INITIATIVES FOR DIALOGUE AND EMPOWERMENT THROUGH ALTERNATIVE LEGAL SERVICES, INC. (IDEALS, INC.), REPRESENTED BY ITS EXECUTIVE DIRECTOR, MR. EDGARDO LIGON, AND FREEDOM FROM DEBT...

G.R. No. 192088. October 09, 2012

Ponente: VILLARAMA, JR., J.

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VILLARAMA, JR., J.:

Before us is a petition for certiorari and prohibition seeking to permanently enjoin the sale of the Angat Hydro-Electric Power Plant (AHEPP) to Korea Water Resources Corporation (K-Water) which won the public bidding conducted by the Power Sector Assets and Liabilities Management Corporation (PSALM).

The Facts

Respondent PSALM is a government-owned and controlled corporation created by virtue of Republic Act No. 9136,[1] otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA). The EPIRA provided a framework for the restructuring of the electric power industry, including the privatization of the assets of the National Power Corporation (NPC), the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities. Said law mandated PSALM to manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and Independent Power Producer (IPP) contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner, which liquidation is to be completed within PSALM's 25-year term of existence.[2]

Sometime in August 2005, PSALM commenced the privatization of the 246-megawatt (MW) AHEPP located in San Lorenzo, Norzagaray, Bulacan. AHEPP's main units built in 1967 and 1968, and 5 auxiliary units, form part of the Angat Complex which includes the Angat Dam, Angat Reservoir and the outlying watershed area. A portion of the AHEPP -- the 10 MW Auxiliary Unit No. 4 completed on June 16, 1986 and the 18 MW Auxiliary Unit No. 5 completed on January 14, 1993 -- is owned by respondent Metropolitan Waterworks and Sewerage System (MWSS).[3] The main units produce a total of 200 MW of power while the auxiliary units yield the remaining 46 MW of power. The Angat Dam and AHEPP are utilized for power generation, irrigation, water supply and flood control purposes. Because of its multi-functional design, the operation of the Angat Complex involves various government agencies, namely: (1) NPC; (2) National Water Resources Board (NWRB); (3) MWSS; (4) respondent National Irrigation Administration (NIA); and (5) Philippine Atmospheric, Geophysical and Astronomical Services Administration (PAG-ASA).

On December 15, 2009, PSALM's Board of Directors approved the Bidding Procedures for the privatization of the AHEPP. An Invitation to Bid was published on January 11, 12 and 13, 2010 in three major national newspapers. Subject of the bid was the AHEPP consisting of 4 main units and 3 auxiliary units with an aggregate installed capacity of 218 MW. The two auxiliary units owned by MWSS were excluded from the bid.

The following terms and conditions for the purchase of AHEPP were set forth in the Bidding Package:

> IB-05 CONDITION OF THE SALE
>
> The Asset shall be sold on an "AS IS, WHERE IS" basis.
>
> The Angat Dam (which is part of the Non-Power Components) is a multi-purpose hydro facility which currently supplies water for domestic use, irrigation and power generation. The four main units of the Angat Plant release water to an underground trailrace that flows towards the Bustos Dam which is owned and operated by the National Irrigation Administration ("NIA") and provides irrigation requirements to certain areas in Bulacan. The water from the auxiliary units 1, 2 and 3 flows to the Ipo Dam which is owned and operated by MWSS and supplies domestic water to Metro Manila and other surrounding cities.
>
> The priority of water usage under Philippine Law would have to be observed by the Buyer/Operator.
>
> The Winning Bidder/Buyer shall be requested to enter into an operations and maintenance agreement with PSALM for the Non-Power Components in accordance with the terms and conditions of the O & M Agreement to be issued as part of the Final Transaction Documents. The Buyer, as Operator, shall be required to operate and maintain the Non-Power Components at its own cost and expense.
>
> PSALM is currently negotiating a water protocol agreement with various parties which are currently the MWSS, NIA, the National Water Resources Board and NPC. If required by PSALM, the Buyer will be required to enter into the said water protocol agreement as a condition to the award of the Asset.
>
> The Buyer shall be responsible for securing the necessary rights to occupy the land underlying the Asset.[4] (Emphasis supplied.)

All participating bidders were required to comply with the following: (a) submission of a Letter of Interest; (b) execution of Confidentiality Agreement and Undertaking; and (c) payment of a non-refundable fee of US$ 2,500 as Participation Fee.[5] After holding pre-bid conferences and forum discussions with various stakeholders, PSALM received the following bids from six competing firms:

> K-Water
>
> US$ 440,880,000.00
>
> First Gen Northern Energy Corporation
>
> 365,000,678.00
>
> San Miguel Corporation
>
> 312,500,000.00
>
> SN Aboitiz Power-Pangasinan, Inc.
>
> 256,000,000.00
>
> Trans-Asia Oil & Energy Development Corporation
>
> 237,000,000.00
>
> DMCI Power Corporation
>
> 188,890,000.00

On May 5, 2010, and after a post-bid evaluation, PSALM's Board of Directors approved and confirmed the issuance of a Notice of Award to the highest bidder, K-Water.[6]

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On May 19, 2010, the present petition with prayer for a temporary restraining order (TRO) and/or writ of preliminary injunction was filed by the Initiatives for Dialogue and Empowerment Through Alternative Legal Services, Inc. (IDEALS), Freedom from Debt Coalition (FDC), AKBAYAN Citizen's Action Party (AKBAYAN) and Alliance of Progressive Labor.

On May 24, 2010, this Court issued a Status Quo Ante Order directing the respondents to maintain the status quo prevailing before the filing of the petition and to file their respective Comments on the petition.[7]

Arguments of the Parties

Petitioners contend that PSALM gravely abused its discretion when, in the conduct of the bidding it disregarded and violated the people's right to information guaranteed under the Constitution, as follows: (1) the bidding process was commenced by PSALM without having previously released to the public critical information such as the terms and conditions of the sale, the parties qualified to bid and the minimum bid price, as laid down in the case of Chavez v. Public Estates Authority[8]; (2) PSALM refused to divulge significant information requested by petitioners, matters which are of public concern; and (3) the bidding was not conducted in an open and transparent manner, participation was indiscriminately restricted to the private sectors in violation of the EPIRA which provides that its provisions shall be "construed in favor of the establishment, promotion, preservation of competition and people empowerment so that the widest participation of the people, whether directly or indirectly, is ensured."[9]

Petitioners also assail the PSALM in not offering the sale of the AHEPP to MWSS which co-owned the Angat Complex together with NPC and NIA. Being a mere co-owner, PSALM cannot sell the AHEPP without the consent of co-owners MWSS and NIA, and being an indivisible thing, PSALM has a positive obligation to offer its undivided interest to the other co-owners before selling the same to an outsider. Hence, PSALM's unilateral disposition of the said hydro complex facility violates the Civil Code rules on co-ownership (Art. 498) and Sec. 47 (e) of the EPIRA which granted PSALM the legal option of transferring possession, control and operation of NPC generating assets like the AHEPP to another entity in order "to protect potable water, irrigation and all other requirements imbued with public interest."

As to the participation in the bidding of and award of contract to K-Water which is a foreign corporation, petitioners contend that PSALM clearly violated the constitutional provisions on the appropriation and utilization of water as a natural resource, as implemented by the Water Code of the Philippines limiting water rights to Filipino citizens and corporations which are at least 60% Filipino-owned. Further considering the importance of the Angat Dam which is the source of 97% of Metro Manila's water supply, as well as irrigation for farmlands in 20 municipalities and towns in Pampanga and Bulacan, petitioners assert that PSALM should prioritize such domestic and community use of water over that of power generation. They maintain that the Philippine Government, along with its agencies and subdivisions, have an obligation under international law, to recognize and protect the legally enforceable human right to water of petitioners and the public in general.

Petitioners cite the Advisory on the "Right to Water in Light of the Privatization of the Angat Hydro-Electric Power Plant"[10] dated November 9, 2009 issued by the Commission on Human Rights (CHR) urging the Government to revisit and reassess its policy on water resources vis-à-vis its concurrent obligations under international law to provide, and ensure and sustain, among others, "safe, sufficient, affordable and convenient access to drinking water." Since investment in hydropower business is primarily driven by generation of revenues both for the government and private sector, the CHR warns that once the AHEPP is privatized, there will be less accessible water supply, particularly for those living in Metro Manila and the Province of Bulacan and nearby areas which are currently benefited by the AHEPP. The CHR believes that the management of AHEPP is better left to MWSS being a government body and considering the public interest involved. However, should the

decision to privatize the AHEPP become inevitable, the CHR strongly calls for specific and concrete safeguards to ensure the right to water of all, as the domestic use of water is more fundamental than the need for electric power.

Petitioners thus argue that the protection of their right to water and of public interest requires that the bidding process initiated by PSALM be declared null and void for violating such right, as defined by international law and by domestic law establishing the State's obligation to ensure water security for its people.

In its Comment With Urgent Motion to Lift Status Quo Ante Order, respondent PSALM prayed for the dismissal of the petition on the following procedural grounds: (a) a petition for certiorari is not the proper remedy because PSALM was not acting as a tribunal or board exercising judicial or quasi-judicial functions when it commenced the privatization of AHEPP; (b) the present petition is rendered moot by the issuance of a Notice of Award in favor of K-Water; (c) assuming the petition is not mooted by such contract award, this Court has no jurisdiction over the subject matter of the controversy involving a political question, and also because if it were the intent of Congress to exclude the AHEPP in the privatization of NPC assets, it should have clearly expressed such intent as it did with the Agus and Pulangui power plants under Sec. 47 of the EPIRA; (d) petitioners' lack of standing to question the bidding process for failure to show any injury as a result thereof, while Rep. Walden Bello likewise does not have such legal standing in his capacity as a duly elected member of the House of Representatives as can be gleaned from the rulings in David v. Arroyo[11] and Philippine Constitutional Association v. Enriquez.[12]

On the alleged violation of petitioners' right to information, PSALM avers that it conducted the bidding in an open and transparent manner, through a series of events in accordance with the governing rules on public bidding. The non-disclosure of certain information in the invitation to bid was understandable, such as the minimum or reserve price which are still subject to negotiation and approval of PSALM's Board of Directors. The ruling in Chavez v. Public Estates Authority[13]is inapplicable since it involved government property which has become unserviceable or was no longer needed and thus fell under Sec. 79 of the Government Auditing Code whereas the instant case concerns a hydroelectric power plant adjacent to a dam which still provides water supply to Metro Manila. In the bidding for the AHEPP, PSALM claims that it relied on the Rules and Regulations Implementing the EPIRA, as well as COA Circular No. 89-296 on the general procedures for bidding by government agencies and instrumentalities of assets that will be divested or government property that will be disposed of. PSALM likewise avers that it was constrained to deny petitioner IDEALS' letter dated April 20, 2010 requesting documents relative to the privatization of Angat Dam due to non-submission of a Letter of Interest, Confidentiality and Undertaking and non-payment of the Participation Fee. With regard to IDEALS' request for information about the winning bidder, as contained in its letter dated May 14, 2010, the same was already referred to respondent K-Water's counsel for appropriate action. In any case, PSALM maintains that not all details relative to the privatization of the AHEPP can be readily disclosed; the confidentiality of certain matters was necessary to ensure the optimum bid price for the property.

PSALM further refutes the assertion of petitioners that the Angat Complex is an indivisible system and co-owned with MWSS and NIA. It contends that MWSS's contribution in the funds used for the construction of the AHEPP did not give rise to a regime of co-ownership as the said funds were merely in exchange for the supply of water that MWSS would get from the Angat Dam, while the Umiray-AngatTransbasin Rehabilitation Project the improvement and repair of which were funded by MWSS, did not imply a co-ownership as these facilities are located in remote places. Moreover, PSALM points out that PSALM, MWSS and NIA each was issued a water permit, and are thus holders of separate water rights.

On the alleged violation of petitioners' and the people's right to water, PSALM contends that such is baseless and proceeds from the mistaken assumption that the Angat Dam was sold and as a result thereof, the continuity

and availability of domestic water supply will be interrupted. PSALM stresses that only the hydroelectric facility is being sold and not the Angat Dam which remains to be owned by PSALM, and that the NWRB still governs the water allocation therein while the NPC-FFWSDO still retains exclusive control over the opening of spillway gates during rainy season. The foregoing evinces the continued collective control by government agencies over the Angat Dam, which in the meantime, is in dire need of repairs, the cost of which cannot be borne by the Government.

PSALM further debunks the nationality issue raised by petitioners, citing previous opinions rendered by the Department of Justice (DOJ) consistently holding that the utilization of water by a hydroelectric power plant does not constitute appropriation of water from its natural source considering that the source of water (dam) that enters the intake gate of the power plant is an artificial structure. Moreover, PSALM is mindful of the State's duty to protect the public's right to water when it sold the AHEPP. In fact, such concern as taken into consideration by PSALM in devising a privatization scheme for the AHEPP whereby the water allocation is continuously regulated by the NWRB and the dam and its spillway gates remain under the ownership and control of NPC.

In its Comment,[14] respondent MWSS asserts that by virtue of its various statutory powers since its creation in 1971, which includes the construction, maintenance and operation of dams, reservoir and other waterworks within its territorial jurisdiction, it has supervision and control over the Angat Dam given that the Angat Reservoir supplies approximately 97% of the water requirements of Metro Manila. Over the course of its authority over the Angat Dam, Dykes and Reservoir, MWSS has incurred expenses to maintain their upkeep, improve and upgrade their facilities. Thus, in 1962, MWSS contributed about 20% for the construction cost of the Angat Dam and Dykes (then equivalent to about P21 million); in 1992, MWSS contributed about P218 million for the construction of Auxiliary Unit No. 5; in 1998, MWSS contributed P73.5 million for the construction cost of the low level outlet; and subsequently, MWSS invested P3.3 billion to build the Umiray-AngatTransbasin Tunnel to supplement the water supply available from the Angat Dam, which tunnel contributes a minimum of about 9 cubic meters per second to the Angat Reservoir, thus increasing power generation. MWSS argues that its powers over waterworks are vested upon it by a special law (MWSS Charter) which prevails over the EPIRA which is a general law, as well as other special laws, issuances and presidential edicts. And as contained in Sec. 1 of the MWSS Charter, which remains valid and effective, it is expressly provided that the establishment, operation and maintenance of waterworks systems must always be supervised by the State.

MWSS further alleges that after the enactment of EPIRA, it had expressed the desire to acquire ownership and control of the AHEPP so as not to leave the operation of the Angat Reservoir to private discretion that may prejudice the water allocation to MWSS as dictated by NWRB rules. Representations were thereafter made with the Office of the President (OP) for the turn over of the management of these facilities to MWSS, and joint consultation was also held with PSALM officials for the possibility of a Management Committee to manage and control the Angat Dam Complex under the chairmanship of the water sector, which position was supported by former Secretary HermogenesEbdane of the Department of Public Works and Highways (DPWH). In March 2008, PSALM proposed the creation of an inter-agency technical working group (TWG) to draft the Operations and Maintenance (O & M) Agreement for the AHEPP that will be in effect after its privatization. PSALM likewise sought the view of the Office of the Government Corporate Counsel (OGCC) which opined that PSALM may turn over the facility to a qualified entity such as MWSS without need of public bidding. In 2009, various local governments supported the transfer of the control and management of the AHEPP to MWSS, while the League of Cities and Municipalities interposed its opposition to the privatization of the AHEPP fearing that it might increase the cost of water in Metro Manila, and also because it will be disadvantageous to the national government since the AHEPP only contributes 246 MW of electricity to the Luzon Grid. Even the CHR has advised the Government to reassess its privatization policy and to always consider paramount the most basic

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resources necessary and indispensable for human survival, which includes water.

MWSS further avers that upon the facilitation of the OGCC and participated in by various stakeholders, including its two concessionaires, Manila Water Company, Inc. and Maynilad Water Services, Inc., various meetings and conferences were held relative to the drafting of the Memorandum of Agreement on the Angat Water Protocol. On April 20, 2010, the final draft of the Angat Water Protocol was finally complete. However, as of June 18, 2010, only MWSS and NIA signed the said final draft. MWSS thus contends that PSALM failed to institute any safeguards as prescribed in Sec. 47 of the EPIRA when it proceeded with the privatization of the AHEPP.

As to the issue of nationality requirement in the appropriation of water resources under the Constitution, MWSS cites the case of Manila Prince Hotel v. Government Service Insurance System[15] which interpreted paragraph 2, Sec. 10, Art. XII of the 1987 Constitution providing that "[i]n the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos" to imply "a mandatory, positive command which is complete in itself and which needs no further guidelines or implementing laws or rules for its enforcement x xx and is per se judicially enforceable." In this case, the AHEPP is in dire danger of being wholly-owned by a Korean corporation which probably merely considers it as just another business opportunity, and as such cannot be expected to observe and ensure the smooth facilitation of the more critical purposes of water supply and irrigation.

