Participatory Dispute Prevention: Managing Risks and Partnering for Marawi's Big Rise

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I. INTRODUCTION

On 23 May 2017, the Maute Group, Abu Sayyaf, and other Daesh-inspired armed terrorists and lawless elements attempted to perpetuate a rebellion with the avowed intention of taking over portions of the Islamic City of Marawi in Mindanao, Philippines for the purpose of removing its allegiance from the Government, Constitution, laws, and duly constituted authorities of the Republic of the Philippines.[1] Due to the foregoing acts of rebellion,[2] President Rodrigo Roa Duterte promulgated, on the same day, Proclamation No. 216, placing Mindanao in a state of Martial Law, and suspending the privilege of the writ of *habeas corpus*.[3] As a result of the military operations by the Philippine Government to liberate Marawi City from armed terrorists and lawless elements, which spanned a five-month period covering 23 May 2017 to 23 October 2017, significant damage was caused to public and private infrastructure, government facilities, and public utilities, which the rebels exploited, and in which they took refuge in. The scale and magnitude of the destruction require a comprehensive effort to rehabilitate and rebuild the damage caused to and shepherd the resilient recovery of Marawi City and other affected communities.

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1. *See* Lagman v. Medialdea, 829 SCRA 1, 127 (2017).

2. *See* Office of the President, Declaring a State of Martial Law and Suspending the Privilege of the Writ of Habeas Corpus in the Whole of Mindanao, Proclamation No. 216, Series of 2017, whereas cl. para. 3 (May 23, 2017). *See also* An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 134 (1930) (as amended).

3. Proclamation No. 216, s. 2017, §§ 1-2.

A. Question and Issues

This Article endeavors to consider a dispute prevention paradigm consisting of policies, frameworks, and mechanisms relative to contracts and projects that will be undertaken by the Philippine Government within the context of the comprehensive rehabilitation and recovery efforts for Marawi City and other affected communities through Task Force Bangon Marawi (Rise Marawi) (TFBM).[4] This Article focuses on partnering as a dispute prevention paradigm, addresses the misplaced judicial distrust on alternative dispute resolution mechanisms, and recommends policies and frameworks for project resilience through partnering. This Article considers dispute prevention as an important foundational consideration and support mechanism that provides a secure working environment allowing contracts and projects to move forward appropriately, without which delays would be prevalent and efficient project execution not realized. This is particularly crucial for rehabilitation and recovery initiatives considering the Philippine Government's commitment towards a comprehensive and holistic rebuilding not only of the conflict-affected areas physically, but, more importantly, of the dreams and aspirations of individuals, families, and communities.

This Article endeavors to affirm the utility and efficacy of partnering as a tool to support rehabilitation, recovery, and reconstruction projects, and provide foundational resilience that would sustain such projects, which, in the greater scheme of humanitarian affairs, are intended to rebuild lives and communities through the principle of Building Back Better.

This Article looks into and proposes to build on the documented effectiveness of partnering as a vehicle for dispute prevention, as evinced by its far-reaching impact and cost-effective role in Boston's Central

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4. Office of the President, Creating an Inter-Agency Task Force for the Recovery, Reconstruction, and Rehabilitation of the City of Marawi and Other Affected Localities, Administrative Order No. 3, Series of 2017, whereas cl. para. 2 (June 28, 2017) & Office of the President, Amending Administrative Order No. 3 (s. 2017), Creating an Inter-Agency Task Force for the Recovery, Reconstruction, and Rehabilitation of the City of Marawi and Other Affected Localities, Administrative Order No. 09, Series of 2017 (Oct. 27, 2017).

Artery/Tunnel Project (Big Dig),[5] and without which, the megaproject would not have been manageable considering its scope and complexity.[6]

Within the context of this Article, the term "dispute prevention" is understood to mean the process whereby concerns and conflicts are resolved prior to their ripening into or the filing or institution of formal disputes and/or complaints before courts and other adjudicatory bodies. This is in contrast to the term "dispute resolution," which is taken in this Article to mean the process whereby formal disputes and/or complaints are taken cognizance of, managed, and resolved under a given set of rules and procedures.

Although dispute prevention is likewise governed by rules and procedures, this stage is characterized by internal consultative processes that highlight the indispensable participation of parties towards arriving at a solution that avoids external processes that would most likely entail greater costs and significant project delays. As will be demonstrated by the Big Dig experience, partnering as a form of dispute prevention was ultimately voluntary, yet widespread enough, such that parties preferred to or elected to utilize partnering rather than litigation.[7] Thus, dispute prevention through partnering as part of the greater risk management continuum should be incorporated into project designs to secure and ensure its success, sustainability, and resilience. Accordingly, a participatory dispute prevention paradigm is particularly critical in the recovery, rehabilitation, and rebuilding of conflict-affected communities.

B. Methodology and Scope

Qualitative methodology and applied research shall be utilized to develop this Article, particularly a survey of laws and jurisprudence involving contractual agreements and dispute resolution, as well as a review of best practices from the Big Dig and case studies of community-based dispute resolution systems in several countries. A comprehensive examination of Philippine

5. VIRGINIA A. GREIMAN, MEGA PROJECT MANAGEMENT: LESSONS ON RISK AND PROJECT MANAGEMENT FROM THE BIG DIG 102 & 363 (2013) [hereinafter GREIMAN, MEGA PROJECT MANAGEMENT].

6. Virginia Greiman, The Big Dig: Learning from a Mega Project, *available at* https://appel.nasa.gov/2010/07/15/the-big-dig-learning-from-a-mega-project (last accessed July 25, 2019) [hereinafter Greiman, The Big Dig].

7. GREIMAN, MEGA PROJECT MANAGEMENT, *supra* note 5, at 362.

jurisprudence will be employed to establish a cohesive understanding of controlling doctrines as they relate to commercial law and dispute resolution. Foreign jurisprudence shall likewise be reviewed to achieve a holistic understanding of persuasive case law pertinent to and bearing upon this Article. The writings of legal scholars, commentators, and practitioners will be considered, as they provide crucial insights into the legal issues under review. A discussion on and an application of risk management principles and best practices shall be undertaken to frame and contextualize dispute prevention as a critical risk management tool that would breed project resilience.

C. Background and Structure

"The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."[8] Beckoning towards the development of the study of law, Justice Oliver Wendell Holmes, Jr. called for exactitude in legal prophecies by reason that the primordial object of this Article of law is precisely "the prediction of the incidence of the public force through the instrumentality of the courts."[9] These legal prophecies, by no mistake "oracles of the law"[10] as aptly considered by Justice Holmes, take the form of jurisprudential pronouncements, statutory law, and seminal treatises that mantle civilizations both ancient and contemporary.[11]

This Article, therefore, draws from the perspective that the State is responsible for the welfare of its people; that its functions are not limited to a purely governmental or sovereign sphere; and that, taken within the context of rebuilding conflict-affected communities, proprietary functions are also germane to its nature as a juridical entity. Accordingly, a State, through its Government, may contract out to private entities the erection of vital projects that are essential for the maintenance of public order and the return to normalcy of affected areas and communities. In this regard, the Civil Code of the Philippines plainly and straightforwardly defines a contract as "a meeting

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8. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

9. *Id.*

10. *Id.*

11. *Id.*

of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service."[12] At its core, in order to bring about the efficacy of a contractual relationship, the consent of the parties, the object of the agreement, and the cause of the agreement must necessarily concur.[13] As a juridical person, the State "may acquire and possess property of all kinds, as well as incur obligations and bring civil or criminal actions, in conformity with the laws and regulations of their organization."[14]

To emphasize the need for a resilient dispute prevention paradigm that would underwrite, support, and sustain the rebuilding of conflict-affected communities, it is important to scrutinize ruling case law to understand how disputes are treated in the Philippines. The legality of erecting the Philippines' International Passenger Terminal III (IPT3 Project) has been the source of robust legal debate in *Agan v. Philippine International Air Terminals Co., Inc.*,[15] wherein the Supreme Court nullified the 1997 Concession Agreement, the Amended and Restated Concession Agreement (ARCA), and the Supplemental Agreements (PIATCO Contracts) entered into by the Philippine Government and Philippine International Air Terminals Co., Inc. (PIATCO).[16] The doctrine in *PIATCO* will be examined against global best practices in dispute settlement, specifically those employed in the Big Dig, as well as lessons learned from community-based dispute resolution systems all

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12. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 1305 (1950).

13. *Id.* art. 1318.

14. *Id.* art. 46.

15. Agan, Jr. v. Philippine International Air Terminals Co., Inc., 402 SCRA 612 (2003).

16. *Id.* at 678-79. The five agreements executed by the Philippine Government and PIATCO are the following:

    (1) Concession Agreement dated July 12, 1997;
    (2) ARCA dated November 26, 1999;
    (3) First Supplement to the ARCA dated August 27, 1999;
    (4) Second Supplement to the ARCA dated September 4, 2000; and
    (5) Third Supplement to the ARCA dated June 22, 2001.

    Id. at 631.

over the world. *PIATCO* is viewed in terms of its seeming hostility towards extrajudicial dispute settlement and should be revisited. The principle of arbitral autonomy or the separability doctrine shall be pervasive in this Article as it bears a direct impact on how the Philippine jurisdiction views extrajudicial or out-of-court dispute settlement proceedings as a means either to support or to constrain projects. Within this context, the concept of dispute prevention is offered to internally resolve concerns and conflicts prior to becoming formal disputes that require external intervention.

Arbitral autonomy shall take on a significant role considering that it is through such a principle that this Article shall expound on the legal tension that exists between the judicial finding that the PIATCO Contracts were null and void, on the one hand, and the implication of affirming the party-ordained dispute resolution modality, on the other hand. The tension is magnified by a comparison of domestic law with treaty obligations. As regards treaties, the Philippines is a signatory to the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention);[17] the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention), which established International Centre for Settlement of Investment Disputes (ICSID);[18] and the Bilateral Investment Treaty (BIT) with Germany.[19] As regards domestic law, the New

17. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]. *See also* Resolution Concurring in the Ratification by the President of the Philippines of the United Nations Convention on the Recognition and Enforcement of Arbitral Awards of 1958, S. Res. No. 71, 5th Cong., 4th Sess. (1965).

18. Convention on the settlement of investment disputes between States and nationals of other States, ch. 1, § 1, art. 1 (1), *opened for signature* March 18, 1965, 575 U.N.T.S. 159 [hereinafter Washington Convention].

19. Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, Phil.-Ger., Apr. 18, 1997. Notably, the Philippines is a signatory to 37 Bilateral Investment Treaties (BITs), 32 of which are in force; 18 Treaties with Investment Provisions (TIPs), although one has been terminated and another is still ongoing negotiation; and 22 Investment Related Instruments (IRIs). United Nations

York Convention shall be applied "to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal"[20] and "to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[21]

In terms of structure, after providing the research question and issues to be discussed, the methodology and scope of this Article, and the background and framework of the discussion in Part I, this Article will proceed to discuss its premises in Part II, with a particular focus on disaster law and policy in the Philippines, as well as their alignment and compliance with existing international frameworks on disaster risk reduction. The laws on contracts and dispute resolution shall be reviewed to contextualize the critical utility of participatory dispute prevention through partnering in building back better communities after calamities and large-scale incidents as part of the greater risk management continuum.

Part III will then consider the consequences of the siege of Marawi City and the intended comprehensive rehabilitation and recovery of conflict-affected communities.

Part IV shall examine the dispute resolution policies, frameworks, and mechanisms employed in the IPT3 Project, the Big Dig, and community-based dispute resolution programs to consider underlying policies and situational considerations, adopt best practices, and institutionalize lessons learned, as well as recommend ways ahead for Marawi's Big Rise through a resilient dispute prevention paradigm. The legal implications of arbitral

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Conference on Trade and Development, Philippines, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/166/philippines?type=bits (last accessed July 25, 2019).

20. New York Convention, *supra* note 17, art. I, ¶ 1.

21. *Id.* The provisions of the New York Convention and the Resolution of the Philippine Senate notwithstanding, "[r]ecognition and enforcement of the award may be refused by a country" if the competent authority in the country where the recognition and enforcement are sought finds that: (a) the subject matter of the difference is not arbitrable under the law of that country; and (b) the recognition or enforcement of the award would be contrary to the public policy of that country. *Id.* art. V, ¶ 2, (a)-(b).

autonomy shall be scrutinized, particularly in light of *PIATCO*, which portrays apparent distrust and hostility towards extrajudicial dispute settlement.

In Part V, this Article shall attempt to arrive at and recommend ways ahead towards the institutionalization of a participatory dispute prevention paradigm through partnering within the context of post-conflict rehabilitation and recovery that provides a sustainable and resilient legal framework that supports Marawi's Big Rise.

To conclude, Part VI shall summarize the discussions involving Marawi's resilient Big Rise through participatory dispute prevention.

II. Premises of the Inquiry

Rehabilitation constitutes measures that ensure the ability of affected communities and areas to restore their normalcy and normal level of functioning by rebuilding livelihood and damaged infrastructures and increasing the communities' organizational capacity.[22] Similarly, post-conflict or disaster recovery constitutes the restoration and improvement of facilities, livelihood, and living conditions of disaster-affected communities, including efforts to reduce and/or avoid future risks, in accordance with the principle of building-better-forward.[23] In this regard, the Philippine Government's comprehensive rehabilitation and recovery efforts for Marawi City and other affected communities through TFBM should consider and incorporate proactive and participatory dispute prevention policies, frameworks, and mechanisms that would serve as quintessential foundational considerations and support systems that would foster a secure working environment allowing contracts and projects to move forward appropriately — and without which delays would be prevalent and efficient project execution not realized, resulting in overall mission failure.

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22. An Act Strengthening The Philippine Disaster Risk Reduction And Management System, Providing For The National Disaster Risk Reduction And Management Framework And Institutionalizing The National Disaster Risk Reduction And Management Plan, Appropriating Funds Therefor And For Other Purposes [Philippine Disaster Risk Reduction and Management Act of 2010], Republic Act No. 10121, § 3 (ee) (2010).

23. *Id.* § 3 (aa).

A. Philippine Disaster Law and Policy

After decades of operating under a reactive disaster management framework, the Philippine Government shifted to a proactive disaster management paradigm through the enactment on 27 May 2010 of Republic Act No. 10121, otherwise known as the Philippine Disaster Risk Reduction and Management Act. Considering that no single government agency would be able to address the country's risk profile,[24] the disaster management efforts of the Philippine Government is shepherded by the National Disaster Risk Reduction and Management Council (NDRRMC), which is composed of at least 44 national government agencies, leagues of local government units, civil society organizations, and private sector organizations.[25] The Office of Civil Defense (OCD) serves as the executive arm and secretariat of the NDRRMC, and administers a comprehensive national civil defense and disaster risk reduction and management program for the protection and preservation of life and property in times of war and other national emergencies, hazards, and disasters

24. In terms of risk profile, the Philippines faces major threats from natural hazards owing to its geographic location along the Pacific Ring of Fire where the Philippine Sea and Eurasian Tectonic Plates meet and which makes it prone to earthquakes, tsunamis, and volcanic eruptions. The Philippines is likewise located along the Pacific Typhoon Belt, which makes it extremely vulnerable to tropical cyclones. In addition to natural hazards, human-induced incidents — such as crises, conflict, rebellion, and terrorism — threaten individuals and communities. National Disaster Risk Reduction and Management Council, National Disaster Response Plan: Consequence Management For Terrorism-Related Incidents at 3-4, *available at* http://www.ndrrmc.gov.ph/attachments/article/3031/NDRP_Consequence_Management_for_Terrorism_related_Incidents.pdf (last accessed July 25, 2019) [hereinafter NDRRMC, NDRP for Terrorism-Related Incidents].

