AHI project proposals for the National Broadband Network of the DOTC and the Cyber Education Project of the DepEd. The TWG recommended to the BAC the indorsement of a single national broadband project subject to the following conditions:
 - a. The project should satisfy the network requirements of government agencies for VOIP, e-Government and e-Education.
 - b. The system should be designed and implemented considering the demands in areas not covered by existing services. Corollarily, the system shall take into account and utilize and integrate if

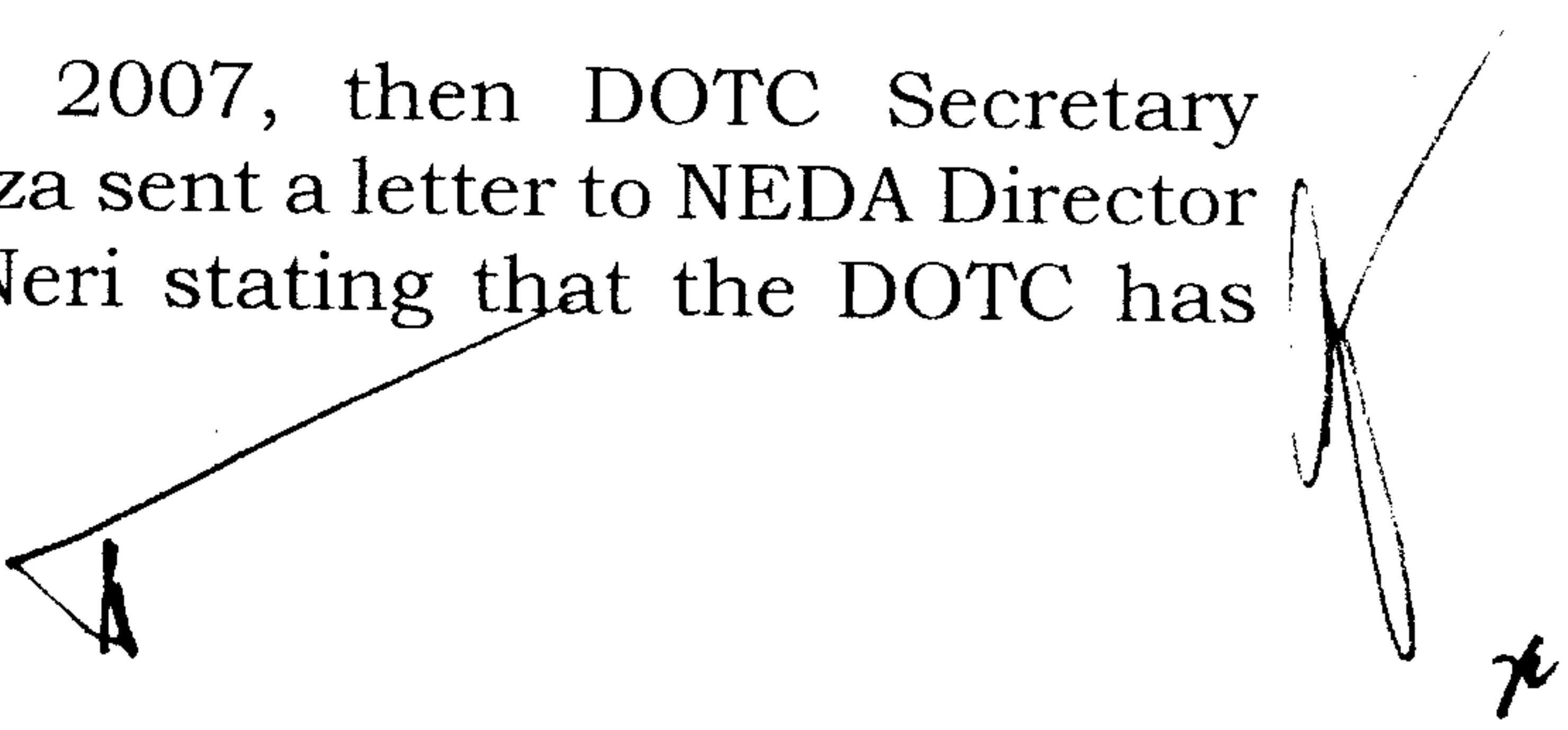
⁹⁴ This was mentioned in the letter of then DOTC Secretary Mendoza to NEDA Secretary Neri dated April 16, 2007 (Exhibit "W").

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possible existing private and public telecommunications infrastructure.

- c. The funding shall fully cover all requirements of the project including those for the initial operation and maintenance.
8. On March 1, 2007, then DOTC Secretary Leandro R. Mendoza and CICT Chairperson Ramon P. Sales co-signed the reply to Secretary Romulo Neri's letter stating that the BAC for the ICT through its TWG, composed of members from the National Telecommunications Commission (NTC), Commission on Information and Communications Technology (CICT), Telecommunications Office (Telof) and DOTC, reviewed the proposals of ZTE and AHI and are adopting the TWG's recommendation, which in turn, they are submitting for appropriate action of the NEDA.
9. On the same date, ZTE Corporation wrote Elmer Soneja, Assistant Secretary for Planning and Development of the DOTC, submitting its revised proposal. It enumerated the major changes and features of its proposal.
10. On March 18, 2007, before the NEDA Board approved the ZTE proposal, AHI wrote the DOTC that it has already been more than 60 days since it submitted its proposal and DOTC has not conducted an initial evaluation. AHI asked the DOTC to comply with the rules on unsolicited proposals and to commence evaluation on its proposal on the NBN Project.
11. On March 22, 2007 then DOTC Secretary, Leandro R. Mendoza endorsed to NEDA the approval and implementation of the ZTE proposal in a letter to Assistant Director General Rolando G. Tungpalan.
12. On March 23, 2007, then DOTC Secretary Leandro R. Mendoza sent a letter to NEDA Director General Romulo Neri stating that the DOTC has
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evaluated the NBN Proposal submitted by ZTE and based on the documents submitted, it was found to be capable of catering to the needs of the Government in VOIP (Voice Over Internet Protocol), e-Governance and e-Education. He said that in the evaluation, the financial and technical capability of ZTE was also verified. He then endorsed for approval and implementation the ZTE proposal subject to further refinement of specifications and other technical requirements during the detailed engineering stage of the project

13. On March 27, 2007, the NEDA Board held a meeting and took up the following projects: the Cyber Education Project, the Biñan-Sucacat 230 kV Transmission Line Upgrading Project, Pinatubo hazard Urgent Mitigation Project, Local Governance Support Program-Local Economic Development, Hospital Equipment Assistance Project, and the National Broadband Network. Accused PGMA directed CICT Chairperson Ramon P. Sales to *“technically modify the NBN proposal by removing the overlapping component, reducing the project cost and for economic managers to look into the terms of financing of the NBN Project by aligning it with the Cyber Education Project”*.⁹⁵ Accused PGMA gave that instruction with a view of reducing the NBN project cost. Thus, the NBN project was not approved on this meeting.

