

Republic of the Philippines
HOUSE OF REPRESENTATIVES
THIRTEENTH CONGRESS
Second Regular Session



HOUSE BILL NO. 4664

Introduced by Reps. SATUR C. OCAMPO, TEODORO A. CASIÑO, JOEL G. VIRADOR, CRISPIN B. BELTRAN, RAFAEL V. MARIANO, LIZA L. MAZA,

Explanatory Note

Onerous National Power Corporation (NPC or Napocor) contracts with independent power producers (IPPs) include provisions to purchase overpriced and unutilized power and to unduly absorb expensive business risks, including fluctuating fuel and fuel purchasing costs and costs from unstable exchange rates. These instances of fraud, deceit, and abuse of market (monopoly) power have bloated the debts of Napocor, prompting the government to sell it, and have inflicted upon consumers the heavy burden of electricity rate jack-ups, consequent hikes in the prices of goods and services, and, by virtue of the government assumption of NPC debt, diversions of tax revenues from social services to debt payments.

A Brief History

After the Ministry of Energy was abolished in 1986, no government support was given to rehabilitate existing power plants and to build new plants due to misguided budget priorities. To address the looming power shortage, former President Corazon Aquino signed EO 215 in 1987, opening power generation to the private sector, paving the way for IPPs, mostly foreign-owned, to enter and dominate the sector.

In the beginning of the 1990s, the country was hit by power shortages and frequent brown outs. To address the power crisis he inherited, former President Fidel Ramos asked for and was given emergency powers. Under his Administration, Napocor entered into expensive 10- to 25-year contracts with IPPs, most of which were signed during 1992-1994.

Napocor currently has 46 IPP contracts: 13 were signed from May 1990 - April 1992; 31 from September 1992 - November 1997; and, 2 in July & November 1998. Of the remaining active 35 IPP contracts reviewed by the inter-agency review committee (IAC)—the committee mandated by the Electric Power Industry Reform Act or the EPIRA to review the IPP contracts—five contain onerous terms (i.e. Binga hydroelectric, MCI, Sual coal-fired, and Casecnan, San Roque multipurpose project), only six had no legal or financial issues, and 24 had “financial, remedial policy, and remedial financial issues.”

Onerous IPP Contracts

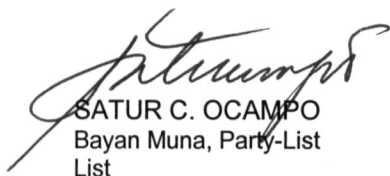
The four schemes to guarantee income for the IPPs also guaranteed unlawful and undue burden on the government and on consumers. First, Napocor entered into Take or Pay Agreements where it promised to buy 70%-90% power (whether actually generated / utilized or not) of the total capacity of IPP plants, when only 20%-40% would actually be generated. Second, Napocor pledged to supply fuel to IPPs and subsequently absorbed any fluctuations in fuel cost. Third, all IPP contracts were in US dollars, so Napocor would absorb dollar fluctuations. Finally, above all these, Napocor bought overpriced power. In 1996, average IPP generation cost was US\$76 per mwh, compared with US\$57 per mwh for NPC generation facilities.

Consumers have had to bear the heavy burden of NPC debt through electricity rate jack-ups, consequent hikes in the prices of goods and services, and, by virtue of the government assumption of NPC debt, diversions of tax revenues from social services to debt payments.

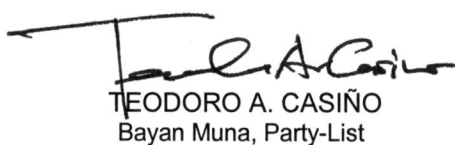
To call for the cancellation of the payments of fraudulent, onerous, and illegitimate debt incurred from IPP contracts is valid, as supported by our very own Civil Code and by international law, which render voidable contracts involving fraud. Moreover, the right against the impairment of contracts is not absolute. It yields to police power and general welfare of the people. In the words of the 1987 Constitution: "The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."

Debts incurred from most IPP contracts were contracted through questionable, illegitimate and/or illegal means, with unfair and onerous terms disadvantageous for the people and the Philippine government.

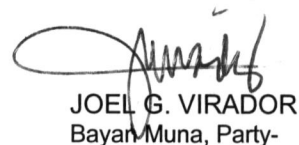
To redress this injustice, this bill requires the cancellation of servicing of unjust and fraudulent debts, the refund of the loans and interest payments already serviced, and the refund of their equivalent in past maintenance expenses plus interest thereon, net of all settlements and negotiations previously made.