25. Philippine Disaster Risk Reduction and Management Act of 2010, §§ 4-7. The NDRRMC is chaired by the Secretary of National Defense and has four (4) vice-chairs that correspond to the pillars or thematic areas under the Sendai Framework for Disaster Risk Reduction, i.e., the Secretary of Science and Technology for Disaster Prevention and Mitigation, the Secretary of the Interior and Local Government for Disaster Preparedness, the Secretary of Social Welfare and Development for Disaster Response, and the Secretary for Socio-Economic Planning for Disaster Rehabilitation and Recovery. *Id.* § 5, para. 2.

of equally grave character.[26] The OCD manages the mobilization of assets and resources in preparation for and in response to emergencies, hazards, and disasters.[27]

The Philippine Disaster Risk Reduction and Management Act mandates the OCD to lead and shepherd the continuous development of strategic and systematic approaches to reduce vulnerabilities and risks to hazards, as well as manage the consequences of disasters.[28] Moreover, the OCD provides leadership in the development and implementation of strategic and systematic approaches for disaster management[29] consistent with the Sendai Framework for Disaster Risk Reduction (SFDRR).[30] The National Disaster Risk Reduction and Management Framework (NDRRMF) serves as the principal guide to achieve the vision of safer, adaptive, and resilient Filipino communities towards sustainable development.[31] Prior to the shift to proactive disaster management, the four thematic areas of prevention and mitigation,[32]

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26. *See* Philippine Disaster Risk Reduction and Management Act of 2010, §§ 8-9.

27. *Id.* § 9.

28. *Id.*

29. *Id.* §§ 8-9.

30. Briefer on the Sendai Framework for Disaster Risk Reduction, *available at* http://ndrrmc.gov.ph/images/NDRRMC/Sendai_Framework_for_DRR_2015_-_2030.jpg (last accessed July 25, 2019).

31. National Disaster Risk Reduction And Management Council, National Disaster Risk Reduction and Management Plan 2011-2028 at *2, *available at* http://www.ndrrmc.gov.ph/attachments/article/41/NDRRM_Plan_2011-2028.pdf (last accessed July 25, 2019) [hereinafter NDRRMC, NDRRMP].

32. *Id. Disaster Prevention* is defined as

> the outright avoidance of adverse impacts of hazards and related disasters. It expresses the concept and intention to completely avoid potential adverse impacts through action taken in advance such as construction of dams or embankments that eliminate flood risks, land-use regulations that do not permit any settlement in high-risk zones, and seismic engineering designs that ensure the survival and function of a critical building in any likely earthquake.

preparedness,[33] response,[34] and rehabilitation and recovery[35] were given equal importance. However, taking into account the various disasters that have occurred in the Philippines, prioritizing prevention and mitigation is more critical in terms of utilizing resources, optimizing capacities, and reducing costs.

Further, the Philippines subscribes to and applies the Build Back Better principle, where communities are rebuilt through a resilient process which would ideally reduce future risks, as well as requirements or needs, in terms of rehabilitating communities as they are supposed to be rebuilt much better than

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Philippine Disaster Risk Reduction and Management Act of 2010, § 3(k).

Disaster Mitigation is defined as the "lessening or limitation of the adverse impacts of hazards and related disasters. Mitigation measures encompass engineering techniques and hazard-resistant construction as well as improved environmental policies and public awareness." *Id.* § 3 (i).

33. *Disaster Preparedness* is defined as

> the knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to, and recover from, the Impacts of likely, imminent or current hazard events or conditions. Preparedness action is carried out within the context of disaster risk reduction and management and aims to build the capacities needed to efficiently manage all types of emergencies and achieve orderly transitions from response to sustained recovery. Preparedness is based on a sound analysis of disaster risk and good linkages with early warning systems, and includes such activities as contingency planning, stockpiling of equipment and supplies, the development of arrangements for coordination, evacuation and public information, and associated training and field exercises.

Id. § 3 (j).

34. *Disaster Response* is defined as "the provision of emergency services and public assistance during or immediately after a disaster in order to save lives, reduce health impacts, ensure public safety and meet the basic subsistence needs of the people affected." *Id.* § 3 (l).

35. *Post-Disaster Recovery* is defined as "the restoration and improvement where appropriate, of facilities, livelihood and living conditions. of disaster-affected communities, including efforts to reduce disaster risk factors, in accordance with the principles of '[B]uild [B]ack [B]etter.'" *Id.* § 3 (aa).

they have been previously built.[36] In this regard, *Resilience* is understood as "the ability of a system, community, or society exposed to hazards to resist, absorb, accommodate [to,] and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions."[37] Resilient rebuilding aims to ensure that communities will not be easily affected by future crises, incidents, emergencies, hazards, and calamities, whether they be natural or human-induced. Complementing resilience is *Sustainability* or *Sustainable Development*, which entails development that meets the needs of the present without compromising the ability of future generations to meet their own needs and denotes the harmonious integration of a sound and viable economy, responsible governance, social cohesion and harmony, and ecological integrity to ensure that human development now and through future generations is a life-enhancing process.[38]

The various programs, projects, and activities under the NDRRMF and the National Disaster Risk Reduction and Management Plan are dovetailed with contingency and continuity measures at all levels of governance, including interoperability with private sector stakeholders as part of the greater whole-of-nation and whole-of-society effort towards disaster resilience. In particular, the National Disaster Response Plan (NDRP) for Consequence Management For Terrorism-Related Incidents,[39] involves a thoroughly coordinative methodology and considers the worst-case scenario for various human-induced incidents involving crisis, conflict, rebellion, and/or

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36. *See* Philippine Disaster Risk Reduction and Management Act of 2010, § 3 (aa).

37. Philippine Disaster Risk Reduction and Management Act of 2010, § 3 (ff).

38. *Id.* § 3 (mm). Sustainable Development embraces two

key concepts: "(1) the concept of 'needs', in particular, the essential needs of the world's poor, to which overriding priority should be given; and (2) the idea of limitations imposed by the state of technology and social organizations on the environment's ability to meet present and future needs." *Id.*

39. NDRRMC, NDRP for Terrorism-Related Incidents, *supra* note 24, at 6. The NDRP for Consequence Management for Terrorism-Related Incidents is one of three NDRPs, the others being the NDRP for Earthquakes and Tsunamis and the NDRP for Hydro-Meteorological Hazards. *Id.* at 23.

terrorism[40] that may trigger mass casualties, massive destruction of property and livelihood, and disruption of normal life saving-support systems.

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40. An Act to Secure the State and Protect Our People from Terrorism [Human Security Act of 2007], Republic Act No. 9372, § 3 (2007).

> Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:
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> (a) Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
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> (b) Article 134 (Rebellion or Insurrection);
>
> (c) Article 134-a (Coup d'Etat), including acts committed by private persons;
>
> (d) Article 248 (Murder);
>
> (e) Article 267 (Kidnapping and Serious Illegal Detention);
>
> (f) Article 324 (Crimes Involving Destruction), or under
>
> (1) Presidential Decree No. 1613 (The Law on Arson);
>
> (2) Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
>
> (3) Republic Act No. 5207, (Atomic Energy Regulatory and Liability Act of 1968);
>
> (4) Republic Act No. 6235 (Anti-Hijacking Law);
>
> (5) Presidential Decree No. 532 (Anti-Piracy and Anti-Highway Robbery Law of 1974); and
>
> (6) Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)
>
> thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.
>
> *Id.*

See also Human Security Act of 2007, §§ 4, 5, & 6 & An Act Defining the Crime of Financing of Terrorism, Providing Penalties Therefor and for Other Purposes

Consequence management under the NDRP employs two approaches: (1) augmenting the operations of affected local government units; and (2) assuming the functions of local government units in providing response assistance to affected communities — both of which take into account the capacity and capability of affected local government units, to determine the extent of assistance that will be deployed.[41] The NDRRMC acts in support of local government units, which shall have the primary responsibility as first responders.[42] Response systems and protocols are activated based on available information and include the utilization of the response cluster coordination system, emergency operations center, and/or the incident command system.[43] The tiered response protocols adhere to the coping capacity of responders and promote accountability.[44] Thus, optimal coordination and appropriate response interventions are realized, resulting in the proper allocation, use, and management of assets and resources.

B. Philippine Law on Contracts

As it properly should, contract law ought to be viewed in light of the relationship between or among the contracting parties who wish to embody their intentions in accordance with the applicable law in order that their covenants are recognized and protected. Commercial practice could not have developed without reliance on the efficacy and predictability of contractual commitments grounded on statutory law and judicial pronouncements. In the Philippines, a contract is the stipulated law between the contracting parties.[45] In no uncertain terms, the Civil Code of the Philippines defines a contract to be a "meeting of minds between two persons whereby one binds himself, with

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[The Terrorism Financing Prevention and Suppression Act of 2012], Republic Act No. 10168 §§ 3 (j); 4; 5; 6; & 7 (2012).

41. NDRRMC, NDRP for Terrorism-Related Incidents, *supra* note 24, at 6.

42. *Id.* at 7.

43. *Id.*

44. *Id.*

45. CIVIL CODE, art. 1159.

respect to the other, to give something or to render some service."[46] On the other hand, the Restatement (Second) of Contracts defines a contract as "a promise ... for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[47]

By its nature and character, contracts are imbued with the attributes of autonomy, mutuality, and relativity. With respect to the autonomous nature of contracts, parties may "establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy."[48] As regards mutuality, "the contract must bind both contracting parties; its validity or compliance cannot be left to the will of one of them."[49] With regard to relativity, "[c]ontracts take effect only between the parties, their assigns and heirs, except in case where the rights and obligations arising from the contract are not transmissible by their nature, or by stipulation[,] or by provision of law."[50] Consensual contracts, as such, are perfected by mere concurrence of consent by the parties. Thus, from the moment of concurrence of consent, "parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage[,] and law."[51] The Civil Code further provides that no contract enters into legal existence unless the consent of the contracting parties, object certain which is the subject matter of the contract, and cause of the obligation which is established, should concur.[52]

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46. *Id.* art. 1305.

47. Restatement (Second) of Contracts, § 1 (Am. Law. Inst. 1981).

48. CIVIL CODE, art. 1306.

49. *Id.* art. 1308.

50. *Id.* art. 1311.

51. *Id.* art. 1315. Consensual contracts should be distinguished from real contracts, wherein delivery of the object of the contract is a condition precedent to the perfection of the contract, as provided for under Article 1316 of the Civil Code. *Id.* art. 1316.

52. *Id.* art. 1318. However, according to the Civil Code, the following contractual agreements have never been born in the eyes of the law as they are void from the beginning:

Prescinding from the principles of contract law, a government contract is considered to be a public contract

> entered into by a public officer acting for and on behalf of the Government within the scope of his authority and in his official capacity, in which the people are interested, the subject matter of which is of public concern and affects private rights only insofar as the law confers such rights when its provisions are carried out by the officer to who, it is confided to perform.[53]

In this respect, the State or Government, which is considered a juridical person in legal fiction, may thus enter into valid and binding contracts with private entities, to wit —

> It is axiomatic that the Philippine Government is endowed with a juridical personality that invests it with the authority to enter into contracts. Being a sovereign political entity, the Republic of the Philippines is clothed with all of the privileges and prerogatives attendant and appropriate to the just exercise of its powers. As a government, it is capable of realizing the ends for which it was created, by all the means necessary for their attainment. Being a body politic and corporate and as an incident of and necessarily implied

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> (1) [t]hose whose cause, object[,] or purpose is contrary to law, morals, good customs, public order[,] or public policy;
> (2) [t]hose which are absolutely simulated or fictitious;
> (3) [t]hose whose cause or object did not exist at the time of the transaction;
> (4) [t]hose whose object is outside the commerce of men;
> (5) [t]hose which contemplate an impossible service;
> (6) [t]hose where the intention of the parties relative to the principal object of the contract cannot be ascertained; [and]
> (7) [t]hose expressly prohibited or declared void by law.

CIVIL CODE, art. 1409.

By reason of the fact that these contracts are void *ab initio*, they can neither be ratified nor can the right to setup the defense of illegality be waived. *Id*.

53. BARTOLOME C. FERNANDEZ, A TREATISE ON GOVERNMENT CONTRACTS UNDER PHILIPPINE LAW 5 (2001) (citing People v. Palmer, 14 Misc. 41, 45 (1895) (U.S.)).

from its constitutional capacity to contract and to be contracted with and, having thus entered into a contract, to be bound thereby.[54]

It is well established that "contracts or conveyances may be executed for and in behalf of the Government or of any of its branches, subdivisions, agencies, or instrumentalities, including government-owned or [-]controlled corporations, whenever demanded by the exigency or exigencies of the service and as long as the same are not prohibited by law."[55] In this connection, ruling case law in the Philippines holds that, as a general principle, the State is immune from suits.[56] Nonetheless, if the State consents, then it may be the subject of a suit.[57] "There is express consent when a law, either special or general, so provides. On the other hand, there is implied consent when the [S]tate 'enters into a contract [in its proprietary or private capacity, or when]

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54. *Id.* at 3.

55. *Id.* (citing Office of the President, Instituting the "Administrative Code of 1987", Executive Order No. 292, bk. I, ch. 12, § 47 (1987)). Further, the charters of government-owned and government-controlled corporations include in their enumeration of powers the authority to contract and to be contracted with. Moreover, each local government unit, as a corporate body, is empowered to enter into contracts. FERNANDEZ, *supra* note 53, at 3. (citing An Act Providing for a Local Government Code of 1991 [Local Government Code of 1991], Republic Act No. 7160, § 22 (1991)). Accordingly, a government officer who contracts on behalf the Government "functions as agent of the Philippine Government for the purpose of making the contract." FERNANDEZ, *supra* note 53, at 8. There arises then "a principal-agent relationship between the Government, on the one hand, and the contracting official, on the other." *Id.* The contracting power of the agent exists "only because and by virtue of a law, or by authority of a law" creating principal-agent relationship and conferring upon the agent the actual authority to enter into contracts on behalf of the Government. The agent "may make only such contracts as he is so authorized to make." *Id.* Flowing from this premise is the principle that "the Government is bound only to the extent of the power it has actually given its officer-agents." *Id.* Pursuant, therefore, to a well-established principle in agency, "the acts of such agents in entering into agreements or contract beyond the scope of their actual authority do not bind or obligate the Government." *Id.* at 8-9.