14. On March 29, 2007, the NEDA Board conducted a joint meeting with the Investment Coordination Committee (ICC) Cabinet Committee, which was a continuation of the meeting held last March 27, 2007. CICT Chairperson Ramon P. Sales made the presentation of the NBN Project stating that with the consent of and upon consultation with the proponent, DOTC, certain changes were proposed, which are the following:

a. The e-Education and Distance Learning aspects of the NBN projects have been removed thereby reducing the funding

⁹⁵ Minutes of the NEDA Board Meeting on 27 March 2007, Exhibit “JJ”.

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requirement from US\$379million to US\$330million, or a savings of \$49,000,000.00. In other words, the overlapping components were removed which led to the reduction of the cost.

- b. During the meeting, the grace period for the loan repayment was also extended from 3 years to 5 years.
- c. The repayment period was extended from 7 years to 10 years.
- d. The concessional loan interest rate was reduced from 4% to 3% per annum.

DOTC Assistant Secretary Lorenzo G. Formoso discussed before the NEDA Board the benefits of the NBN project, which are:

- a. Savings from operation and maintenance of old government communications network,
- b. Savings on VOIP (Voice Internet Protocol) expenses,
- c. Savings on internet connection,
- d. Savings on centralized integrated data center,
- e. Benefits to Local Government Units (LGUs), and
- f. Savings from avoided travels.

It was during this meeting that the NEDA Board unanimously approved the NBN project. No one raised any objections. Therefore, from the chronological discussion of the facts involving the approval of the NBN project, it is clear that the second, third and fourth elements of Section 3 (i), R.A. No. 3019 were all met.

What is crucial in the determination of the sufficiency of evidence proved by the prosecution is the presence or the absence of the fifth (5th) element—which is, the accused PGMA having a direct or indirect interest in the transaction for personal gain or material interest.

Personal gain is presumed and therefore, it need not be proven by the prosecution if the Board's approval of the transaction is manifestly unlawful, inequitable, or irregular transactions.

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In the case of the NBN project, the prosecution believes that there are certain irregularities and anomalies attendant to its approval, because of the: a.) attempt by COMELEC Chairperson Abalos to bribe NEDA Director General Neri with the amount of Php200 million for the immediate approval of the ZTE proposal; b.) lack of public bidding; c.) absence of a DOJ opinion whether the contract is exempted from the coverage of public bidding; d.) unnecessary presence of PGMA during the signing between the Philippine Government and ZTE on April 21, 2007 of a contract which is grossly and manifestly disadvantageous to the former; and e.) the haste in the processing and approval of the NBN project.

A closer look at the facts established is required in order to determine if one or all of the five (5) mentioned circumstances were proven.

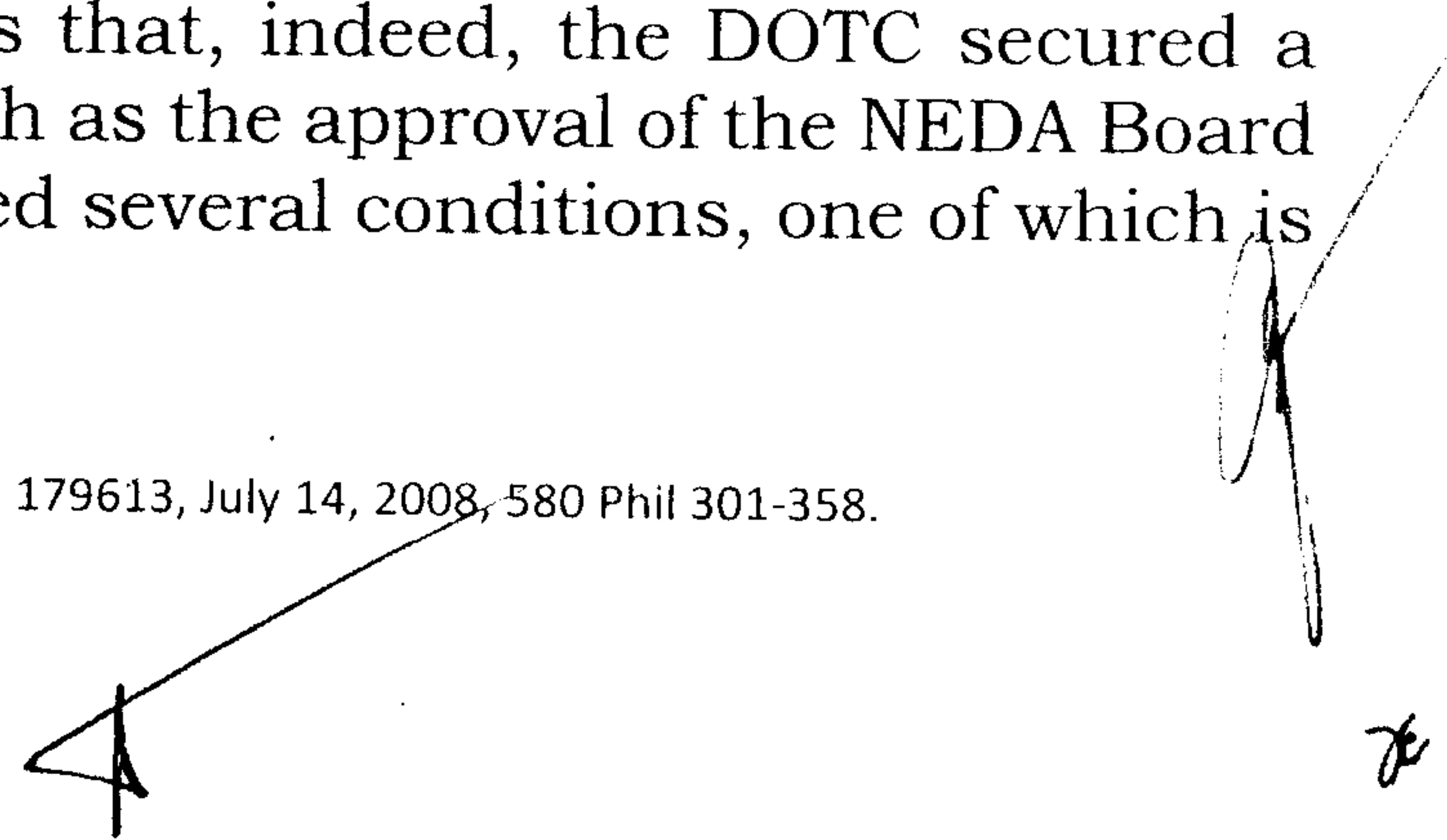
To prove its allegation that there was an attempt by COMELEC Chairperson Abalos to bribe NEDA Director General Neri with the amount of Php200 million for the immediate approval of the ZTE proposal, the prosecution presented the Transcript of Stenographic Notes of the Senate Blue Ribbon Committee Hearing on the NBN ZTE investigation. Based on the TSN dated September 26, 2007, then NEDA Secretary, Romulo Neri, presented himself before the Senate Blue Ribbon Committee Hearing on the NBN ZTE investigation. During that hearing, he recalled a meeting with Chairman Abalos relative to the ZTE proposal on the NBN Project prior to the March 27 and 29, 2007 meetings. He recalled asking questions whether or not it will just be another TELOF, a failed telecommunications project. He also stated that Chairman Abalos bribed him with Php 200million and then reported this incident to accused PGMA who told him not to accept the bribe.⁹⁶

However, let it be clarified that the Senate investigation in aid of legislation cannot be the basis of this Court's resolution or decision which requires a judicial finding of facts.⁹⁷

On the matter of lack of public bidding and/or the lack of DOJ opinion whether the NBN project is exempted from public bidding, the Court believes that, indeed, the DOTC secured a DOJ legal opinion inasmuch as the approval of the NEDA Board of the NBN project contained several conditions, one of which is

⁹⁶ Exhibit "M", pp. 42-45.