Respondent First Gen Northern Energy Corporation (FGNEC) also filed a Comment[16] disagreeing with the contentions of petitioners and respondent MWSS on account of the following: (1) the NPC charter vested upon it complete jurisdiction and control over watersheds like the Angat Watershed surrounding the reservoir of the power plants, and hence Art. 498 of the Civil Code is inapplicable; (2) NPC, MWSS and NIA are not co-owners of the various rights over the Angat Dam as in fact each of them holds its own water rights; (3) the State through the EPIRA expressly mandates PSALM to privatize all NPC assets, which necessarily includes the AHEPP; (4) the privatization of the AHEPP will not affect the priority of water for domestic and municipal uses as there are sufficient safeguards to ensure the same, and also because the Water Code specifically mandates that such use shall take precedence over other uses, and even the EPIRA itself gives priority to use of water for domestic and municipal purposes over power generation; (5) the Water Protocol also safeguards priority of use of water for domestic purposes; (6) the bidding procedure for the AHEPP was valid, and the bidding was conducted by PSALM in an open and transparent manner; and (7) the right to information of petitioners and the public in general was fully satisfied, and PSALM adopted reasonable rules and regulations for the orderly conduct of its functions pursuant to its mandate under the EPIRA.

FGNEC nevertheless prays of this Court to declare the nationality requirements for the ownership, operation and maintenance of the AHEPP as prescribed by the Constitution and pertinent laws. Considering the allegation of petitioners that K-Water is owned by the Republic of South Korea, FGNEC asserts that PSALM should not have allowed said entity to participate in the bidding because under our Constitution, the exploration, development and utilization of natural resources are reserved to Filipino citizens or to corporations with 60% of their capital being owned by Filipinos.

Respondent NIA filed its Comment[17] stating that its interest in this case is limited only to the protection of its water allocation drawn from the Angat Dam as determined by the NWRB. Acknowledging that it has to share the meager water resources with other government agencies in fulfilment of their respective mandate, NIA submits that it is willing to sit down and discuss issues relating to water allocation, as evidenced by the draft Memorandum of Agreement on the Angat Water Protocol. Since the reliefs prayed for in the instant petition will not be applicable to NIA which was not involved in the bidding conducted by PSALM, it will thus not be affected by the outcome of the case.

Respondents San Miguel Corporation (SMC), DMCI Power Corporation, Trans-Asia Oil and Energy Development Corporation and SNAboitiz Power-Pangasinan, Inc. filed their respective Comments[18] with common submission that they are not real parties-in-interest and should be excluded from the case. They assert that PSALM acted pursuant to its mandate to privatize the AHEPP when it conducted the bidding, and there exists no reason for them to take any action to invalidate the said bidding wherein they lost to the highest bidder K-Water.

On its part, respondent K-Water filed a Manifestation In Lieu of Comment[19] stating that it is not in a position to respond to petitioners' allegations, having justifiably relied on the mandate and expertise of PSALM in the conduct of public bidding for the privatization of the AHEPP and had no reason to question the legality or constitutionality of the privatization process, including the bidding. K-Water submits that its participation in the bidding for the AHEPP was guided at all times by an abiding respect for the Constitution and the laws of the Philippines, and hopes for a prompt resolution of the present petition to further strengthen and enhance the investment environment – considering the level of investment entailed, not only in financial terms – by providing a definitive resolution and reliable guidance for investors, whether Filipino or foreign, as basis for effective investment and business decisions.

In their Consolidated Reply,[20] petitioners contend that the instant petition is not mooted with the issuance of a Notice of Award to K-Water because the privatization of AHEPP is not finished until and unless the deed of absolute sale has been executed. They cite the ruling in David v. Arroyo,[21] that courts will decide cases, otherwise moot and academic, if: first, there is a grave violation of the Constitution; second, the exceptional character of the situation and the paramount public interest is involved; third, when constitutional issue raised requires formulation of controlling principles to guide the bench, the bar and the public; and fourth, the case is capable of repetition yet evading review.

Petitioners reiterate their legal standing to file the present suit in their capacity as taxpayers, or as Filipino citizens asserting the promotion and protection of a public right, aside from being directly injured by the proceedings of PSALM. As to the absence of Certification and Verification of Non-Forum Shopping from petitioner Bello in the file copy of PSALM, the same was a mere inadvertence in photocopying the same.

On the matter of compliance with an open and transparent bidding, petitioners also reiterate as held in Chavez v. Public Estates Authority,[22] that the Court's interpretation of public bidding applies to any law which requires public bidding, especially since Sec. 79 of the Government Auditing Code does not enumerate the data that must be disclosed to the public. PSALM should have followed the minimum requirements laid down in said case instead of adopting the "format generally used by government entities in their procurement of goods, infrastructure and consultancy services," considering that what was involved in Chavez is an amended Joint Venture Agreement which seeks to transfer title and ownership over government property. Petitioners point out that the requirement under COA Circular 89-296 as regards confidentiality covers only sealed proposals and not all information relating to the AHEPP privatization. PSALM's simple referral of IDEALS' request letter to the counsel of K-Water is very telling, indicating PSALM's limited knowledge about a company it allowed to participate in the bidding and which even won the bidding.

On the transfer of water rights to K-Water, petitioners reiterate that this violates the Water Code, and contrary to PSALM's statements, once NPC transfers its water permit to K-Water, in accordance with the terms of the Asset Purchase Agreement, NPC gives up its authority to extract or utilize water from the Angat River. Petitioners further assert that the terms of the sale of AHEPP allowing the buyer the operation and management of the Non-Power Components, constitutes a relinquishment of government control over the Angat Dam, in violation of Art. XII, Sec. 2 of the Constitution. PSALM likewise has not stated that all stakeholders have signed the Water

Protocol. Such absence of a signed Water Protocol is alarming in the light of PSALM's pronouncement that the terms of the sale to K-Water would still subject to negotiation. Is PSALM's refusal to sign the Water Protocol part of its strategy to negotiate the terms of the sale with the bidders? If so, then PSALM is blithely and cavalierly bargaining away the Filipinos' right to water.

Responding to the claims of MWSS in its Comment, PSALM contends that MWSS's allegations regarding the bidding process is belied by MWSS's own admission that it held discussions with PSALM to highlight the important points and issues surrounding the AHEPP privatization that needed to be threshed out. Moreover, MWSS also admits having participated, along with other agencies and stakeholders, various meetings and conferences relative to the drafting of a Memorandum of Agreement on the Angat Water Protocol.

As regards the Angat Dam, PSALM emphasizes that MWSS never exercised jurisdiction and control over the said facility. PSALM points out that the Angat Dam was constructed in 1967, or four years before the enactment of Republic Act No. 6234, upon the commissioning thereof by the NPC and the consequent construction by Grogun, Inc., a private corporation. MWSS' attempt to base its claim of jurisdiction over the Angat Dam upon its characterization of EPIRA as a general law must likewise fail. PSALM explains that EPIRA cannot be classified as a general law as it applies to a particular portion of the State, i.e., the energy sector. The EPIRA must be deemed an exception to the provision in the Revised MWSS Charter on MWSS's general jurisdiction over waterworks systems.

PSALM stresses that pursuant to the EPIRA, PSALM took ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and other disposable assets, which necessarily includes the AHEPP Complex, of which the Angat Dam is part. As to the OGCC opinion cited by MWSS to support its position that control and management of the Angat Dam Complex should be turned over to MWSS, the OGCC had already issued a second opinion dated August 20, 2008 which clarified the tenor of its earlier Opinion No. 107, s. 2008, stating that "the disposal of the [Angat] HEPP by sale through public bidding – the principal mode of disposition under [EPIRA] – remains PSALM's primary option." Moreover, as pointed out by the National Economic Development Authority (NEDA) in its letter dated September 16, 2009, the ownership and operation of a hydropower plant goes beyond the mandate of MWSS. This view is consistent with the provisions of EPIRA mandating the transfer of ownership and control of NPC generation assets, IPP Contracts, real estate and other disposable assets to a private person or entity. Consequently, a transfer to another government entity of the said NPC assets would be a clear violation of the EPIRA. Even assuming such is allowed by EPIRA, it would not serve the objective of the EPIRA, i.e., that of liquidating all NPC's financial obligations and would merely transfer NPC's debts from the hands of one government entity to another, the funds that would be utilized by MWSS in the acquisition of the AHEPP would doubtless come from the pockets of the Filipino people.

As regards the opposition of various local government units to the sale of the AHEPP, PSALM said that a forum was held specifically to address their concerns. After the said forum, these LGUs did not anymore raise the same concerns; such inaction on their part could be taken as an acquiescence to, and acceptance of, the explanations made by PSALM during the forum. PSALM had made it clear that it is only the AHEPP and not the Angat Dam which was being privatized. The same wrong premise underpinned the position of the CHR with its erroneous allegation that MWSS is allowed, under its Revised Charter, to operate and maintain a power plant.

PSALM further contends that the sale of AHEPP to K-Water did not violate the Constitution's provision on the State's natural resources and neither is the ruling in Manila Prince Hotel applicable as said case was decided under different factual circumstances. It reiterates that the AHEPP, being a generation asset, can be sold to a foreign entity, under the EPIRA, in accordance with the policy reforms said law introduced in the power sector; the EPIRA aims to enable open access in the electricity market and then enable the government to concentrate

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more fully on the supply of basic needs to the Filipino people. Owing to the competitive and open nature of the generation sector, foreign corporation may own generation assets.

Issues

The present controversy raised the following issues:

1) Legal standing of petitioners;
2) Mootness of the petition;
3) Violation of the right to information;
4) Ownership of the AHEPP;
5) Violation of Sec. 2, Art. XII of the Constitution;
6) Violation of the Water Code provisions on the grant of water rights; and
7) Failure of PSALM to comply with Sec. 47 (e) of EPIRA.

Mootness and Locus Standi

PSALM's contention that the present petition had already been mooted by the issuance of the Notice of Award to K-Water is misplaced. Though petitioners had sought the immediate issuance of injunction against the bidding commenced by PSALM -- specifically enjoining it from proceeding to the next step of issuing a notice of award to any of the bidders -- they further prayed that PSALM be permanently enjoined from disposing of the AHEPP through privatization. The petition was thus filed not only as a means of enforcing the State's obligation to protect the citizens' "right to water" that is recognized under international law and legally enforceable under our Constitution, but also to bar a foreign corporation from exploiting our water resources in violation of Sec. 2, Art. XII of the 1987 Constitution. If the impending sale of the AHEPP to K-Water indeed violates the Constitution, it is the duty of the Court to annul the contract award as well as its implementation. As this Court held in Chavez v. Philippine Estates Authority,[23] "[s]upervening events, whether intended or accidental, cannot prevent the Court from rendering a decision if there is a grave violation of the Constitution."

We also rule that petitioners possess the requisite legal standing in filing this suit as citizens and taxpayers.

"Legal standing" or locus standi has been defined as a personal and substantial interest in the case such that the party has sustained or will sustain direct injury as a result of the governmental act that is being challenged, alleging more than a generalized grievance. The gist of the question of standing is whether a party alleges "such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions."[24] This Court, however, has adopted a liberal attitude on the locus standi of a petitioner where the petitioner is able to craft an issue of transcendental significance to the people, as when the issues raised are of paramount importance to the public.[25] Thus, when the proceeding involves the assertion of a public right, the mere fact that the petitioner is a citizen satisfies the requirement of personal interest.[26]

There can be no doubt that the matter of ensuring adequate water supply for domestic use is one of paramount importance to the public. That the continued availability of potable water in Metro Manila might be compromised if PSALM proceeds with the privatization of the hydroelectric power plant in the Angat Dam Complex confers upon petitioners such personal stake in the resolution of legal issues in a petition to stop its implementation.

Moreover, we have held that if the petition is anchored on the people's right to information on matters of public concern, any citizen can be the real party in interest. The requirement of personal interest is satisfied by the mere fact that the petitioner is a citizen, and therefore, part of the general public which possesses the right. There is no need to show any special interest in the result. It is sufficient that petitioners are citizens and, as such, are interested in the faithful execution of the laws.[27]

Violation of Right to Information

The people's right to information is provided in Section 7, Article III of the Constitution, which reads:

> Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law. (Emphasis supplied.)

The people's constitutional right to information is intertwined with the government's constitutional duty of full public disclosure of all transactions involving public interest.[28] Section 28, Article II of the Constitution declares the State policy of full transparency in all transactions involving public interest, to wit:

> Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest. (Italics supplied.)

The foregoing constitutional provisions seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to exercise effectively other constitutional rights. They are also essential to hold public officials "at all times x xx accountable to the people," for unless citizens have the proper information, they cannot hold public officials accountable for anything. Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential to the existence and proper functioning of any democracy.[29]

Consistent with this policy, the EPIRA was enacted to provide for "an orderly and transparent privatization" of NPC's assets and liabilities.[30] Specifically, said law mandated that "[a]ll assets of NPC shall be sold in an open and transparent manner through public bidding."[31]

In Chavez v. Public Estates Authority[32] involving the execution of an Amended Joint Venture Agreement on the disposition of reclaimed lands without public bidding, the Court held:

> x x x Before the consummation of the contract, PEA must, on its own and without demand from anyone, disclose to the public matters relating to the disposition of its property. These include the size, location, technical description and nature of the property being disposed of, the terms and conditions of the disposition, the parties qualified to bid, the minimum price and similar information. PEA must prepare all these data and disclose them to the public at the start of the disposition process, long before the consummation of the contract, because the Government Auditing Code requires public bidding. If PEA fails to make this disclosure, any citizen can demand from PEA this information at any time during the bidding process.
>
> Information, however, on on-going evaluation or review of bids or proposals being undertaken by the bidding or review committee is not immediately accessible under the right to information. While the evaluation or review is still on-going, there are no "official acts, transactions, or decisions" on the bids or proposals. However, once the committee makes its official recommendation, there arises a "definite proposition" on the part of the government. From this moment, the public's right to information attaches, and any citizen can access all the non-proprietary information leading to such definite proposition. In Chavez v. PCGG, the Court ruled as follows:
>
> "Considering the intent of the framers of the Constitution, we believe that it is incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they have decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, though, must pertain to definite propositions of the government not necessarily to intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the "exploratory" stage. There is need, of course, to

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> observe the same restrictions on disclosure of information in general, as discussed earlier – such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information." (Emphasis supplied.)

Chavez v. Public Estates Authority thus laid down the rule that the constitutional right to information includes official information on on-going negotiations before a final contract. The information, however, must constitute definite propositions by the government and should not cover recognized exceptions like privileged information, military and diplomatic secrets and similar matters affecting national security and public order. In addition, Congress has prescribed other limitations on the right to information in several legislations.[33]

In this case, petitioners' first letter dated April 20, 2010 requested for documents such as Terms of Reference and proposed bids submitted by the bidders. At that time, the bids were yet to be submitted at the bidding scheduled on April 28, 2010. It is also to be noted that PSALM's website carried news and updates on the sale of AHEPP, providing important information on bidding activities and clarifications regarding the terms and conditions of the Asset Purchase Agreement (APA) to be signed by PSALM and the winning bidder (Buyer).[34]

In Chavez v. National Housing Authority,[35] the Court held that pending the enactment of an enabling law, the release of information through postings in public bulletin boards and government websites satisfies the constitutional requirement, thus:

> It is unfortunate, however, that after almost twenty (20) years from birth of the 1987 Constitution, there is still no enabling law that provides the mechanics for the compulsory duty of government agencies to disclose information on government transactions. Hopefully, the desired enabling law will finally see the light of day if and when Congress decides to approve the proposed "Freedom of Access to Information Act." In the meantime, it would suffice that government agencies post on their bulletin boards the documents incorporating the information on the steps and negotiations that produced the agreements and the agreements themselves, and if finances permit, to upload said information on their respective websites for easy access by interested parties. Without any law or regulation governing the right to disclose information, the NHA or any of the respondents cannot be faulted if they were not able to disclose information relative to the SMDRP to the public in general.[36] (Emphasis supplied.)

The Court, however, distinguished the duty to disclose information from the duty to permit access to information on matters of public concern under Sec. 7, Art. III of the Constitution. Unlike the disclosure of information which is mandatory under the Constitution, the other aspect of the people's right to know requires a demand or request for one to gain access to documents and paper of the particular agency. Moreover, the duty to disclose covers only transactions involving public interest, while the duty to allow access has a broader scope of information which embraces not only transactions involving public interest, but any matter contained in official communications and public documents of the government agency.[37] Such relief must be granted to the party requesting access to official records, documents and papers relating to official acts, transactions, and decisions that are relevant to a government contract.