56. Department of Health v. Phil. Pharmawealth, Inc., 691 SCRA 421, 433 (2013).

57. *Id.* (citing United States of America v. Guinto, 182 SCRA 644, 654 (1990)).

it ... commences litigation.'"[58] However, when the State enters into a contract in its sovereign or governmental capacity, no such waiver of immunity may be implied as such waivers are construed *in strictissimi juris* considering that it is in derogation of sovereignty.[59]

In terms of international commerce, Republic Act No. 7042, otherwise known as the Foreign Investments Act, as amended by Republic Act No. 8179,[60] liberalized the entry of foreign investments into the Philippines. Foreign companies are generally allowed to conduct business in the country subject to specific restrictions under the Foreign Investment Negative List, i.e., nationalized or partly-nationalized industries, as mandated by the Philippine Constitution and statutory laws.[61] In all cases, Article III, Section 9 of the Philippine Constitution provides that "[p]rivate property shall not be taken for public use without just compensation."[62]

C. Dispute Resolution in the Philippines

In the Philippines, there are three prevailing statutory enactments with regard to arbitration: Republic Act No. 9285[63] or the Alternative Dispute Resolution Law (ADR Law) governing international commercial arbitration, Republic

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58. *Department of Health*, 691 SCRA at 433-34 (citing *Guinto*, 182 SCRA at 654).

59. *Department of Health*, 691 SCRA at 434 (citing *Guinto*, 182 SCRA at 657 & Equitable Ins. & Casualty Co., Inc. v. Smith, Bell & Co. (Phil.) Inc., 20 SCRA 1121, 1122-23 (1967)).

60. An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes [Foreign Investments Act of 1991], Republic Act No. 7042 (1991) (as amended).

61. *See* Office of the President, Promulgating the Eleventh Regular Foreign Investment Negative List, Executive Order No. 65 (Oct. 29, 2018).

62. PHIL. CONST. art. III, § 9.

63. An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285 (2004).

Act No. 876[64] (Old Arbitration Law) governing domestic arbitration,[65] and Articles 2028 to 2046 of the Civil Code.[66]

It is a declared the policy of the State, under Section 2 of the ADR Law, "to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes."[67] To this end, the use of ADR is encouraged "as an important means to achieve speedy and impartial justice and declog court dockets."[68] In view thereof, "the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases."[69] *Alternative Dispute Resolution* refers to

> any process or procedure used to resolve a dispute or controversy, other than by adjudication of a presiding judge of a court or an officer of a government agency, as defined in [the] Act, in which a neutral third party participates to assist in the resolution of issues, which includes arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof.[70]

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64. An Act to Authorize the Making of Arbitration and Submission Agreements, to Provide for the Appointment of Arbitrators and the Procedure for Arbitration in Civil Controversies, and for Other Purposes [Arbitration Law], Republic Act No. 876 (1953).

65. Alternative Dispute Resolution Act of 2004, §§ 32-33.

66. CIVIL CODE, arts. 2028-2046.

67. Alternative Dispute Resolution Act of 2004, § 2.

68. *Id.*

69. *Id.*

70. *Id.* § 3 (a). *Mediation* refers to a "voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assist the parties in reaching a voluntary agreement regarding a dispute." *Id.* § 3 (q). Mediation includes Conciliation. *Id.* § 7. *Early Neutral Evaluation* refers to "an ADR process wherein parties and their lawyers are brought together early in a pre-trial phase to present summaries of their cases and receive a nonbinding assessment by an experienced, neutral person, with expertise in the subject in the substance of the dispute[.]" Alternative Dispute Resolution Act of 2004, § 3 (n). "'*Mini-Trial*" refers to a structured dispute resolution method in which the merits

Specifically, the law defines *Arbitration* as "a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award."[71] *Commercial Arbitration* applies to matters "arising from all relationships of a commercial nature, whether contractual or not."[72] The law further provides that it shall be governed by the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985.[73] In the Philippines, as will be discussed, arbitral awards are binding and have the effect of *res judicata* if the parties so stipulate or when they are recognized and enforced as final and executory decisions of Philippine courts.

Section 24 of the ADR Law provides that a court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, at the request of at least one party, refer the parties to arbitration unless the court finds that the arbitration agreement is null and void, inoperative, or incapable of being performed.[74] This is in consonance with the thrust of

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of a case are argued before a panel comprising senior decision makers with or without the presence of a neutral third person after which the parties seek a negotiated settlement[.]" *Id.* § 3 (u).

71. *Id.* § 3 (d).

72. *Id.* § 3 (g). According to the ADR Law, this includes any trade transaction for the supply or exchange of goods or services; distribution agreements; construction of works; commercial representation or agency; factoring; leasing, consulting; engineering; licensing; investment; financing; banking; insurance; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail[,] or road. *Id.* § 21.

73. *Id.* § 19 (citing U.N. Commission on International Trade Law, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, annex I, U.N. Doc. A/40/17 (June 3-21, 1985)).

74. Alternative Dispute Resolution Act of 2004, § 24. The law provides that

> [a] court before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if at least one party so requests not later that the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that

Section 25 of the ADR Law requiring courts to have due regard to the policy in favor of arbitration.[75] In turn, Sections 28 and 29 of the ADR Law provide for interim measures for the protection of the parties.[76]

With respect to judicial review of domestic arbitral awards, Section 40 of the ADR Law provides that confirmation of a domestic arbitral award shall be governed by Section 23 of the Old Arbitration Law and in accordance with the Rules of Procedure to be promulgated by the Court, after which it shall be enforced in the same manner as final and executory decisions of the Regional Trial Court (RTC) (i.e., equivalent to federal district courts).[77] Shifting to foreign arbitral awards, Section 42 of the ADR Law provides that "[t]he New York Convention shall govern the recognition and enforcement of arbitral awards ..."[78] Section 43 of the ADR Law provides that the Court may recognize and enforce foreign arbitral awards not covered by the New York Convention and consider the same convention awards.[79] Section 44 of

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> the arbitration agreement is null and void, inoperative or incapable of being performed.

Id.

75. *Id.* § 25. The provision is as follows —

> In interpreting the Act, the court shall have due regard to the policy of the law in favor of arbitration. Where action is commenced by or against multiple parties, one or more of whom are parties who are bound by the arbitration agreement although the civil action may continue as to those who are not bound by such arbitration agreement.

Id.

76. *Id.* §§ 28 & 29.

77. *Id.* § 40. With respect to vacating the award, Section 41 of the ADR Law provides that a party to a domestic arbitration may question the arbitral award with the RTC in accordance with the Rules of Procedure to be promulgated by the Court exclusively on those grounds enumerated in Section 25 of the Arbitration Law. Alternative Dispute Resolution Act of 2004, § 41. Procedurally, decisions of the RTC confirming, vacating, setting aside, modifying or correcting an arbitral award may be appealed to the Court of Appeals. *Id.* § 46.

78. *Id.* § 42.

79. *Id.* § 43.

the ADR Law distinguishes foreign arbitral awards from foreign judgments, such that a foreign arbitral award confirmed by a court of a foreign country "shall be recognized and enforced as a foreign arbitral award and not a judgment of a foreign court."[80] Likewise, a confirmed foreign arbitral award shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines and not as a judgment of a foreign court.[81] Relatedly, Section 45 of the ADR Law provides that "[a] party to a foreign arbitration proceeding may oppose an application for recognition and enforcement of the arbitral award exclusively on those grounds enumerated under Article V of the New York Convention."[82] Notably, the Court promulgated Administrative

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80. Alternative Dispute Resolution Act of 2004, § 44, para. 1.

81. *Id.* § 44, paras. 2 & 3.

82. *Id.* § 45. Article V of the New York Convention provides that "[r]ecognition and enforcement of the foreign arbitral award may be refused, at the request of the party against whom it is invoked, [ ] if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that:"

> (1) either of the parties were incapacitated to enter into the arbitration agreement, the arbitration agreement is not valid under the law to which the parties have subjected it, or the law of the country where the award was made;
>
> (2) the party against whom the award was made was not given any proper notice of the arbitration proceedings, or was unable to present his case;
>
> (3) the award deals with a difference not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the submission to arbitration;
>
> (4) the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement, or in the absence thereof, the law of the State where arbitration took place; and
>
> (5) the arbitral award is not yet final and executory or has been suspended or set aside by a competent authority of the State where the award was rendered.

New York Convention, *supra* note 17, art. V, ¶ 1, (a)-(e).

Matter No. 07-11-08-SC dated 01 September 2009, otherwise known as the Special Rules of Court on Alternative Dispute Resolution, providing for the procedural guidelines for both domestic and international arbitration, as well as enforcement of arbitral awards.[83]

It is recognized that there is undeniable interest within the international business community in arbitration as a dispute resolution mechanism.[84] The desire for certainty and predictability is a powerful motivating factor in international commercial relations.[85] In this regard, "the existence of arbitral institutions is a source of great comfort to foreign investors who would wish to resort to such institutions with their pre-established rules in the event of any dispute."[86]

Institutionally, the International Chamber of Commerce (ICC) is considered to be the dominant arbitral institution globally[87] and caters to the resolution of commercial disputes involving private parties. Conversely, ICSID is the arbitral body that is equipped to handle the conduct of arbitration between a sovereign entity and a private investor. Structured as an association of national committees, ICC created the International Court of Arbitration in 1923, which "has become the most important and significant tribunal for

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Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that (a) the subject matter of the difference is not arbitrable under the law of that country; and (b) the recognition or enforcement of the award would be contrary to the public policy of that country. *Id.* art. V, ¶ 2, (a)-(b). Furthermore, the burden of proof rests on the party opposing the recognition and enforcement of the foreign arbitral award.

83. SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, A.M. No. 07-11-08-SC (Sep. 1, 2009).

84. STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS 199 (1990).

85. *Id.* at 201.

86. *Id.*

87. *Id.*

disputes arising out of international commerce."[88] ICC serves as a "convenient paradigm" for international commercial arbitration.[89] On the other hand, ICSID, which is under the auspices of the World Bank, came into being by virtue of the Washington Convention with the primary goal of maintaining "a careful balance between the interests of investors and those of host States."[90] Relevant trade usages may be considered in arbitration proceedings under the auspices of the ICC.[91] In the same vein, applicable rules of international law

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88. *Id.* (citing JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 22 (1978)).

89. TOOPE, *supra* note 84, at 201.

90. *Id.* at 219 (citing International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and nationals of Other States*, *reprinted in* 4 I.L.M. 524, 526 (1965)). Notably, the Philippines has been a respondent in four concluded arbitration cases and one pending arbitration case before ICSID, namely:

    (1) SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6; Award dated 11 April 2008);
    (2) Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/03/25; Award dated 16 August 2007);
    (3) Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/11/12; Award dated 16 September 2014);
    (4) Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines (ICSID Case No. ARB/11/27; Award dated 23 January 2017); and
    (5) Shell Philippines Exploration B.V. v. Republic of the Philippines (ICSID Case No. ARB/16/22; Ongoing).

91. International Chamber of Commerce, ARBITRATION RULES In force as from 1 March 2017 & MEDIATION RULES In force as from 1 January 2014 (A Publication by the International Chamber of Commerce) at 27, *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-

may be taken into consideration in arbitration proceedings under the ICSID regime.[92] Customarily, international arbitrators rely on commercial norms in resolving the contractual dispute presented before them and in subsequently making their arbitral awards.[93] "Reliance on trade usages is particularly pronounced in arbitrations between private parties and foreign governments;"[94] Furthermore, "[i]nternational arbitrators frequently rely [upon] good faith in resolving ... disputes."[95] In several instances, international arbitration tribunals have shown willingness "to apply the good faith requirements of national laws and to find that a contract party has not acted in good faith."[96] Without question, "parties to international contracts must act in good faith regardless of whether national law imposes such a requirement,"[97] considering that the duty of good faith is "one of the general principles of international trade law developed in international arbitration proceedings."[98]

In the Philippines, arbitration may be *ad hoc*, institutional, or specialized. With respect to *ad hoc* arbitration, the Civil Code grants contracting parties the right to select an arbitrator or arbitrators and choose the procedure or rules to govern the proceedings, which may include those utilized by arbitration institutions.[99] Institutional arbitration is coursed through institutions such as the Philippine Dispute Resolution Centre Inc., which prescribes its own

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Arbitration-and-2014-Mediation-Rules-english-version.pdf (last accessed July 25, 2019).

92. Washington Convention, *supra* note 18, art. 42 (1).
93. Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 122-24 (2000).
94. *Id.* at 126.
95. *Id.* at 127.
96. *Id.*
97. *Id.*
98. *Id.* at 128.
99. *See* CIVIL CODE, art. 2046 & SPECIAL RULES OF COURT ON ALTERNATIVE DISPUTE RESOLUTION, rules 1.11 (b) & 6.1.

arbitration procedure.[100] As to specialized arbitration, an example would be the Construction Industry Arbitration Commission, which has original and exclusive jurisdiction over all construction disputes.[101] Considering that arbitral tribunals are not quasi-judicial bodies, their awards do not have the effect of *res judicata*. Nonetheless, the contracting parties may stipulate that the award shall be final.[102] Moreover, recognized arbitral awards, which are enforceable as final and executory decisions of Philippine courts, have the effect of *res judicata*.[103]

As shown by the discussion, a well-developed, yet continually evolving arbitration system, whether international or domestic, await contractual parties should dispute resolution be required. However, proactive risk management dictates that dispute prevention should be the preferred risk management approach that would cultivate an environment whereby parties are capacitated, empowered, and encouraged to partner between and among themselves to detect, address, and resolve conflicts before they ripen into formal disputes and/or complaints before courts and other adjudicatory bodies. This proactive dispute prevention paradigm would benefit and sustain projects as it preempts and avoids delays and contribute towards the reduction of costs.

D. Risk Management Continuum

Risk management is focused on minimizing the impact of known risks (i.e., identified and measured), known unknown risks (i.e., expected and estimated), and unknown unknown risks (i.e., generally ambiguous and unmeasurable). Together with Enterprise Risk Management (ERM), it is

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100. *See* Philippine Dispute Resolution Center, About us, *available at* http://www.pdrci.org/about-us (last accessed July 25, 2019) & Philippine Dispute Resolution Center, 2015 PDRCI Arbitration Rules, *available at* http://www.pdrci.org/our-rules/arbitration-rules-pdrci-admin-guidelines (last accessed July 25, 2019).

101. Creating an Arbitration Machinery in the Construction Industry of the Philippines [Construction Industry Arbitration Law], Executive Order No. 1008, § 4 (1985) & Alternative Dispute Resolution Act of 2004, §§ 34-35.

