RECOVERY OF THE MARCOS ASSETS

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This paper tells of the Philippines' recent experience abroad in its efforts to recover the ill-gotten wealth of former President Ferdinand E. Marcos, his family, and his close business associates and the challenges which the Philippines continues to face despite the judgments obtained in Switzerland, the United States, and the Philippines as bases for the forfeiture of the Marcos ill-gotten wealth.

I. MARCOS CASE IS CLASSIC CASE IN ASSET RECOVERY

You may recall that in 1986, the Philippines requested mutual legal assistance from Switzerland to recover the alleged Marcos ill-gotten wealth at a time when there was no case law in Switzerland to guide this effort. The Marcos case has, therefore, been described as the classic case in asset recovery.

Here, I wish to stress that the right to asset recovery is a fundamental principle of the UN Convention against Corruption (UNCAC) because the right to asset recovery is the major deterrent to high level corruption.

The relative success of the Philippines in recovering some of the Marcos ill-gotten wealth can be credited to a number of factors:

Firstly, President Corazon C. Aquino in the first law that she passed (Executive Order No.1) created the Presidential Commission on Good Government (PCGG), giving it the special mandate to recover all ill-gotten wealth of the Marcoses and his close associates whether located in the Philippines or abroad. This was followed by Executive Order No. 2 which empowered the PCGG to freeze said assets and to appeal to foreign governments wherein such assets are located to take similar measures. Executive Order No. 14 authorized the PCGG to file civil and criminal cases with the anti-graft court, the *Sandiganbayan*, which was given the exclusive original jurisdiction over these cases.

Secondly, there was in place a number of government institutions to assist the PCGG. Thus, Executive Order No. 14 provides that the PCGG shall be assisted by the Office of the Solicitor General and other government agencies in filing and prosecuting all cases investigated by it. The other agencies included the Office of the Special Prosecutor in the Ombudsman assisting in criminal cases and the Central Bank of the Philippines which assisted in freezing bank accounts.

Thirdly, there were laws to prosecute corruption such as Republic Act No. 1379, "An Act Declaring Forfeiture In Favor of the State Any Property Found To Have Been Unlawfully Acquired By Any Public Officer or Employee and Providing For the Proceedings Therefore", which was enacted as early as 1955, and Republic Act No. 3019, the "Anti-Graft and Corrupt Practices Act", passed in 1960 before Mr. Marcos became president. There was also the existence of the *Sandiganbayan.*

Moreover, the Philippines had the good fortune of recovering Marcos diaries and documents left behind in Malacanang, the presidential palace, when the Marcos family fled Manila. These documents revealed the existence of secret bank deposits in Switzerland and other financial centers. In addition, the Philippine government recovered Marcos documents confiscated by the US Customs in Hawaii when Mr. Marcos arrived in Honolulu. These documents included reports of business transactions received by Mr. Marcos from his close associates.

The PCGG's strategy in recovering Marcos ill-gotten wealth was to give priority to recovery of assets

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abroad because these are easier to dispose of and dissipate. PCGG's first action was to file civil actions in the United States to recover several buildings in New York City. In Switzerland, the PCGG requested mutual legal assistance to recover bank deposits and securities.

II. MARCOS DEPOSITS IN SWITZERLAND OF CRIMINAL PROVENANCE

After a long and tedious process, the Swiss Federal Supreme Court ruled there was little doubt about the criminal provenance of the secret Marcos accounts and securities hidden in the Swiss banks. It ordered that they be transferred to the Republic of the Philippines, subject to certain conditions and that their disposition be determined by a final enforceable judgment of the competent Philippine court.[1]

Among the conditions was that these accounts and securities be placed under escrow with the Philippine National Bank and that they could be reinvested only in banks with Standard & Poor's "AA" rating.[2]

In 1998, Switzerland turned over to the Republic of the Philippines, as the requesting state, the bank deposits worth some US$ 627 million, in accordance with the decisions of the Swiss Federal Supreme Court, acting as an administrative court.

In 2000, Switzerland turned over two stock certificates of Arelma S.A., representing the entire ownership of Arelma. This is a Panamanian entity created by Mr. Marcos which had opened a deposit with Merrill Lynch in New York. The transfer by Switzerland of the stock certificates to the Republic of the Philippines was made under the same conditions as the bank deposits.