Here, petitioners' second letter dated May 14, 2010 specifically requested for detailed information regarding the winning bidder, such as company profile, contact person or responsible officer, office address and Philippine registration. But before PSALM could respond to the said letter, petitioners filed the present suit on May 19, 2010. PSALM's letter-reply dated May 21, 2010 advised petitioners that their letter-re quest was referred to the counsel of K-Water. We find such action insufficient compliance with the constitutional requirement and inconsistent with the policy under EPIRA to implement the privatization of NPC assets in an "open and transparent" manner. PSALM's evasive response to the request for information was unjustified because all bidders were required to deliver documents such as company profile, names of authorized officers/representatives,

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financial and technical experience.

Consequently, this relief must be granted to petitioners by directing PSALM to allow petitioners access to the papers and documents relating to the company profile and legal capacity of the winning bidder. Based on PSALM's own press releases, K-Water is described as a Korean firm with extensive experience in implementing and managing water resources development projects in South Korea, and also contributed significantly to the development of that country's heavy and chemical industries and the modernization of its national industrial structure.

Angat HEPP is Under the Jurisdiction of
the Department of Energy Through NPC

It must be clarified that though petitioners had alleged a co-ownership by virtue of the joint supervision in the operation of the Angat Complex by MWSS, NPC and NIA, MWSS actually recognized the ownership and jurisdiction of NPC over the hydroelectric power plant itself. While MWSS had initially sought to acquire ownership of the AHEPP without public bidding, it now prays that PSALM be ordered to turn over the possession and control of the said facility to MWSS. MWSS invokes its own authority or "special powers" by virtue of its general jurisdiction over waterworks systems, and in consideration of its substantial investments in the construction of two auxiliary units in the AHEPP, as well as the construction of the Umiray-AngatTransbasin Tunnel to supplement the water intake at the Angat Reservoir which resulted in increased power generation.

Records disclosed that as early as December 2005, following the decision of PSALM's Board of Directors to commence the sale process of the AHEPP along with Magat and AmlanHEPPs in August 2005, MWSS was actively cooperating and working with PSALM regarding the proposed Protocol for the Privatization of the AHEPP, specifically on the terms and conditions for the management, control and operation of the Angat Dam Complex taking into consideration the concerns of its concessionaires. A Technical Working Group (TWG) similar to that formed for the Operation and Management Agreement of Pantabangan and Magat dams was created, consisting of representatives from PSALM, MWSS and other concerned agencies, to formulate strategies for the effective implementation of the privatization of AHEPP and appropriate structure for the operation and management of the Angat Dam Complex.[38]

In March 2008, PSALM sought legal advice from the OGCC on available alternatives to a sale structure for the AHEPP. On May 27, 2008, then Government Corporate Counsel Alberto C. Agra issued Opinion No. 107, s. 2008[39] stating that PSALM is not limited to "selling" as a means of fulfilling its mandate under the EPIRA, and that in dealing with the AHEPP, PSALM has the following options:

> - Transfer the ownership, possession, control, and operation of the Angat Facility to another entity, which may or may not be a private enterprise, as specifically provided under Section 47 (e) of RA 9136;
>
> - Transfer the Angat Facility, through whatever form, to another entity for the purpose of protecting the public interest.[40]

The OGCC cited COA Circular No. 89-296 which provides that government property or assets that are no longer serviceable or needed "may be transferred to other government entities/agencies without cost or at an appraised value upon authority of the head or governing body of the agency or corporation, and upon due accomplishment of an Invoice and Receipt of Property." Pointing out the absence of any prohibition under R.A. No. 9136 and its IRR for PSALM to transfer the AHEPP to another government instrumentality, and considering that MWSS is allowed under its charter to acquire the said facility, the OGCC expressed the view that PSALM may, "in the interest of stemming a potential water crisis, turn over the ownership, operations and management of the Angat Facility to a qualified entity, such as the MWSS, without need of public bidding as the latter is also a government

entity."[41]

Consequently, MWSS requested the Office of the President (OP) to exclude the AHEPP from the list of NPC assets to be privatized under the EPIRA. Said request was endorsed to the Department of Finance (DOF) which requested the National Economic Development Authority (NEDA) to give its comments. Meanwhile, on August 20, 2008, the OGCC issued a Clarification[42] on its Opinion No. 107, s. 2008 stating that the tenor of the latter issuance was "permissive" and "[n]ecessarily, the disposal of the AHEPP by sale through public bidding – the principal mode of disposition under x xx R.A. 9136 – remains PSALM's primary option." The OGCC further explained its position, thus:

> If, in the exercise of PSALM's discretion, it determines that privatization by sale through public bidding is the best mode to fulfill its mandate under R.A. 9136, and that this mode will not contravene the State's declared policy on water resources, then the same is legally permissible.
>
> Finally, in OGCC Opinion No. 107 s. 2008, this Office underscored "the overriding policy of the State x x x recogniz[ing] that 'water is vital to national development x xx' [and] the crucial role which the Angat Facility plays in the uninterrupted and adequate supply and distribution of potable water to residents of Metro Manila." This Office reiterates "the primacy of the State's interest in mitigating the possible deleterious effects of an impending "water crisis" encompassing areas even beyond Metro Manila." Any transfer of the AHEPP to be undertaken by PSALM – whether to a private or public entity – must not contravene the State's declared policy of ensuring the flow of clean, potable water under RA 6395 and 9136, and Presidential Decree 1067. Hence, said transfer and/or privatization scheme must ensure the preservation of the AHEPP as a vital source of water for Metro Manila and the surrounding provinces.[43] (Emphasis supplied.)

On September 16, 2009, NEDA Deputy Director General Rolando G. Tungpalan, by way of comment to MWSS's position, wrote the DOF stating that MWSS's concern on ensuring an uninterrupted and adequate supply of water for domestic use is amply protected and consistently addressed in the EPIRA. Hence, NEDA concluded that there appears to be no basis to exclude AHEPP from the list of NPC generation assets to be privatized and no compelling reason to transfer its management, operations and control to MWSS.[44] NEDA further pointed out that:

> Ownership and operation of a hydropower plant, however, goes beyond the mandate of MWSS. To operate a power generation plant, given the sector's legislative setup would require certification and permits that has to be secured by the operator. MWSS does not have the technical capability to undertake the operation and maintenance of the AHEPP nor manage the contract of a contracted private party to undertake the task for MWSS. While MWSS may tap NPC to operate and maintain the AHEPP, this, similar to contracting out a private party, may entail additional transaction costs, and ultimately result to higher generation rates.[45] (Emphasis supplied.)

Thereafter, MWSS sought the support of the DPWH in a letter dated September 24, 2009 addressed to then Secretary Hermogenes E. Ebdane, Jr., for the exclusion of the AHEPP from the list of NPC assets to be privatized and instead transfer the ownership, possession and control thereof to MWSS with reasonable compensation. Acting on the said request, Secretary Ebdane, Jr. wrote a memorandum for the President recommending that "the Angat Dam be excluded from the list of NPC assets to be privatized, and that the ownership, management and control of the Dam be transferred from NPC to MWSS, with reasonable compensation."[46]

Based on the foregoing factual backdrop, there seems to be no dispute as to the complete jurisdiction of NPC over the government-owned Angat Dam and AHEPP.

The Angat Reservoir and Dam were constructed from 1964 to 1967 and have become operational since 1968. They have multiple functions:

1) To provide irrigation to about 31,000 hectares of land in 20 municipalities and towns in Pampanga and Bulacan;
2) To supply the domestic and industrial water requirements of residents in Metro Manila;
3) To generate hydroelectric power to feed the Luzon Grid; and
4) To reduce flooding to downstream towns and villages.[47]

The Angat Dam is a rockfill dam with a spillway equipped with three gates at a spilling level of 219 meters and has storage capacity of about 850 million cubic meters. Water supply to the MWSS is released through five auxiliary turbines where it is diverted to the two tunnels going to the Ipo Dam.[48] The Angat Dam is one of the dams under the management of NPC while the La Mesa and Ipo dams are being managed by MWSS. MWSS is a government corporation existing by virtue of R.A. No. 6234.[49]NAPOCOR or NPC is also a government-owned corporation created under Commonwealth Act (C.A.) No. 120,[50] which, among others, was vested with the following powers under Sec. 2, paragraph (g):

(g) To construct, operate and maintain power plants, auxiliary plants, dams, reservoirs, pipes, mains, transmission lines, power stations and substations, and other works for the purpose of developing hydraulic power from any river, creek, lake, spring and waterfall in the Philippines and supplying such power to the inhabitants thereof; to acquire, construct, install, maintain, operate and improve gas, oil, or steam engines, and/or other prime movers, generators and other machinery in plants and/or auxiliary plants for the production of electric power; to establish, develop, operate, maintain and administer power and lighting system for the use of the Government and the general public; to sell electric power and to fix the rates and provide for the collection of the charges for any service rendered: Provided, That the rates of charges shall not be subject to revision by the Public Service Commission;

x x x x (Emphasis supplied.)

On September 10, 1971, R.A. No. 6395 was enacted which revised the charter of NPC, extending its corporate life to the year 2036. NPC thereafter continued to exercise complete jurisdiction over dams and power plants including the Angat Dam, Angat Reservoir and AHEPP. While the NPC was expressly granted authority to construct, operate and maintain power plants, MWSS was not vested with similar function. Section 3 (f), (o) and (p) of R.A. No. 6234 provides that MWSS's powers and attributes include the following –

(f) To construct, maintain, and operate dams, reservoirs, conduits, aqueducts, tunnels, purification plants, water mains, pipes, fire hydrants, pumping stations, machineries and other waterworks for the purpose of supplying water to the inhabitants of its territory, for domestic and other purposes; and to purify, regulate and control the use, as well as prevent the wastage of water;

x x x x

(o) To assist in the establishment, operation and maintenance of waterworks and sewerage systems within its jurisdiction under cooperative basis;

(p) To approve and regulate the establishment and construction of waterworks and sewerage systems in privately owned subdivisions within its jurisdiction; x xx. (Emphasis supplied.)

On December 9, 1992, by virtue of R.A. No. 7638,[51] NPC was placed under the Department of Energy (DOE) as one of its attached agencies.

Aside from its ownership and control of the Angat Dam and AHEPP, NPC was likewise mandated to exercise complete jurisdiction and control over its watershed, pursuant to Sec. 2 (n) and (o) of R.A. No. 6395 for development and conservation purposes:

(n) To exercise complete jurisdiction and control over watersheds surrounding the reservoirs of plants and/or

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> projects constructed or proposed to be constructed by the Corporation. Upon determination by the Corporation of the areas required for watersheds for a specific project, the Bureau of Forestry, the Reforestation Administration and the Bureau of Lands shall, upon written advice by the Corporation, forthwith surrender jurisdiction to the Corporation of all areas embraced within the watersheds, subject to existing private rights, the needs of waterworks systems, and the requirements of domestic water supply;
>
> (o) In the prosecution and maintenance of its projects, the Corporation shall adopt measures to prevent environmental pollution and promote the conservation, development and maximum utilization of natural resources; and
>
> x x x x (Emphasis supplied.)

On December 4, 1965, Presidential Proclamation No. 505 was issued amending Proclamation No. 71 by transferring the administration of the watersheds established in Montalban, San Juan del Monte, Norzagaray, Angat, San Rafael, Peñaranda and Infanta, Provinces of Rizal, Bulacan, Nueva Ecija and Quezon, to NPC. Subsequent executive issuances [Presidential Decree (P.D.) No. 1515 which was signed in June 1978 and amended by P.D. No. 1749 in December 1980] led to the creation of the NPC Watershed Management Division which presently has 11 watershed areas under its management.[52]

Privatization of AHEPP Mandatory Under EPIRA

With the advent of EPIRA in 2001, PSALM came into existence for the principal purpose of managing the orderly sale, privatization and disposition of generation assets, real estate and other disposable assets of the NPC including IPP Contracts. Accordingly, PSALM was authorized to take title to and possession of, those assets transferred to it. EPIRA mandated that all such assets shall be sold through public bidding with the exception of Agus and Pulangui complexes in Mindanao, the privatization of which was left to the discretion of PSALM in consultation with Congress,[53] thus:

> Sec. 47. NPC Privatization.– Except for the assets of SPUG, the generation assets, real estate, and other disposable assets as well as IPP contracts of NPC shall be privatized in accordance with this Act. Within six (6) months from the effectivity of this Act, the PSALM Corp. shall submit a plan for the endorsement by the Joint Congressional Power Commission and the approval of the President of the Philippines, on the total privatization of the generation assets, x x x of NPC and thereafter, implement the same, in accordance with the following guidelines, except as provided for in [p]aragraph (f) herein:
>
> x x x x
>
> (d) All assets of NPC shall be sold in an open and transparent manner through public bidding, x x x;
>
> x x x x
>
> (f) The Agus and the Pulangui complexes in Mindanao shall be excluded from among the generation companies that will be initially privatized. Their ownership shall be transferred to the PSALM Corp. and both shall continue to be operated by the NPC. Said complexes may be privatized not earlier than ten (10) years from the effectivity of this Act, x xx.The privatization of Agus and Pulangui complexes shall be left to the discretion of PSALM Corp. in consultation with Congress;
>
> x x x x (Emphasis supplied.)

The intent of Congress not to exclude the AHEPP from the privatization of NPC generation assets is evident from the express provision exempting only the aforesaid two power plants in Mindanao. Had the legislature intended that PSALM should likewise be allowed discretion in case of NPC generation assets other than those mentioned in Sec. 47, it could have explicitly provided for the same. But the EPIRA exempted from privatization only those two plants in Mindanao and the Small Power Utilities Group (SPUG).[54] Expressio unius est exclusio alterius,

the express inclusion of one implies the exclusion of all others.[55]

> It is a settled rule of statutory construction that the express mention of one person, thing, or consequence implies the exclusion of all others. The rule is expressed in the familiar maxim, expressio unius est exclusio alterius.
>
> The rule of expressio unius est exclusio alterius is formulated in a number of ways. One variation of the rule is principle that what is expressed puts an end to that which is implied. Expressium facit cessare tacitum. Thus, where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be extended to other matters.
>
> x x x x
>
> The rule of expressio unius est exclusio alterius and its variations are canons of restrictive interpretation. They are based on the rules of logic and the natural workings of the human mind. They are predicated upon one's own voluntary act and not upon that of others. They proceed from the premise that the legislature would not have made specified enumeration in a statute had the intention been not to restrict its meaning and confine its terms to those expressly mentioned.[56]

The Court therefore cannot sustain the position of petitioners, adopted by respondent MWSS, that PSALM should have exercised the discretion not to proceed with the privatization of AHEPP, or at least the availability of the option to transfer the said facility to another government entity such as MWSS. Having no such discretion in the first place, PSALM committed no grave abuse of discretion when it commenced the sale process of AHEPP pursuant to the EPIRA.

In any case, the Court finds that the operation and maintenance of a hydroelectric power plant is not among the statutorily granted powers of MWSS. Although MWSS was granted authority to construct and operate dams and reservoirs, such was for the specific purpose of supplying water for domestic and other uses, and the treatment, regulation and control of water usage, and not power generation.[57] Moreover, since the sale of AHEPP by PSALM merely implements the legislated reforms for the electric power industry through schemes that aim "[t]o enhance the inflow of private capital and broaden the ownership base of the power generation, transmission and distribution sectors,"[58] the proposed transfer to MWSS which is another government entity contravenes that State policy. COA Circular No. 89-296 likewise has no application to NPC generating assets which are still serviceable and definitely needed by the Government for the purpose of liquidating NPC's accumulated debts amounting to billions in US Dollars. Said administrative circular cannot prevail over the EPIRA, a special law governing the disposition of government properties under the jurisdiction of the DOE through NPC.

Sale of Government-Owned AHEPP
to a Foreign Corporation Not Prohibited
But Only Filipino Citizens and Corporations
60% of whose capital is owned by Filipinos
May be Granted Water Rights

The core issue concerns the legal implications of the acquisition by K-Water of the AHEPP in relation to the constitutional policy on our natural resources.

Sec. 2, Art. XII of the 1987 Constitution provides in part:

> SEC.2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of

> the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In case of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.
>
> x x x x (Emphasis supplied.)