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List



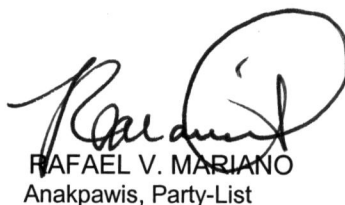
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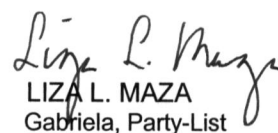
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Introduced by Reps. SATUR C. OCAMPO, TEODORO A. CASIÑO, JOEL G. VIRADOR, CRISPIN B. BELTRAN, RAFAEL V. MARIANO, LIZA L. MAZA,

AN ACT
CANCELLING PAYMENTS OF LOANS AND RECOVERING PREVIOUS PAYMENTS INCURRED THROUGH
UNJUST AND FRAUDULENT CONTRACTS BETWEEN THE NATIONAL POWER CORPORATION AND
INDEPENDENT POWER PRODUCERS

Be it enacted by the Senate and the House of Representatives of the Philippines in Congress assembled:

SECTION 1. Short Title.

This Act shall be known as the "National Power Corporation-Independent Power Producer (NPC-IPP) Debt Cancellation Act."

SECTION 2. Declaration of Policy.

I. Sovereignty

Article I, Section VII of the 1987 Constitution states: "The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination."

II. Social Justice

Article I, Section IX of the 1987 Constitution states: "The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all."

III. Obligations Under Philippine Laws

- (a) Article 1267, Section Two, Chapter Four, Book Four, of Republic Act 286, otherwise known as the Civil Code
"When the service has become so difficult as to be manifestly beyond the contemplation of the parties, the obligor may also be released therefrom, in whole or in part."
- (b) Article 1330, Section One, Chapter Two, Book Four, of Republic Act 286, otherwise known as the Civil Code
"A contract where consent is given through mistake, violence, intimidation, undue influence, or fraud is voidable."

1 IV. Obligations Under International Law

- 2
3 (a) Article 61, Section Three, Part Five of the Vienna Convention on the Law of Treaties
4 between States and International Organizations or between International Organizations

5
6 *Supervening impossibility of performance*

- 7
8 (1) A party may invoke the impossibility of performing a treaty as a ground for
9 terminating or withdrawing from it if the impossibility results from the permanent
10 disappearance or destruction of an object indispensable for the execution of the
11 treaty. If the impossibility is temporary, it may be invoked only as a ground for
12 suspending the operation of the treaty.

- 13
14 (2) XXXX

- 15
16 (b) Article 49, Section Two, Part Five of the Vienna Convention on the Law of Treaties
17 between States and International Organizations or between International Organizations

18
19 *Fraud*

20
21 "A State or an international organization induced to conclude a treaty by the fraudulent
22 conduct of a negotiating State or a negotiating organization may invoke the fraud as
23 invalidating its consent to be bound by the treaty."

- 24
25 (c) Article 50, Section Two, Part Five of the Vienna Convention on the Law of Treaties
26 between States and International Organizations or between International Organizations

27
28 *Corruption of a representative of a State or of an international organization*

29
30 "A State or an international organization the expression of whose consent to be bound
31 by a treaty has been procured through the corruption of its representative directly or
32 indirectly by a negotiating State or a negotiating organization may invoke such
33 corruption as invalidating its consent to be bound by the treaty."

34
35 Consistent with the foregoing, it is hereby the declared policy of the State to take steps to void contracts
36 and corresponding debts incurred fraudulently. The State shall act freely from any foreign influence in
37 its policy formulation processes, especially relating to the economic allocation of its resources geared
38 towards common prosperity and equitable distribution. To this effect, the State shall be independent
39 from the dictates of foreign creditors or other entities imposing any policy, law, or practice ensuring or
40 guaranteeing the allocation of government funds for debt service.

41
42
43 **SECTION 3. Debt Cancellation and Amendatory Provisions.**

- 44
45 (a) The Debt Service Fund for Interest Payment of Republic Act No. 9336, or Annex A of what is
46 otherwise known as the General Appropriations Act of 2005 shall hereby be amended such that
47 the total value of debt service shall be decreased by the amount appropriated for 2005 interest
48 payments for IPP illegitimate debt or the portion of loans incurred by and related to onerous
49 provisions of contracts between the National Power Corporation and independent power
50 producers.
51
52 (b) The Debt Service Fund for Principal Amortization, of Republic Act No. 9336, or Annex B of
53 what is otherwise known as the General Appropriations Act of 2005 shall hereby be amended
54 such that the total value of debt service shall be decreased by the amount appropriated for
55 2005 principal amortization payments for IPP illegitimate debt or the portion of loans incurred
56 by and related to onerous provisions of contracts between the National Power Corporation and
57 independent power producers.
58
59 (c) IPP illegitimate debt for 2005 or the portion of loans incurred by and related to onerous
60 provisions of contracts between the National Power Corporation and independent power
61 producers covering the year 2005 shall be calculated as follows.