The Swiss Federal Supreme Court dismissed the appeals of the Marcos foundations to prevent the transfer of the bank deposits to the Republic of the Philippines, ruling that these foundations were mere creations of Marcos and under his control, that they had participated in his bad faith, and that they had not contested this finding and could not show an acquisition in good faith independent of Marcos.[3]

The Swiss Federal Supreme Court also dismissed the petition of the Pimentel class of human rights claimants to be admitted to the proceedings and enforce their judgment against Mr. Marcos on the ground that they are creditors without proprietary rights and that, as human rights victims their remedy was to present their claims before the probate proceedings for Mr. Marcos' personal liability or file a claim for damages against the Republic for the wrong committed by its organs.[4]

III. HAWAII JUDGMENT AGAINST MARCOS ESTATE

The Pimentel class of human rights claimants had obtained from the U.S. district court for Hawaii an award of some US$ 2 billion for compensatory damages and exemplary damages against Mr. Marcos for his personal liability for human rights violations, plus attorneys' fees. The awardees consisted of 134 named claimants and some 10,000 unnamed claimants.[5]

The Philippine Government had intervened in this suit in Hawaii by waiving former President Ferdinand E. Marcos' personal immunity as a former head of state but it did not thereby waive its rights to the Marcos ill-gotten wealth. The Hawaii court's award was against the estate of Mr. Marcos, and not against the Philippine Government.

Worthy of note is the compromise agreement between the Marcoses and the Pimentel class, whereby

1. *Federal Office for Police Affairs vs Aquamina Corporation, Panama* (regarding request for mutual Assistance for the Republic of the Philippines), 10 December 1997.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Multi-District Litigation* (*"MDL"*) Case No. 840 (D. Hawaii).

the Marcoses were released from all criminal and civil liability in exchange for the payment of US$150 million to be taken from the Swiss bank deposits under litigation in the forfeiture case in the Philippines. The compromise was to be in full settlement of the Hawaii judgment. It was approved by Judge Manuel Real of the US District Court of Hawaii.

The *Sandiganbayan*, however, rejected the compromise agreement as having no statutory or constitutional justification. Among the reasons, the *Sandiganbayan* noted that the law provides that the ill-gotten wealth of the Marcoses are to be used for funding the Comprehensive Agrarian Reform Program, and that it would be illegal to use these assets for the payment of a judgment debt against the Marcoses. In the words of the *Sandiganbayan,* "the Republic cannot compensate its own citizens for the grave injury done to them and then release from any liability the one or the ones responsible for that grave injury." The *Sandiganbayan* also noted that the attorney's fees claimed was more than US $41 million or more than one quarter of the compromise award, plus other expenses.[6]

Also worthy of note is that there are pending bills in both the Philippine Senate and the House of Representatives to pass the human rights compensation bills which would amend the Comprehensive Agrarian Reform law.[7]

IV. SWISS FEDERAL SUPREME COURT DISMISSED PIMENTEL CLASS PETITION

The Swiss Federal Supreme Court ruled against the claim of the human rights claimants, noting that civil attachments cannot in general prevent a restitution in proceedings for mutual assistance, and that, in this particular case, the civil attachments were obtained after the blocking of the accounts in the legal assistance proceedings and after it had already granted in principle the return of the assets to the Republic of the Philippines.[8]

The Court further ruled that the human rights claimants could not proceed against the blocked bank accounts on the basis of human rights violations because there is no connection between the graft offenses which probably generated the assets in Switzerland and the claims of the creditors (Pimentel c1ass).[9]

Neither from the UN Pact II nor from the UN Agreement against Torture is it possible to derive any right of the victims to attach certain assets for previous compensation. Therefore, the victims of the Marcos regime as a matter principle are obliged to either present their claim in the probate proceedings if they want to assert Ferdinand Marcos' personal liability for the human rights violations committed during his tenure, or they have to claim damages from the Republic for the wrongs committed by its organs.[10]

V. US DISTRICT COURT'S ORDER TO SWISS BANKS TO TRANSFER ASSETS TO PIMENTEL CLASS VIOLATES SWITZERLAND'S SOVEREIGNTY

The Swiss banks also opposed the return of the bank deposits to the Republic of the Philippines on the ground that they could be held in contempt by the US District Court for disobeying its order to transfer the assets to the Pimentel class.[11]

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6. *Republic of the Philippines vs. Ferdinand E. Marcos, et al.* Civil Case No. 0141.
7. *Cf.* House Bill 3756 and S.B. 1532.
8. Supra, note 1.
9. Id. and *Josepito C. Segui and other petitioners vs. Estate of Ferdinand Marcos,* Decision of the Swiss Federal Supreme Court 1A.81/1998/kls.
10. Id
11. *Supra*, note 1. .