The State's policy on the management of water resources is implemented through the regulation of water rights. Presidential Decree No. 1067, otherwise known as "The Water Code of the Philippines" is the basic law governing the ownership, appropriation utilization, exploitation, development, conservation and protection of water resources and rights to land related thereto. The National Water Resources Council (NWRC) was created in 1974 under P.D. No. 424 and was subsequently renamed as National Water Resources Board (NWRB) pursuant to Executive Order No. 124-A.[59] The NWRB is the chief coordinating and regulating agency for all water resources management development activities which is tasked with the formulation and development of policies on water utilization and appropriation, the control and supervision of water utilities and franchises, and the regulation and rationalization of water rates.[60]

The pertinent provisions of Art. 3, P.D. No. 1067 provide:

> Art. 3. The underlying principles of this code are:
>
> - All waters belong to the State.
>
> - All waters that belong to the State can not be the subject to acquisitive prescription.
>
> - The State may allow the use or development of waters by administrative concession.
>
> - The utilization, exploitation, development, conservation and protection of water resources shall be subject to the control and regulation of the government through the National Water Resources Council x x x
>
> - Preference in the use and development of waters shall consider current usages and be responsive to the changing needs of the country.
>
> x x x x
>
> Art. 9. Waters may be appropriated and used in accordance with the provisions of this Code.
>
> Appropriation of water, as used in this Code, is the acquisition of rights over the use of waters or the taking or diverting of waters from a natural source in the manner and for any purpose allowed by law.
>
> Art. 10. Water may be appropriated for the following purposes:
>
> x x x x
>
> (d) Power generation
>
> x x x x
>
> Art. 13. Except as otherwise herein provided, no person including government instrumentalities or government-owned or controlled corporations, shall appropriate water without a water right, which shall be evidenced by a document known as a water permit.
>
> Water right is the privilege granted by the government to appropriate and use water.

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x x x x

Art. 15. Only citizens of the Philippines, of legal age, as well as juridical persons, who are duly qualified by law to exploit and develop water resources, may apply for water permits. (Emphasis supplied.)

It is clear that the law limits the grant of water rights only to Filipino citizens and juridical entities duly qualified by law to exploit and develop water resources, including private corporations with sixty percentof their capital owned by Filipinos. In the case of Angat River, the NWRB has issued separate water permits to MWSS, NPC and NIA.[61]

Under the EPIRA, the generation of electric power, a business affected with public interest, was opened to private sector and any new generation company is required to secure a certificate of compliance from the Energy Regulatory Commission (ERC), as well as health, safety and environmental clearances from the concerned government agencies. Power generation shall not be considered a public utility operation,[62] and hence no franchise is necessary. Foreign investors are likewise allowed entry into the electric power industry. However, there is no mention of water rights in the privatization of multi-purpose hydropower facilities. Section 47 (e) addressed the issue of water security, as follows:

(e) In cases of transfer of possession, control, operation or privatization of multi-purpose hydro facilities, safeguards shall be prescribed to ensure that the national government may direct water usagein cases of shortage to protect potable water, irrigation, and all other requirements imbued with public interest;

x x x x (Emphasis supplied.)

This provision is consistent with the priority accorded to domestic and municipal uses of water[63] under the Water Code, thus:

Art. 22. Between two or more appropriators of water from the same sources of supply, priority in time of appropriation shall give the better right, except that in times of emergency the use of water for domestic and municipal purposes shall have a better right over all other uses; Provided, That, where water shortage is recurrent and the appropriator for municipal use has a lower priority in time of appropriation, then it shall be his duty to find an alternative source of supply in accordance with conditions prescribed by the [Board]. (Emphasis supplied.)

Rule 23, Section 6 of the Implementing Rules and Regulations (IRR) of the EPIRA provided for the structure of appropriation of water resources in multi-purpose hydropower plants which will undergo privatization, as follows:

Section 6. Privatization of Hydroelectric Generation Plants.

(a) Consistent with Section 47(e) of the Act and Section 4(f) of this Rule,the Privatization of hydro facilities of NPC shall cover the powercomponent including assignable long-term water rights agreements for the use of water, which shall be passed onto and respected by the buyers of the hydroelectric power plants.

(b) The National Water Resources Board (NWRB) shall ensure that the allocation for irrigation, as indicated by the NIA and requirements for domestic water supply as provided for by the appropriate Local WaterDistrict(s) are recognized and provided for in the water rights agreements. NPC or PSALM may also impose additional conditions inthe shareholding agreement with the winning bidders to ensurenational security, including, but not limited to, the use of waterduring drought or calamity.

(c) Consistent with Section 34(d) of the Act, the NPC shall continue to be responsible for watershed rehabilitation and management and shallbe entitled to the environmental charge equivalent to one-fourth ofone centavo per kilowatt-hour sales (P0.0025/kWh), which shall formpart of the Universal Charge. This environmental fund shall be usedsolely for watershed rehabilitation and management and shall bemanaged by

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> NPC under existing arrangements. NPC shall submit anannual report to the DOE detailing the progress of the watershedrehabilitation program.
>
> (d) The NPC and PSALM or NIA, as the case may be, shall continue to be responsible for the dam structure and all other appurtenant structures necessary for the safe and reliable operation of the hydropower plants. The NPC and PSALM or NIA, as the case may be,shall enter into an operations and maintenance agreement with theprivate operator of the power plant to cover the dam structure and allother appurtenant facilities. (Emphasis supplied.)

In accordance with the foregoing implementing regulations, and in furtherance of the Asset Purchase Agreement[64] (APA), PSALM, NPC and K-Water executed on April 28, 2010 an Operations and Maintenance Agreement[65] (O & M Agreement) for the administration, rehabilitation, operation, preservation and maintenance, by K-Water as the eventual owner of the AHEPP, of the Non-Power Components meaning the Angat Dam, non-power equipment, facilities, installations, and appurtenant devices and structures, including the water sourced from the Angat Reservoir.

It is the position of PSALM that as the new owner only of the hydroelectric power plant, K-Water will be a mere operator of the Angat Dam. In the power generation activity, K-Water will have to utilize the waters already extracted from the river and impounded on the dam. This process of generating electric power from the dam water entering the power plant thus does not constitute appropriation within the meaning of natural resource utilization in the Constitution and the Water Code.

The operation of a typical hydroelectric power plant has been described as follows:

> Hydroelectric energy is produced by the force of falling water. The capacity to produce this energy is dependent on both the available flow and the height from which it falls. Building up behind a high dam, water accumulates potential energy. This is transformed into mechanical energy when the water rushes down the sluice and strikes the rotary blades of turbine. The turbine's rotation spins electromagnets which generate current in stationary coils of wire. Finally, the current is put through a transformer where the voltage is increased for long distance transmission over power lines.[66]

Foreign ownership of a hydropower facility is not prohibited under existing laws. The construction, rehabilitation and development of hydropower plants are among those infrastructure projects which even wholly-owned foreign corporations are allowed to undertake under the Amended Build-Operate-Transfer (Amended BOT) Law (R.A. No. 7718).[67] Beginning 1987, the policy has been openness to foreign investments as evident in the fiscal incentives provided for the restructuring and privatization of the power industry in the Philippines, under the Power Sector Restructuring Program (PSRP) of the Asian Development Bank.

The establishment of institutional and legal framework for the entry of private sector in the power industry began with the issuance by President Corazon C. Aquino of Executive Order No. 215 in 1987. Said order allowed the entry of private sector – the IPPs –to participate in the power generation activities in the country. The entry of IPPs was facilitated and made attractive through the first BOT Law in 1990 (R.A. No. 6957) which aimed to “minimize the burden of infrastructure projects on the national government budget, minimize external borrowing for infrastructure projects, and use the efficiency of the private sector in delivering a public good.” In 1993, the Electric Power Crisis Act was passed giving the President emergency powers to urgently address the power crisis in the country.[68] The full implementation of the restructuring and privatization of the power industry was achieved when Congress passed the EPIRA in 2001.

With respect to foreign investors, the nationality issue had been framed in terms of the character or nature of the power generation process itself, i.e., whether the activity amounts to utilization of natural resources within the

meaning of Sec. 2, Art. XII of the Constitution. If so, then foreign companies cannot engage in hydropower generation business; but if not, then government may legally allow even foreign-owned companies to operate hydropower facilities.

The DOJ has consistently regarded hydropower generation by foreign entities as not constitutionally proscribed based on the definition of water appropriation under the Water Code, thus:

> Opinion No. 173, 1984
>
> This refers to your request for opinion on the possibility of granting water permits to foreign corporations authorized to do business in the Philippines x xx
>
> x x x x
>
> x x x while the Water Code imposes a nationality requirement for the grant of water permits, the same refers to the privilege "to appropriate and use water." This should be interpreted to mean the extraction of water from its natural source (Art. 9, P.D. No. 1067). Once removed therefrom, they cease to be a part of the natural resources of the country and are the subject of ordinary commerce and may be acquired by foreigners (Op. No. 55, series of 1939). x x x in case of a contract of lease, the water permit shall be secured by the lessor and included in the lease as an improvement. The water so removed from the natural source may be appropriated/used by the foreign corporation leasing the property.
>
> Opinion No. 14, S. 1995
>
> The nationality requirement imposed by the Water Code refers to the privilege "to appropriate and use water." This, we have consistently interpreted to mean the extraction of water directly from its natural source. Once removed from its natural source the water ceases to be a part of the natural resources of the country and may be subject of ordinary commerce and may even be acquired by foreigners. (Secretary of Justice Op. No. 173, s. 1984; No. 24, s. 1989; No. 100 s. 1994)
>
> In fine, we reiterate our earlier view that a foreign entity may legally process or treat water after its removal from a natural source by a qualified person, natural or juridical.
>
> Opinion No. 122, s. 1998
>
> The crucial issue at hand is the determination of whether the utilization of water by the power plant to be owned and operated by a foreign-owned corporation (SRPC) will violate the provisions of the Water Code.
>
> As proposed, the participation of SRPC to the arrangement commences upon construction of the power station, consisting of a dam and a power plant. After the completion of the said station, its ownership and control shall be turned over to NPC. However, SRPC shall remain the owner of the power plant and shall operate it for a period of twenty-five (25) years.
>
> It appears that the dam, which will be owned and controlled by NPC, will block the natural flow of the river,. The power plant, which is situated next to it, will entirely depend upon the dam for its water supply which will pass through an intake gate situated one hundred (100) meters above the riverbed. Due to the distance from the riverbed, water could not enter the power plant absent the dam that traps the flow of the river. It appears further that no water shall enter the power tunnel without specific dispatch instructions from NPC, and such supplied water shall be used only by SRPC for power generation and not for any other purpose. When electricity is generated therein, the same shall be supplied to NPC for distribution to the public. These facts x xx viewed in relation to the Water Code, specifically Article 9 thereof, x x x
>
> clearly show that there is no circumvention of the law.
>
> This Department has declared that the nationality requirement imposed by the Water Code refers to the

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> privilege "to appropriate and use water" and has interpreted this phrase to mean the extraction of water directly from its natural source (Secretary of Justice Opinion No. 14, s. 1995). "Natural" is defined as that which is produced without aid of stop, valves, slides, or other supplementary means (see Webster's New International Dictionary, Second Edition, p. 1630). The water that is used by the power plant could not enter the intake gate without the dam, which is a man-made structure. Such being the case, the source of the water that enters the power plant is of artificial character rather than natural. This Department is consistent in ruling, that once water is removed from its natural source, it ceases to be a part of the natural resources of the country and may be the subject of ordinary commerce and may even be acquired by foreigners. (Ibid., No. 173, s. 1984; No. 24, s. 1989; No. 100, s. 1994).
>
> It is also significant to note that NPC, a government-owned and controlled corporation, has the effective control over all elements of the extraction process, including the amount and timing thereof considering that x xx the water will flow out of the power tunnel and through the power plant, to be used for the generation of electricity, only when the Downstream Gates are opened, which occur only upon the specific water release instructions given by NPC to SRPC. This specific feature of the agreement, taken together with the above-stated analysis of the source of water that enters the plant, support the view that the nationality requirement embodied in Article XII, Section 2 of the present Constitution and in Article 15 of the Water Code, is not violated.[69] (Emphasis supplied.)

The latest executive interpretation is stated in DOJ Opinion No. 52, s. 2005 which was rendered upon the request of PSALM in connection with the proposed sale structure for the privatization of hydroelectric and geothermal generation assets (Gencos) of NPC. PSALM sought a ruling on the legality of its proposed privatization scheme whereby the non-power components (dam, reservoir and appurtenant structures and watershed area) shall be owned by the State through government entities like NPC or NIA which shall exercise control over the release of water, while the ownership of the power components (power plant and related facilities) is open to both Filipino citizens/corporations and 100% foreign-owned corporations.

Sustaining the position of PSALM, then Secretary Raul M. Gonzalez opined:

> Premised on the condition that only the power components shall be transferred to the foreign bidders while the non-power components/structures shall be retained by state agencies concerned, we find that both PSALM's proposal and position are tenable.
> x x x x
>
> x x x as ruled in one case by a U.S. court:
>
> Where the State of New York took its natural resources consisting of Saratoga Spring and, through a bottling process, put those resources into preserved condition where they could be sold to the public in competition with private waters, the state agencies were not immune from federal taxes imposed upon bottled waters on the theory that state was engaged in the sale of "natural resources."

Applied to the instant case, and construed in relation to the earlier-mentioned constitutional inhibition, it would appear clear that while both waters and geothermal steam are, undoubtedly "natural resources", within the meaning of Section 2 Article XII of the present Constitution, hence, their exploitation, development and utilization should be limited to Filipino citizens or corporations or associations at least sixty per centum of the capital of which is owned by Filipino citizens, the utilization thereof can be opened even to foreign nationals, after the same have been extracted from the source by qualified persons or entities. The rationale is because, since they no longer form part of the natural resources of the country, they become subject to ordinary commerce.

A contrary interpretation, i.e., that the removed or extracted natural resources would remain inalienable especially to foreign nationals, can lead to absurd consequences, e.g. that said waters and geothermal steam, and any other

extracted natural resources, cannot be acquired by foreign nationals for sale within or outside the country, which could not [have] been intended by the framers of the Constitution.

The fact that under the proposal, the non-power components and structures shall be retained and maintained by the government entities concerned is, to us, not only a sufficient compliance of constitutional requirement of "full control and supervision of the State" in the exploitation, development and utilization of natural resources. It is also an enough safeguard against the evil sought to be avoided by the constitutional reservation x x x.[70] (Italics in the original, emphasis supplied.)

Appropriation of water, as used in the Water Code refers to the "acquisition of rights over the use of waters or the taking or diverting of waters from a natural source in the manner and for any purpose allowed by law."[71] This definition is not as broad as the concept of appropriation of water in American jurisprudence:

> An appropriation of water flowing on the public domain consists in the capture, impounding, or diversion of it from its natural course or channel and its actual application to some beneficial use private or personal to the appropriator, to the entire exclusion (or exclusion to the extent of the water appropriated) of all other persons. x xx[72]

On the other hand, "water right" is defined in the Water Code as the privilege granted by the government to appropriate and use water.[73] Black's Law Dictionary defined "water rights" as "[a] legal right, in the nature of a corporeal hereditament, to use the water of a natural stream or water furnished through a ditch or canal, for general or specific purposes, such as irrigation, mining, power, or domestic use, either to its full capacity or to a measured extent or during a defined portion of the time," or "the right to have the water flow so that some portion of it may be reduced to possession and be made private property of individual, and it is therefore the right to divert water from natural stream by artificial means and apply the same to beneficial use."[74]

Under the Water Code concept of appropriation, a foreign company may not be said to be "appropriating" our natural resources if it utilizes the waters collected in the dam and converts the same into electricity through artificial devices. Since the NPC remains in control of the operation of the dam by virtue of water rights granted to it, as determined under DOJ Opinion No. 122, s. 1998, there is no legal impediment to foreign-owned companies undertaking the generation of electric power using waters already appropriated by NPC, the holder of water permit. Such was the situation of hydropower projects under the BOT contractual arrangements whereby foreign investors are allowed to finance or undertake construction and rehabilitation of infrastructure projects and/or own and operate the facility constructed. However, in case the facility requires a public utility franchise, the facility operator must be a Filipino corporation or at least 60% owned by Filipino.[75]

With the advent of privatization of the electric power industry which resulted in its segregation into four sectors -- generation, transmission, distribution and supply – NPC's generation and transmission functions were unbundled. Power generation and transmission were treated as separate sectors governed by distinct rules under the new regulatory framework introduced by EPIRA. The National Transmission Corporation (TRANSCO) was created to own and operate the transmission assets and perform the transmission functions previously under NPC. While the NPC continues to undertake missionary electrification programs through the SPUG, PSALM was also created to liquidate the assets and liabilities of NPC.

Under the EPIRA, NPC's generation function was restricted as it was allowed to "generate and sell electricity only from the undisposed generating assets and IPP contracts of PSALM" and was prohibited from incurring "any new obligations to purchase power through bilateral contracts with generation companies or other suppliers."[76] PSALM, on the other hand, was tasked "[t]o structure the sale, privatization or disposition of NPC assets and IPP contracts and/or their energy output based on such terms and conditions which shall optimize the value and sale

prices of said assets."[77] In the case of multi-purpose hydropower plants, the IRR of R.A. No. 9136 provided that their privatization would extend to water rights which shall be transferred or assigned to the buyers thereof, subject to safeguards mandated by Sec. 47(e) to enable the national government to direct water usage in cases of shortage to protect water requirements imbued with public interest.

