

## Actual results —

After all is said and done, the task of recovering the ill-gotten wealth will be judged in terms of actual results, not in terms of legal niceties.

PCGG has turned over to the Office of the President around 2 billion pesos in cash, free of any lien. It has also delivered to the President— as a result of a compromise settlement— around 200 land titles involving vast tracts of land in Metro Manila, Rizal, Laguna, Cavite, and Bataan, worth several billion pesos. These lands are now available for low-cost housing projects for the benefit of the poor and the dispossessed amongst our people.

In the legal custody of the Commission, as a result of sequestration proceedings, are expensive jewelry amounting to 310 million pesos, 42 aircraft amounting to 718 million pesos, vessels amounting to 748 million pesos, and shares of stock amounting to around 215 million pesos.

But, as I said, the bulk of the ill-gotten wealth is located abroad, not in the Philippines. Through the efforts of the PCGG, we have caused the freezing or sequestration of properties, deposits, and securities probably worth many billions of pesos in New York, New Jersey, Hawaii, California, and— more importantly— in Switzerland. Due to favorable developments in Switzerland, we may expect, according to our Swiss lawyers, the first deliveries of the Swiss deposits in the foreseeable future perhaps in less than a year's time. In New York, PCGG, through its lawyers who render their services free of cost to the Philippine Government, succeeded in getting injunctive relief against Mr. and Mrs. Marcos and their nominees and agents. There is now an offer for settlement that is being studied and explored by our lawyers there.

If we succeed in recovering not all (since this is impossible) but a substantial part of the ill-gotten wealth here and in various countries of the world— something the revolutionary governments of China, Ethiopia, Iran, and Nicaragua were not able to accomplish at all with respect to properties outside their territorial boundaries, the Presidential Commission on Good Government, which has undertaken the difficult and thankless task of trying to undo what had been done so secretly and effectively in the last twenty years, shall have more than justified its existence.

To paraphrase Abraham Lincoln, himself the object of so much criticism and vilification during one of the most difficult periods in American history:

'If the end brings us out alright, a thousand angels saying we had been wrong would make no difference at all.'

Sequestration  
 Philippine President  
 Commission on Good Government

## SEQUESTRATION OR FREEZE ORDER BY PCGG

By AMBROSIO PADILLA\*

The President and Officers of the Integrated Bar of the Philippines and fellow lawyers:

The theme of this IBP Congress reads: "The Integrated Bar — Its Role Today". I believe its immediate role is to help circulate copies and disseminate the contents of the new Constitution prepared by the 1986 Constitutional Commission, for the purpose of informing our people of its good and also *new* provisions.

As Vice President of the 1986 Constitutional Commission I dare say that the new Constitution is much better than the 1973 Constitution and it is more complete than the 1935 Constitution. It is a good Constitution that deserves the acceptance and ratification of our sovereign people.

## The special elections of February 7, 1986

The special (snap) election was decreed by former President, Marcos on February 7 for him to seek a new mandate from our people and he even shortened his six (6) year term from his 1981 election. But President Marcos did *not* resign from his position, and so there was *no* vacancy in the Office of the President. The Batasang Pambansa passed Batas Pambansa Blg. 883 confirming the February 7 special election. Petitions were filed with the Supreme Court questioning the legality of said Presidential election of February 7, because there was *no vacancy* in the Office of the President and petitioners expected Pres. Marcos would resign and vacate his position. I was one of those who appeared as *amicus curiae* in the Supreme Court and I submitted that the election for President and of Vice President is *political*, rather than judicial, and therefore the honorable Supreme Court should not prevent nor restrain the holding of such election. The decision of the Hon. Supreme Court upheld that view and allowed said special election as agreed by the Executive and the Legislative. Despite massive vote buying, violence and terrorism, electoral frauds in the February 7 election, Cory Aquino and Doy Laurel were *voted* by the majority of our people, but the Batasan Pambansa included in its canvass of electoral returns many dubious, irregular, altered or manufactured returns, and declared as winners Marcos and Tolentino. Thereafter, the historical political *miracle* happened in EDSA on February 22-25, 1986.