The Swiss Federal Court noted that the US Court of Appeals for the Ninth Circuit in the case of In Re Credit Suisse[12] dated 3 December 1997 had already decided that the Order was at variance with the decision of Switzerland to block the accounts upon the request of the Republic of the Philippines and that it, therefore, violated the Act of State of Doctrine, and that the US District Court had been further directed to refrain from taking any further action with respect to these assets.[13]

Furthermore, the Swiss Federal Supreme Court noted that even if the US Ninth Circuit had not ruled in this sense, a refusal of the Philippine request because of the injunctions issued in the United States would have been impossible for fundamental reasons. The Court noted that the injunctions seek to defeat a legal assistance measure which had been validly ordered by the Swiss authorities and that Switzerland has repeatedly intervened with the United States authorities and courts, pointing out that Swiss mutual measures must take priority and that unilateral measures of American courts to force Swiss companies within Switzerland to deliver the blocked accounts to the United states constituted a breach of Swiss sovereignty.[14]

VI. PHILIPPINE JUDGMENT IS AN *IN REM* JUDGMENT

In compliance with the conditions of the Swiss Federal Supreme Court, the PCGG representing the Republic of the Philippines filed a petition for forfeiture against Marcos assets, under the Forfeiture Law in relation to Executive Orders Nos 1, 2, 14, 14-A for violations of the Anti-Graft Law in Civil Case No. 0141. The petition covered, among others, the bank deposits and the Arelma shares. On 15 July 2003, the Philippine Supreme Court, after long delays due in great part to delaying tactics by the Marcoses, granted the forfeiture of the bank deposits.[15] On 18 November 2003, the Supreme Court en banc denied the Marcos' motion for reconsideration and ruled that the forfeiture judgment was a judgment *in rem*.[16] This judgment was limited to the bank deposits and did not include the Arelma shares. Switzerland has acknowledged the validity of the Philippine judgment.

VII. US NINTH CIRCUIT HAS RULED THAT PHILIPPINE JUDGMENT WAS PROTECTED BY ACT OF STATE DOCTRINE

The Pimentel class human rights claimants then sought to pursue contempt and discovery proceedings in the US District Court for Hawaii against the Philippine National Bank to prevent it from enforcing the Philippine judgment. PNB thus filed for mandamus with the US Ninth Circuit to restrain the district court. In issuing the mandamus, the US Ninth Circuit held in the case of *In Re Philippine National Bank*:[17]

> "There is no question that the judgment of the Philippine Supreme Court gave effect to the public interest of the Philippine government. The forfeiture action was not a mere dispute between private parties; It was an action initiated by the Philippine government pursuant to its "statutory mandate to recover property allegedly stolen from the treasury." In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d at 546. We have earlier characterized the collection efforts of the Republic to be governmental. Id. The subject matter of the forfeiture action thus qualifies for treatment as an act of state."

12. *Credit Suisse vs. United State District Court for the Central District of California,* 130 F.3d 1342.
13. *Id*.
14. *Supra*, note 1.
15. *Republic v. Sandiganbayan*, G.R. No. 152154, July 15, 2003.
16. *Republic v. Sandiganbayan*, G.R. No. 152154, November 18, 2003.
17. *In re Philippines National Bank vs. United States District Court for the District of Hawaii Respondent, Maximo Hilao; Estate of Fernand Marcos; Imelda Marcos; Fernand R. Marcos Jr. Real Parties in Interest*, 397 F.3d 768.

The mandamus vacated the district court's order and directed it from refraining from any further action against PNB in this action or any other action involving any of the funds that were the subject of the decision of the Philippine Supreme court dated July 15, 2003.

VIII. REPUBLIC PLEADS SOVEREIGN IMMUNITY IN INTERPLEADER PROCEEDINGS

In 2000, Merrill Lynch filed for interpleader before the US District Court presided by Judge Manuel Real because of the conflicting claims of the Pimentel class, among others.