102. CIVIL CODE, art. 2044.

103. Alternative Dispute Resolution Act of 2004, § 40.

focused on identifiable and estimable events that can adversely impact organizational assets or its well-being.[104] Risk management deflects adverse incidents — be it economic, financial, natural calamities, human-induced complex emergencies, and crises — whether quantifiable or qualitative.[105] Risk management provides the data or information to build up risk knowledge through risk profiling and use this to deflect the potential impact of consequences and build up an organization's agility by building its capability and capacity to absorb the potential shocks or consequences of adverse incidents.[106]

Being situated within or surrounded by risk should trigger the development of a holistic risk management approach or active management of a risk profile as it draws attention to the specific demands and/or nuances of managing the underpinnings of specific risks and the determination of and preparing for possible risk outcomes towards being capacitated and empowered to systemically evaluate whether a risk should be taken (i.e., management of upside risks) or whether exposure to risk should be reduced or avoided (i.e., management of downside risks).[107] To actively manage exposure to risk, explicit steps need to be taken to mitigate the possibility of unfavorable outcomes and to put in place sufficient responses to address said risks, taking into account the probability or likelihood and the impact or severity of the risk or exposure.[108]

Accordingly, a risk management framework may be approached using a five-step risk estimation process, *viz*:

(1) Identification;

(2) Estimation;

(3) Mapping;

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104. ANDREW D. BANASIEWICZ, TOTAL EXPOSURE MANAGEMENT: RISK, RESILIENCE, CHANGE 14 (2016).

105. *See* BANASIEWICZ, *supra* note 104, at 14-16.

106. BANASIEWICZ, *supra* note 104, at 22-24.

107. *Id.* at 87-89.

108. *Id.* at 89-91.

(4) Response; and

(5) Capitalization.[109]

First, it is necessary to identify clearly the specific risks (downside and upside) that are likely to impact an organization.[110] Second, the probability and severity of each specific risk should be estimated through analytics and other empirical methodology.[111] Third, identified and estimated risks should be mapped or populated into a matrix categorized in terms of probability/likelihood and impact/severity.[112] Fourth, based on available information and data, the most appropriate response to the risk must be determined and adopted, i.e., acceptance, avoidance, reduction, containment, or transfer.[113] Fifth, appropriate capitalization should be provided for the risk management measures that would be undertaken either before, during, or after the occurrence of the specific risks identified.[114]

Notably, the eight components under the Committee of Sponsoring Organizations of the Treadway Commission (COSO) ERM framework fit into the risk estimation process outlined above, namely:

(1) Internal Environment (Identification);

(2) Objective Setting (Identification);

(3) Event Identification (Identification);

(4) Risk Assessment (Estimation and Mapping);

(5) Risk Response (Response);

(6) Control Activities (Response and Capitalization);

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109. *Id.* at 92–94.

110. *Id.* at 92.

111. *Id.*

112. BANASIEWICZ, *supra* note 104, at 92–93.

113. *Id.* at 94.

114. *Id.*

(7) Information and Communication (Response and Capitalization); and

(8) Monitoring (Identification, Estimation, and Mapping).[115]

In particular, the last component links the entire risk management framework as it jumps off from the response phase and informs the continuing assessment/estimation process moving forward.[116] Making this cycle work at its optimal level results in an enhanced and improved framework that would better respond to, address, and resolve future crises, incidents, emergencies, hazards, and calamities.

Under the International Organization for Standardization (ISO) 31000 ERM framework, four essential elements can be noted:

(1) Senior management and the board must commit to an ERM framework and provide a mandate for ERM as part of the organization's governance;

(2) The risk management process is well known by all decision-makers in the organization and is used by every manager to support decision-making;

(3) There is a joined-at-the-hip linkage of risk management that is an integral part of the organization through its IT management systems; and

(4) The requirements of committees that are needed to implement the framework are identified.[117]

Taking the cue from the governance thrust of ISO 31000, it is critical to define beforehand the context of the decision that the risk management effort will support. In this regard, the United States Department of Homeland

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115. *See* Committee Of Sponsoring Organizations Of The Treadway Commission, Enterprise Risk Management — Integrated Framework: Executive Summary at 3-4, *available at* https://www.coso.org/Documents/COSO-ERM-Executive-Summary.pdf (last accessed July 25, 2019).

116. *See* Committee Of Sponsoring Organizations Of The Treadway Commission, *supra* note 115, at 4.

117. *See* John Shortreed, *ERM Frameworks*, *in* ENTERPRISE RISK MANAGEMENT, 97-123 (2011).

Security offers the following variables that may be considered in executing a risk management process:

(1) Goals and Objectives;

(2) Mission Space and Values;

(3) Policies and Standards;

(4) Scope and Criticality of the Decision;

(5) Decision Makers and Stakeholders;

(6) Decision Timeframe;

(7) Risk Management Capabilities and Resources;

(8) Risk Tolerance; and

(9) Availability and Quality of Information.[118]

These variables are subsumed under the homeland security risk management process consisting of the following planning and analysis efforts that likewise fit into the five-step risk estimation process initially outlined, *viz*:

(1) Define the Context (Identification);

(2) Identify Potential Risk (Identification);

(3) Assess and Analyze Risk (Estimation and Mapping);

(4) Develop Alternatives (Estimation, Mapping, and Response);

(5) Decide Upon and Implement Risk Management Strategies (Response and Capitalization);

(6) Evaluation and Monitoring (Identification, Estimation, and Mapping); and

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118. *See* U.S. Department of Homeland Security, Risk Management Fundamentals: Homeland Security Risk Management Doctrine at 16-18, *available at* https://www.dhs.gov/xlibrary/assets/rma-risk-management-fundamentals.pdf (last accessed July 25, 2019).

(7) Risk Communications (Response and Capitalization).[119]

To further elaborate, studying ERM through a disaster management lens, the following definitions under the Philippine Disaster Risk Reduction and Management Act are helpful:[120]

(1) *Risk* is "the combination of the probability of an event and its negative consequences." [121] Relatedly, *Disaster Risk* is "the potential disaster losses in lives, health status, livelihood, assets[,] and services, which could occur to a particular community or a society over some specified future time period[;]"[122]

(2) *Exposure* is the "degree to which the elements at risk are likely to experience hazard events of different magnitudes[;]"[123]

(3) *Hazard* is "a dangerous phenomenon, substance, human activity or condition that may cause loss of life, injury[,] or other health impacts, property damage, loss of livelihood and services, social and economic disruption, or environmental damage[;]"[124] and

(4) *Vulnerability* is "the characteristics and circumstances of a community, system[,] or asset that make it susceptible to the damaging effects of a hazard."[125]

Thus, within the context of disaster management, the following equation is utilized:

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119. *Id.* at 15-26.

120. *Compare* Philippine Disaster Risk Reduction and Management Act of 2010, § 3 (hh); (m); (t); (v); & (nn) *with* United Nations Office for Disaster Reduction, UNISDR Terminology on Disaster Risk Reduction (2009) at 9-10; 15; 17; 25-26; & 30, *available at* http://www.unisdr.org/files/7817_UNISDRTerminology English.pdf (last accessed July 25, 2019).

121. Philippine Disaster Risk Reduction and Management Act of 2010, § 3 (hh).

122. *Id.* § 3 (m).

123. *Id.* § 3 (t).

124. *Id.* § 3 (v).

125. *Id.* § 3 (nn).

Risk = Hazard x Exposure x Vulnerability

Or, more specifically:

Risk = Probability of Hazard x Level of Exposure x Degree of Vulnerability

Taken as a holistic discipline, ERM should be considered as an integrated continuum and not merely the sum of separate stages or steps. Although the planning process involves the identification of individual parts and deconstruction of the entire framework, those efforts should be taken in the context of making sure that each part fits into the framework so that the entire spectrum is seamless and integrated, i.e., one sees a singular figure and not individual segments. It is only in the understanding and execution of the totality of the risk management process through a holistic approach that an organization can and will attain, in the face of risks, resilience.

E. Partnering as Dispute Prevention

As previously intimated, this Article endeavors to consider a dispute prevention paradigm relative to contracts and projects that will be undertaken by the Philippine Government towards the comprehensive and holistic rehabilitation, recovery, and rebuilding efforts for Marawi City and other affected communities — not only of the conflict-affected areas physically, but, more importantly, to include the dreams and aspirations of individuals, families, and communities. This Article views partnering as an instrument of dispute prevention tool and an important foundational consideration and support mechanism that provides a secure working environment allowing contracts and projects to move forward in a successful, sustainable, and resilient manner.

To recall, the term *dispute prevention* was taken to mean the process whereby concerns and conflicts are resolved prior to their ripening into or the filing or institution of formal disputes and/or complaints before courts and other adjudicatory bodies. Approaching the concept from a commercial perspective, "[p]roactive businesses today are moving towards a dispute management framework where high importance is given to customized dispute prevention and resolution systems"[126] and "the importance and value

126. Deborah Masucci & Shravanthi Suresh, *Transforming Business Through Proactive Dispute Management*, 18 CARDOZO J. CONFLICT RESOL. 659, 660 (2017).

of dispute prevention[is demonstrated] not only as a mode of avoiding disputes, preserving their brands, and incurring minimal damage to their businesses, but also as fostering profit making incentives."[127]

Notwithstanding the obvious benefits of dispute prevention and the fact that "[c]orporations have long accepted the value and importance of dispute management to address disputes that arise[,]"[128] it is surprising to note that "the dispute resolution clause is the most neglected part of drafting an agreement for future business."[129] It is unfortunate that dispute resolution clauses "are often added at the last minute and addressed at the end of contract negotiations with very little thought and consideration given to the consequences and intricacies of the clause[.]"[130] Said provisions have been relegated to becoming "midnight" clauses because of the supposed "fear that negotiations will break down by damaging the optimistic structuring of a deal by introducing the idea that something might go wrong,"[131] resulting in dispute resolution clauses becoming "standardized, boilerplate clauses just added into the agreement at the end."[132] It was observed that "[p]arties in the midst of negotiations and deal-making often do not invest time into looking at the possible conflicts that could potentially arise in the future."[133] However, investing time and developing a dispute management system "can help avoid high costs of litigation, and more importantly, help preserve relationships"[134] as "[p]arties who acknowledge and identify potential conflicts will thus be at a competitive advantage in the industry."[135] Realizing that settling for standardized boilerplate dispute resolution clauses at the stroke of midnight "could actually act against the interest of the company by creating unintended

127. *Id.* at 659.

128. *Id.* at 662.

129. *Id.*

130. *Id.*

131. *Id.*

132. Masucci & Suresh, *supra* note 126, at 662.

133. *Id.* at 671.

134. *Id.*

135. *Id.*

consequences when triggered,"[136] time and thought should be invested "into crafting customized dispute resolution clauses and developing the dispute resolution clauses as negotiations proceed."[137]

Considering the premise that dispute prevention is a crucial and critical aspect of risk management and that "avoiding the usage of dispute prevention is a risk that can now be avoided[,]"[138] dispute prevention should serve as a bedrock paradigm that would support Marawi's Big Rise and provide foundational resilience that would sustain intervention that are intended to rebuild lives and communities through Building Back Better. As a way of

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136. *Id.* at 662 (emphasis omitted). Masucci and Suresh point out that

> [t]ransactional lawyers have an opportunity to provide a value-added role in representing their client's interests in the business deal through the dispute resolution clause. To do so effectively, the transactional lawyer should partner with litigation counsel who has experience with dispute resolution clauses that go bad. These pathological clauses lead to unnecessary litigation or results that were not foreseen during drafting. Litigation lawyers often mop up these mistakes so they are in a good position to advise about how to avoid the problems in the initial drafting.

Id. at 664.

137. Masucci & Suresh, *supra* note 126, at 662-63. Masucci and Suresh further explain that

> [i]t is vital that Chief Executive Officers ('CEO') and leaders of businesses understand the importance and value of investing time and resources into drafting an effective dispute resolution clause early and building a dispute prevention system after carefully taking into consideration the culture and practices of the company. Transactional lawyers who develop expertise and training in ADR have the ability to convert midnight clauses into morning clauses as well as influencing clients to develop dispute management systems that are discussed below. However, it is imperative that they have the support of the executives of the company through this process. The value of dispute resolution clauses must be elevated to that of drafting any other important clause in an agreement. This kind of a change is only possible if acknowledged, supported, and promoted by the leaders of businesses.

Id. at 664.

138. *Id.* at 671.

proceeding, therefore, this Article advocates a deliberate and calculated paradigm shift — through genuine leadership and stakeholder buy-in and ownership — making midnights mornings and advancing proactive participatory interventions.

In this respect, as an integral aspect of a dispute prevention paradigm, *partnering* is considered to be a "contractual relationship that seeks to deliver successful projects, utilizing a structured management approach which facilitates [teamwork], trust[,] and openness, while supporting the effective management of conflict between the parties." [139] Partnering emphasizes

139. SPYROS KOSTAVARAS, CONFLICT AND DISPUTE IN PARTNERING PROJECTS: CONFLICT MANAGEMENT AND DISPUTE RESOLUTION 42 (2011). Partnering is likewise defined as:

> (1) a management approach used by two or more [organizations] to achieve specific business objectives by maximizing the effectiveness of each participant's resources. The approach is based on mutual objectives, an agreed method of problem resolution[,] and an active search for continuous measurable improvements[;]
>
> (2) the creation of an owner-contractor relationship that promotes the achievement of mutually beneficial goals. It involves an agreement in principle to share the risk involved in completing the project and to establish and promote a nurturing partnership environment[;]
>
> (3) a long-term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources. The relationship is based on trust, dedication to common goals[,] and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost-effectiveness, increased opportunity for innovation[,] and the continuous improvement of quality products and services.
>
> (4) [a] way of achieving an optimum relationship between a customer and a supplier. It is a method of doing business in which a person's word is his or her bond and people accept responsibility of their actions. 'Partnering is not a business contract but a recognition that every business contract includes an implied covenant of good faith[;]' and
>
> (5) involving 'two or more [organizations] working together to improve performance through agreeing mutual objectives, devising a way [of] resolving disputes and committing themselves to

"cooperation rather that confrontation and it calls on the simple philosophy of trust, respect, and long-term relationships."[140] As opposed to relationships that are "generally characterized by being adversarial and stressful, focusing on litigation and suffering from bureaucratic inertia, win-lose attitudes, and finger-pointing practices,"[141] partnering focuses on "co-operative teamwork, accomplishment and win-win attitudes, provide satisfactory work environments and encourage collaboration and calculated risk-taking actions."[142] Partnering "relies on the presence of mutual commitment, trust, and teamwork."[143]

Flowing from a beneficial relationship where there is genuine leadership and stakeholder ownership, partnering is a proactive dispute prevention tool

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> continuous improvement, measuring progress[,] and sharing the gains.'