⁹⁷ *Suplico v. NEDA*, G.R. Nos. 178830, 179317, 179613, July 14, 2008, 580 Phil 301-358.



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to secure a DOJ legal opinion pertaining to the procurement process for this project.

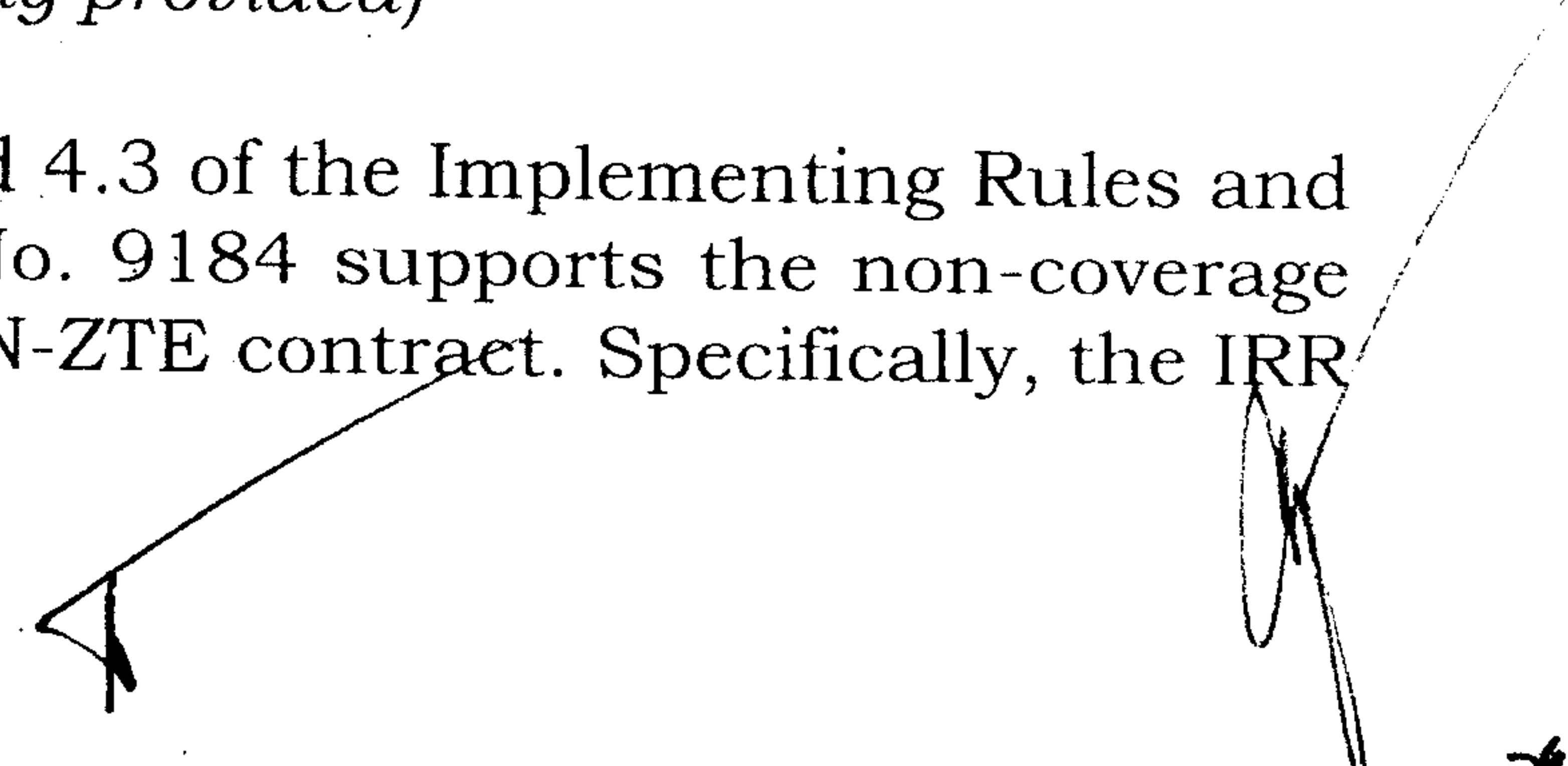
The DOJ opined that the NBN-ZTE contract entered into by the Government of the Philippines has a character of an executive agreement and that: a.) the Supreme Court ruling in *Abaya vs. Ebdane* made the exchanges between the Philippine government through Presidential Management Chief of Staff Michael Defensor and the government of China through Minister of Commerce Bo XiLai and Chinese Ambassador to the Philippines Li Jinjun, in fact partake of the character of an executive agreement, provided a loan agreement with Eximbank is concluded; b.) the designation of ZTE as the primary contractor in the exchange of notes has to be observed pursuant to R.A. No. 9184 and its implementing rules following the principle of *pacta sunt servanda*; and c.) the procurement guidelines of foreign lending institutions, in this case Eximbank, has to be followed and in its absence, then R.A. No. 9184 may be followed.

In other words, the DOJ opined that the NBN-ZTE contract is an executive agreement and therefore the agreement between China and the Philippines, even if there is a matter of procurement contained therein, must be observed. The provisions of R.A. No. 9184, particularly on public bidding may not be followed.

Section 4, R.A. No. 9184 provides:

Sec. 4. Scope and Application.- This act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or-controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is signatory shall be observed. (underscoring provided)

Even Sections 4.2 and 4.3 of the Implementing Rules and Regulations (IRR) of R.A. No. 9184 supports the non-coverage of R.A. No. 9184 in the NBN-ZTE contract. Specifically, the IRR states:



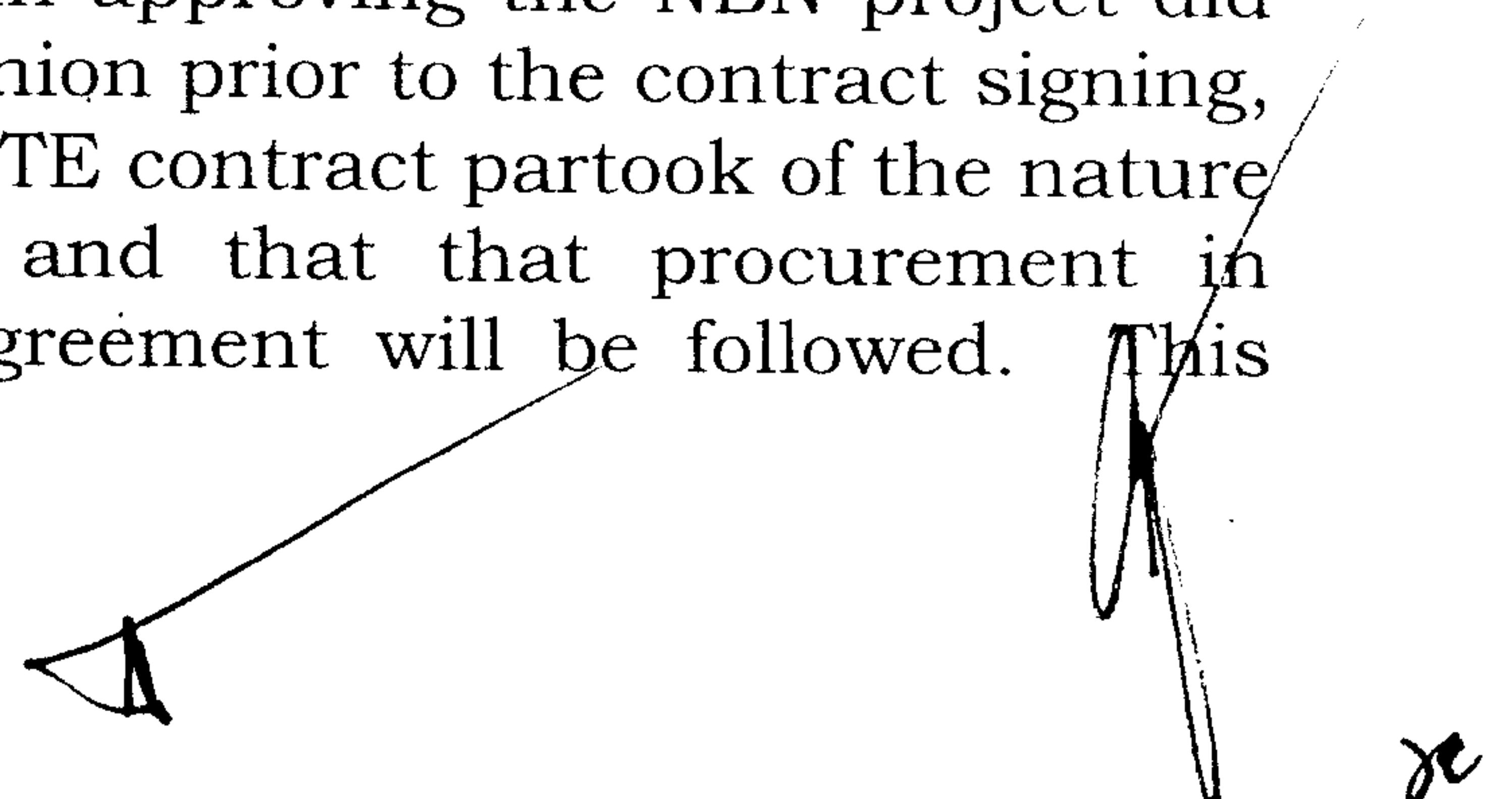
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4.2. *Any Treaty or International or Executive Agreement to which the GOP is a signatory affecting the subject matter of the Act and this IRR shall be observed. In case of conflict between the terms of the Treaty or International or Executive Agreement and this IRR, the former shall prevail.*

4.3. *Unless the Treaty or International or Executive Agreement expressly provides use of foreign government/foreign or international financing institution procurement procedures and guidelines, this IRR shall apply to Foreign-funded Procurement for goods, infrastructure projects, and consulting services by the GOP.*

It is, therefore, clear that the public bidding which the prosecution thought is required considering that the NBN project entailed a procurement of a contractor, is not necessary. The Chinese government has nominated or designated ZTE Corporation as the project contractor, inasmuch as it is the Chinese government itself, through the Eximbank, a foreign lending institution, which will fund the NBN project. When the Philippine government incurs a loan from a foreign bank such as the World Bank, Asian Development Bank and in this case, the Eximbank (a bank owned by the Chinese government), the Philippine government, or any borrower country for that matter, normally observes the bank's procurement guidelines. Therefore, the lack of bidding and the lack of DOJ opinion (although this is not true) cannot be considered as anomalies or irregularities in the NBN project that would lead to a presumption that accused PGMA has interest for personal gain.

Perhaps, what is meant by the prosecution is the failure of accused PGMA to secure the said opinion on the procurement process prior to the signing of the NBN-ZTE contract on April 21, 2007 considering that the DOTC endorsement to the DOJ was made only on May 31, 2007 and the DOJ, through then Secretary Raul M. Gonzalez issued DOJ Opinion No. 46, Series of 2007 only on July 26, 2007. However, a reading of condition 41.12.3 of the NEDA Board in approving the NBN project did not require the DOJ legal opinion prior to the contract signing, especially because the NBN-ZTE contract partook of the nature of an executive agreement and that that procurement in accordance with the loan agreement will be followed. This provision states:

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41.12.3 Legal opinion on the procurement process by the Department of Justice of the Government of the Republic of the Philippines.

The Information also averred that accused PGMA acted as witness to the contract signing between the Philippine government and ZTE, a contract which is grossly and manifestly disadvantageous to government.

The Court, however, is of the opinion that it could not make a determination as to whether the contract entered into by government and ZTE was grossly and manifestly disadvantageous to the former.

On April 21, 2007, the NBN-ZTE Contract was signed between the Government of the Republic of the Philippines through the then DOTC Secretary, Leandro R. Mendoza, and DOTC Assistant Secretary Lorenzo G. Formoso and the ZTE, through its Vice President, Yu Yong, and its Chairman, Hou Weigui. But, the copy of the contract presented by the prosecution in this case does not contain an acknowledgment page. Moreover, this copy was not notarized.

An acknowledgment is the act of one who has executed a deed before some competent officer or court and declaring it to be his act or deed; while a *jurat* is that part of an affidavit where the officer certifies that the same was sworn before him.⁹⁸ On the other hand, notarization of documents ensures the authenticity and reliability of a document.⁹⁹ In the cited case, the Supreme Court quoted its decision in *Angeles vs. Atty. Ibanez*¹⁰⁰, which states:

Notarization of a private document converts such document into a public one, and renders it admissible in court without further proof of its authenticity. Courts, administrative agencies and the public at large must be able to rely upon the acknowledgment executed by a notary public and appended to a private instrument. Notarization is not an empty routine; to the contrary, it engages public interest in a substantial degree and the protection of that interest requires preventing those who are not qualified or authorized

⁹⁸ Tigno v. Spouses Aquino, G.R. No. 129416, November 25, 2004, 486 Phil 254-275.

⁹⁹ Anudon v. Cefra, A.C. No. 5482 (Resolution), February 10, 2015.

¹⁰⁰ Angeles v. Atty. Ibanez, 596 Phil 99.