The EDSA political miracle toppled the well entrenched dictatorial regime of fourteen (14) years of martial misrule, a historical fact unprecedented in the history of Asia, nay of the World. The Aquino Government was installed by "people power" based on the rule of law, truth, justice, freedom, love, equality and peace (Preamble of the new Constitution). The Aquino government is not only supported by our sovereign people, but its *legitimacy* is upheld by our Supreme Court, and is recognized by our Asean neighbor countries and by the entire community of nations throughout the world.

In your first workshop, the topic is sequestration and presidential powers.

Address delivered extemporaneously by former Sen. Ambrosio Padilla at the National Convention of "the IBP Chapter Presidents Congress" at the IBP Building, Julia Vargas Avenue, Pasig, Metro Manila on October 25, 1986.

Going directly to the subject of sequestration, the Aquino government issued Proclamation No. 3, and Art. II thereof on the President, Vice President and the Cabinet, Sec. 1, par. (d) provides for the recovery of ill-gotten wealth.

"d) Recover *ill-gotten properties* amassed by the leaders and supporters of the previous regime and protect the interest of the people through orders of *sequestration or freezing* of assets or accounts."

President Aquino issued Executive Order No. 1, dated 28 February 1986, creating Presidential Commission on Good Government (PCGG).

Sec. 2 states that the Commission shall be charged with the *task* of assisting the President in regard to the following matters:

"(a) The *recovery* of all *ill-gotten wealth* accumulated by former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the *take-over or sequestration* of all business enterprises and entities *owned* or controlled by them, \* \* ."

Sec. 3 provides that the Commission shall have the power and authority:

- (a) to conduct investigation, \* \* ;
- (b) to sequester or place or cause to be placed under its control or possession any building or office wherein any *ill-gotten wealth* or properties may be found, and any records pertaining thereto in order to *prevent* their destruction, concealment or disappearance \* \* ;
- (c) to provisionally take over in the public interest or to *prevent* its disposal or dissipation \* \* .

Executive Order No. 1 was followed by Executive Order No. 2, dated 12 March 1986 and a pertinent portion thereof reads:

"(1) *Freeze* all assets and properties in the Philippines in which former President Marcos and/or his wife, Mrs. Imelda Romualdez Marcos, their close relatives, subordinates, business associates, dummies, agents, or nominees have any interest or participation,

"(2) Prohibit any person from *transferring*, conveying, encumbering or otherwise depleting or concealing such assets and properties \* \* ."

After Executive Orders Nos. 1 and 2, President Aquino issued Executive Order No. 14 dated 7 May 1986, one of its whereases states:

"The President shall give priority to measures to achieve the mandate of the people to *recover ill-gotten* properties amassed by the leaders and supporters of the previous regime and protect the interest of the people through orders of *sequestration or freezing* of assets or accounts, or reconvey such ill-gotten wealth, but with due respect to requirements of *fairness* and *due process*."

This executive Order No. 14 makes express mention of Republic Act No. 1379, the Anti-Graft law of 1955 during the time of President Ramon Magsaysay, when I was the Solicitor General.

Section 3 of Executive Order No. 14 reads:

"Civil suits for restitution, reparation of damages, or indemnification for consequential damages, *forfeiture* proceedings provided for under Rep. Act No. 1379 or any other civil action under the Civil Code or other existing laws, in connection with Executive Order No. 1 dated February 28, 1986 and Executive Order No. 2 dated March 12, 1986, may be filed *separately* from and proceed independently of any criminal proceedings and may be proved by a preponderance of evidence."

Section 1, R.A. no. 1379 provides for a presumption of "unlawfully acquired properties" or ill-gotten wealth of any public official, when they are manifestly out of proportion of his salary, his lawful income or income from lawfully acquired properties.