The illegitimate debt consists of four basic parts:

- (1) Payment for unused energy based on take-or-pay scheme
- (2) Overprice payment for energy equipment and services of IPPs
- (3) Opportunity cost or lost income to Filipino public sector and taxpayers from (1) and (2), and based on seven (7) percent interest rate (as applied in the case of fuel imports)
- (4) Illegitimate debt due to payments for fluctuations and instabilities in foreign exchange rate and fuel costs.

The variables and formula below determine the computation of the illegitimate 2005 NAPOCOR-IPP debt.

(1) Variables

Let:

- Dispatch Rate (DR) = (energy actually generated and used) / (energy contracted to pay regardless of use under the minimum energy off-take or take-or-pay contract)
 DR_{2005} = Dispatch Rate for the year 2005
- Energy Non-use Rate (ENR) = (energy actually generated but unused) / (energy contracted to pay regardless of use under the minimum energy off-take or take-or-pay contract)
 ENR_{2005} = Energy Non-use Rate for the year 2005
- Overprice Ratio (OR) = (IPP basic cost at start — NPC generation cost of similar plant at start) / (IPP basic cost at start of contract)
 OR_{2005} = Overprice Ratio for the year 2005
- Foreign Exchange Rate Fluctuation Rate (FXF) = the difference between start-of-year exchange rates and annual exchange rate averages (averaged over monthly foreign exchange rates published by the Bangko Sentral ng Pilipinas)
 $FX_{01-2005}$ = exchange rate for January 2005, or the start-of-year exchange rate for 2005
 $FX_{02-2005}$ = exchange rate for February 2005 (and so on...)
 FXF_{2005} = annual foreign exchange rate fluctuation for the year 2005
= $[(FX_{2005\ 01} + FX_{2005\ 02} + \dots + FX_{2005\ 12}) / 12] - FX_{2005\ 01}$
- Fuel and Purchase Cost Fluctuation Rate (FPCF) = the difference between start-of-year monthly fuel and purchase costs and annual fuel and purchase cost averages (averaged over monthly fuel and purchase cost)
 $FPC_{01-2005}$ = fuel and purchase costs for January 2005, or the start-of-year fuel and purchase costs
 $FPC_{02-2005}$ = fuel and purchase costs for February 2005 (and so on...)
 $FPCF_{2005}$ = annual fuel and purchase cost fluctuation for the year 2005

$$F_{2005} = \frac{[(FPC_{2005\ 01} + FPC_{2005\ 02} + \dots + FPC_{2005\ 12}) / 12] - FPC_{2005\ 01}}{\text{total amount, in barrels, of fuel purchased for the year 2005}}$$

- Payments to each IPP for any year of operations represented by the variable x (P_x)

$$P_{2005} = \text{Payments to each IPP for the year 2005}$$

(2) Formula

Total illegitimate debt for the year 2005 for each IPP

$$\begin{aligned} &= (ENR_{2005} * P_{2005}) + (DR_{2005} * OR_{2005} * P_{2005}) + (FXF_{2005} * P_{2005}) + (FPCF_{2005} * F_{2005}) + 0.07 * [(ENR_{2005} * P_{2005}) + (DR_{2005} * OR_{2005} * P_{2005}) + (FXF_{2005} * P_{2005}) + (FPCF_{2005} * F_{2005})] * (\text{fraction of the year 2005 completed}) \\ &= [1 + 0.07 * (\text{fraction of the year 2005 completed})] * [(ENR_{2005} * P_{2005}) + (DR_{2005} * OR_{2005} * P_{2005}) + (FXF_{2005} * P_{2005}) + (FPCF_{2005} * F_{2005})] \end{aligned}$$

(3) Averages

Any mid-year adjustments in IPP generation rates/basic costs shall be reflected in the calculations by summing up different rates weighted by their respective time period coverage.