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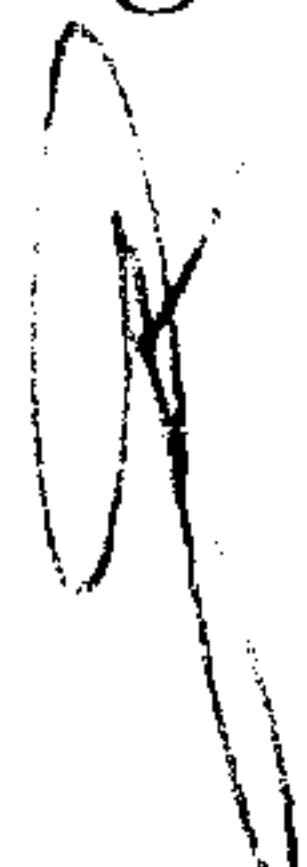
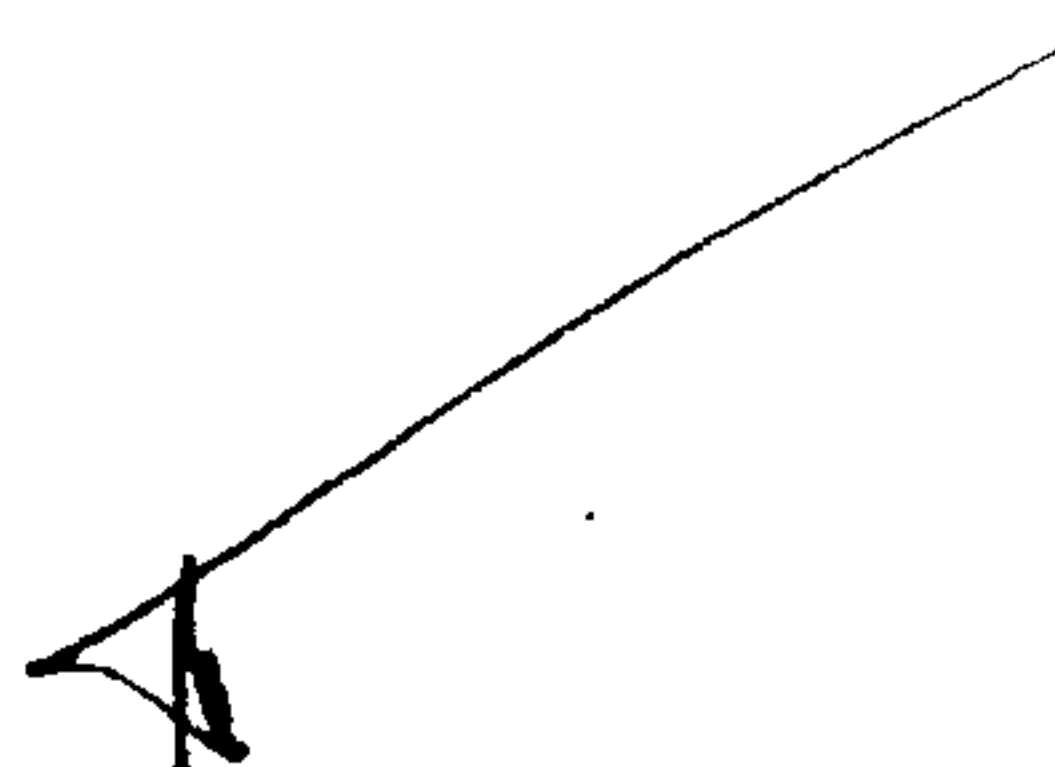
to act as notaries public from imposing upon the public and the courts and administrative offices generally.

This Court is not saying that the ZTE contract was never acknowledged or notarized. It is simply saying that what was presented before this Court by the prosecution was without any acknowledgment and notarization. Therefore, it was incumbent upon the prosecution to prove the authenticity and due execution of this document.

Be that as it may, even if the authenticity and due execution of the document denominated as NBN-ZTE contract is admitted, for purposes of argument, the Court could, nevertheless, not proceed to make a factual determination of whether the same was grossly and manifestly disadvantageous to the government because the identified attachments to this contract or agreement was not presented or offered in evidence. Stated as attachments to the contract and was supposed to be an integral part thereof are the following documents:

- Attachment A: Priced Bill of Quantities
- Attachment B: Technical Specification
- Attachment C: Scope of Work
- Attachment D: Implementation Schedule
- Attachment E: Testing Items of Provisional Acceptance Test
- Attachment F: Training Plan
- Attachment G: Service Level Agreement
- Attachment H: Scope of Work for Managed Services
- Attachment I: SLA and KPI for Managed Services
- Attachment J: Responsibility Matrix for Managed Services
- Attachment K: Part Services Maintenance and Some Products Maintenance Transfer

In the determination of whether or not the contract signed by government is grossly and manifestly disadvantageous to it, it is important to examine the bill of quantities and the prices of the materials quoted, the scope of work that the contractor is supposed to conduct, the schedule of implementation of the works proposed as well as the technical specification. The contract price alone is not sufficient to make a determination of the disadvantage. The contract, in its totality including the annexes that are part thereof, must be examined.



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It is, thus, presumed that in contracting with ZTE, the Philippine government officials regularly performed their actions and the terms and the conditions of the contract, mutually beneficial. In all contracts and agreements, the principle of mutuality is presumed, not the gross and manifest disadvantage of one party.

In *GF Equity Inc. vs. Valenzona*¹⁰¹, the Supreme Court held that:

(M)mutuality is one of the characteristics of a contract, its validity or performance or compliance of which cannot be left to the will of only one of the parties. This is enshrined in Article 1308 of the New Civil Code, whose underlying principle is explained in Garcia v. Rita Legarda, Inc., viz:


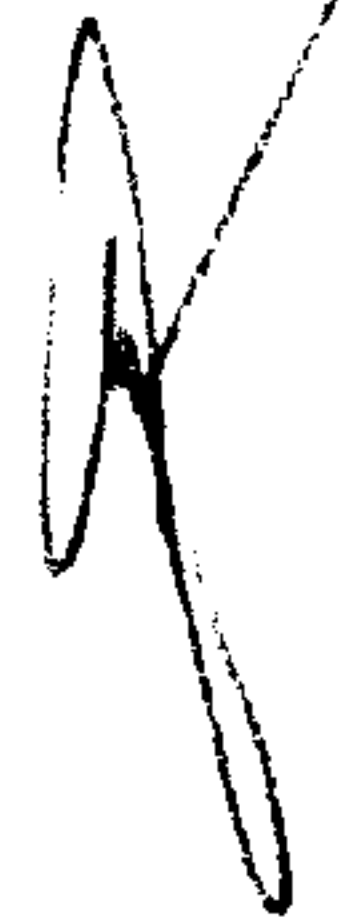
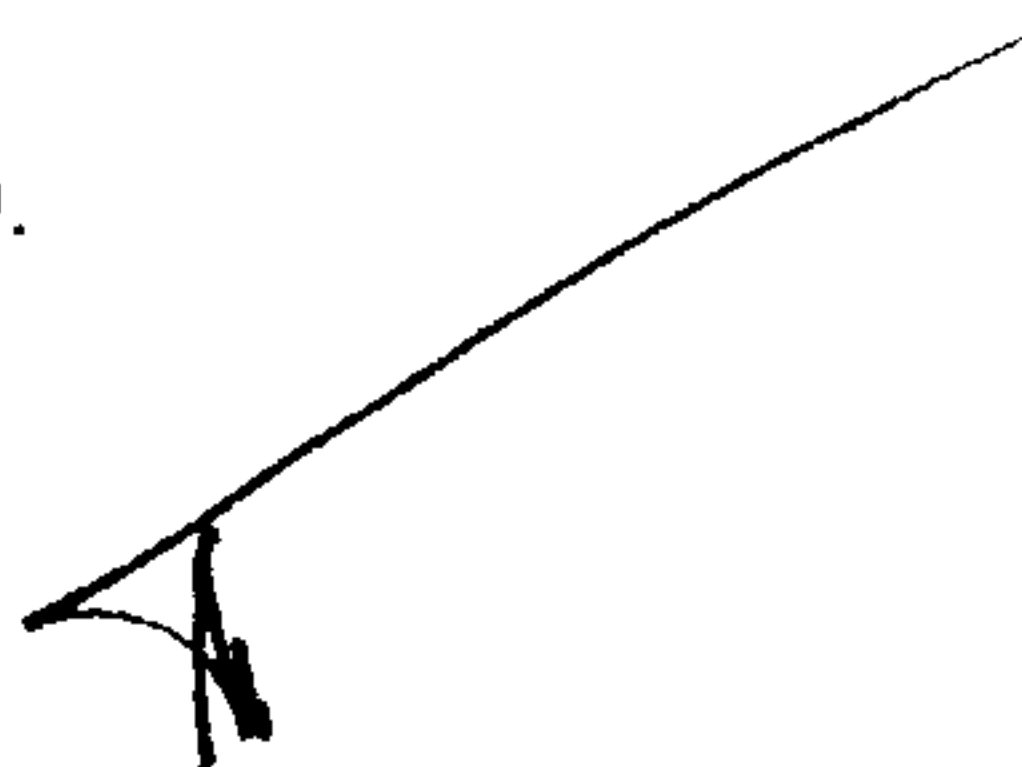
Article 1308 of the New Civil Code reads as follows:

The contract must bind both contracting parties; its validity or compliance cannot be left to the will of one of them."

The above legal provision is a virtual reproduction of Article 1256 of the old Civil Code but it was so phrased as to emphasize the principle that the contract must bind both parties. This, of course is based firstly, on the principle that obligations arising from contracts have the force of law between the contracting parties and secondly, that there must be mutuality between the parties based on their essential equality to which is repugnant to have one party bound by the contract leaving the other free therefrom (8 Manresa 556). Its ultimate purpose is to render void a contract containing a condition which makes its fulfillment dependent exclusively upon the uncontrolled will of one of the contracting parties.

Moreover, Article 19 of the New Civil Code mandates all persons to observe good faith in all its actions. Good faith is

¹⁰¹ G.R. No. 156841, June 30, 2005, 501 Phil 153-169.



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always presumed. Specifically, a public officer is presumed to have acted in good faith in the performance of his duties.¹⁰² It could then be safe to conclude that the NBN-ZTE contract was entered into in good faith and that mutual advantage to the parties (Philippine government and ZTE) be presumed, absent the opportunity for this Court to scrutinize the contract brought about by the non-submission by the prosecution of a complete copy thereof.

This being the case, the presence or absence of accused PGMA in the contract signing on April 21, 2007 is of no consequence at all.

The last anomaly or irregularity that the prosecution stated in the Information is the haste attendant to the approval by the NEDA Board of the project. Not all hasty actions are disallowed. What is prohibited in government transactions is undue haste. The term "undue" *has been defined as "more than necessary, not proper, [or] illegal."*¹⁰³ Haste, on the other hand, refers to the speed in the NEDA Board's approval of the NBN project.

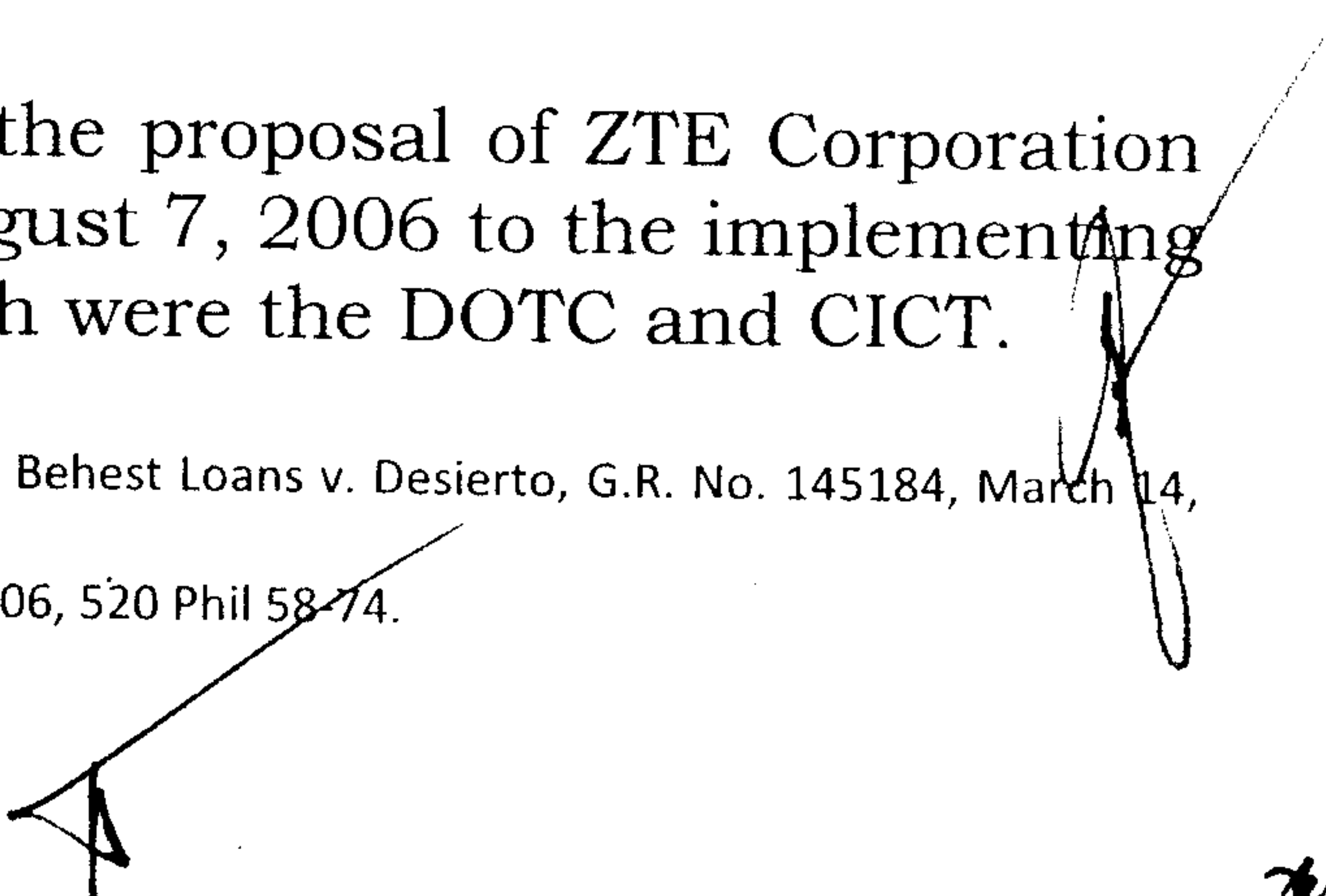
If what will be considered are only the NEDA Board meetings of March 27, 2007 and March 29, 2007, then, indeed there was undue haste in the approval of the NBN project, especially because the prosecution also presented proof that the NEDA Board did not hold any meetings in December 2006, as well as in the months of January and February 2007. But this view is certainly myopic.