Section 2 provides for the filing of the necessary *petition* leading to hearing for the forfeiture of such unlawfully acquired properties. Section 12 provides for a penal offense to those who *transfer* or convey such property subject to forfeiture by the State.

Executive Order No. 14 on the powers of the PCGG to file and prosecute all cases investigated under Executive Orders Nos. 1 and 2 was followed by Executive Order No. 14-A, which mentions an *action* to be filed with the Sandiganbayan.

#### The new Constitution

Pertinent to this matter of unlawfully acquired properties or ill-gotten wealth and the power of sequestration or *freezing* of assets, the new Constitution provides that —

"The right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their *nominees* or *transferees*, shall not be barred by prescription, laches or estoppel." (Sec. 15, Art. XI on Accountability of Public Officers).

And with regard to the office of the PCGG the *Transitory Provisions*, Art. XVIII provides:

"Sec. 26. The authority to issue sequestration or *freeze orders* under Proclamation No. 3 dated March 25, 1986 in relation to the recovery of ill-gotten wealth shall remain operative for not more than *eighteen months* after the ratification of this Constitution. However, in the national interest, as certified by the President, the Congress may extend said period.

"A sequestration or *freeze order* shall be issued only upon showing of a *prima facie* case. The order and the list of the sequestered or frozen properties shall forthwith be registered with the proper court. For orders issued before the ratification of this Constitution, the corresponding judicial action or proceeding shall

be filed within *six months* from its ratification. For those issued after such ratification, the judicial action or proceeding shall be commenced within *six months* from the issuance thereof.

"The sequestration or *freeze order* is deemed automatically lifted if no judicial action or proceeding is commenced as herein provided."

The Presidential Commission on Good Government (PCGG) issued several orders of sequestration or freezing of assets.

Fellow lawyers, the sequestration or *freeze order* by the PCGG does not include "search and seizure orders. Under the 1935 and 1973 Constitutions, no warrant of *arrest* shall be issued except upon probable cause after the Judge has examined the complainant and the witnesses he may produce. So to issue a warrant of arrest is a *judicial* function after a criminal information has been filed. The 1973 Constitution erroneously inserted the clause "or such other responsible officer as may be authorized by law". The new Constitution has eliminated that clause in Sec. 3, Art. III on the Bill of Rights, because we have to adhere to the original and correct section 3 of the Bill of Rights as provided in the 1935 Constitution. The Arrest, Search and Seizure Order (ASSO), Presidential Commitment Order (PCO) and Preventive Detention Action (PDA), were issued by the deposed President Marcos or any *executive* officer authorized by him due to that bad inserted clause in the 1973 Constitution. So with regards to the authority of the PCGG under the Transitory Provisions under Proclamation No. 3, in addition to the recovery of ill-gotten wealth, the new Constitution provides:

"A sequestration or freeze order shall be issued only upon showing of a *prima facie* case." (Sec. 26, Art. XVIII)

The purpose of a sequestration or *freeze order* is to preserve or *conserve* the assets that are suspected with *prima facie* presumption as ill-gotten wealth which were stolen by President Marcos and his cronies. What is really proper to conserve or preserve are those assets, particularly *shares* of stock that are believed to be owned by Mr. Marcos, the members of his family, his cronies, business associates, etc. And so a *freeze order* is like a writ of *attachment* to place the property in *custodia legis* to prevent their transfer or conveyance to other parties, and that is why the PCGG has the power to *preserve* the assets or properties through sequestration or freeze order for forfeiture proceedings under R.A. No. 1379.

The problem that often arises is that the PCGG in issuing its sequestration or freeze orders, often include therein *general* search warrant, and we all know that a general search and seizure order, even when issued by the judiciary is unconstitutional, for the place to be searched and the things to be seized must be specified. The sequestration or freeze order of the PCGG does not include "warrant of *arrest*" nor search and *seizure* orders. It may avail of some remedies provided they are coursed through *judicial* proceedings.