- (d) Interest payments and principal amortization payments for IPP illegitimate debt or the portion of loans incurred by and related to onerous provisions of contracts between the National Power Corporation and independent power producers are hereby prohibited from being included in all succeeding General Appropriations Acts and supplementary budgets and from being charged against contingent funds upon the effectivity of this act.

SECTION 4. *Negotiations for the Refund of Previous Debt Payments.*

- (a) IPP illegitimate debt or the cumulative (start of contract up to 2004) portion of loans incurred by and related to onerous provisions of contracts between the National Power Corporation and independent power producers shall be calculated as follows:

The illegitimate debt consists of three basic parts:

- (1) Payment for unused energy based on take-or-pay scheme
- (2) Overprice payment for energy equipment and services of IPPs
- (3) Opportunity cost or lost income to Filipino public sector and taxpayers from (1) and (2), and based on 7 percent interest rate (as applied in the case of fuel imports)
- (4) Illegitimate debt due to fluctuations in exchange rate and fuel cost instabilities are beyond the scope of this bill.

The variables and formulae below determine the computation of the illegitimate NAPOCOR-IPP debt.

(1) Variables

Let:

- Dispatch Rate (DR) = $\frac{\text{(energy actually generated and used)}}{\text{(energy contracted to pay regardless of use under the minimum energy off-take or take-or-pay contract)}}$

1	DR_x	= Dispatch Rate for any year represented by the variable x
2		
3	DR_1	= Dispatch Rate for the first year of operations
4	DR_2	= Dispatch Rate for the second year of operations (and so on...)
5		
6	DR_{2004}	= Dispatch Rate for the year 2004
7		
8		
9	• Energy Non-use Rate (ENR)	= (energy actually generated but unused) / (energy contracted to pay regardless of use under the minimum energy off-take or take-or-pay contract)
10		
11		
12		
13	ENR_x	= Energy Non-use Rate for any year represented by the variable x
14		
15	ENR_1	= Energy Non-use Rate for the first year of operations
16		
17	ENR_2	= Energy Non-use Rate for the second year of operations (and so on...)
18		
19	ENR_{2004}	= Energy Non-use Rate for the year 2004
20		
21		
22	• Overprice Ratio (OR)	= (IPP basic cost at start — NPC generation cost of similar plant at start) / (IPP basic cost at start of contract)
23		
24		
25	OR_x	= Overprice Ratio for any year represented by the variable x
26		
27	OR_1	= Overprice Ratio for the first year of operations
28	OR_2	= Overprice Ratio for the second year of operations (and so on...)
29		
30	OR_{2004}	= Overprice Ratio for the year 2004
31		
32		
33	• Payments to each IPP for any year of operations (P):	
34		
35	P_x	= Payments to each IPP for any year represented by the variable x
36		
37	P_1	= Payments to each IPP for the first year of operations
38		
39	P_2	= Payments to each IPP for the second year of operations
40		
41	P_{2005}	= Payments to each IPP for the year 2004
42		
43	• Foreign Exchange Rate Fluctuation Rate (FXF)	= the difference between start-of-year exchange rates and annual exchange rate averages (averaged over monthly foreign exchange rates published by the Bangko Sentral ng Pilipinas)
44		
45		
46		
47		
48		
49	FX_{x-y}	= exchange rate for the x^{th} month of the y^{th} year of operations
50		
51	FX_{01-1}	= exchange rate for January of the first year of operations, or the start-of-year exchange rate for the first year of operations
52		
53		
54	FX_{02-2}	= exchange rate for February of the second year of operations, or the start-of-year exchange rate for the first year of operations (and so on...)
55		
56		
57		
58	FXF_{2004}	= annual foreign exchange rate fluctuation for the year 2004
59		
60		= $[(FX_{2004\ 01} + FX_{2004\ 02} + \dots + FX_{2004\ 12}) / 12] - FX_{2004\ 01}$
61		