Accordingly, the Asset Purchase Agreement executed between PSALM and K-Water stipulated:

> 2.04 Matters Relating to the Non-Power Component
>
> x x x x
>
> Matters relating to Water Rights
>
> NPC has issued a certification (the "Water Certification") wherein NPC consents, subject to Philippine Law, to the (i) transfer of the Water Permit to the BUYER or its Affiliate, and (ii) use by the BUYER or its Affiliate of the water covered by the Water Permit from Closing Date up to a maximum period of one (1) year thereafter to enable the BUYER to appropriate and use water sourced from Angat reservoir for purposes of power generation; provided, that should the consent or approval of any Governmental Body be required for either (i) or (ii), the BUYER must secure such consent or approval. The BUYER agrees and shall fully comply with the Water Permit and the Water Certification. x xx
>
> x x x x
>
> Multi-Purpose Facility
>
> The BUYER is fully aware that the Non-Power Components is a multi-purpose hydro-facility and the water is currently being appropriated for domestic use, municipal use, irrigation and power generation. Anything in this Agreement notwithstanding, the BUYER shall, at all times even after the Payment Date, fully and faithfully comply with Philippine Law, including the Instructions, the Rule Curve and Operating Guidelines and the Water Protocol.[78] (Emphasis supplied.)

Lease or transfer of water rights is allowed under the Water Code, subject to the approval of NWRB after due notice and hearing.[79] However, lessees or transferees of such water rights must comply with the citizenship requirement imposed by the Water Code and its IRR. But regardless of such qualification of water permit holders/transferees, it is to be noted that there is no provision in the EPIRA itself authorizing the NPC to assign or transfer its water rights in case of transfer of operation and possession of multi-purpose hydropower facilities. Since only the power plant is to be sold and privatized, the operation of the non-power components such as the dam and reservoir, including the maintenance of the surrounding watershed, should remain under the jurisdiction and control of NPC which continue to be a government corporation. There is therefore no necessity for NPC to transfer its permit over the water rights to K-Water. Pursuant to its purchase and operation/management contracts with K-Water, NPC may authorize the latter to use water in the dam to generate electricity.

NPC's water rights remain an integral aspect of its jurisdiction and control over the dam and reservoir. That the EPIRA itself did not ordain any transfer of water rights leads us to infer that Congress intended NPC to continue exercising full supervision over the dam, reservoir and, more importantly, to remain in complete control of the extraction or diversion of water from the Angat River. Indeed, there can be no debate that the best means of ensuring that PSALM/NPC can fulfill the duty to prescribe "safeguards to enable the national government to direct water usage to protect potable water, irrigation, and all other requirements imbued with public interest" is for it to retain the water rights over those water resources from where the dam waters are extracted. In this way, the State's full supervision and control over the country's water resources is also assured notwithstanding the privatized power generation business.

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Section 6 (a) of the IRR of R.A. No. 9136 insofar as it directs the transfer of water rights in the privatization of multi-purpose hydropower facilities, is thus merely directory.

It is worth mentioning that the Water Code explicitly provides that Filipino citizens and juridical persons who may apply for water permits should be "duly qualified by law to exploit and develop water resources." Thus, aside from the grant of authority to construct and operate dams and power plants, NPC's Revised Charter specifically authorized it –

> (f) To take water from any public stream, river, creek, lake, spring or waterfall in the Philippines, for the purposes specified in this Act; to intercept and divert the flow of waters from lands of riparian owners and from persons owning or interested in waters which are or may be necessary for said purposes, upon payment of just compensation therefor; to alter, straighten, obstruct or increase the flow of water in streams or water channels intersecting or connecting therewith or contiguous to its works or any part thereof: Provided, That just compensation shall be paid to any person or persons whose property is, directly or indirectly, adversely affected or damaged thereby.[80]

The MWSS is likewise vested with the power to construct, maintain and operate dams and reservoirs for the purpose of supplying water for domestic and other purposes, as well to construct, develop, maintain and operate such artesian wells and springs as may be needed in its operation within its territory.[81] On the other hand, NIA, also a water permit holder in Angat River, is vested with similar authority to utilize water resources, as follows:

> (b) To investigate all available and possible water resources in the country for the purpose of utilizing the same for irrigation, and to plan, design and construct the necessary projects to make the ten to twenty-year period following the approval of this Act as the Irrigation Age of the Republic of the Philippines;[82]
>
> (c) To construct multiple-purpose water resources projects designed primarily for irrigation, and secondarily for hydraulic power development and/or other uses such as flood control, drainage, land reclamation, domestic water supply, roads and highway construction and reforestation, among others, provided, that the plans, designs and the construction thereof, shall be undertaken in coordination with the agencies concerned;[83]

To reiterate, there is nothing in the EPIRAwhich declares that it is mandatory forPSALM or NPC to transfer or assign NPC's water rights to buyers of its multi-purpose hydropower facilities as part of the privatization process. While PSALM was mandated to transfer the ownership of all hydropower plants except those mentioned in Sec. 47 (f), any transfer of possession, operation and control of the multi-purpose hydropower facilities, the intent to preserve water resources under the full supervision and control of the State is evident when PSALM was obligated to prescribe safeguards to enable the national government to direct water usage to domestic and other requirements "imbued with public interest." There is no express requirement for the transfer of water rights in all cases where the operation of hydropower facilities in a multi-purpose dam complex is turned over to the private sector.

As the new owner of the AHEPP, K-Water will have to utilize the waters in the Angat Dam for hydropower generation. Consistent with the goals of the EPIRA, private entities are allowed to undertake power generation activities and acquire NPC's generation assets. But since only the hydroelectric power plants and appurtenances are being sold, the privatization scheme should enable the buyer of a hydroelectric power plant in NPC's multi-purpose dam complex to have beneficialuse of the waters diverted or collected in the Angat Dam for its hydropower generation activities, and at the same time ensure that the NPC retains full supervision and control over the extraction and diversion of waters from the Angat River.

In fine, the Court rules that while the sale of AHEPP to a foreign corporation pursuant to the privatization mandated by the EPIRA did not violate Sec. 2, Art. XII of the 1987 Constitution which limits the exploration,

development and utilization of natural resources under the full supervision and control of the State or the State's undertaking the same through joint venture, co-production or production sharing agreements with Filipino corporations 60% of the capital of which is owned by Filipino citizens, the stipulation in the Asset Purchase Agreement and Operations and Maintenance Agreement whereby NPC consents to the transfer of water rights to the foreign buyer, K-Water, contravenes the aforesaid constitutional provision and the Water Code.

Section 6, Rule 23 of the IRR of EPIRA, insofar as it ordered NPC's water rights in multi-purpose hydropower facilities to be included in the sale thereof, is declared as merely directoryand not an absolute condition in the privatization scheme. In this case, we hold that NPC shall continue to be the holder of the water permit even as the operational control and day-to-day management of the AHEPP is turned over to K-Water under the terms and conditions of their APA and O & M Agreement, whereby NPC grants authority to K-Water to utilize the waters diverted or collected in the Angat Dam for hydropower generation. Further, NPC and K-Water shall faithfully comply with the terms and conditions of the Memorandum of Agreement on Water Protocol, as well as with such other regulations and issuances of the NWRB governing water rights and water usage.

WHEREFORE, the present petition for certiorari and prohibition with prayer for injunctive relief/s is PARTLY GRANTED.

The following DISPOSITIONS are in ORDER:

1) The bidding conducted and the Notice of Award issued by PSALM in favor of the winning bidder, KOREA WATER RESOURCES CORPORATION (K-WATER), are declared VALID and LEGAL;

2) PSALM is directed to FURNISH the petitioners with copies of all documents and records in its files pertaining to K-Water;

3) Section 6 (a), Rule 23, IRR of the EPIRA, is hereby declared as merely DIRECTORY, and not an absolute condition in all cases where NPC-owned hydropower generation facilities are privatized;

4) NPC shall CONTINUE to be the HOLDER of Water Permit No. 6512 issued by the National Water Resources Board. NPC shall authorize K-Water to utilize the waters in the Angat Dam for hydropower generation, subject to the NWRB's rules and regulations governing water right and usage. The Asset Purchase Agreement and Operation & Management Agreement between NPC/PSALM and K-Water are thus amended accordingly.

Except for the requirement of securing a water permit, K-Water remains BOUND by its undertakings and warranties under the APA and O & M Agreement;

5) NPC shall be a CO-PARTY with K-Water in the Water Protocol Agreement with MWSS and NIA, and not merely as a conforming authority or agency; and

6) The Status Quo Ante Order issued by this Court on May 24, 2010 is hereby LIFTED and SET ASIDE.

No pronouncement as to costs.

SO ORDERED.

Sereno, C.J., Carpio, Leonardo-De Castro, Brion, Peralta, Bersamin, Del Castillo, Abad, Perez, Mendoza, Reyes, and Perlas-Bernabe, JJ., concur.
Velasco, Jr., J., please see dissenting opinion.

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[1] Approved on June 8, 2001.

[2] Sections 3, 49, 50 and 51 (a), R.A. No. 9136.

[3] Rollo (Vol. II), p. 927. Auxiliary Units 1, 2 and 3 are owned by NPC. Auxiliary Unit 4 is being operated and maintained by NPC under a lease agreement between NPC and MWSS; Auxiliary Unit 5 was installed and operated by NPC under a letter agreement between NPC and MWSS. The 4 main units and 5 auxiliary units are all situated in a single structure ("Power House"). [Rollo (Vol. II), p. 924.]

[4] Rollo (Vol. II), back of p. 1056.

[5] Id. at 1055.

[6] Rollo (Vol. I), pp. 409-411.

[7] Id. at 119-122.

[8] G.R. No. 133250, July 9, 2002, 384 SCRA 152.

[9] Sec. 75, R.A. No. 9136.

[10] Rollo (Vol. I), pp. 110-117.

[11] G.R. Nos. 171396, 171409, etc., May 3, 2006, 489 SCRA 160.

[12] G.R. Nos. 113105, 113174, etc., August 19, 1994, 235 SCRA 506.

[13] Supra note 8.

[14] Rollo (Vol. I), pp. 529-553.

[15] G.R. No. 122156, February 3, 1997, 267 SCRA 408.

[16] Rollo (Vol. I), pp. 191-238.

[17] Id. at 474-478.

[18] Id. at 127-134, 149-154, 163-166 and 467-471.

[19] Id. at 169-175.

[20] Id. at 624-655.

[21] Supra note 11.

[22] Supra note 8.

[23] Supra note 8, at 177.

[24] La Bugal-B'laan Tribal Association, Inc. v. Ramos, G.R. No. 127882, January 27, 2004, 421 SCRA 148, 178, citing Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, August 15, 2000, 338 SCRA 81, 100; Dumlao v. COMELEC, No. L-52245, January 22, 1980, 95 SCRA 392; and People v. Vera, 65 Phil. 56 (1937).

[25] Francisco, Jr. v. NagmamalasakitnamgaManananggolngmgaManggagawang Pilipino, Inc., G.R. Nos. 160261, 160262, etc., November 10, 2003, 415 SCRA 44, 139, citing Kilosbayan, Inc. v. Morato, G.R. No. 118910, November 16, 1995, 250 SCRA 130.

[26] Id. at 136, citing Chavez v. Presidential Commission on Good Government, G.R. No. 130716, December 9, 1998, 299 SCRA 744.

[27] Guingona, Jr. v. Commission on Elections, G.R. No. 191846, May 6, 2010, 620 SCRA 448, 460.

[28] Id. at 461.

[29] Chavez v. Philippine Estates Authority, supra note 8, at 184, citing Sec. 1, Art. XI of the 1987 Constitution and Valmonte v. Belmonte, Jr., G.R. No. 74930, February 13, 1989, 170 SCRA 256.

> Sec. 1, Art. XI of the 1987 Constitution reads: "Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives."

[30] Sec. 2 (i), R.A. No. 9136.

[31] Sec. 47 (d), id. Italics supplied.

[32] Supra note 8, at 186-187.

[33] Id. at 189, citing People's Movement for Press Freedom, et al. v. Hon. Raul Manglapus, G.R. No. 84642, En Banc Resolution dated April 13, 1988; Chavez v. Presidential Commission on Good Government, supra note 26; and Sec. 270 of the National Internal Revenue Code, Sec. 14 of R.A. No. 8800 (Safeguard Measures Act), Sec. 6 (j) of R.A. No. 8043 (Inter-Country Adoption Act), and Sec. 94 (f) of R.A. No. 7942 (Philippine Mining Act).

[34] "PSALM launches sale of Angat hydro plant" posted 12 January 2010 at http://www.psalm.gov.ph/News.asp?id=20100012; "12 bidders attend pre-bid conference for AngatHEPP sale" posted 19 February 2010 at http://www.psalm.gov.ph/News.asp?id=20100048; "Angat Dam not for sale" posted 11 March 2010 at http://www.psalm.gov.ph/News.asp?id=20100067; "PSALM discusses Angat water protocol with prospective bidders" posted 5 April 2010 at http://www.psalm.gov.ph/News.asp?id=20100086; "Korean company declared highest bidder for Angat power plant" posted 28 Aril 2010 at http://www.psalm.gov.ph/News.asp?id=20100111; "Sale of AngatHEPP supported by EPIRA" posted 30 April 2010 at http://www.psalm.gov.ph/News.asp?id=20100114; rollo (Vol. I), pp. 121-129.

[35] G.R. No. 164527, August 15, 2007, 530 SCRA 235.

[36] Id. at 330.

[37] Id. at 331.

[38] Rollo (Vol. I), pp. 309-312, rollo (Vol. II), pp. 1457, 1470, 1489.

[39] Id. at 313-318.

[40] Id. at 317.

[41] Id. at 317-318.

[42] Id. at 319-321.

[43] Id. at 321.

[44] Id. at 332-333.

[45] Id. at 333.

[46] Id. at 107-108.

[47] "Water Supply System – Raw Water Sources" accessed at

http://manilawater.com/section.php?section_id=6&category_id=35&article_id=6.

[48] Id.

[49] Revised Charter of MWSS, approved on June 19, 1971.

[50] Approved on November 3, 1936.

[51] "Department of Energy Act of 1992."

[52] "...the Watershed Management Group was created with five watershed areas under its management, namely: Ambuklao and Binga (Upper Agno), Angat, Caliraya and Tiwi. Considering its huge investments in hydro and geothermal plants, the complete control and jurisdiction of these five watersheds with addition of Buhi-Barit and Makiling-Banahaw Geothermal reservation was vested to NPC by virtue of Executive [O]rder No. 224 which was signed in July 16, 1987. At present, a total of eleven (11) watersheds are being managed by NPC with the addition of San Roque watershed (Lower Agno) (portion) for San Roque Multi-Purpose Project (SRMPP) by virtue of PD 2320 and two (2) watershed reservations namely Pantabangan and Magat under an area sharing scheme with National Irrigation Administration (NIA) and two (2) more watersheds, Lake Lanao-Agus and Pulangi Watershed Area under a Memorandum of agreement with the Department of Environmental and Natural Resources (DENR)." Source: http://www.napocor.gov.ph/WMD%20WEBPAGE/about%20us.htm.

[53] Sec. 47 (f), R.A. No. 9136 provides: "The Agus and the Pulangui complexes in Mindanao shall be excluded from among the generation companies that will be initially privatized. Their ownership shall be transferred to the PSALM Corp. and both shall continue to be operated by the NPC. Said complexes may be privatized not earlier than ten (10) years from the effectivity of this Act, x xx. The privatization of Agus and Pulangui complexes shall be left to the discretion of PSALM Corp. in consultation with Congress." (Emphasis supplied.)

[54] Sec. 4 (tt): "Small Power Utilities Group or "SPUG" refers to the functional unit of NPC created to pursue missionary electrification function."

[55] See Commissioner of Internal Revenue v. Michel J. Lhuillier Pawnshop, Inc., G.R. No. 150947, July 15, 2003, 406SCRA 178, 186.

[56] Malinias v. Commission on Elections, G.R. No. 146943, October 4, 2002, 390 SCRA 480, 491-492, as cited in Lung Center of the Philippines v. Quezon City, G.R. No. 144104, June 29, 2004, 433 SCRA 119, 135.

[57] Sec. 3 (f), R.A. No. 6234.

[58] Sec. 1 (d), R.A. No. 9136.

[59] Issued by President Corazon C. Aquino on July 22, 1987.

[60] Country Paper. National Water Sector Apex Body.Philippines: National Water Resources Board, www.pacificwater.org/userfiles/file/IWRM/Philippines.pdf.

[61] Rollo (Vol. I), pp. 95-97.

[62] Sec. 6, R.A. No. 9136.