The Executive Orders of Pres. Aquino impose upon the PCGG the duty to resort to *judicial* action in the proper court or judicial proceedings in the Sandiganbayan. The new Constitution provides that:

"the corresponding judicial *action* or proceeding shall be filed within six months from the issuance thereof or from its ratification" (Sec. 26)

and

"The sequestration or freeze order is deemed automatically lifted if no judicial action or proceeding is commenced as herein provided." (Sec. 26)

The PCGG has sequestered the assets and/or shares of stock when it has *prima facie* base (sic) to be ill-gotten wealth, but it has not filed the corresponding judicial action in court, to give the adverse party the opportunity to contest such order, not only *notice*, but also *hearing* in compliance with due process. The PCGG was created in March 1986 and has been issuing sequestration orders, but unfortunately *no* single action has been filed with the Sandiganbayan.

#### BASECO and COCOFED

In relation to the sequestration orders to the BASECO and the COCOFED, I was one of the *amicus curiae* who appeared before the Supreme Court and I argued that BASECO is now a *private* corporation but its predecessor NASCO was a *public* corporation. The conversion from a public to a private corporation was thru the manipulations of the Marcos regime.

With particular reference to the COCOFED, I recall that a bill was sponsored by Sen. Dominador Aytona for the development of the coconut industry, and the coco levy was increased from five centavos due to the Philippine Coconut Authority (PCA) to twenty or twenty-five centavos, for its initial capitalization of one hundred million pesos (P100 million). I opposed said bill in the Senate, not because I am against a law that would promote the development and promotion of the coconut industry, which is one of the two main sources of our export and dollar earnings, but because said bill would raise *public* funds thru levies and/or taxes to constitute the initial capitalization of a *private* corporation. Under the 1935 and even the 1973 Constitution, not even the Congress can enact a *special* law for the incorporation of a *private* corporation, as all private corporations must be organized under a *general* law. Public corporations may be created by law, but I submitted then that if public funds are levied and collected they are all *government* funds.

With regard to other sequestration orders affecting private enterprises, they refer only to *shares* of stocks in the names of few stockholders, who are suspected by the PCGG to be nominees or transferees of the Marcos regime, and therefore are "ill-gotten wealth". The public are sometimes puzzled - why in sequestration orders involving only *shares* of stock, some of the officers in charge (OIC) and their task forces designated by the PCGG, want to *manage* and even *control* the operations of on-going businesses, like the Allied Bank, where the "fiscal committee" of the PCGG can attend meetings of the Board and its executive committee and its OICs demand reports on the *daily* activities of the bank, as well as its daily transactions. They *interfere* in the operation, in the management and operation of private business. I believe that such policy is not correct, because they are private enterprises owned by private individuals. The PCGG can not *take over* the business, for the sequestration order only refers to *shares* of stock which should be *preserved* leading to a judicial action and only after due *hearing* and *trial*

can their *forfeiture* be adjudged by the court. But the OICs and their task forces, would be acting beyond their powers of *preserving* sequestered assets, when they interfere and even want to control the management and *operation* of commercial business by private enterprises.

In my appearance as *amicus curiae*, I tried to clarify the Constitution (sic) on the right of the State to recover ill-gotten wealth (Sec. 15, Art. XI). That is not only mentioned in Proclamation No. 3 (the Freedom Constitution), and in Executive Orders Nos. 1 and 2 and Executive Order No. 14 of the President, but it is also recognized in the Transitory Provisions of the new Constitution (Sec. 26, Art. XVIII).