In Singapore, the Pimentel class also filed a claim with WestLB, one of the banks in Singapore where PNB deposited all the accounts it held in escrow, in compliance with Switzerland's condition that it could re-invest these funds only in banks with Standard & Poors "AA" rating. All the other banks had complied with title Philippine judgment forfeiting the accounts in favor of the Republic. WestLB also complied, except for the accounts that had not matured.

WestLB filed for interpleader but did not implead the Republic of the Philippines. The Republic filed motion to intervene but only to invoke its sovereign immunity. The Republic of the Philippines/PCGG also pleaded sovereign immunity in the interpleader for the Arelma assets filed by Merrill Lynch.

IX. US SUPREME COURT DECISION UPHOLDS SOVEREIGN IMMUNITY

In the United States, the US District Court presided by Judge Manuel Real recognized the Republic's/PCGG's sovereign immunity but proceeded to dismiss them from the case. In the absence of the Republic/PCGG, he proceeded with the case and awarded the Arelma assets to the Pimentel class of human rights claimants.

The Ninth Circuit reversed the decision, holding that the Republic/PCGG are entitled to sovereign immunity and are required parties, and entered a stay pending the *Sandiganbayan*'s decision.

Judge Real, however vacated the stay, holding that the litigation in the *Sandiganbayan* could not determine entitlement to the Arelma assets. The Ninth Circuit affirmed. The Republic/PCGG filed for certiorari. Recognizing the importance of the issue of sovereign immunity, the US Supreme Court granted the Certiorari and ordered the US Government to present its views.

The US Government represented by the State Department and the US Solicitor General duly supported the Philippines' position that the interpleader be dismissed and that the issue of the ownership of the assets should be determined by the Philippine courts. The US Supreme Court after oral arguments dismissed the interpleader, ruling that the lower courts erred in not giving sufficient weight to sovereign immunity when they awarded the assets to the human rights claimants.

The Court stated that it is clear that an analysis of joinder cases "instruct us that, where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is potential to injury to the interests of the absent sovereign." The US Supreme Court noted that: "The entities' (Republic of the Philippines and its agency, the Presidential Commission on Good Government) claims arise from historically and politically significant events for the Republic and its people, and the entities' have a unique interest in resolving matters related to Arelma's assets."[18]

The Philippines' case was greatly assisted by the authoritative replies of the US Deputy Solicitor General in answer to a number of issues raised by the Justices of the US Supreme Court:

18. *Republic of the Philippines et al vs. Pimentel, Temporary administrator of Estate of Pimentel. Deceased et al.* 12 June 2008.

- With respect to the requirement of due process and the right to intervene in the *Sandiganbayan,* the claimants are unsecured judgment creditors. In the reverse situation, if they were suing as creditors of a criminal defendant in forfeiture proceedings brought by the United States in US courts, they would typically have no standing to intervene. But if they do intervene, they would have no rights superior to the US because they would not be bona fide purchasers and they would not be without knowledge of the illegal conduct.

- As to whether the Republic was inconsistent in supporting the litigation in Hawaii against former President Ferdinand E. Marcos, and then preventing the class claimants from enforcing judgment against the Arelma assets, the Republic was in exactly the same position as the US would be if the US filed a brief in this Court saying that a former Government official did not have qualified immunity and could be sued in his personal capacity, or that the Westfall Act did not protect him, but that would in no way be a representation by the US that the judgment against that officer could be satisfied out of assets of the United States including assets that the United Slates might be seeking to recover from the defendant.

X. REPUBLIC EXPECTED COMITY FROM SINGAPORE COURTS

In the interpleader case filed by WestLB bank, the Republic of the Philippines did not immediately intervene and it asked to be impleaded after two years, when the lower court did not approve PNB's application for *forum non conveniens*.

The Republic did not immediately intervene because it expected comity from the Singapore courts. The Philippine Supreme Court had rendered an *in rem* judgment forfeiting the funds to the Republic. The Swiss Government had recognized the validity of the Philippine judgment and emphasized the importance of giving validity to the legal assistance that Switzerland had provided to the Republic of the Philippines. The US Ninth Circuit Court had recognized the forfeiture judgment as an act of state and ordered the district court to stop from interfering.

Singapore's Foreign Sovereign Immunity Act provides that its courts can recognize the sovereign immunity of a foreign state even though the foreign state does not appear in the proceeding in question.