It should be remembered that the NEDA assessment or appraisal and approval of projects in line with the Medium Term Development Plan (MTDP) and Public Investment Program undergoes a 3-stage process before it is submitted to the NEDA Board for approval. The NBN project underwent the approval process stages—i.e., from the evaluation by the agency concerned (DOTC and CICT), to a review by the NEDA Technical Committee, to the NEDA Investment Coordinating Committee (NEDA-ICC), and then the NEDA Board.

Like the other projects, the proposal of ZTE Corporation for NBN was submitted on August 7, 2006 to the implementing agency of an ICT project, which were the DOTC and CICT.

¹⁰² Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Desierto, G.R. No. 145184, March 14, 2008, 572 Phil 71-94.

¹⁰³ Santos v. People, G.R. No. 161877, March 23, 2006, 520 Phil 58-74.



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On October 23, 2006, Secretary Sales of the CICT formally endorsed to the NEDA Technical Committee the NBN project proposal for review. But on February 20, 2007, NEDA Director General, Romulo Neri, wrote to the DOTC requesting the latter to submit or endorse a reconciled project proposal on the Cyber Education Project of the Department of Education (DepEd) and the project proposals of ZTE and AHI for NBN.

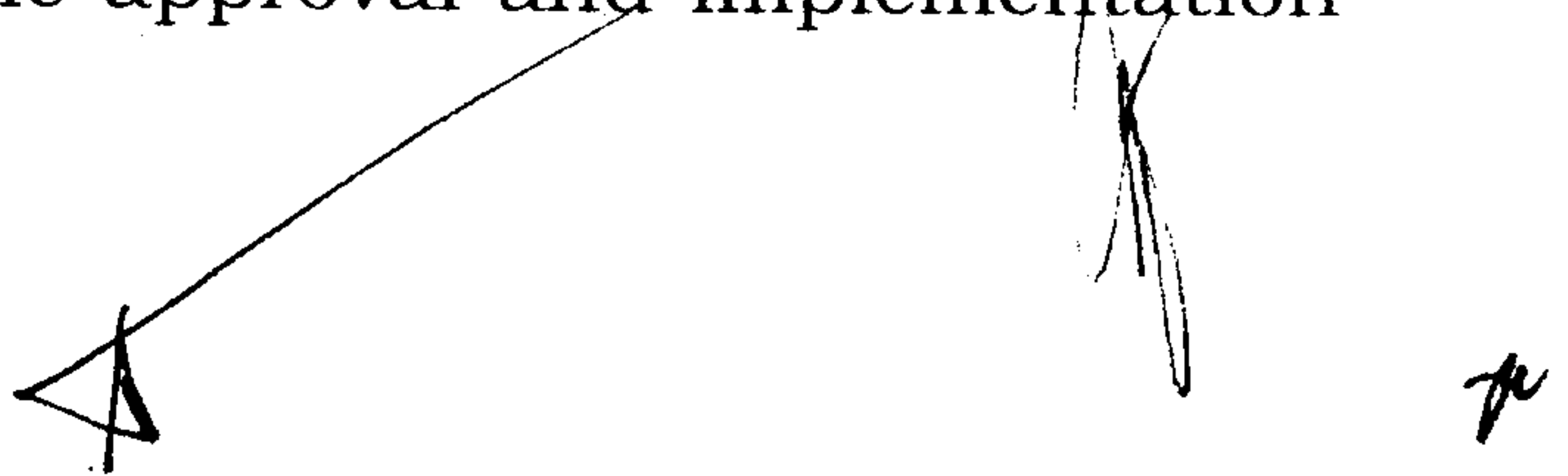
On February 28, 2007, the Bids and Awards Committee Technical Working Group (BAC-TWG) for Information and Communications Technology (ICT) submitted its evaluation of the ZTE and Amsterdam Holdings Inc. proposals for the National Broadband Network of the DOTC and the Cyber Education Project of the DepEd. And on March 1, 2007, the Secretaries of the DOTC and CICT submitted their review of the proposals of ZTE and Amsterdam Holdings and they adopted the recommendation of the DOTC BAC-TWG endorsing the ZTE project.

The NEDA Investment Coordinating Committee (NEDA-ICC) also recommended to the NEDA Board the approval of the NBN project.

All these actions, taken together and the six-month project incubation period, would lead a reasonable mind to conclude that there was no undue haste in the approval of the project.

The failure of the prosecution to establish in evidence the irregularities, inequitableness or anomalies of the NBN-ZTE contract should have prompted them to establish in evidence the proof that accused PGMA had interest for personal gain in the said contract. But again, the prosecution did not bother to introduce evidence to prove the same. This is fatal to the prosecution's case especially because the last element of the crime charged—i.e., the interest for personal gain of accused PGMA in the NBN project as approved by the NEDA Board of which she was the Chair, was not proven in evidence.

Lastly, this Court takes judicial notice that on October 2, 2007, accused PGMA cancelled the NBN Project, just as the Supreme Court took judicial notice of such cancellation in *Suplico vs. NEDA*. The cancellation of the NBN-ZTE contract bolsters the argument that accused PGMA did not hold any interest for personal gain in the approval and implementation of the NBN project.



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By way of summary of the discussion above, there is no doubt that accused PGMA is not liable under Section 3 paragraph (i) of R.A. No. 3019 for failure of the prosecution to establish the element of interest for personal gain in the NBN project, a project that required the NEDA Board's discretionary approval.

Violation of Section 7 (d), R.A. No. 6713

This section provides:

In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful:

(d.) Solicitation or acceptance of gifts. — Public officials and employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or anything of monetary value from any person in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by the functions of their office.

The pronouncement of the Supreme Court in *Prieto vs. Cariaga*¹⁰⁴ is very instructive on how R.A. No. 6713 should be construed. It said:

Among the norms of personal conduct of public officials and employees provided under R.A. 6713 otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees is commitment to public interest and professionalism. The Code mandates that public officials and employees use the powers of their office efficiently, effectively and honestly, endeavoring to discourage wrong perceptions of their roles as peddlers of undue patronage to the end that the time honored principle that "public office is a public trust" is forever upheld.

¹⁰⁴ A.M. No. P-94-1061, March 13, 1995, 312 Phil 373-381.