During the plenary sessions of the Constitutional Commission I suggested that the transitory provision on the PCGG should state that judicial *action* be filed within *six months* after the issuance of the sequestration order. Some Commissioners made a distinction between sequestration orders issued *before* the ratification of the Constitution and those that will be issued *after* its ratification on February 2, 1987. I replied that the transitory provisions have reference to the transition from the Freedom Constitution to the new Constitution. The actions and powers of the PCGG do not have material relevance to the ratification of the Constitution. However, my proposal was amended to the effect that sequestration orders issued *before* the ratification of the Constitution (the Government) would still have six months *after* said ratification to file the required civil action. Some sequestration orders have been issued on April or May 1986, and judicial action may still be filed within six months after February 2, 1987. In my opinion that period is too long. Because in our earnest policy to recover ill-gotten wealth as plunder of our national wealth, the function of the PCGG may still be extended by law. We have to restore political normalcy to encourage more investments, both domestic and foreign and continue our program of productivity based on sound agricultural development and promote industrialization and full employment (Sec. 1, Art. XII).

My friends, I would like to say that one of the state policies, which I suggested and was adopted reads:

"Sec. 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments." (Art. II)

I have warned my fellow Commissioners against so many monetary burdens and financial obligations on the State, like highest budgetary priority for Education (Art. XIV) with free elementary and secondary public education (Sec. 2(2)) and also to Social Justice (Art. XIII) when the State, may not have sufficient resources to undertake such laudable projects. The private sector not the Government, can increase productivity and create additional sources of wealth.

The provision in the fundamental principles which I suggested and was also approved reads:

"The maintenance of peace and order, the protection of life, liberty and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy." (Sec. 5, Art. II)

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## 1.0 INTRODUCTION

Countertrade, according to estimates, now accounts for between 20 to 30 percent of world trade and by some projections could account for 50 percent of world trade by the year 2000.<sup>1</sup> OECD studies in the mid-1970s had estimated that 40 percent of developing country trade (North-South trade) was covered by countertrade arrangements and this figure is believed to be higher for the present.<sup>2</sup> Authorities are in dispute as to the actual figures but most are in agreement that the trend towards the use of countertrade is growing and the National Foreign Trade Council of New York as of 1984 listed 88 countries as requiring countertrade in some form while in 1972, only 15 countries were listed as doing so.<sup>3</sup>

Various factors have contributed to the resurgence of barter in the modern economy in the form of countertrade and the main reason cited is the hard currency shortage faced by developing countries and the world in general as triggered by the two oil shocks of the 1970s.<sup>4</sup> In the 1980s, a new factor may serve to promote countertrade and at the same time subject it to more scrutiny, i.e., the rising tide of protectionism in the developed world.<sup>5</sup> GATT studies predict that the growth of international trade will drop from 9 percent last year to only 2 or 3 percent this year, citing among other reasons, increased "voluntary restraints, quotas and other non-tariff barriers being erected all over the world."<sup>6</sup> An example of the countertrade effect of protectionism is the U.S. Congress' targeting of textile imports into the United States which has led Thailand, an affected country, to negotiate with the Soviet Union on a *barter* basis for its garment exports.<sup>7</sup>

Countertrade, thus has broad global repercussions, both economic and political. It is the object of this memorandum to look briefly at the various types of countertrade arrangements and to examine them in relation to GATT's legal framework.

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<sup>1</sup>McVey, *Countertrade: Commercial Practices, Legal Issues and Policy Dilemmas*, 16 L. & Policy Int'l Business 1, 2 (1984).

<sup>2</sup>Walsh, *Countertrade: Not Just for East-West Anymore*, 17 J.W. Trade L. 3 (1983).

<sup>3</sup>Williams, *Not for the Faint or Weary: Legal Aspects of Countertrade*, in Symp. Priv. invest. Abroad 265, 273 (1984).

<sup>4</sup>Zarin, *Countertrade and the Law*, 18 Geo. Wash. J. Int'l Law & Econ. 235, 237-238 (1984).

<sup>5</sup>Note, *Countertrade and Export Trading Companies: Has the United States Joined the Successful Trading Game of Japan and Others?*, 11 Syr. J. Int'l L. & Com. 417, 421 (1984).

<sup>6</sup>Wall Street Journal, Nov. 18, 1985, at 30, col. 1

<sup>7</sup>*Id.*