JOHN BENNET & SARAH JAYES, TRUSTING THE TEAM: THE BEST PRACTICE GUIDE TO PARTNERING IN CONSTRUCTION 2 (1995); United States Army Corps of Engineers, Partnering (A Pamphlet Describing the Concepts and Implementation of an Innovative New Program Designed to Create a Positive, Disputes-Prevention Atmosphere During Contract Performance), *available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/a253380.pdf (last accessed July 25, 2019); RALPH J. STEPHENSON, PROJECT PARTNERING FOR THE DESIGN AND CONSTRUCTION INDUSTRY 116 (1996) (citing ASSOCIATED GENERAL CONTRACTORS OF AMERICA, PARTNERING: A CONCEPT FOR SUCCESS (1991)); & Construction Task Force, Rethinking Construction (The Report of the Construction Task Force to the Deputy Prime Minister the scope for Improving the Quality and Efficiency of U.K. Construction) at 9 *available at* http://constructingexcellence.org.uk/wp-content/uploads/2014/10/rethinking_construction_report.pdf (last accessed July 25, 2019). *See generally* Construction Industry Institute, Partnering II Research Team, Model For Partnering Excellence (A Research Paper Published Online), *available at* https://classes.engineering.wustl.edu/2009/spring/jme4900/Articles/RS102-1ModelforPartnering.pdf (last accessed July 25, 2019).

140. KOSTAVARAS, *supra* note 139, at 44.

141. *Id.*

142. *Id.*

143. *Id.* at 46-47.

that seeks to resolve conflicts at the earliest stages while other dispute resolution mechanisms, together with litigation, are reactive dispute management modalities that operates within and already presumes the existence of formal disputes and complaints. The benefits of partnering include "improved efficiency, reduced cost, reliable quality, faster construction, completion on time, continuity of work, sharing risk, reliable flow of design information, and lower legal cost."[144] In order to work, partnering requires parties to "redirect their energies and focus on the real issues associated with achieving the ultimate objective,"[145] which remains a challenging endeavor as the participants "have to be committed to change and to working in a team environment that fosters win-win relationships."[146]

In this context, a culture of dispute prevention as part of the greater risk management continuum should be incorporated into project designs such that there should be disincentives for having disputes and, conversely, incentives for working together towards avoiding disputes, thus resulting in project

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144. *Id.* at 47. Further, partnering (1) serves as a motivation for innovation; (2) improves cooperation between design and implementation teams; (3) establishes a relationship between the parties that may lead to future work; (4) improves services, subcontract quality, and timeliness; (5) reduces delays and insufficiencies; (6) speeds up decision making; and (7) reduces potential claims. Moreover, other reported and documented benefits of using partnering as a method of procuring construction projects include the (1) reduction in overall project cost; (2) reduction of disputes and formal claims; (3) project completion with no outstanding claims or litigation; (4) improvement in morale within the project team; (5) reduction in time taken to reach completion; (6) lowering risks of cost overruns and delays; (7) reduction in administrative costs; (8) significant improvement in site safety; (9) improvements in communications; and (10) higher trust levels. NIGEL J. SMITH, ET AL., ENGINEERING PROJECT MANAGEMENT 301 (2002). *See also* United States Army Corps of Engineers, PARTNERING: A Tool for USACE, Engineering, Construction, and Operations (A Pamphlet Published Online in 2010) at 25, *available at* https://www.iwr.usace.army.mil/Portals/70/docs/cpc/91-ADR-P-4_Partnering.pdf (last accessed July 25, 2019).

145. KOSTAVARAS, *supra* note 139, at 50.

146. *Id. But see* KOSTAVARAS, *supra* note 139, at 49-54 (discussing the constraints in partnering).

sustainability and resilience. Rather, dispute prevention involves a systemic ownership that cuts across projects, organizations, and objectives. To achieve this ideal, significant time and resources should be invested in anticipating conflicts and disputes through which conflict imagination leads to dispute prevention and a resilient project. Dispute prevention is a culture; it is not merely a set of protocols, a sum of processes and procedures, or a series of mechanisms culminating in an abstracted system. Accordingly, this Article advocates partnering as a highly-effective form of dispute prevention that seeks to resolve disagreements, through hybrid community-based mechanisms — at the earliest stages, at the most basic levels, and in a participatory manner — to avoid the conflict maturing into a formal dispute that would have to undergo institutional dispute resolution and/or litigation. In the end, genuine participatory dispute prevention is imperative towards achieving project success, sustainability, and resilience.

A participatory dispute prevention paradigm is, therefore, particularly critical in the recovery, rehabilitation, and rebuilding of conflict-affected communities where build-back-better interventions necessitate ownership by stakeholders and empowerment of communities. Through this, it could immediately be perceived that dispute prevention through partnering, as a foundational element of project resilience, serves a crucial purpose in the greater scheme of humanitarian affairs and informs consequence prevention, i.e., the avoidance of future conflicts. This further highlights the quintessential utility of dispute prevention within the risk management continuum, particularly with respect to risk reduction, mitigation, and avoidance.

III. Marawi's Rehabilitation, Recovery, and Rebuilding

The Marawi question is complex and complicated. Radicalism was at the core of the Marawi Siege and of the destruction and devastation that interrupted and forever changed the lives, hopes, dreams, and aspirations of individuals, families, and communities. It is unfortunate, however, that thoughtless and senseless radicalism is attempting to impede, disrupt, and undo the positive and significant milestones that characterize the momentum of efforts and initiatives accomplished by TFBM thus far through inclusive dialogue and consultation with all stakeholders. As part of the rehabilitation, recovery, and rebuilding of Marawi City and other affected areas, a multi-sectoral and multi-disciplinary structured approach for assessing impacts and prioritizing recovery and reconstruction needs was undertaken through the Post-Conflict Needs

Assessment (PCNA),[147] which focuses on short-term interventions to initiate recovery from the damages and losses and financial requirements needed to achieve a holistic post-conflict recovery, reconstruction, and risk management framework. PCNA has the following objectives:

(1) support post-conflict assessment and initiate recovery planning processes;

(2) evaluate the adverse consequences of the disaster on assets, processes, service delivery, and access to goods and services;

(3) estimate the damage and loss caused by the disaster;

(4) identify all recovery and construction needs;

(5) develop the recovery strategy, which would form the basis for a comprehensive recovery plan; and

(6) provide the bases for mobilizing resources for recovery and reconstruction.

From this assessment, lessons learned are utilized to enhance existing policies and recommend prospective policy directions in disaster management.

The thoughtless and senseless radicalism that destroyed the beloved Islamic City of Marawi is the same thoughtless and senseless opposition for opposition's sake that destroys recovery and rehabilitation efforts before they even take root. These oppositors believe in nothing other than their own selfishness as they intend to thrive in the chaos and lack of comprehensive governance that once characterized our beloved Marawi. TFBM has been working without pause since its establishment by President Duterte in June 2017,[148] doing so with pride and commitment undivided. The Task Force has come to serve because that is the call of the times. All stakeholders should, in a similar manner, engage with, contribute to, and support the initiatives and objectives of the Task Force towards the resilient rise of Marawi City and other affected communities because all those caught in the conflict's

147. Philippine Disaster Risk Reduction and Management Act of 2010, § 9 (m). In the aftermath of disasters, the terminology used is Post-Disaster Needs Assessment (PDNA).

148. Bangon Marawi, Task Force Bangon Marawi, *available at* https://bangonmarawi.com/about-tfbm (last accessed July 25, 2019).

predicament and who continue to suffer the consequences thereof deserve nothing less than selfless unity of efforts.

PCNA is principally utilized by the Philippine Government through the OCD-NDRRMC in collaboration with international development partners and the private sector. The methodology is a convergence of a Damage and Losses Assessment (DALA) and a Human Recovery Needs Assessment (HRNA). DALA is conducted based on baseline data obtained from local government units and Local DRRM Councils. Meanwhile, HRNA is measured to revitalize people's abilities to restore their full potential to lead productive and creative lives in accordance with their needs and interests. Data from the assessments are processed and analyzed in order to estimate and prioritize the recovery and reconstruction needs in the affected communities prior to the development of the recovery framework. By going through the prioritization process, decisions are made faster and choices properly justified, especially if resources are limited, as is often the case.

PCNA is an important tool that provides an overview of the funding and resource requirements for recovery, rehabilitation, and reconstruction efforts. The results of the undertaking detail the total value of destruction in physical assets (damage) and changes (losses) in the economy of affected communities. Moreover, it identifies the most affected sectors, the geographic distribution of disaster effects, impacts of disaster at the macro-economic and household levels, and the distribution of damages and losses by ownership.

As previously mentioned, disaster management involves leadership in the development and implementation of strategic and systematic approaches for the prevention/mitigation, preparedness, response, and recovery or rehabilitation involving emergencies, hazards, and disasters consistent with the SFDRR. These thematic areas are the focus of the Philippine Disaster Risk Reduction and Management System (PDRRMS) and the NDRRMF. The thematic area involving Disaster Rehabilitation and Recovery is understood as "the restoration and improvement ... of facilities, livelihood, and living conditions,"[149] as well as organizational capacities of affected communities, and reduction of disaster risks in accordance with the overarching commitment to Build Back Better.[150] Thus, from the perspective of disaster

149. Rules and Regulations Implementing the Philippine Disaster Risk Reduction and Management Act of 2010, Republic Act No. 10121, rule 2, § 1 (ee).

150. *Id.*

management, recovery (including rehabilitation) involves not only the immediate or short-term restoration of basic services (which, in the context of disaster management, is properly subsumed under the response phase, and not under the recovery phase) but also includes the medium- and long-term restoration of normalcy in affected communities, as well as in government agencies and private enterprises.

The Philippine Government, through the OCD-NDRRMC, applies the Build Back Better principle to post-disaster and post-emergency interventions as a proactive approach in recovery and rehabilitation efforts towards the full restoration of living conditions in conflict-affected communities. Commencing from the development of the comprehensive rehabilitation and recovery plan to its implementation, consultations are made with all stakeholders. Furthermore, as the plan is implemented, periodic progress reports are submitted, as well as evaluations and validations conducted, to ensure that all recovery and rehabilitation interventions and initiatives are consistent with the plan, responsive to the identified needs, and the mechanisms employed are the most appropriate and effective.

In terms of administrative enforcement, the NDRRMC possesses policy-making, coordination, integration, supervision, monitoring, and evaluation functions to ensure the proper discharge of, and compliance with, disaster management mandates.[151] Criminal charges may be filed against any person who commits dereliction of duties leading to destruction, loss of lives, critical damage to facilities, and misuse of funds.[152]

In terms of coordination with private enterprises, it has been previously noted that the NDRRMC is composed of national government agencies, local government units, and private sector stakeholders. Thus, coordination is built into the PDRRMS and has been working well in all thematic areas. As regards specific assistance to the functional recovery effort, private enterprises can, and do, provide support by:

(1) shouldering a significant amount of the cost of rehabilitation and recovery;

(2) helping design structures and infrastructure to be built, which are compliant with standards on resilient infrastructure;

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151. Philippine Disaster Risk Reduction and Management Act of 2010, § 6.

152. *Id.* §§ 19 (a) & 20.

(3) supplying reconstruction materials;

(4) undertaking the construction itself; and/or

(5) pump-priming local, regional, and national economies by quickly re-establishing their businesses in affected areas by activating their own enterprise recovery strategies in support of greater recovery efforts.

In this regard, the private sector has been assisting the NDRRMC in cascading Business Continuity Planning to private stakeholders (e.g., private companies, private sector organizations, nongovernment organizations, and civil society organizations) and Public Service Continuity Planning (PSCP) to public sector stakeholders (e.g., national government agencies, government-owned and -controlled corporations, government financial institutions, and local government units). The overarching mandate within the context of natural or human-induced emergencies and disasters is that the Philippine Government must continue to exist and function regardless of crises, incidents, emergencies, hazards, and calamities. Thus, PSCP consists of developing and sustaining internal capacities, recovery requirements, and strategies of all agencies and instrumentalities of the Philippine Government.

Given the vulnerabilities endemic to the Philippines in terms of the evolving landscape of natural hazards, such as typhoons, earthquakes, volcanic eruptions, and tsunamis, as well as human-induced disasters, such as terrorism, bombing, and other CBRNE-related incidents, it is necessary for all agencies to play a key role in the continuity of operations of the Philippine Government. No agency is exempted from this, and those agencies that do not realize the importance of their role suffers from risk myopia considering that the ultimate objective of the PSCP is the unhampered delivery of public services during and after emergencies and disasters.

In summary, recovery constitutes the comprehensive restoration and improvement of facilities, livelihood, and living conditions of disaster-affected communities, including efforts to reduce and/or avoid future risks. Accordingly, it should be underscored that conflicts (as well as disasters) serve as opportunities to build resilience. In the face of conflicts and disasters, national government agencies, local government units, and even private enterprises will have an opportunity to move towards resilience — as in the case of Marawi City and other affected communities. Therefore, by providing foundational support and stability for the ongoing rehabilitation and recovery

efforts, dispute prevention through partnering is indispensable for Marawi's Big Rise.

IV. ADVOCATING DISPUTE PREVENTION

With the end in view of proposing a resilient partnering system that will support the comprehensive efforts for the rebuilding, rehabilitation, and recovery of Marawi City and other conflict-affected communities, this Article shall look into the dispute settlement policies, frameworks, and mechanisms employed in the Philippines' IPT3 Project, Boston's Big Dig, and selected community-based dispute resolution systems; review underlying policies and situational considerations; adopt best practices; and institutionalize lessons learned. The ruling case law with respect to the apparent distrust by the Court towards extra-judicial dispute resolution, as exemplified and highlighted by *PIATCO*, shall be compared with partnering as a dispute prevention modality utilized in the Big Dig and in the case studies in Cambodia, Indonesia, and India, which would reveal the conspicuous difference between the Philippine approach and the best practices elsewhere.

As best practices and lessons learned from the Big Dig would demonstrate, partnering as a form of dispute prevention was voluntary yet widespread enough such that parties preferred or elected to utilize partnering rather than risk having conflicts evolve into formal disputes and/or complaints before courts and other adjudicatory bodies. The benefits of such a proactive paradigm were immediately apparent and contributed towards achieving the megaproject's success, sustainability, and resilience.[153] This is particularly important within the context of Marawi's Big Rise considering that its rebuilding, rehabilitation, and recovery is a top priority of President Duterte. Accordingly, there is much to learn not just from the Big Dig experience but also from jurisprudence and case studies the world over to secure and ensure the adoption of a dispute prevention paradigm that will shepherd, cultivate, and institutionalize a sustainable and resilient legal framework and project environment that would support and significantly contribute towards the realization of Marawi's Big Rise.

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153. GREIMAN, MEGA PROJECT MANAGEMENT, *supra* note 5, at 361-62 & Greiman, The Big Dig, *supra* note 6.