[63] Art.10, P.D. No. 1067 provides in part:

> Use of water for domestic purposes is the utilization of water for drinking, washing, bathing, cooking or other household needs, home gardens, and watering of lawns or domestic animals.
>
> Use of water for municipal purposes is the utilization of water for supplying the water requirements of the

community.

Use of water for irrigation is the utilization of water for producing agricultural crops.

[64] Rollo (Vol. II), pp. 1330-1378.

[65] Id. at 1379-1407.

[66] "Hydroelectric Power Water Use" (Source: Environment Canada), accessed at http://ga.water.usgs.gov/edu/wuhy.html.

[67] Sec. 2, R.A. No. 7718.

[68] "Philippine Power Industry Restructuring and Privatization", Philippine Council for Investigative Journalism (PCIJ), accessed at http://www. pcij.org/blog/wp-docs/Philippine_Power_Fact_Sheet.pdf.

[69] Rollo (Vol. I), pp. 436, 439-440.

[70] Id. at 444-446.

[71] Art. 9, Water Code of the Philippines.

[72] Black's Law Dictionary, 5th Ed., p. 93.

[73] Art. 13, Water Code of the Philippines.

[74] Supra note 71, at 1427-1428.

[75] Sec. 2 (m), R.A. No. 7718.

[76] Sec. 47 (j), R.A. No. 9136.

[77] Sec. 51 (m), id.

[78] Rollo (Vol. II), p. 1341.

[79] Art. 19, Water Code of the Philippines.

[80] Sec. 3 (f), R.A. No. 6395.

[81] Sec. 3 (f) and (i), R.A. No. 6234.

[82] Sec. 2 (b), R.A. No. 3601, approved on June 22, 1963.

[83] Sec. 2 (c) P.D. No. 552 amending the NIA Charter, issued September 11, 1974.

D I S S E N T I N G O P I N I O N

VELASCO, JR., J.:

Subject of this petition for certiorari and prohibition are two Agreements entered into by and between Power Sector Assets and Liabilities Management Corporation (PSALM) and Korean Water Resources Corporation (K-Water), involving the Angat Hydro-Electric Power Plant (AHEPP) and the Angat Dam Complex. The first agreement, denominated as Asset Purchase Agreement (APA), covers AHEPP, while the second, the Operation and Maintenance Agreement (O & M), covers the non-power components of AHEPP, including Angat Dam. PSALM entered into the said agreements pursuant to its mandate under Republic Act No. (RA) 9136 or the

Electric Power Industry Reform Act of 2001 (EPIRA) to privatize the assets of National Power Corporation (NPC).

Petitioners question the validity of the said agreements for being repugnant to the 1987 Constitution, specifically Sec. 2, Art. XII thereof, Presidential Decree No. (PD) 1067 or the Water Code of the Philippines (Water Code), and the EPIRA. They allege that PSALM acted with grave abuse of discretion when it allowed K-Water, a corporate entity wholly owned by the Republic of Korea, to participate in the bidding process, and thereafter declaring it the winning bidder.[1]

I submit that the two Agreements themselves are, in their entirety, null and void for infringing the ownership and nationality limitations in Sec. 2, Art. XII of the 1987 Constitution, which provides:

> Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant." (Emphasis supplied.)

The Agreements fall squarely within the ambit of the aforequoted constitutional provision, and are, thus, properly subject to the nationality restriction provided therein.

K-Water, being a wholly foreign-owned corporation, is disqualified from engaging in activities involving the exploration, development, and utilization of water and natural resources belonging to the state. Necessarily, it is barred from operating Angat Dam, a structure indispensable in ensuring water security in Metro Manila. PSALM, therefore, committed grave abuse of discretion amounting to lack or excess of jurisdiction when it allowed K-Water to participate in the bidding out of properties that will directly extract and utilize natural resources of the Philippines.

The Facts

On June 8, 2001, RA 9136 or the EPIRA was passed into law. Among the policies declared therein is the "orderly and transparent privatization of the assets and liabilities of the National Power Corporation (NPC)."[2] To carry out this policy, the EPIRA created PSALM, a government-owned and controlled corporation with the mandate to "manage the orderly sale, disposition, and privatization of NPC generation assets, real estate and other disposable assets, and IPP [independent power producers] contracts with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner."[3] To enable PSALM to effectively discharge its functions under the law, it was allowed to "take ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate, and all other disposable assets."[4] On the manner of privatization of NPC assets, the EPIRA provides:

> Section 47. NPC Privatization.- Except for the assets of SPUG, the generating assets, real estate, and other disposable assets as well as generation contracts of NPC shall be privatized in accordance with this Act. Within six (6) months from the effectivity of this Act, the PSALM Corp. shall submit a plan for the endorsement by the Joint Congressional Power Commission and the approval of the President of the Philippines, on the total privatization of the generation assets, real estate, other disposable assets as well as existing generation contracts of NPC and thereafter, implement the same, in accordance with the following guidelines, except as

provided for in paragraph (e) herein:

(a) The privatization value to the national government of the NPC generation assets, real estate, other disposable assets as well as IPP contracts shall be optimized;

(b) The participation by Filipino citizens and corporations in the purchase of NPC assets shall be encouraged;

In the case of foreign buyers at least seventy-five percent (75%) of the funds used to acquire NPC-generating assets and generating contracts shall be inwardly remitted and registered with the Bangko Sentral ng Pilipinas.

x x x x

(d) All generation assets and IPP contracts shall be sold in an open and transparent manner through public bidding;

x x x x

(h) Not later than three (3) years from the effectivity of this Act, and in no case later than the initial implementation of open access, at least seventy percent (70%) of the total capacity of generating assets of NPC and of the total capacity of the power plants under contract with NPC located in Luzon and Visayas shall have been privatized; and

(i) NPC may generate and sell electricity only from the undisposed generating assets and IPP contracts of PSALM Corp.: Provided, That any unsold capacity shall be privatized not later than eight (8) years from the effectivity of this Act.

Pursuant to the EPIRA, PSALM is currently the owner of the subject Angat Dam complex, including AHEPP.

On January 11, 2010, PSALM officially opened the process of privatization of AHEPP, through the publication of an Invitation to Bid in local broadsheets on January 11, 12, and 13, 2010.[5] This notice was also posted on its website.[6] In the Invitation to Bid, interested parties were required to submit a Letter of Interest (LOI) which expresses the interested party's intention to participate in the bidding, a Confidentiality Agreement and Undertaking with PSALM, and a non-refundable participation fee of two thousand five hundred US dollars (USD 2,500).

The bidding package indicated that the prospective bid shall cover the sale and purchase of the asset, and operations and maintenance by the buyer of the non-power components, to wit:

The four main units each have a rated capacity of 50 MW. Main units 1 and 2 were commission[ed] in 1967 and main units 3 and 4 in 1968. Three auxiliary units each have a rated capacity of 6 MW and were commissioned as follows: auxiliary units 1 and 2 in 1967 and auxiliary unit 3 in 1978. It is the foregoing 4 main units and 3 auxiliary units with an aggregate installed capacity of 218 MW that is the subject of the Bid.

x x x x

The Asset includes all the items listed in Schedule A (List of Assets). All other assets which may be found on the site or with the Asset but are not listed in Schedule A do not form part of the Asset. The Non-Power Components are more particularly described in Schedule B (Non-Power Components). The Information Memorandum contained in the Bidding Package also contains relevant information on the Asset and Non-Power Component. The final list of the Asset and the description of the Non-Power Components shall be contained in the Final Transaction Documents.[7] (Emphasis in the original.)

The bidding package also contains the following conditions with respect to the proposed sale of AHEPP:

The Asset shall be sold on an "AS IS, WHERE IS" basis.

> The Angat Dam (which is part of the Non-Power Components) is a multi-purpose hydro facility which currently supplies water for domestic use, irrigation and power generation. The four main units of the Angat Plant release water to an underground tailrace that flows towards the Bustos Dam which is owned and operated by the National Irrigation Administration ("NIA") and provides irrigation requirements to certain areas in Bulacan. The water from the auxiliary units 1,2, and 3 flows to the Ipo Dam which is owned and operated by MWSS and supplied domestic water to Metro Manila and other surrounding cities.
>
> The priority of water usage under Philippine Law would have to be observed by the Buyer/Operator.
>
> The Winning Bidder/Buyer shall be required to enter into an operations and maintenance agreement with PSALM for the Non-Power Components in accordance with the terms and conditions of the O&M Agreement to be issued as part of the Final Transaction Documents. The Buyer, as Operator, shall be required to operate and maintain the Non-Power Components at its own cost and expense.
>
> PSALM is currently negotiating a water protocol agreement with various parties which are currently the MWSS, NIA, National Water Resources Board and NPC. If required by PSALM, the Buyer will be required to enter into the said water protocol agreement as a condition to the award of the Asset.
>
> The Buyer shall be responsible for securing the necessary rights to occupy the underlying Asset.[8]

On February 17, 2010, a pre-bid conference was conducted between PSALM, prospective bidders, and government agencies affected by the privatization.[9]

On April 5, 2010, PSALM declared the bids of the following as complying with the bidding procedures: (1) DMCI Power Corporation (DMCI); (2) First Gen Northern Energy Corporation (First Gen); (3) Korean Water Resources Corporation (K-Water); (4) San Miguel Corporation (SMC); (5) SN Aboitiz Power-Pangasinan, Inc. (SN Aboitiz); and (6) Trans-Asia Oil & Energy Development Corporation (Trans-Asia). Five other bidders were, however, disqualified for failure to comply with the pre-qualification requirements.[10]

On April 16, 2010, PSALM approved the Asset Purchase Agreement (for AHEPP) and the Operations & Maintenance Agreement (for the Non-Power Components) for the public bidding.[11] Following the opening and evaluation of the bid envelopes of the six qualifying firms on April 28, 2010, the PSALM Bids and Awards Committee opened the bid envelopes of the six qualifying firms, and found their respective bids as follows:

> Korean Water Resources Corporation
>
> USD 440,880,000
>
> First Gen Northern Energy Corporation
>
> 365,000,678
>
> San Miguel Corporation
>
> 312,500,000
>
> SN Aboitiz Power-Pangasinan, Inc.
>
> 256,000,000
>
> Trans-Asia Oil & Energy Development Corporation
>
> 237,000,000
>
> DMCI Power Corporation

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188,890,000

On May 5, 2010, after the post-bid evaluation, the Board of Directors of PSALM approved and confirmed the issuance of a Notice of Award in favor of K-Water.[12] In its Manifestation in lieu of Comment,[13] K-Water opted not make any statement as to its being a Korean state-owned corporation. PSALM, however, in its Comment[14] admitted that K-Water is a Korean state-owned corporation.

In the instant petition, petitioners assert that the sale of AHEPP is imbued with public interest, 97% of the water supply of Metro Manila sourced as it were directly from Angat Dam. They argue that the physical control and management of Angat Dam, as well as the security of the water supply, are matters of transcendental interest to them as residents of Metro Manila. In spite of this, petitioners claim, PSALM kept the bidding process largely confidential, and information over such process withheld from the public. Further, they maintain that the bidding process for AHEPP undermined the elements of the right to water.[15] Lastly, they argue that PSALM, in grave abuse of its discretion, overstepped the Constitution and the Water Code in allowing foreign-owned corporation, K-Water, to participate in the bidding, and later favoring it with a Notice of Award.[16] They, thus, urge the nullification of the same, and the enjoinment of the privatization of AHEPP.

On May 24, 2010, this Court issued a Status Quo Ante Order,[17] directing the parties and all concerned to maintain the status quo prevailing before the filing of the petition, until further orders from the Court.

Respondents Trans-Asia, DMCI, SN Aboitiz, and SMC forthwith filed their respective Comments,[18] all averring that they are merely nominal parties to the petition, and thus are not real parties-in-interest.

In its Comment[19] dated June 17, 2010, respondent NIA disclaimed involvement in the bidding conducted by PSALM concerning AHEPP, adding that its interest is “only limited to the protection of its water allocation drawn from the Angat Dam as determined by the National Water Resources Board (NWRB).”

In its Comment[20] dated June 22, 2010, respondent PSALM stressed its compliance with the relevant laws and the Constitution in conducting the bidding process for AHEPP, describing the process as open and transparent manner, and with full respect to the limitations set forth in the Constitution. It further alleged that contrary to the petitioners’ posture, the agreements will have no effect on the right to water, as they do not involve the sale of Angat Dam itself.

On the procedural aspect, PSALM claimed that the petitioners have no standing to file the petition, and that a petition for certiorari is not the proper remedy, PSALM not exercising discretionary powers. Further, they take the view that the controversy has been rendered moot and academic by the issuance of a Notice of Award. In any case, they added, the petition poses a political question over which the Court has no jurisdiction.

Vis-à-vis the AHEPP and Angat Dam, PSALM argued that it is the sole owner of the two facilities, by virtue of the transfer of ownership from NPC under Sec. 49 of the EPIRA. Neither MWSS nor NIA, it said, was a co-owner of the said structures. Further, transfer of ownership of AHEPP to MWSS or NIA would not be in accordance with the law, since the respective charters of MWSS and NIA do not have provisions for their operating a hydro-power facility like AHEPP.

Finally, PSALM, citing DOJ Opinions to the effect that there is no constitutional barrier to the operation of a power plant by a foreign entity, would assert that the award of the AHEPP to K-Water is in accordance with the law, since AHEPP, as a generation asset, may be sold to a foreign entity.

Respondent First Gen, in its Comment[21] dated June 23, 2010, supported the position of PSALM with respect to the AHEPP being subject to privatization under the terms of the EPIRA. AHEPP, it concurred, is merely one facility in the Angat Complex, exclusively owned and operated by NPC. Further, it claimed that the watershed is

under the exclusive jurisdiction and control of NPC, pursuant to Executive Order No. (EO) 258,[22] which provides:

> Section 2. NPC's jurisdiction and control over the Angat Watershed Reservation is hereby restored. Accordingly, NPC shall be responsible for its management, protection, development and rehabilitation in accordance with the provisions of Sec. 3(n) of Republic Act No. 6359, as amended, Sec. 2 of Executive Order No. 224 and the preceding Section.

For its part, respondent MWSS, in its Comment[23] of July 19, 2010, stated that AHEPP is not like any other hydro-electric power plant, because while its power contribution to the Luzon grid is negligible, its water supply to the commercial and domestic needs of the clientele of MWSS is incontestable and indispensable. Pushing this point, MWSS would argue that the case is really about the virtual surrender of the control and operation of the Angat Dam and Reservoir to a foreign country, thereby impinging on the water supply of twelve million Filipinos.

Respondent MWSS further asserted that, by statutory mandate, part of the waterworks that are within its jurisdiction and under its control and supervision ipso jure are the Angat Dam, Dykes and Reservoir. This is by virtue of Sections 1 and 3 of the MWSS Charter[24] which vests MWSS with the powers of control, supervision, and regulation of the use of all waterworks systems, including dams, reservoirs, and other waterworks for the purpose of supplying water to inhabitants of its territory. It claimed that in the exercise of its jurisdiction over Angat Dam, it even incurred expenses for its upkeep and maintenance.

MWSS related that upon the passage of EPIRA, it wrote PSALM informing the latter of its desire to acquire ownership or control, upon payment of just compensation, over AHEPP. In this regard, MWSS draws attention to the support it got for its desire from the Department of Public Works and Highways (DPWH) and various local government units.

In 2006, PSALM also acknowledged the need to come up with effective strategies for the implementation of the privatization of AHEPP. MWSS and PSALM thereafter engaged in several discussions over AHEPP and the control and management of AHEPP and Angat Dam. A draft of the Angat Water Protocol was made between MWSS, PSALM, NIA, NPC, and NWRB. However, only MWSS and NIA signed the draft protocol.

MWSS then went on to argue that due to the non-signing of the Water Protocol, respondent PSALM failed to provide safeguards to protect potable water, irrigation, and all other requirements imbued with public interest, in violation of the EPIRA. It then went on to say that the sale of AHEPP to a foreign corporation violates the Constitution. It said that the waters of the Angat River that propel the AHEPP to supply water and irrigation and generate power form part of the National Patrimony. It added that K-Water would probably simply consider AHEPP as another business opportunity, contrary to the role that the Angat Dam Complex plays in the life of the Filipino people. Thus, MWSS prayed for the granting of the petition, and in the alternative, to order PSALM to turn over control and management of AHEPP to MWSS.

Meanwhile, respondent K-Water filed a Manifestation in lieu of Comment, wherein it averred that it merely relied on the mandate and expertise of PSALM in conducting the bidding process for the privatization of AHEPP. It stated that in participating with the bidding process, it was guided at all times by the Constitution and the laws of the Philippines.