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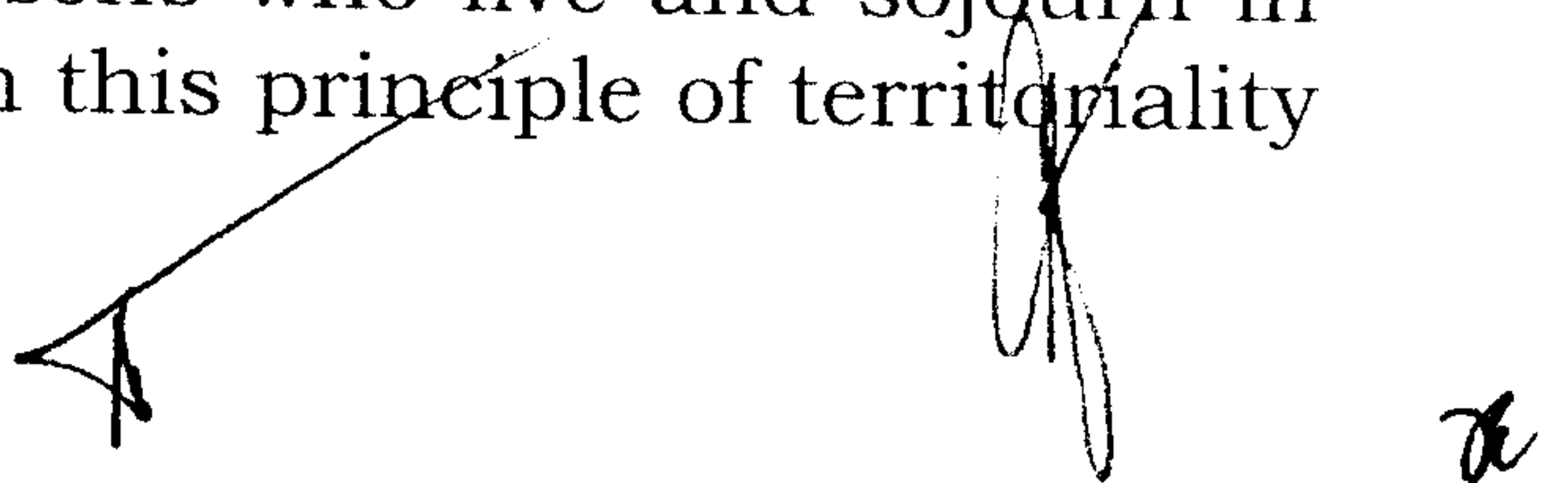
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In this context, the Code forbids public officials or employees from directly or indirectly having any financial or material interest in any transaction requiring the approval of their office, or soliciting or accepting, directly or indirectly, any gift, gratuity, favor, entertainment, loan or anything of monetary value from any person in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by the functions of their office. Similarly, Sec. 3, pars. (e) and (h), of R.A. 3019 or the Anti-Graft and Corrupt Practices Act penalizes the following acts of public officials and employees, viz: . . . (e) Causing any undue injury to any party, including the government, or giving any private party any unwarranted benefit, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. . . (h) Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity or in which he is prohibited by the Constitution or by any law from having any interest. . . . Evidently, the common, element which makes an act of a public official or employee fall within the abovementioned provisions is his intent to gain, to obtain pecuniary advantage or enrich himself materially while discharging his official duties although not necessarily utilizing his office.

The Information charging accused PGMA for violation of Section 7 (d) of R.A. No. 6713 is for her willfull and unlawful acceptance of entertainment, gift or favor from ZTE officials in the form of a round of golf and lunch. The golf and lunch accepted by accused PGMA were made in the Shenzhen Province, China sometime in November 2006.

It bears stressing that acts complained of and alleged to have been committed or the *situs* of such actions by accused PGMA were committed not within the territorial jurisdiction of the Philippines. This is very clear from the testimony of prosecution witness, former Speaker of the House of Representative Jose De Venecia, Jr. The principle of territoriality of criminal law provides that penal laws are applicable and binding upon persons who live and sojourn in the Philippine territory. Although this principle of territoriality



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in criminal law is not absolute, there is no jurisprudence nor reason to exclude Section 7 (d) of R.A. No. 6713 from its applicability. One example of the inapplicability of the principle of territoriality in criminal laws is Title 1 of Book II of the Revised Penal Code (RPC).¹⁰⁵ The crimes defined in this title are considered repulsive and reprehensible not just to the Philippine state but to the entire world, in general.

On the other hand, the prohibition in Section 7 (d) is *malum prohibitum* and could not be considered to be of the same nature and gravity as piracy, treason and espionage (the crimes defined in Title I, Book II, RPC). It is the commission of that act as defined by the law and not the character or effect thereof that determines whether or not the provision has been violated.¹⁰⁶

But, even if the principle of territoriality is brushed aside, for argument purposes, the prosecution was still unable to establish that accused PGMA received entertainment and lunch from ZTE. There was no clear and indubitable proof presented by the prosecution that accused PGMA was the recipient. As a matter of fact, there was no evidence introduced on who made the payment. What is clear, is that it was not witness De Venecia, Jr. who footed the bill for the golf game and the lunch, but on the other hand, there was no evidence that PGMA played the golf game without paying and that the lunch was paid for by ZTE.

Moreover, not all kinds of gifts are prohibited under R.A. No. 6713. Tokens or gifts of small value may be received by a public official. This is so provided in Section 3 (c) of R.A. No. 6713:

(c) "Gift" refers to a thing or a right disposed of gratuitously, or any act or liberality, in favor of another who accepts it, and shall include a simulated sale or an ostensibly onerous disposition thereof. It shall not include an unsolicited gift of nominal or insignificant value not given in anticipation of, or in exchange for, a favor from a public official or employee. (underscoring provided)

The green fee of the golf game and lunch, if at all accused

¹⁰⁵ People v. Tulin, G.R. No. 111709, August 30, 2001, 416 Phil 365-394.

¹⁰⁶ Martinez v. Villanueva, G.R. No. 169196, 169198, July 6, 2011, 669 Phil 14-31.

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PGMA did not pay for it, may fall under the second sentence of Section 3 (c) of R.A. No. 6713 for as long as she did not solicit for it. It should be emphasized that when accused PGMA played golf at the Shenzhen Province in China, she was received by Chinese officials, too. In fact, during the lunch, witness De Venecia himself made the observation that there were Chinese government officials who were also present.

The business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause.

*-Anonymous
(Thompson v. Church
(1791), 1 Root 312)*

WHEREFORE, considered in its entirety, the evidence adduced by the prosecution in Criminal Case No. SB-11-CRM-0468 for violation of Section 3 (i), R.A. No. 3019 and in Criminal Case No. SB-11-CRM-0469 for violation of Section 7 (d), R.A. No. 6713 did NOT SUFFICIENTLY prove the guilt of accused Ma. Gloria M. Macapagal Arroyo and this Court hereby GRANTS Accused's Demurrer to Evidence. These cases are then DISMISSED.

Approved:

HERNANDEZ, J., Chairperson

QUIROZ, J.

ECONG, J.