A. PIATCO and the Evolving Dispute Resolution Environment

In *PIATCO*, the Court discussed the legal effect of the commencement of arbitration proceedings by PIATCO before the ICC, pursuant to Section 10.02 of the ARCA, holding that the submission to arbitration will not oust it of its jurisdiction over the petitions.[154] It should be underscored that even prior to the action before the Court, PIATCO filed, on 26 February 2003, a Request for Arbitration against the Republic of the Philippines with the ICC, as provided for in the PIATCO Contracts.[155] Thereafter, on 17 September 2003, PIATCO investor Fraport AG Frankfurt Airport Services Worldwide filed a Request for Arbitration against the Republic of the Philippines with ICSID, alleging that the Philippine Government has expropriated the investments of Fraport AG in the IPT3 Project in alleged violation of the BIT entered into by the Philippines and Germany on 17 April 1997.[156] Notwithstanding the fact that Section 10.02 of the ARCA provides that any dispute, controversy, or claim arising in connection with the PIATCO Contracts shall be settled by means of ICC arbitration, and in spite of the fact that arbitration proceedings were already pending before the ICC, the Court

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154. *Agan, Jr.*, 402 SCRA at 647-48. Considering that petitioners were not parties to the PIATCO Contracts, the Court held, in its Decision promulgated on 5 May 2003 nullifying the PIATCO Contracts, that petitioners cannot be bound by the arbitration clause in the ARCA and, hence, cannot be compelled to submit to arbitration proceedings. The Court further underscored that "[a] speedy and decisive resolution of all the critical issues in the present controversy, including those raised by petitioners, cannot be made before an arbitral tribunal." The Court moreover stated that the objective of arbitration, which is to allow and expedite the determination of a dispute, "would not be met if this Court were to allow the parties to settle the cases by arbitration as there are certain issues involving non-parties to the PIATCO Contracts which the arbitral tribunal will not be equipped to resolve." Subsequently, the Court denied the separate Motions for Reconsideration of the Decision on 21 January 2004. *Id.* at 647-48 (emphasis omitted) & Agan, Jr. v. Philippine International Air Terminals Co., Inc., 420 SCRA 575, 607 (2004).

155. *Agan, Jr.*, 402 SCRA at 641.

156. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Judgment, pt. 1, ¶ 6 (Aug. 16, 2007).

still took cognizance of *PIATCO*, invoking the transcendental importance of the case.[157] In resolving the case, the Court adopted the reasoning that because the PIATCO Contracts are null and void, the arbitration agreement is likewise without legal existence.[158] This contradicts the arbitral autonomy principle, which provides that an arbitration clause is separate or independent from the principal contract. Accordingly, the invalidity of the principal agreement does not necessarily result in the invalidity of the arbitration agreement.[159]

Further, even the Court has repeatedly recognized the arbitral autonomy principle. In *General Insurance and Surety Corporation v. Union Insurance Society of Canton, Ltd.*,[160] the Court compelled the parties to arbitrate pursuant to their arbitral agreement despite the alleged nullity of the contract containing the arbitral clause.[161] In fact, in *General Insurance*, the Court cited *Mindanao Portland Cement Corp. v. McDonough Construction Co. of Florida*,[162] in which it held that when there is an arbitral agreement and one party puts up a claim which the other disputes, the need to arbitrate is imperative.[163] Moreover, although the conduct of judicial proceedings was eventually affirmed in *Del Monte Corporation-USA v. Court of Appeals*,[164] the very case relied upon by the

157. *Agan, Jr.*, 402 SCRA at 646.

158. *Id.* at 683-84.

159. Although the principle of arbitral autonomy is embodied in Sections 24 and 25 of the ADR Law, *PIATCO* was decided before the enactment of the ADR Law. Nonetheless, the Arbitration Law recognizes arbitral autonomy, such that after being satisfied that the making of the agreement or any failure to comply therewith is not raised as an issue in the proceedings, Section 6 thereof provides that the court before which the action is pending "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." Arbitration Law, § 6.

160. General Insurance & Surety Corporation v. Union Insurance Society of Canton, Ltd., 179 SCRA 530 (1989).

161. *Id.* at 538.

162. *Id.* at 54 (citing Mindanao Portland Cement Corp. v. McDonough Construction Co. of Florida, 19 SCRA 808, 814 (1967)).

163. *Mindanao Portland Cement Corp.*, 19 SCRA at 814-15.

164. Del Monte Corporation-USA v. Court of Appeals, 351 SCRA 373 (2001).

Court in *PIATCO*, the Court nonetheless stated in *Del Monte* that a "provision to submit to arbitration any dispute arising [from the contract] and the relationship of the parties is part of the contract and is itself a contract."[165]

American jurisprudence has likewise demonstrated the separability effect of the arbitral autonomy principle. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[166] the Supreme Court of the United States (SCOTUS) held that under the Federal Arbitration Act, the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue."[167] Further, in *Par-knit Mills, Inc. v. Stockbridge Fabric Co.*,[168] the United States Court of Appeals for the Third Circuit held that before a party to a lawsuit can be ordered to arbitrate, there should be an express and unequivocal agreement to that effect.[169] Moreover, in *Three Valleys Mun.*

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165. *Id.* at 381.

166. Prima Paint Corporation v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967).

167. *Id.* at 403 (citing 9 U.S.C.A. § 4 (West)). The Supreme Court of the United States (SCOTUS) held that a claim of fraud in the inducement of the arbitration agreement itself is cognizable by the courts but not as to claims of fraud in the inducement of the principal contract. Thus, a claim of fraud in the inducement of the contract is to be resolved by means of arbitration. For a comprehensive discussion of Prima Paint in relation with the concept of fraud in inducement of contracts as opposed to the concept of fraud in fact, see *Republic of the Philippines v. Westinghouse Electric Corporation*, decided by the United States District Court for the District of New Jersey. *Id.* at 404 & Republic of the Philippines v. Westinghouse Electric Corporation, 714 F.Supp. 1362 (N.J. Dist. Ct. 1989) (U.S.).

168. Par-knit Mills, Inc. v. Stockbridge Fabrics Company, Ltd., 636 F.2d 51 (3d Cir. 1980) (U.S.).

169. *Id.* at 54–55. SCOTUS held that

> [i]f there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury. Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such [ ] agreement. The district court, when

Water Dist. v. E.F. Hutton & Co., Inc.,[170] the United States Court of Appeals for the Ninth Circuit held that although "an arbitrator may properly decide whether a contract is 'voidable' because the parties have agreed to arbitrate the dispute[,]"[171] "a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate."[172]

By virtue of the arbitral autonomy principle, therefore, questions on the validity of the principal contract is cognizable by an arbitrator or arbitral tribunal. In *PIATCO*, considering that the legal existence of Section 10.02 of the ARCA was not put into question, the dispute relative to the PIATCO Contracts should have been submitted to the party-ordained dispute resolution modality. Absent any allegation that the arbitral agreement in the ARCA was procured through fraud such that no meeting of the minds therefor occurred, arbitration should take its due course.[173]

> considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.

In this case, it was held that the determination of whether or not an arbitral agreement had in fact been executed by the contracting parties was an issue cognizable by judicial proceedings. *Id.* at 54-55.

170. Three Valleys Municipal Water District v. E.F. Hutton, 925 F.2d. 1136 (9th Cir. 1991) (U.S.).

171. *Id.* at 1140.

172. *Id.* at 1140-41 (emphasis omitted).

173. In fact, the Court has had several occasions to construe the meaning of the phrase "any dispute, controversy, or claim" arising from contracts in relation to the question of applicability of arbitration. In *Bay View Hotel, Inc., v. Ker & Co., Ltd.*, the Court construed the clause "if ... dispute should arise as to the amount of [the insurance] company's liability" to exclude the total and complete negation of liability. Thus, the Court held that the clause "requires arbitration only as to disputes regarding the *amount* of the insurer's liability but not as to any dispute as to the *existence or non-existence* of liability."

In *Western Minolco Corporation v. Court of Appeals*, the Court construed the clause "[s]hould any dispute, difference[,] or disagreement arise between the [Claim-Owner] and the [Company] regarding the meaning, application or effect of this

Considering that the Philippines encourages arbitration as a means of resolving disputes between parties, the Court should have respected the express intentions of the contracting parties. [174] However, by taking cognizance of *PIATCO*, the Court disregarded the express intention of the parties. Worse, by holding that the contracts are void from the very beginning, the Court distorted the arbitral autonomy principle that the Court itself recognized in *General Insurance*, *Mindanao Portland Cement*, and *Del Monte*.

Agreement or of any clause thereof, or in regard to the amount and computation of the royalties, deductions, or other item of expense" to exclude actions for breach of contract, rescission, and damages. As such, an aggrieved party may not be barred from instituting judicial proceedings to rescind the contract in spite of a stipulation on prior arbitration.

In *Puromines, Inc. v. Court of Appeals*, the Court construed "any dispute arising under this contract" to include cargo claims against the vessel owners and/or charterers for breach of contract of carriage. The Court held that "the sales contract is comprehensive enough to include claims for damages arising from carriage and delivery of goods" because the right to the cargo is derived from the bill of lading and the sales contract, which incorporates the arbitration clause.

Bay View Hotel, Inc., v. Ker & Co., Ltd., 116 SCRA 327, 334 (1982); Western Minolco Corporation v. Court of Appeals, 167 SCRA 592, 596-97 (1988); & Puromines, Inc. v. Court of Appeals, 220 SCRA 281, 285-87 (1993).

174. Notably, in *Bengson v. Chan*, the Court held that a civil action should be stayed in order that the parties may be able to resort to arbitration proceedings as they themselves agreed upon in their contract. The Court cited Sections 6 and 7 of the Arbitration Law, which provide that after a determination that the making of the arbitration agreement is not in issue, a court shall order the parties to proceed to arbitration and that the civil proceedings shall be stayed until the arbitration has terminated. The issue of stay of judicial proceedings was also discussed in *Almacenes Fernandez, S.A. v. Golodetz*, decided by the United States Court of Appeals for the Second Circuit, and *Lawson Fabrics, Inc. v. Akzona, Inc.*, decided by the United States District Court for the Southern District of New York. Further, in *Toyota Motor Philippines Corp. v. Court of Appeals*, the Court held that the presence of third parties does not render the arbitration clause dysfunctional. Bengson v. Chan, 78 SCRA 113, 118-19 (1977); Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d. 625 (2d Cir. 1945) (U.S.); Lawson Fabrics, Inc. v. Akzona, Inc., 355 F.Supp. 1146 (S.D.N.Y. 1973) (U.S.); & Toyota Motor Philippines Corp. v. Court of Appeals, 216 SCRA 236, 246 (1992).

After being satisfied that the making of the agreement or such failure to comply therewith is not raised as an issue in the proceedings, the Court should have issued an order directing the parties to proceed to arbitration in accordance with the terms of the agreement, pursuant to Section 6 of the Old Arbitration Law.[175] By brushing aside arbitration as a means of resolving contractual

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175. Arbitration Law, § 6. The provision is as follows —

> A party aggrieved by the failure, neglect[,] or refusal of another to perform under an agreement in writing providing for arbitration may petition the court for an order directing that such arbitration proceed in the manner provided for in such agreement. [Five-day] notice in writing of the hearing of such application shall be served either personally or by registered mail upon the party in default. The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or default be in issue the court shall proceed to summarily hear such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in the proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
>
> The court shall decide all motions, petitions[,] or applications filed under the provisions of this Act, within ten days after such motions, petitions, or applications have been heard by it.

Id.

In *PIATCO*, however, the Court held that it would be improper to relegate to an arbitral body the resolution of the issues presented therein. This is disturbing in two ways. Firstly, the Court is essentially saying that an arbitral tribunal is incapable of reaching a credible conclusion of the dispute presented before the Court. The Court is totally mistaken in this regard. Arbitral tribunals are triers of facts that are precisely tasked to investigate and arrive at the factual and circumstantial antecedents of a dispute and, based thereon, reach a conclusion as to the legal liability of either party or both parties. By claiming that arbitral tribunals are not equipped to resolve the attendant issues in *PIATCO*, the Court brushed aside in one fell swoop the competence of arbitral tribunals to resolve fact-based contractual disputes while declaring that it is the proper venue for resolving such fact-based disputes. This *ratio* emanates from the very court that

disputes, the Court manifestly expressed its distrust towards party-ordained dispute resolution. Although it is true that the Philippine Constitution expanded the power of judicial review, as embodied in Article VIII, Section 1 thereof,[176] such expansion is not a license for the Court to pervade each aspect and product of governmental action.[177] *PIATCO* is a clear case of a contract dispute that is well within the jurisdiction and competence of ICC and ICSID to resolve. The Court, unfortunately, demonstrated that it is not prepared to accept the evolving character of, and progressive trust in, international commercial arbitration. *PIATCO* is an example of the propensity of the Judiciary to work within a parochial framework.

For a Court that relies upon American jurisprudence for enlightenment on developments in the law, it is astounding that the Court espoused a regressive stance involving arbitration as an effective means of dispute resolution. Without a doubt, arbitration holds an esteemed place in American law and jurisprudence. In *Shearson/American Express, Inc. v. McMahon,*[178] the SCOTUS recognized arbitration as an effective means of resolving disputes arising from contractual agreements[179] and reversed the previously well-entrenched judicial hostility or distrust towards arbitration, as expressed in

has time and again held that it is not a trier of fact. *Agan, Jr.*, 402 SCRA at 647-48.

176. PHIL. CONST. art. VIII, § 1. The Constitution provides —

> The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

PHIL. CONST. art. VIII, § 1.

177. *See PIATCO*, 402 SCRA at 679-81 (2003) (J. Vitug, separate opinion).

178. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

179. *Id.* at 226-27.

Wilko v. Swan.[180] This enlightened jurisprudential lineage was expressed in *Scherk v. Alberto Culver Co.*,[181] wherein SCOTUS held that an arbitration clause is to be respected and enforced by federal courts in accordance with the explicit provisions of the Federal Arbitration Act.[182] Furthermore, citing *M/S Bremen v. Zapata Off-Shore Co.*,[183] *Scherk* held that

> [a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts ... We

180. Wilko v. Swan, 346 U.S. 427 (1953). In *Wilko*, SCOTUS stated that the right to select the forum even after the creation of a liability is a substantial right. It found that the arbitral agreement in the contract of sale of securities restricted the choice of forum, in contravention of the Securities Act. As between arbitration and the choice of venue guaranteed by the Securities Act, SCOTUS chose the latter, to wit —

> Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

Id. at 438.

181. Scherk v. Alberto Culver Co., 417 U.S. 506 (1974).

182. *Id.* at 516-17. SCOTUS held that such an arbitration agreement shall be considered "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 511 (citing 9 U.S.C. § 2 (1925)).

183. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.'[184]

Further, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[185] citing *Scherk* and *M/S Bremen*, the SCOTUS held that ruling case law establishes a strong presumption in favor of enforcing freely negotiated contractual choice-of-forum provisions, which is "reinforced by the emphatic federal policy in favor of arbitral dispute resolution."[186] The federal policy applies with special force in international commerce since the United States' accession in 1970 to the New York Convention and the implementation thereof in the same year by amendment of the Federal Arbitration Act.[187] Accordingly, SCOTUS held that potential complexity should not suffice to ward off arbitration considering that adaptability and access to expertise are hallmarks of arbitration and that the subject matter of the dispute is taken into account when the arbitrators are appointed and arbitral rules typically provide for the participation of experts.[188] In any eventuality, even if domestic courts are asked "to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration,"[189] as well as "shake off the judicial hostility to arbitration"[190] and the "customary and understandable unwillingness to cede jurisdiction of a

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184. *Scherk*, 417 U.S. at 519 (citing *M/S Bremen*, 407 U.S. at 9).

185. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

186. *Id.* at 631.