Petitioners, in their Consolidated Reply[25] dated October 29, 2010, traversed in some detail respondent PSALM's allegations and supportive arguments on the issues of legal standing, mootness of the petition, and on whether a political question is posed in the controversy. On the matter of mootness, they claimed that the issuance of a Notice of Award does not ipso facto render the case moot, as it is not the final step for the privatization of AHEPP. On the claim that the controversy constitutes a political question, they replied that they have amply

argued that PSALM's exercise of power is limited by the Constitution, the EPIRA, other laws, as well as binding norms of international law. Thus, its acts in conducting the bidding process fall within the expanded jurisdiction of this Court. On the matter of standing, they claimed to have sufficient personality as the issue involves a public right. Moreover, they invoked the transcendental importance doctrine and the rule on liberality when it comes to public rights.

And on the matter of how PSALM conducted the bidding, the petitioners reiterated their contention that PSALM ran roughshod over the public's right to be informed of the bidding process, the terms and conditions of the privatization, the bidding procedures, minimum price, and other similar information. They related that Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc.'s (IDEAL's) request for information on the winning bidder was unheeded, with PSALM merely referring the matter to the counsel of K-Water for appropriate action.

On the matter of water rights, they related that the provisions of the APA itself negate PSALM's contention that it is erroneous to conclude that water rights will be necessarily transferred to respondent K-Water as a result of the AHEPP. They claimed that this is a wanton disregard of the provisions of the Water Code.

While conceding that Angat Dam is not being sold, petitioners nonetheless maintain that, by the terms of the Agreements in question, the control over Angat Dam, among other non-power components will also be given to the buyer. This, taken with the fact that the Water Protocol continues to be unsigned, the petitioners argue, leads to no other conclusion except PSALM's failure to provide safeguards to ensure adequate water supply coming from Angat Dam. This, they claimed, would result in the winning K-Water having complete control over the entire Angat Dam Complex.

As a counterpoint, particularly to the allegations of MWSS in its Comment, respondent PSALM, in its Comment,[26] stated that the non-signing of the Water Protocol was merely due to its observance of this Court's Status Quo Ante Order. It claimed that MWSS admitted participating, along with various stakeholders, in the discussions over AHEPP, through the various meetings and correspondences held relative to the drafting of the Memorandum of Agreement on the Angat Water Protocol.

On the issue of jurisdiction over Angat Dam, PSALM replied that MWSS never exercised control and jurisdiction over Angat Dam. The arguments of MWSS, so PSALM claims, are based on the faulty characterization of EPIRA as a general law and the MWSS Charter as a special law.

Further, PSALM stressed that its mandate under the EPIRA is to privatize the assets of NPC, i.e., to transfer ownership and control thereof to a private person or entity, not to another government entity.

PSALM also reiterated that AHEPP may be sold to a foreign entity, in accordance with the policy reforms espoused by EPIRA, i.e., to enable open access in the electricity market and then enable the government to concentrate more fully on the supply of basic needs of the people. Even assuming that the transfer of AHEPP to MWSS is allowed under EPIRA, the same would not serve the objective of EPIRA of liquidating all of the financial obligations of NPC.

The Issues

1.
WHETHER THE PETITIONERS AVAILED OF THE PROPER REMEDY BY FILING THIS PETITION FOR CERTIORARI AND PROHIBITION.

2.
WHETHER THE PETITION HAS BEEN RENDERED MOOT AND ACADEMIC BY THE ISSUANCE OF

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A NOTICE OF AWARD IN FAVOR OF RESPONDENT K-WATER ON MAY 5, 2010

3.
WHETHER THE PETITION INVOLVES A POLITICAL QUESTION

4.
WHETHER THE PETITIONERS HAVE LEGAL STANDING TO FILE THE INSTANT PETITION

5.
WHETHER THE PETITIONER'S RIGHT TO INFORMATION HAS BEEN VIOLATED BY THE PUBLIC RESPONDENT PSALM

6.
WHETHER PETITIONER ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT UNDERTOOK THE PRIVATIZATION OF AHEPP

7.
WHETHER THE PUBLIC RESPONDENT PSALM ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT ALLOWED K-WATER TO PARTICIPATE IN THE BIDDING FOR AHEPP, AND LATER AWARDED K-WATER AS THE HIGHEST BIDDER

Discussion

First Issue:
Petition for Certiorari and Prohibition as the Proper Remedy

The Court's jurisdiction over questions of grave abuse of discretion finds expression in Art. VIII, Sec. 1 of the Constitution vesting the Court the power 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." This expanded power of judicial review allows the Court to review acts of other branches of the government, to determine whether such acts are committed with grave abuse of discretion amounting to lack or excess of jurisdiction.

Grave abuse of discretion generally refers to:

> capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility.[27] (Citations omitted.)

However, not all errors in exercise of judgment amount to grave abuse of discretion. The transgression, jurisprudence teaches, must be "so patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform the duty enjoined or to act at all in contemplation of law."[28]

In the case before Us, the petitioners allege that respondent PSALM exceeded its jurisdiction when it allowed K-Water to participate in the bidding for the privatization of AHEPP, and later awarded the contract to it. In its exercise of its mandate under the EPIRA, PSALM exercises not only ministerial, but also discretionary powers. The EPIRA merely provides that the privatization be done "in an open and transparent manner through public bidding,"[29] suggesting that it is up to PSALM to decide the specific manner and method in conducting the bidding process.

In determining the terms of reference of the public bidding to be conducted, as well as in determining the

qualifications of the respective bidders, respondent PSALM exercises discretionary, not ministerial, powers. Corollarily, when it allowed K-Water to participate in the bidding, and when it eventually awarded the contract to K-Water as the highest bidder, PSALM was engaged not in ministerial functions, but was actually exercising its discretionary powers.

Hence, as a government agency discharging official functions, its actions are subject to judicial review by this Court, as expressly provided under Art. VIII, Sec. 1, par. 2 of the Constitution.

This Court's jurisdiction over petitions for certiorari under Rule 65 is concurrent with Regional Trial Courts. This jurisdiction arrangement calls for the application of the doctrine of hierarchy of courts, such that this Court generally will not entertain petitions filed directly before it. However, direct recourse to this Court may be allowed in certain situations. As We said in Chavez v. National Housing Authority (NHA):[30]

> [S]uch resort may be allowed in certain situations, wherein this Court ruled that petitions for certiorari, prohibition, mandamus, though cognizable by other courts, may directly be filed with us if the redress desired cannot be obtained in the appropriate courts or where exceptions compelling circumstances justify availment of a remedy within and calling for the exercise of this Court's primary jurisdiction. (citation omitted)

As in Chavez, herein petitioners have made serious constitutional challenges not only with respect to the constitutional provision on exploitation, development, and utilization of natural resources, but also the primordial right of the people to access to clean water. The matter concerning Angat Dam and its impact on the water supply to the entire Metro Manila area and neighboring cities and provinces, involving a huge number of people has, to be sure, far-reaching consequences. These imperatives merit direct consideration by this Court, and compel us, as now, to turn a blind eye to the judicial structure, like that envisioned in the hierarchy of courts rule, "meant to provide an orderly dispensation of justice and consider the instant petition as a justified deviation from an established precept."[31]

Second Issue:
Mootness of the Petition

PSALM maintains that the petition no longer presents an actual justiciable controversy due to the mootness of the issues presented in the petition, for, as claimed, the petitioners are seeking to enjoin the performance of an act that it has already performed, i.e., that of the issuance of a Notice of Award to the highest winning bidder in the public bidding for AHEPP.[32]

PSALM's contention on mootness cannot be sustained. What the petitioners seek in this recourse is to enjoin the privatization of AHEPP altogether, arguing that it runs counter to the nationality limitation in the Constitution. Moreover, they claim that the issues raised would have consequences to their primordial right to access to clean water. And, as the petitioners aptly argued, the Notice of Award itself is not the final act in the privatization of AHEPP. Also telling is the fact that the water protocol has yet to be finalized. In short, all the acts that, for all intents and purposes, would bring about the privatization of AHEPP have yet to ensue.

Even assuming that the Notice of Award finalizes the privatization of AHEPP, this Court will not shirk from its duty to prevent the execution of a contract award violative of the Constitution. This Court can still enjoin, if it must, the transfer of ownership of AHEPP if such transfer is repugnant to the spirit and the letter of the Constitution. As We said in Chavez: "it becomes more compelling for the Court to resolve the issue to ensure the government itself does not violate a provision of the Constitution intended to safeguard the national patrimony. Supervening events, whether intended or accidental, cannot prevent the Court from rendering a decision if there is a grave violation of the Constitution."

Third Issue:
Application of the Political Question Doctrine

Political questions, as defined in Tañada v. Cuenco,[33] refer to:

> those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislature or the executive branch of the Government.

Simply put, the political question doctrine applies when the question calls for a ruling on the wisdom, and not the legality, of a particular governmental act or issuance.

The political question doctrine has no application in the case here. In the privatization of AHEPP, PSALM's discretion is circumscribed not only by the provisions of EPIRA and its Implementing Rules and Regulations (IRR), but also by pertinent laws that are consequential and relevant to its mandate of privatizing the power generation assets of NPC. Needless to stress, PSALM is duty bound to abide by the parameters set by the Constitution. In case it violates any existing law or the Constitution, it cannot hide behind the mantle of the political question doctrine, because such violation inevitably calls for the exercise of judicial review by this Court.

This is the very question the petitioners pose. They allege that in the process of pursuing its mandate under EPIRA, PSALM transgressed the Constitution, particularly when it failed to observe the petitioners' right to information, and when it allowed a foreign corporation to utilize the natural resources of the Philippines.

Respondent PSALM's contention that the petition partakes of the nature of a collateral attack on EPIRA[34] is misplaced. Petitioners' challenge is not directed, as it were, against the wisdom of or the inherent infirmity of the EPIRA, but the legality of PSALM's acts, which, to the petitioners, violate their paramount constitutional rights. This falls squarely within the expanded jurisdiction of this Court.

At any rate, political questions, without more, are now cognizable by the Court under its expanded judicial review power. The Court said so in Osmeña v. COMELEC:[35]

> We would still not be precluded from resolving it under the expanded jurisdiction conferred upon us that now covers in proper cases even political questions (Daza v. Singson, 180 SCRA 496), provided naturally, that the question is not solely and exclusively political (as when the Executive extends recognition to a foreign government) but one which really necessitates a forthright determination of constitutionality, involving as it does a question of national importance.

Fourth Issue:
Legal Standing of Petitioners

The petitioners have sufficient locus standi to file the instant petition.

The petitioners raise questions relating to two different provisions of the Constitution, to wit: (1) the right to information on matters of public concern[36] and (2) the limitation on the exploration, development, and utilization of natural resources to Filipino citizens and corporations and associations at least sixty per centum of whose capital is owned by such citizens.[37]

On the first constitutional question, the petition urges the Court to compel PSALM to disclose publicly the details and records of the Agreements with K-Water. On the second issue, the petition seeks to declare the Agreements as unconstitutional, for violating the constitutional limitation that only Filipino citizens and Filipino corporations may engage in the exploration, development, and utilization of natural resources.

Where the issue revolves around the people's right to information, the requisite legal standing is met by the mere

fact that the petitioner is a citizen. The Court said as much in Akbayan Citizens Action Party v. Aquino:[38]

> In a petition anchored upon the right of the people to information on matters of public concern, which is a public right by its very nature, petitioners need not show that they have any legal or special interest in the result, it being sufficient to show that they are citizens and, therefore, part of the general public which possesses the right. (Emphasis supplied.)

Of the same tenor is the Court's pronouncement in Guingona, Jr. v. Commission on Elections:[39] "[I]f the petition is anchored on the people's right to information on matters of public concern, any citizen can be a real party in interest."

Here, the members of the petitioner-organizations are Filipino citizens. In view of the relevant jurisprudence on the matter, that fact alone is sufficient to confer upon them legal personality to file this case to assert their right to information on matters of public concern.

On the second constitutional question, on the constitutional limitation on the exploration, development, and utilization of natural resources, the rule on locus standi is not sufficiently overcome by the mere fact that the petitioners are citizens. The general rule applies and the petition must show that the party filing has a "personal stake in the outcome of the controversy."[40] As stated in Telecommunications and Broadcast Attorneys of the Philippines, Inc., v. COMELEC,[41] "there must be a showing that the citizen personally suffered some actual or threatened injury arising from the alleged illegal official act." Thus, petitioners here technically lack the requisite legal standing to file the petition as taxpayers, as they have no direct and personal interest in the controversy.

The above notwithstanding, the petitioners have sufficiently crafted an issue involving matters of transcendental importance to the public. Thus, the technical procedural rules on locus standi may be set aside to allow this Court to make a pronouncement on the issue. We have held before that the Court:

> has discretion to take cognizance of a suit which does not satisfy the requirement of legal standing when paramount interest is involved. In not a few cases, the Court has adopted a liberal attitude on the locus standi of a petitioner where the petitioner is able to craft an issue of transcendental significance to the people.[42]

Here, the interest of the petitioners is inchoate in that neither they as organizations nor their respective members will suffer any direct injury in the allowing of a foreign corporation to utilize Philippine water resources. As residents of Metro Manila, the consequences of the privatization of AHEPP will have an impact on the petitioners, albeit not the direct injury contemplated by law.

The issues they have raised, including the effect of the Agreements on water security in Metro Manila, and the significance of Angat Dam as part of the Angat-Ipo-La Mesa system, is, however, a matter of transcendental importance. Hence, the technical rules on standing may be brushed aside, and enable this Court to exercise judicial review.

Fifth Issue:
Alleged Violation of Petitioners' Right to Information

Petitioners fault PSALM for failing to provide them with information on the details of the transaction that PSALM was entering into, in breach of their constitutional right to information regarding matters of public concern. In particular, petitioners rue that the Invitation to Bid published by PSALM did not specify crucial information related to the sale of the water facility, including the terms and conditions of the disposition, the qualification of bidders, the minimum price, and other basic details.[43] They allege that PSALM should have publicly disclosed such crucial information on the privatization of AHEPP, pursuant to its legal obligation to conduct the bidding in an open and transparent manner.

As a counter-argument, PSALM states that it had discharged its duty of disclosure when it publicly disseminated information regarding the privatization of AHEPP, effected not only through the publication of the Invitation to Bid, but right "from the very start of the disposition process."[44] First, PSALM points out, it wrote the Regional Director of the National Commission on Indigenous Peoples (NCIP), informing him of the planned disposition of AHEPP, and inviting him to a meeting to discuss matters related to the concerns of indigenous peoples in the area. Then, it conducted a forum in a hotel, with various stakeholders in attendance, "to provide them an opportunity to share relevant information and to thoroughly discuss the structure and pertinent provisions of the sale."[45] Third, it also published the relevant information on its website, in the form of press releases.

On April 20, 2010, the petitioners sent a letter to respondent PSALM requesting certain documents and information relating to the privatization of AHEPP. This request was denied, however, allegedly due to a violation of the bidding procedures. In its letter dated April 30, 2010, PSALM stated that it can only release such documents to persons and entities which submitted a Letter of Interest, paid the participation fee, and executed a Confidentiality Agreement and Undertaking.

On May 14, 2010, the petitioners sent a second letter specifically requesting for detailed information on the winning bidder, including its company profile, contact person or responsible officer, office address and Philippine registration. PSALM replied, in a letter dated May 19, 2010, that the petitioner's request has been referred to the counsel of K-Water.

The people's right to information is based on Art. III, Sec. 7 of the Constitution, which states:

> Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

The policy of public disclosure and transparency of governmental transactions involving public interest enunciated in Art. II, Sec. 28 of the Constitution complements the right of the people to information:

> Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.

The purpose of these two constitutional provisions, as we observed in Chavez v. Public Estates Authority, is:

> to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to exercise effectively other constitutional rights. These twin provisions are essential to the exercise of freedom of expression. x x x Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential to the existence and proper functioning of any democracy.[46]

This right to information, however, is not without limitation. Fr. Joaquin Bernas S.J. notes that the two sentences of Section 7 guarantee only one general right, the right to information on matters of public concern. The right to access official records merely implements the right to information. Thus, regulatory discretion must include both authority to determine what matters are of public concern and authority to determine the manner of access to them.[47]

We have sufficiently elucidated the matter of right to information in Chavez, where We said:

> We must first distinguish between information the law on public bidding requires PEA to disclose publicly, and information the constitutional right to information requires PEA to release to the public. Before the

consummation of the contract, PEA must, on its own and without demand from anyone, disclose to the public matters relating to the disposition of its property. These include the size, location, technical description and nature of the property being disposed of, the terms and conditions of the disposition, the parties qualified to bid, the minimum price and similar information. PEA must prepare all these data and disclose them to the public at the start of the disposition process, long before the consummation of the contract, because the Government Auditing Code requires public bidding. If PEA fails to make this disclosure, any citizen can demand from PEA this information at any time during the bidding process.