XI. SINGAPORE PROCEEDINGS APPEAR TO RUN COUNTER TO CURRENT TRENDS ILL MULTI-LATERAL CO-OPERATION

The High Court stated it was satisfied that the Republic of the Philippines had established sufficient standing to apply to stay the proceedings, citing the test applied in *Juan Ysmael & Co. Inc vs Government of the Republic of Indonesia.* This is similar to the rationale of the decision of the US Supreme Court in the Arelma case. But the High Court further ruled that the Philippines had submitted to the jurisdiction of the court through implied waiver even though the Republic had expressly declared that it was intervening solely to plead its sovereign immunity and was not submitting to the jurisdiction of the forum.

Pending appeal of this judgment to Singapore's Court of Appeal, Switzerland forwarded an Aide Memoire to Singapore's Ministry of Foreign Affairs, upon the request of the Philippine Government.

The Aide Memoire informed the Ministry of the legal assistance provided by Switzerland to the Philippines, and emphasized the importance of close cooperation between governments in dealing with the recovery of illicit assets. The Aide Memoire concluded:

> "..... The proceedings before the Court of Appeals of Singapore appear to run counter to the current trends in multilateral cooperation represented by the

> Convention and by Switzerland's own prior actions in assisting the Philippines and could make future inter-governmental cooperation in such matters more complicated.
>
> Switzerland trusts upon the willingness of other countries to acknowledge the legal property of the Republic of the Philippines in accordance with the decisions of the Swiss Federal Supreme Court to hand over these assets to the Republic of the Philippines."

It is apparent that the Singapore Court of Appeal was unaware of the concerns conveyed by Switzerland in this Aide Memoire when it issued its decision establishing a new doctrine that sovereign immunity cannot cover intangibles such as choses in action.

Thus, the court did not have the benefit of considering the new dimension of international cooperation in recovery of ill-gotten assets due to corruption and the full legal implications of mutual legal proceedings as sovereign acts of both the requested state and the requesting state. This explains, in my view, the treatment by the Court of Appeal of the Marcos ill-gotten assets as a proceeding between private litigants and failed to give cognizance to the Philippines' sovereign interests and recognize the legal effects of the transfer of possession of the bank accounts from the requested state to the requesting state.

The High Court now has all the information before it to have a fuller appreciation of the sovereign claim of the Republic of the Philippines. Hopefully, the court will now be able to consider an early dismissal of the claims of the Pimentel class and the Marcos foundations, based on a number of grounds, including the Act of State or Comity, estoppel and forum shopping, prescription, and lack of legal personality.

A different decision would be incomprehensible. The Singapore courts would have to invalidate the judgment of the Philippine Supreme Court, defeat the legal assistance provided by Switzerland to the Philippines and ignore the judgments of the US Courts of Appeal and the US Supreme Court for these courts to decide to hand over the Marcos ill-gotten assets to the Pimentel class.

With respect to the Marcos foundations, practitioners familiar with the Marcos case are surprised that the foundations are still in the picture especially because the return of the assets to the foundations would partake of money-laundering.

XII. UNCAC RESOLUTION TO REMOVE BARRIERS TO ASSET RECOVERY: SIMPLIFY AND PREVENT ABUSE OF LEGAL PROCEEDINGS

The Conference of the States Parties to the United Nations Convention, bearing in mind that the return of assets is one of the main objectives and a fundamental principle of the United Nations Convention against Corruption and that States parties to the Convention are obligated to afford one another the widest measure of cooperation and assistance in that regard, issued a far-reaching Resolution on Asset Recovery at its third session recently held at Doha on 9-13 November 2009.

This UNCAC Resolution, sponsored by many countries including the Philippines, encourages States parties to eliminate or reduce the barriers to asset recovery by, among others, taking measures to simplify and prevent the abuse of legal proceedings.[19]

19. Doha Resolution on Asset Recovery, paragraph 10.

XIII. CONCLUSION

The litigation to recover the Marcos ill-gotten assets hidden in Switzerland begun in 1986, more than two decades ago and should not be prolonged any longer by third party claims.

It is respectfully submitted that, as suggested by the abovementioned Swiss Aide Memoire, the pending interpleader in Singapore is an abuse and misuse of judicial proceedings by the Pimentel class, which want to have another bite at the cherry, after failing in the Swiss proceedings and the US proceedings, as well as by the Marcos foundations which have no legal or beneficial interest in the assets.

As the financial center in Southeast Asia, Singapore's long awaited ratification of the United Nations Convention against Corruption will show its commitment to UNCAC and display its goodwill to its neighbors and its partners in the region