187. *Id.* (citing 9 U.S.C. §§ 201-208).

188. *Mitsubishi Motors Corp.*, 473 U.S. at 633-34. Similarly, SCOTUS rejected "the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes considering that international arbitrators are generally drawn from the legal as well as the business community; that the parties and the arbitral body can be expected to select arbitrators accordingly[;]" and that it is an untenable presumption that "the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.* at 634.

189. *Id.* at 639.

190. *Id.* at 638 (citing Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978, 985 (2d Cir. 1942) (U.S.)).

claim arising under domestic law to a foreign or transnational tribunal[,]"[191] domestic courts will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of laws has been addressed as the New York Convention reserves to signatories the right to refuse enforcement of an award where it would be contrary to its public policy.[192] Moreover, the policy favoring parties' chosen dispute resolution mechanism was further affirmed by the SCOTUS in *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[193] wherein it held that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."[194]

As it stands, *Scherk* illustrated the open-minded attitude of the SCOTUS towards party-ordained dispute resolution modalities and squarely addressed the detrimental effects of a parochial assertion of judicial egoism. If Marawi's Big Rise is to succeed, it is submitted that the *Scherk* doctrine and its jurisprudential lineage should be adopted by the Court to shepherd a proactive dispute prevention paradigm towards project success, sustainability, and resilience.

B. Boston's Big Dig and Successful Partnering for Resilience

Built through the heart of one of the nation's oldest cities, the Boston Central Artery/Tunnel Project, otherwise known as the Big Dig, is "the largest, most complex, and most technically challenging highway project in American history."[195] The Big Dig's pioneering engineering successes "include the deepest underwater connection and the largest slurry-wall application in North America, unprecedented ground freezing, extensive deep-soil mixing programs to stabilize soils, the world's widest cable-stayed bridge, and the largest tunnel-ventilation system in the world."[196]

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191. *Mitsubishi Motors Corp.*, 473 U.S. at 638.

192. *Id.* at 638-39 (citing New York Convention, *supra* note 17, art. V (2) (b)).

193. Henry Schein, Inc., et al. v. Archer and White Sales, Inc., 139 S. CT. 524 (2019) (U.S.).

194. *Id.* at 526.

195. Greiman, The Big Dig, *supra* note 6.

196. *Id.*

Boston University School of Law Professor Virginia A. Greiman, who served as the Big Dig's Deputy General Counsel and Risk Manager, notes that extensive environmental feasibility studies, risk assessments, and other documentation[197] were accomplished before the project commenced.[198] However, costs increased across all contracts throughout the project's life cycle despite efforts at transferring, mitigating, and/or avoiding risks, as well as containing and managing costs — with the final cost topping U.S.$14.8 billion in 2007 or more than five times the original estimate of U.S.$2.56 billion.[199] The reported reasons for the escalation included federal rules prohibiting the use of inflation in project procurement documents and baselines, the failure to assess unknown subsurface conditions, environmental and mitigation costs, and expanded scope.[200] Aside from hard project costs, community and social costs were likewise underestimated as the full cost of dealing with the media, community interests, numerous regulatory agencies, auditors, and neighborhood stakeholders were not anticipated and programmed.[201] Throughout the life of the project, communication between and among internal and external stakeholders involved reaching out to local communities, particularly residents living close to major worksites.[202]

In this regard, Professor Greiman correctly emphasizes the crucial point that developing partnering arrangements with all stakeholders is a critical first step in building good relationships as strong relationships with stakeholders are linked to project success.[203] In terms of project management, a collaborative environment is preferred. As Professor Greiman notes, examples of collaboration include "partnering as a dispute resolution technique, integrated risk management, safety, health and insurance programs, integrated change

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Greiman, The Big Dig, *supra* note 6.

202. *Id.*

203. GREIMAN, MEGA PROJECT MANAGEMENT, *supra* note 5, at 102.

control, integration of the project's utilities program, and the establishment of an integrated oversight coordination commission."[204]

In terms of dispute settlement, partnering was employed in the Big Dig as a team problem-solving approach intended to eliminate the adversarial relationship problems between owner and contractor by focusing on mutual interests with the help of a neutral facilitator.[205] Partnering is widely used by numerous government and construction entities globally as a means of sharing project risks and to establish and promote partnership relationships.[206] Further, partnerships were utilized "to reduce costs, claims, disputes, and litigation."[207] Moreover, partnering is a way of conducting business in which two or more organizations make long-term commitments to achieve mutual goals focused on interests, not position.[208]

Considering the magnitude, complexity, and duration of the Big Dig, project management developed a comprehensive dispute prevention program and implemented various mechanisms in response to concerns: that conventional dispute resolution processes could not sufficiently accommodate the significant number of contract scope/scheduling changes and changed/unanticipated conditions and claims as they would require too much time, effort, and process formality to receive a timely decision from the owner; that project officials and personnel would be overwhelmed by the burdens of responding repeatedly to conventional litigation processes, such as document discovery, depositions, evidentiary hearings, and trials; and "that unresolved disputes and claims could slow down the progress of construction"[209] as the

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204. *Id.* at 24.

205. *Id.* at 360.

206. *Id.* at 359.

207. *Id.* at 360.

208. *Id.*

209. Kurt L. Dettman, et al., *Resolving Megaproject Claims: Lesson From Boston's "Big Dig"*, THE CONSTRUCTION LAWYER, Spring 2010, Volume 30, Issue No. 2, Spring 2010, at 2.

parties involved would spend their time fighting each other rather than spending their time and energy on completing the project.[210]

The dispute prevention program in the Big Dig was designed to act as a filter mechanism that "identified and resolved disputes at any one of several stages before they entered the statutory administrative appeal or litigation processes"[211] with the objective of institutionalizing "a process that would be faster and less expensive than court processes, yet produce technically sound, equitable, and auditable results."[212] To highlight the critical role of partnering as a means to support the sustainable progress of the Big Dig, "even arbitration where panelists have construction experience [was deemed] unsuitable because often the arbitration process, especially with complex construction disputes, involves litigation-type discovery and an arbitration process with a lengthy series of hearings."[213]

"For each partnered contract, the parties entered into a partnering agreement or partnering charter that set out the basic mutual [objectives]" together with a dispute prevention model.[214] It should be noted, however, that the partnering agreement neither changed the basic terms and conditions of the construction contract nor "supplant[ed] the requirements of the formal claim submission and resolution process.[215] Rather, it provided a framework to "either resolve or informally elevate issues or disputes for resolution before they became formal claims."[216] Professor Greiman notes that the following contractual language was used in all design and construction contracts on the Big Dig, to wit —

> The Owner and the Management Consultant intend to encourage the foundation of a cohesive partnership with the Design Consultant. This partnership will be structured to draw on the strengths of each organization to identify and achieve reciprocal goals. The objectives include effective and

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210. *Id.*

211. *Id.* at 3.

212. *Id.*

213. *Id.*

214. *Id.*

215. Dettman, et al, *supra* note 209, at 3.

216. *Id.*

> efficient performance; completion within budget; on schedule; and in accordance with the contract documents.
>
> The partnership will be totally voluntary. Any cost associated with effectuating this partnership will be agreed to by both parties and will be shared equally with no change in Contract price. To implement this partnership, it is anticipated that the Consultant's assigned Project Manager and the Owner's authorized representative will attend a leadership development seminar at the earliest opportunity after award followed by a team building workshop to be attended by the Consultant Team and the CA/T Project Design Management Team.
>
> An integral aspect of partnering is the resolution of issues in a timely, professional and non-adversarial manner. Alternative dispute resolution (ADR) methodologies will be encouraged in preference to the more formal mechanisms including arbitration and litigation. ADR will assist in promoting and maintaining an amicable working relationship.
>
> After the contract award[,] key members of the Consultant team may be invited to attend Construction Phase Partnering Workshops with the General Construction Contractor. During construction, the partnering relationship is with the Contractor, and the Consultant team is in a support role with the Owner and the Management Consultant.[217]

Had it not been for the adoption and shared implementation of partnering as a dispute prevention protocol prior to resorting to other ADR programs, if at all, experts have opined that the Big Dig would not have been manageable considering the project's sheer scope and complexity.[218] Further, sufficient data "support the conclusion that partnering contributed significantly towards the reduction of claims and avoidance of expensive and time-consuming litigation."[219]

As an affirmation of its crucial role in support of project sustainability, it has been determined that the extensive benefits of partnering include:

> (1) better value for the owner and recognition and protection of profit margin for contractors;

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217. GREIMAN, MEGA PROJECT MANAGEMENT, *supra* note 5, at 362.

218. Greiman, The Big Dig, *supra* note 6.

219. GREIMAN, MEGA PROJECT MANAGEMENT, *supra* note 5, at 361.

(2) creation of an environment that encourages innovation and technical development;

(3) elimination of duplication, better predictability of time and cost[;] and

(4) stability in the project environment[that] leads to a more productive project with better outcomes.[220]

In turn, the substantial rewards of successful partnering depend on the acceptance of certain critical factors.[221] Accordingly, to maintain its utility as a support tool for project sustainability, "all parties must constantly seek ways to improve the partnering process [itself]"[222] to ensure that it serves the greater and overarching strategic interests of the project.[223] Thus, all construction contractors and most design consultants voluntarily agreed to partnering in accordance with the contractual language.[224]

To reiterate, partnering, together with broader ADR modalities, was implemented "to provide the most productive and non-disruptive environment possible"[225] for the stakeholders in the Big Dig. As all parties involved in the design, construction, and management of the project were involved in partnering, the interaction was one of mutual respect, with an emphasis on working as a team to achieve project goals.[226] This resulted in the successful reduction of adversarial relationships and the progression of the project schedule as disputes were settled.[227] By extension, "[t]he ADR program was invaluable in settling contract disputes without proceeding to [expensive and protracted] litigation."[228] Taking stock of, learning from, and heeding the lessons taught by the Big Dig is critical towards successful and

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220. *Id.* at 363.

221. *Id.*

222. *Id.* at 364.

223. *Id.*

224. *Id.* at 362.

225. GREIMAN, MEGA PROJECT MANAGEMENT, *supra* note 5, at 177.

226. *Id.* at 177–78.

227. *Id.* at 178.

228. *Id.*

resilient project management given the importance of being governed and agreeing to be so governed by a system of dispute prevention through partnering. Through this interest-based approach, project success, sustainability, and resilience are achieved. Accordingly, the partnering arrangements employed and optimized in the Big Dig as integral components of its risk management continuum and proactive dispute prevention paradigm should be adopted for Marawi's Big Rise.

Interestingly, this approach is consistent with the Filipino character and attributes of *paggalang* (respect and honor), *pakiusap* (making a humble request), *pakikipag-usap* (the proper manner of relating to someone), *pakikisama* (proper treatment of others), *bigayan* (having a give-and-take arrangement), *tulungan* (the giving of mutual assistance or aid), and *pagpapatawad* (forgiving those who offended you). These attributes converge to address and resolve conflicts through direct discussions between the parties involved (*pag-uusap*); through the assistance of close family, relatives, or friends who act as godfather or patron (*ninong*), intermediary, or mediator; or through those with gravitas who can dispense advice (*pagpapayo*). Through the attributes of *tiwala* (trust) and *hiya* or *kahihiyan* (shame), the parties are expected to follow the resulting agreement (*napag-usapan* or *usapan*), even when it is not in writing.

C. Best Practices in Community-Based Dispute Resolution

Professor Greiman has explored community-based dispute resolution by analyzing empirical case studies of hybrid ADR practices to demonstrate that investor-state dispute resolution "does not have to be limited to a treaty-negotiated dispute mechanism."[229] Furthermore, selected case studies were analyzed "to determine the core attributes of successful dispute resolution design in developing country contexts where there are limited resources, structural challenges, and extreme poverty."[230] On the basis of the analysis, and compared with investor-state dispute resolution mechanisms, Professor Greiman drew out criteria that best exemplify the alternatives for dispute resolution that balance the interests of local communities and the interests of

229. Virginia A Greiman, *The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships*, 32 WHITTIER L. REV. 395, 427 (2011) [hereinafter Greiman, *International Investment Disputes*].

230. *Id.*

the private and public sponsors who deliver the benefits.[231] It should be noted, however, that although characterized as dispute resolution mechanisms, these community-based systems and processes are, at least from the perspective and parameters of this Article, more aptly considered as dispute prevention modalities.

The first case study involves the establishment of a labor arbitration council in Cambodia (i.e., the Cambodian Garment Exports Hybrid Model) where a trade agreement imposed quotas on garment exports, which were increased if working conditions have substantially complied with labor laws and standards.[232] An Arbitration Council was established as a hybrid model that links "the rule of law with 'a forum for social dialogue between [organized labor] and management.'"[233] Although the awards are generally non-binding, they are immediately enforceable by agreement of the parties.[234] The Arbitration Council is viewed as "an important tool for the development of harmonious worker and employer relationships."[235]

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231. *Id.*

232. *Id.* at 429-30. The Cambodia case study was made within the context of the country's economic recovery against a documented history of famine, genocide, and civil war. *Id.* at 429 (citing Central Intelligence Agency, The World Factbook 2010, East & Southeast Asia: Cambodia, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html last accessed July 31, 2019) & Central Intelligence Agency, The World Factbook 2010, Economy-Overview, *available at* https://workmall.com/wfb2001/cambodia/cambodia_economy.html (last accessed July 25, 2019)).

233. Greiman, *International Investment Disputes*, *supra* note 229, at 429-30 (citing Daniel Adler, Caroline Sage, & Michael Woolcocket, Interim Institutions and the Development Process: Opening Spaces for Reform in Cambodia and Indonesia, (A Working Paper Published by the University of Manchester) at 9, *available at* http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-8609.pdf (last accessed July 25, 2019).

234. Greiman, *International Investment Disputes*, *supra* note 229, at 430 (citing Adler, et al., *supra* note 231, at 8).

235. Greiman, *International Investment Disputes*, *supra* note 229 at 431 (citing Adler, et al., *supra* note 231, at 9).

The second case study involves the establishment of a model for participatory development projects in Indonesia (i.e., the Kecamatan Development Project) to deliver development resources to rural communities through local representative community forums in which villagers determine the form and location of small-scale development projects through competitive bidding.[236] The strategy was to use local villagers who are most familiar with the environmental needs of the local population, as well as the political and economic landscape, as this was found to be effective in enhancing the capacity of participants to constructively manage disputes, thus resulting in projects becoming responsive to community demands and being less likely to cause conflict.[237]

The third case study involves a study of dispute resolution mechanisms in the road construction industry in India.[238] The recommendations included three important requirements: first, the decision of the hierarchical process was made binding on each party until reversed or changed at the next higher level in the process; second, a Road Appellate Tribunal composed of a fixed number of arbitrators specializing in contract law should be established with the ability to make final decisions at both the central and state levels for arbitration of

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236. Greiman, *International Investment Disputes*, *supra* note 229, at 431 (citing Adler, et al., *supra* note 231, at 11). The Indonesia case study is based on social theory and was set against a backdrop of widespread corruption and social unrest in the mid-1990s, the Asian financial crisis, and the 2004 Tsunami. Greiman, *International Investment Disputes*, *supra* note 229, at 431 (citing Adler, et al., *supra* note 231, at 10).