- Fuel and Purchase Cost Fluctuation Rate (FPCF) = the difference between start-of-year monthly fuel and purchase costs and annual fuel and purchase cost averages (averaged over monthly fuel and purchase cost)
- FPC_{x-y} = fuel and purchase costs for the x^{th} month of the y^{th} year of operations
- FPC_{01-1} = fuel and purchase costs for January of the first year of operations, or the start-of-year fuel and purchase costs for the first year of operations
- FPC_{02-2} = fuel and purchase costs for February of the second year of operations (and so on...)
- $FPCF_{2004}$ = annual fuel and purchase cost fluctuation for the year 2004
- = $[(FPC_{2004\ 01} + FPC_{2004\ 02} + \dots + FPC_{2004\ 12}) / 12] - FPC_{2004\ 01}$
- F_x = total amount, in barrels, of fuel purchased for any year represented by variable x
- F_{2005} = total amount, in barrels, of fuel purchased for the year 2004
- Total Payments to each IPP from start of contract to any future year minus fuel (TP):
- TP_x = Total Payments to each IPP (minus fuel) for any year represented by the variable x
- TP_1 = Payments to each IPP (minus fuel) for the first year of operations
- TP_2 = Total Payments to each IPP (minus fuel) for the first and second year of operations
- TP_{2004} = Payments to each IPP (minus fuel) from start of contract to the year 2004

(2) Formulae

- Total illegitimate debt for from start of contract to 2004 for each IPP, excluding opportunity costs
- = $[(ENR_1 * TP_1) + (DR_1 * OR_1 * TP_1) + (FXF_1 * P_1) + (FPCF_1 * F_1)] + [(ENR_2 * TP_2) + (DR_2 * OR_2 * TP_2) + (FXF_2 * P_2) + (FPCF_2 * F_2)] + \dots + [(ENR_{2004} * TP_{2004}) + (DR_{2004} * OR_{2004} * TP_{2004}) + (FXF_{2004} * P_{2004}) + (FPCF_{2004} * F_{2004})]$
- = A
- Total illegitimate debt for from start of contract to 2004 for each IPP, including opportunity costs
- = $(A) + 0.07 * (A) * (\text{number of years covered by debt})$
- = $(A) * [1 + 0.07 * (\text{number of years covered by debt})]$

(3) Averages

Any mid-year adjustments in IPP generation rates/basic costs shall be reflected in the calculations by summing up different rates weighted by their respective time period coverages.

- (b) The Department of Finance is hereby directed to negotiate for the refund of all previous interest and principal amortization payments for loans incurred by or related to contracts between Napocor and the IPPs with the respective foreign ministries of trade and all creditors of loans incurred by or related such contracts.

1
2 (c) Terms of Negotiations
3

- 4 (1) Negotiations should be concluded within one year from the formation of the team;
5 (2) Negotiations shall be transparent and the complete transcript of negotiations shall be
6 made available to the Filipino citizenry through websites and publications.
7

8
9 **SECTION 5. Oversight Functions.**
10

11 The Departments of Finance and Budget and Management shall ensure the strictest compliance with
12 this Act.
13

14
15 **SECTION 6. Penalties.**
16

17 Any violation of Section 3 (b) hereof shall subject the responsible public official/s therefore to
18 imprisonment of eight (8) years with perpetual disqualification from holding elective and appointive
19 office/s.
20

21
22 **SECTION 7. Repealing Clause.**
23

- 24 (a) Section 31 of Presidential Decree No. 1177 of July 30, 1977 entitled 'Revising The Budget
25 Process In Order To Institutionalize The Budgetary Innovations Of The new Society' is hereby
26 amended to read as follows:
27

28 "Section 31. *Automatic Appropriations.* All expenditures for (a) personal retirement premiums,
29 government service insurance, and other similar fixed SOCIAL SERVICE expenditures [, (b)
30 principal and interest on public debt, (c) national government guarantees of obligations which
31 are drawn upon,] are automatically appropriated: provided, that no obligations shall be incurred
32 or payments made from funds thus automatically appropriated except as issued in the form of
33 regular budgetary allotments."
34

- 35 (b) Section 26, Chapter 4, Book VI of Executive Order No. 292, otherwise known as the
36 "Administrative Code of 1987" which reiterates *in toto* Section 31 of Presidential Decree No.
37 1177 and similar laws, decrees, executive orders, administrative orders, or circulars are
38 likewise hereby amended.
39

- 40 (c) Republic Act 9136, otherwise known as the Electric Power Industry Reform Act, is hereby
41 repealed.
42

- 43 (d) All other laws, decrees, executive orders, rules and regulations, or parts thereof inconsistent
44 with any of the provisions of this Act, are hereby repealed or amended accordingly.
45

46
47 **SECTION 8. Separability Clause.** – If, for any reason, any section or provision of this Act is declared
48 unconstitutional or invalid, such other sections or provisions not affected thereby shall remain in full
49 force and effect.
50

51
52 **SECTION 9. Effectivity.** – This Act shall take effect fifteen days after its complete publication in at least
53 two (2) national newspapers of general circulation.
54

55
56 Approved,
57