237. Greiman, *International Investment Disputes*, *supra* note 229 at 431-32 (citing Adler, et al., *supra* note 231, at 12).

238. Greiman, *International Investment Disputes*, *supra* note 229, at 433. The India case study arose from the Indian government's "concern over [its] capacity to deliver and build on previous studies that sought to improve dispute resolution systems in work contracts and other issues." Greiman, *International Investment Disputes*, *supra* note 229, at 433 (citing World Bank, Indian Road Construction Industry: Capacity Issues, Constraints and Recommendations at 13, *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/18914/463260 ESW0Box3101officlalouse0only1.pdf?sequence=1&isAllowed=y (last accessed July 25, 2019) [hereinafter The IBRD Report]).

disputes unresolved by the dispute resolution boards; and third, "all awards should be suitably backed by a guarantee or security deposit ... to address the difficulties of enforcement."[239]

According to Greiman, the case studies "provide important empirical evidence that is critical to designing dispute resolution models"[240] as "they seek to address certain challenges raised in the context of enhancing public participation in developing country investment."[241] Thus, the following considerations are integral and must be taken into account towards realizing genuine participatory dispute prevention in support of project success, sustainability, and resilience:

> The criteria include dispute resolution models that: (1) create an interim institution of a hybrid nature; (2) complement the international investment treaty regime; (3) utilize a participatory process with interest as opposed to rights-based negotiation strategies; (4) develop an independent and transparent process; (5) design explicit and accessible procedures for managing disputes; (6) build capacity and provide necessary resources; (7) are sensitive to culture in the national context; (8) incorporate financial and social returns; (9) provide for transparency and accountability and evaluation and reform; and (10) require enforceable commitments from all stakeholders.[242]

Greiman emphasizes that dispute resolution systems should be (1) "developed incrementally through an inclusive political process;"[243] (2) "accountable and transparent;"[244] (3) "sensitive to local context;"[245] and (4) inputted from and are responsive to a broad cross-section of society, as such have far greater chances of success than those forced upon local communities

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239. Greiman, *International Investment Disputes*, *supra* note 229, at 434 (citing The IBRD Report, *supra* note 238, at 63).

240. Greiman, *International Investment Disputes*, *supra* note 229, at 434.

241. *Id.*

242. *Id.*

243. *Id.* at 453.

244. *Id.*

245. *Id.*

and stakeholders,[246] by highlighting the impact of incentivizing development agreements from the perspective of all stakeholders.[247] In particular, it has been observed that interim institutional approaches are effective in being responsive to the concerns of local communities but at the same time "promote principles of rule-based, transparent, and accountable decision-making[.]"[248] Further, it has been found that local citizens and institutions are best placed to address and resolve local problems and that "dispute resolution is least successful in cases lacking certain [fundamental conditions], such as political commitment, willingness to permit the open interchange of views, and the transparency necessary to ensure adequate information exchange."[249]

In this regard, "the primary focus of community-based dispute resolution is to address citizen suits, labor and environmental disputes, and local concerns" that cannot be properly or adequately addressed in an international setting where the institutional framework is neither designed nor equipped to deal with such complaints.[250] International arbitral institutions, on the other hand, may contribute to the development of community-based dispute resolution by improving the country's capacity to use institutional facilities and providing technical assistance to address local stakeholder concerns.[251] The hybrid system thus proposed by Professor Greiman, which is voluntary in character, and is owned and controlled by the stakeholders themselves, and

246. Greiman, *International Investment Disputes*, *supra* note 229,at 453.

247. *Id.* at 454.

248. *Id.* at 428 (citing Adler, et al., *supra* note 231, at 2).

249. Greiman, *International Investment Disputes*, *supra* note 229, at 435 (citing GAIL BINGHAM, ET AL., RESOLVING WATER DISPUTES: CONFLICT AND COOPERATION IN THE UNITED STATES, THE NEAR EAST, AND ASIA v-vi (1994)).

250. Greiman, *International Investment Disputes*, *supra* note 229, at 437 (citing NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL, THE RESOLVE TO RESOLVE - EMBRACING ADR TO IMPROVE ACCESS TO JUSTICE IN THE FEDERAL JURISDICTION 64 (2009) & Elizabeth Moreno, Lost In Translation: Legislature's Revision Necessary To Restore Funds To Community Based Dispute Resolution Programs, *available at* https://www.mediate.com/articles/morenoE13.cfm (last accessed July 25, 2019)).

251. Greiman, *International Investment Disputes*, *supra* note 229, at 436.

enforceable through their agreement, serves to complement institutional arbitration for community-based claims.[252] Under this framework, institutional arbitration and hybrid systems would complement towards conflict management in an integrated investment regime.[253]

With respect to the utilization of a participatory interest-based process as opposed to a rights-based negotiation approach, it has been found that "participative[and] interest-based design processes hold the greatest potential for durable, usable, and effective methods to resolve disputes on a systematic, rather than a case-by-case approach"[254] — which has been effectively utilized in the Big Dig. It should be pointed out, however, that stakeholders must be involved in the design and development process,[255] which goes into ownership and control of the framework.

A common thread for community-based dispute resolution systems is that they should be designed from the bottom up[256] and should have "rules and standards that prevent systematic discrimination, asymmetrical application, or harm to particular individuals."[257] Further, there should be a conscious sensitivity to cultural and national context as dispute resolution practitioners

252. *Id.* at 438.

253. *Id.*

254. Greiman, *International Investment Disputes*, *supra* note 229, at 439 (citing CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 51 & 56 (1996)).

255. Greiman, *International Investment Disputes*, *supra* note 229, at 438 (citing Cathy A. Costantino, *Using Interest-Based Techniques to Design Conflict Management Systems*, 12 NEGOT. J. 207, 207-09 & 214 (1996)).

256. Greiman, *International Investment Disputes*, *supra* note 229, at 440 (citing Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 229 (2009)).

257. Greiman, *International Investment Disputes*, *supra* note 229, at 440-41 (citing Megan Shepston Overly, *When Private Stakeholders Fail: Adapting Expropriation Challenges in Transnational Tribunals to New Governance Theories*, 71 OHIO ST. L.J. 341, 373 (2010) & Menkel-Medow, *supra* note 256, 229-30)).

"must not only be aware of the culture in which they are operating but also of the peculiarities of their own culture and the reality that [dispute resolution] mechanisms face unique challenges under different national contexts."[258] Moreover, the hybrid model requires enforcement of disputes through commitment or agreement, as opposed to a legally-enforceable mechanism.[259]

Hybrid dispute prevention will thrive in the Philippines as Filipinos have already been employing this modality for generations. In fact, a parallelism can be drawn between community-based dispute resolution and the Philippine tradition of amicably settling disputes among community members at the *barangay* (village) level without necessitating judicial intervention. This hybrid dispute prevention mechanism has since been incorporated in Republic Act No. 7160, otherwise known as the Local Government Code, and institutionalized as the *Katarungang Pambarangay* (Barangay Justice System) serving as the compulsory mediation process at the most basic level of governance.[260]

Recalling the previous discussion on proactive disaster management with an emphasis on disaster prevention and mitigation, studies have shown that instead of having to repeatedly assist affected communities reconstruct their houses each time a conflict or disaster occurs, it has been found that the "more effective long-term approach would be to increase the resilience of the poor to withstand and recover from future shocks and changes."[261] Interestingly, case studies in Peru, Guatemala, El Salvador, Colombia, and Honduras confirm the importance of community participation and inclusivity in realizing project resilience on the premise that beneficiary participation

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258. Greiman, *International Investment Disputes*, *supra* note 229, at 443 (citing Christopher W. Moore & Peter Woodrow, *What Do I Need to Know about Culture?: Practitioners Suggest …*, *in* HANDBOOK OF INTERNATIONAL PEACEBUILDING: INTO THE EYE OF THE STORM 91 (John Paul Lederach & Janice Moomaw Jenner eds., 2002)).

259. Greiman, *International Investment Disputes*, *supra* note 229, at 450.

260. Local Government Code of 1991, §§ 399-422.

261. Theo Schilderman, *How does reconstruction after disaster affect long-term resilience?*, *in* Urban Disaster Resilience: New Dimensions From International Practice In The Built Environment 125 (David Sanderson, Jerold S Kayden, & Julia Leis eds., 2016).

translates to successful projects.[262] Thus, in the rehabilitation, recovery, and rebuilding efforts for Marawi City and other affected communities, genuine resilience is key, thus —

> If reconstruction is to generate resilience, not just of physical structures, but also of the urban poor, there is an overwhelming need for agencies involved to adopt more holistic approaches to reconstruction that tackle a range of vulnerabilities of the poor. They will also need to get better at addressing the risks of all disasters (not just the most recent one) and taking account of climate change. To achieve this, they need to develop a longer-term view than that required for a conventional reconstruction project of a few years duration. They will have to broaden their skills base or seek to work with other agencies that can complement them. They will also have to commit to a longer-term presence, or have partners who can do so.[263]

This affirms the thrust of rebuilding conflict-affected communities in a comprehensive and holistic manner, not only physically, but, more importantly, including the dreams and aspirations of individuals, families, and communities. To this end, the proactive participatory process is as important as the resulting project considering that it is the process itself that empowers people and communities.[264] Moreover, strong participation generates ownership[265] — knowing that it is theirs and that they built themselves and the community into it.

V. PARTNERING FOR PROJECT RESILIENCE

The bedrock thesis of this Article is that proactive dispute prevention through partnering is essential towards managing and reducing risks, as well as ensuring success, sustainability, and resilience.

With the intention of allowing the project to proceed with minimal dispute-caused delays, partnering at the Big Dig was stakeholder-driven. In the same manner, the hybrid interim institutions involving participatory interest-based processes were community-based. These iterations of dispute management served as integral mechanisms to support the greater goal of

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262. *Id.* at 127.

263. *Id.* at 130.

264. *Id.* at 127.

265. *Id.*

project or program completion, success, and resilience. They should be viewed as exemplars of what can be done when people, communities, and stakeholders converge to achieve and realize a common objective. This was the opportunity missed by the Court when it denied the opportunity of the contracting parties in the PIATCO Contracts to settle disputes through the party-ordained dispute resolution mechanism. It should be underscored that stipulations of contracting parties as regards recourse to arbitration proceedings, when the same is not contrary to law, morals, public policy, and public order, should be respected. In this regard, the stability of and the predictability in trade and commerce are particularly important for developing countries. Everyone can only surmise what milestones could have been achieved had the parties been given the opportunity to arbitrate their concerns. And, granting that the parties' thrust was formal referral to institutional arbitration, how much more successful could the situation have been if a dispute prevention paradigm was employed and utilized to great advantages? The parties may have had better mornings.

It does not benefit commercial practice to know that a court is prepared and more than willing to pronounce a contract null and void before the factual issues are settled. It would surely bother foreign investors to realize that the highest court of the land, which traditionally rules only on questions of law, considers itself a trier of facts by the mere stroke of the judicial pen when cases of transcendental importance are brought before its halls. The mere fact that such cases are of transcendental importance should lead courts to exercise greater discretion in taking cognizance thereof. Exceptionality of circumstances should not always result in the relaxation of fundamental rules. To this, the words of Justice Holmes echo —

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.[266]

As the final arbiter of legal expectations and guardian of the Philippine legal system, much is required from the Court. It ought to ensure that expectations arising from contracts be respected. Lest case law in the Philippines be regressive, the Court should respect recognized principles of international commercial arbitration, particularly arbitral autonomy. Absent

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266. Northern Securities Company v. United States, 193 U.S. 197, 400 (1904) (J. Holmes, dissenting opinion).

any question on its due execution, a contractual stipulation specifying the modality through which disputes shall be addressed and resolved — whether through partnering, hybrid participatory interest-based process, or formal/institutional arbitration — should be upheld and enforced. The due respect accorded to such agreement is an indispensable precondition towards achieving the predictability essential to any international commercial transaction and the approximation of stable trade and commerce.

This advocacy takes on a more critical importance when taken within the context of the intended and prospective resilient rebuilding, rehabilitation, and recovery of Marawi City and other affected communities. To recall, resilience is the ability of a system, community, or society exposed to hazards to resist, absorb, accommodate to, and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions. Thus, in Marawi's Big Rise, the thrust of the Philippine Government is to strengthen the resilience of affected people and communities by providing universal and transformative social protection through the reduction of inherent vulnerabilities and building safe communities to resist, absorb, accommodate, adapt to, transform, and recover from the effects of both natural and human-induced hazards in a timely and efficient manner, including the preservation and restoration of essential basic structures and functions through disaster risk reduction and management, civil defense, and climate change adaptation and mitigation towards sustainable development. This legal and policy framework should not be frustrated by judicial hostility and overreach. Therefore, it is quintessential to employ a participatory dispute prevention paradigm in support of achieving project success, sustainability, and resilience. Partnering is thus perfect for Marawi's Big Rise and the 10-point criteria advanced by Professor Greiman should be adopted and adapted in the Philippines.

The critical utility of the dispute prevention paradigm advocated in this Article goes beyond the physical rebuilding of structures and spaces and includes the dreams and aspirations of people and communities that were affected by conflict, considering that sustainable dispute prevention grows into consequence prevention. Participatory processes should therefore empower people and build on the hopes of communities by providing the means to realize their safety and survival. In pursuit of supporting Marawi's Big Rise, the employment of participatory dispute prevention is demonstrative of how a seemingly commercial paradigm, discipline, and perspective impact on the ability of people and communities to counter evolving security threats and

challenges. Accordingly, project resilience is not an end in itself, but rather serves a crucial purpose in the greater scheme of humanitarian affairs, particularly in a post-conflict scenario. Seeing how project success, sustainability, and resilience is interrelated with the security and safety of people and communities, it is resoundingly clear how conflict resilience leading to consequence prevention feeds into and becomes a driver of both human security and a country's national security.

VI. CONCLUSION

As articulated in this Article, it is quintessential to incorporate dispute prevention through partnering as part of the greater risk management continuum into the rehabilitation, recovery, and rebuilding efforts for Marawi City and other affected communities to secure and ensure the success, sustainability, and resilience of Marawi's Big Rise. To this end, significant time and resources should be invested in anticipating conflicts and disputes through which conflict imagination leads to dispute prevention and a resilient project. This Article has demonstrated that, to succeed, dispute prevention requires a comprehensive paradigm shift and genuine stakeholder ownership. Accordingly, partnering as a highly-effective form of dispute prevention should be embraced as it aims to resolve conflicts at the earliest stages, at the most basic levels, and in a participatory manner. A participatory dispute prevention paradigm through partnering is, therefore, integral to the recovery, rehabilitation, and rebuilding efforts as it becomes a foundational element of project resilience; serves a far-reaching purpose within the risk management continuum, particularly with respect to risk reduction, mitigation, and avoidance, and in the greater scheme of humanitarian affairs; and informs consequence prevention.