Information, however, on on-going evaluation or review of bids or proposals being undertaken by the bidding or review committee is not immediately accessible under the right to information. While the evaluation or review is still on-going, there are no "official acts, transactions, or decisions" on the bids or proposals. However, once the committee makes its official recommendation, there arises a "definite proposition" on the part of the government. From this moment, the public's right to information attaches, and any citizen can access all the non-proprietary information leading to such definite proposition. In Chavez v. PCGG, the Court ruled as follows:

"Considering the intent of the framers of the Constitution, we believe that it is incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they have decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, though, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the "exploratory" stage. There is need, of course, to observe the same restrictions on disclosure of information in general, as discussed earlier – such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information." (Emphasis supplied.)

The right covers three categories of information which are "matters of public concern," namely: (1) official records; (2) documents and papers pertaining to official acts, transactions and decisions; and (3) government research data used in formulating policies. The first category refers to any document that is part of the public records in the custody of government agencies or officials. The second category refers to documents and papers recording, evidencing, establishing, confirming, supporting, justifying or explaining official acts, transactions or decisions of government agencies or officials. The third category refers to research data, whether raw, collated or processed, owned by the government and used in formulating government policies.

x x x x

We rule, therefore, that the constitutional right to information includes official information on on-going negotiations before a final contract. The information, however, must constitute definite propositions by the government and should not cover recognized exceptions like privileged information, military and diplomatic secrets and similar matters affecting national security and public order. Congress has also prescribed other limitations on the right to information in several legislations. (Emphasis supplied, citations omitted.)

We further explored the matter of right to information in Chavez v. NHA, where We ruled that:

x x x [G]overnment agencies, without need of demand from anyone, must bring into public view all the steps and negotiations leading to the consummation of the transaction and the contents of the perfected contract. Such information must pertain to "definite propositions of the government," meaning official recommendations or final positions reached on the different matters subject of negotiation. The government agency, however, need not disclose "intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the exploratory stage." The limitation also covers privileged communication like information on military and diplomatic secrets; information affecting national security; information on investigations of crimes by law enforcement agencies before the prosecution of the accused; information on foreign relations, intelligence, and other classified information.[48]

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Even without any demand from anyone then, it behooved PSALM to publicly disclose, information regarding the disposition of AHEPP. Here, PSALM routinely published news and updates on the sale of AHEPP on its website.[49] It also organized several forums where various stakeholders were apprised of the procedure to be implemented in the privatization of AHEPP. As there is yet no sufficient enabling law to provide the specific requirements in the discharge of its duty under the Constitution, these unilateral actions from PSALM must be construed to be a sufficient compliance of its duty under the Constitution. As We observed in Chavez v. NHA:

> It is unfortunate, however, that after almost twenty (20) years from birth of the 1987 Constitution, there is still no enabling law that provides the mechanics for the compulsory duty of government agencies to disclose information on government transactions. Hopefully, the desired enabling law will finally see the light of day if and when Congress decides to approve the proposed "Freedom of Access to Information Act." In the meantime, it would suffice that government agencies post on their bulletin boards the documents incorporating the information on the steps and negotiations that produced the agreements and the agreements themselves, and if finances permit, to upload said information on their respective websites for easy access by interested parties. Without any law or regulation governing the right to disclose information, the NHA or any of the respondents cannot be faulted if they were not able to disclose information relative to the SMDRP to the public in general.[50]

It must be noted however, that aside from its duty to disclose material information regarding the sale of AHEPP, which, We hold, it had sufficiently discharged when it regularly published updates on its website, PSALM further has the duty to allow access to information on matters of public concern. This burden requires a demand or request from a member of the public, to which the right properly belongs. "The gateway to information opens to the public the following: (1) official records; (2) documents and papers pertaining to official acts, transactions, or decisions; and (3) government research data used as a basis for policy development."[51]

When petitioners' wrote PSALM a letter of April 20, 2010 requesting certain documents and information relating to the privatization of AHEPP but was denied, PSALM veritably violated the petitioners' right to information. It should have permitted access to the specific documents containing the desired information, in light of the disclosure of the same information thus made in its website. The documents referred to are neither confidential nor privileged in nature, as the gist thereof had already been published in the news bulletins in the website of PSALM, and as such, access thereto must be granted to the petitioner. On the contrary, the documents requested partake of the nature of official information.

The Court also takes stock of the fact that on May 14, 2010, petitioners requested via another letter specifically requesting detailed information on the winning bidder, including its company profile, contact person or responsible officer, office address and Philippine registration. By way of reply, PSALM informed the petitioners that their request has been referred to the counsel of K-Water.

PSALM's reply to the petitioners' adverted second letter is insufficient to discharge its duty under the Constitution. The reply is evasive, at best. At that stage of the bidding process, PSALM already had possession of and can provide, if so minded, the information requested. As such, there was hardly any need to refer the request to K-Water.

Given the above perspective, the petitioners must be granted relief by granting them access to such documents and papers relating to the disposition of AHEPP, provided the accommodation is limited to official documents and official acts and transactions.

Sixth Issue:
The Legality of the Privatization of AHEPP

The mandate of PSALM under EPIRA is clear—privatization sale of NPC generation assets, real estate, and other disposable assets. Toward the accomplishment of this mandate, EPIRA has vested the PSALM with the following powers:

> (a) To formulate and implement a program for the sale and privatization of the NPC assets and IPP contracts and the liquidation of NPC debts and stranded contract costs, such liquidation to be completed within the Corporation's term of existence;
>
> (b) To take title to and possession of, administer and conserve the assets and IPP contracts transferred to it; to sell or dispose of the same at such price and under such terms and conditions as it may deem necessary or proper, subject to applicable laws, rules and regulations;
>
> x x x x
>
> (i) To own, hold, acquire, or lease real and personal properties as may be necessary or required in the discharge of its functions.[52]

PSALM, as may be noted, was not empowered under the EPIRA to determine which NPC assets are to be privatized. The law merely authorized PSALM to decide upon the specific program to utilize in the disposition of NPC assets, and not the power to determine the coverage of the privatization. The EPIRA itself had laid down which particular assets are to be privatized, and which are not. Sec. 47 thereof provides:

> Section 47. NPC Privatization. - Except for the assets of SPUG, the generating assets, real estate, and other disposable assets as well as generation contracts of NPC shall be privatized in accordance with this Act. Within six (6) months from the effectivity of this Act, the PSALM Corp. shall submit a plan for the endorsement by the Joint Congressional Power Commission and the approval of the President of the Philippines, on the total privatization of the generation assets, real estate, other disposable assets as well as existing generation contracts of NPC and thereafter, implement the same, in accordance with the following guidelines, except as provided for in paragraph (e) herein:
>
> x x x x
>
> (f) The Agus and the Pulangui complexes in Mindanao shall be excluded from among the generating companies that will be initially privatized. Their ownership shall be transferred to the PSALM Corp. and both shall continue to be operated by NPC. In case of privatization, said complexes may be privatized not earlier than ten (10) years from the effectivity of this Act, and, until privatized, shall not be subject to Build-Operate-Transfer (B-O-T), Build-Rehabilitate-Operate-Transfer (B-R-O-T) and other variations pursuant to Republic Act No. 6957, as amended by Republic Act No. 7718. The privatization of Agus and Pulangui complexes shall be left to the discretion of PSALM Corp. in consultation with Congress;
>
> x x x x
>
> (g) The ownership of the Caliraya-Botokan-Kalayaan (CBK) pump storage complex shall be transferred to the PSALM Corporation and shall continue to be operated by NPC.

It is clear from the aforequoted provision that the intention of EPIRA is to include in the privatization program all generating assets, real estate, and other disposable assets of NPC, save those specifically excluded under the same Act. By express provision, only three facilities are excepted from privatization, viz.: Agus and Pulangui Complexes, and the Caliraya-Botokan-Kalayaan pump storage complex, and the assets of the Small Power Utilities Group (SPUG). Nowhere in EPIRA is the AHEPP mentioned as part of the excluded properties. It can, thus, be inferred that the legislative intent is to include AHEPP in the privatization scheme that PSALM will implement. Expresio unius est exclusio alterius.

PSALM is correct in arguing, therefore, that in privatizing AHEPP, it did no more than to perform its mandate under EPIRA. PSALM is also correct in its position that the respective charters of MWSS and NIA do not grant either of them the power to operate a power plant. It is clear that under the EPIRA, the fate of AHEPP is that of being privatized—PSALM neither has discretion to exclude the property from privatization, nor choose to abandon its duty to dispose of them through public bidding. Thus, PSALM committed no grave abuse of discretion in its decision to privatize AHEPP, and in its subsequent acts toward that end.

Petitioners' prayer to enjoin the privatization sale of AHEPP must therefore, fail. The provisions of EPIRA are determinative of the matter, and where the EPIRA provides that the assets of NPC must be privatized, then the command of the law must reign supreme. This Court must uphold the letter and the spirit of EPIRA, even in light of petitioners' argument on the possible repercussions of the privatization of AHEPP.

Seventh Issue:
The Validity of the APA and O&M agreements

This brings Us to the substantive issue of the case. But first, a brief background on the subject Angat Dam Complex is in order, the assailed Agreements revolving as it were on that enormous infrastructure, its features and operations.

The Angat Dam Complex

The Angat Dam Complex is part of the Anga-Ipo-La Mesa Dam system. Originating from the western flank of the Sierra Madre Mountains, the waters cut through mountainous terrain in a westerly direction and flow to Angat River in San Lorenzo, Norzagaray, Bulacan, where the Angat Dam and Reservoir is located.[53]

Angat Dam and Reservoir is a multipurpose rockfill dam constructed in 1964-1967, and provides multiple functions:

> (1) to provide irrigation to about 31,000 hectares of land in 20 municipalities and towns in Pampanga and Bulacan;
>
> (2) to supply the domestic and industrial water requirements of the residents in Metro Manila;
>
> (3) to generate hydroelectric power to feed the Luzon Grid; and
>
> (4) to reduce flooding to downstream towns and villages.[54]

The reservoir is 35 km. long when the water surface of 2,300 hectares is at normal maximum pool, and 3 km. wide at its widest point.[55] From the reservoir, the water enters the intake tower and is conveyed by the power tunnel to the penstocks and valve chambers, and finally to the turbine runners of the AHEPP.[56]

AHEPP, meanwhile, is a 246 Megawatts (MW) rated hydroelectric power plant also located in San Lorenzo, Norzagaray, Bulacan. It is part of the Angat Dam Complex and is situated near the Angat Dam, as it relies on the waters coming from the dam to generate power. AHEPP consists of four (4) main units, producing 200 MW of power, and five (5) auxiliary units, producing 46MW of power.[57]

AHEPP utilizes the waters of Angat Dam for hydropower generation by taking in water from its intake tower. The waters are then conveyed by the power tunnel to the penstocks and valve chambers, and finally to the turbine runners in the AHEPP. Discharge is conveyed to the outlet by the tailrace tunnel.[58]

From the Angat Dam Complex, the waters may flow in either of two directions. The waters may be directed to Ipo Dam, near its confluence with Ipo River.[59] From there, the waters downstream are diverted to the Novaliches

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Portal and the La Mesa Dam in Quezon City.[60] From there, the waters are treated to supply water to end consumers in Metro Manila. The waters may also continue to go through the Balara Treatment Plant, and also finally to end consumers in Metro Manila. The waters coming from Angat Dam may also flow through Bustos Dam in Bustos, Bulacan, where the waters are eventually used for irrigation purposes by the National Irrigation Administration (NIA).[61]

Nature, Ownership, and Appropriation of Waters

Though of Spanish origin, the doctrine of Jura Regalia was first explicitly enshrined in the 1935 Philippine Constitution which proclaimed, as one of its dominating objectives, the nationalization and conservation of the natural resources of the country.[62] Thus, the 1935 Constitution provides in its Sec. 1 of Art. XIII that:

> Sec. 1. All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State x x x (emphasis supplied)

That this doctrine was enshrined in the Constitution was merely a means to an end, as “state ownership of natural resources was seen as a necessary starting point to secure recognition of the state’s power to control their disposition, exploitation, development, or utilization.”[63] In Miners Association of the Philippines, Inc. v. Factoran,[64] this Court found the importance of this limitation in the Constitution, thus:

> The exploration, development and utilization of the country's natural resources are matters vital to the public interest and the general welfare of the people. The recognition of the importance of the country's natural resources was expressed as early as the 1984 Constitutional Convention. In connection therewith, the 1986 U.P. Constitution Project observed: "The 1984 Constitutional Convention recognized the importance of our natural resources not only for its security and national defense. Our natural resources which constitute the exclusive heritage of the Filipino nation, should be preserved for those under the sovereign authority of that nation and for their prosperity. This will ensure the country's survival as a viable and sovereign republic." (Emphasis supplied)

The 1973 Constitution also incorporated the jura regalia doctrine in its Sec. 2, Art. XII:

> Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, flora and fauna, and other natural resources are owned by the State. x x x (emphasis supplied)

It was then transposed to the 1987 Constitution, with Sec. 2, Art. XII thereof providing:

> Sec. 2 All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. x x x (emphasis supplied)

The 1935, 1973, and 1987 Constitutions uniformly provide that all waters belong to the State. Statutorily, the Water Code reaffirms that “all waters belong to the state.”[65]

Corollary to the principle of state ownership of all waters is the provision limiting the exploration, development, and utilization of such resources to certain individuals and subject to certain restrictions. In the 1935 Constitution, this rule was enunciated, thus:

> x x x their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution.[66]

The 1973 Constitution carried a similar provision, to wit:

> Sec. 9. The disposition, exploration, development, exploitation, or utilization of any of the natural resources of the Philippines shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital which is owned by such citizens x x x[67]

The 1987 Constitution couched the limitations a bit differently:

> x x x The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. x x x[68] (emphasis supplied)

In La Bugal B'laan v. Ramos,[69] We reconstructed and stratified the foregoing Constitutional provision, thus:

> 1. All natural resources are owned by the State. Except for agricultural lands, natural resources cannot be alienated by the State.
>
> 2. The exploration, development and utilization (EDU) of natural resources shall be under the full control and supervision of the State.
>
> 3. The State may undertake these EDU activities through either of the following:
>
> (a) By itself directly and solely
> (b) By (i) co-production; (ii) joint venture; or (iii) production sharing agreements with Filipino citizens or corporations, at least 60 percent of the capital of which is owned by such citizens

The constitutional policy and bias concerning water resources is implemented primarily by the Water Code. It provides that the state may "allow the use or development of waters by administrative concession"[70] given in the form of a water permit.[71] Article 13 of the Code grants the permit holder the right to appropriate water, "appropriation" being defined under the law as "the acquisition of rights over the use of waters or the taking or diverting of waters from a natural source in the manner and for any purpose allowed by law."[72] Finally, the Code limits the granting of water permits only to "citizens of the Philippines, of legal age, as well as juridical persons, who are duly qualified by law to exploit and develop water resources."[73]

Created to control and regulate the utilization, exploitation, development, conservation and protection of water resources is the National Water Resources Council,[74] later renamed National Water Resources Board (NWRB).[75] The NWRB is the government agency responsible for the granting of water permits, as well as the regulation of water permits already issued.

In fine, the Constitution and the Water Code provide that all waters belong to the State. The State may nevertheless allow the exploration, development, and utilization of such water resources, through the granting of water permits, but only to qualified persons and entities. And when the Constitution and the Water Code speak of qualified persons, the reference is explicit: Filipino citizens and associations or corporations sixty percent of the capital of which is owned by Filipinos. Such is the protection afforded to Philippine water resources.

The Operations and Maintenance Agreement

By the O & M Agreement, PSALM cedes to K-Water, as operator, the administration, management, operation, maintenance, preservation, repair, and rehabilitation of what the contract considers as the Non-Power Components,[76] defined thereunder as "the Angat Dam, non-power equipment, facilities and installations, and

appurtenant devices and structures which are particularly described in Annex 1."[77] The O & M Agreement is for a period of twenty-five (25) years, renewable for another twenty-five (25) years, maximum, upon mutual and written agreement of the parties.[78]

As couched, the agreement does not include the operation of watershed area, which shall continue to be under the NPC's control and administration. However, in case of emergencies and the NPC does not act to alleviate the emergency in connection with its performance of its obligations in the watershed, the operator shall have the option to prevent the emergency, to mitigate its adverse effects on the purchased assets and non-power components, and to undertake remedial measures to address the emergency.[79]

Article 9 of the O & M Agreement also provides that the buyer/operator, if not organized under Philippine law, warrants that "it shall preserve and maintain in full force and effect its existence as a corporation duly organized under such laws and its qualifications to do business in the Republic of the Philippines."[80] The following is also expressly stipulated: the O & M Agreement is merely "being executed in furtherance of and ancillary to the APA [and]"[81] "shall not survive the termination of the APA."[82]

The Asset Purchase Agreement

The APA includes the sale of the 218 MW AHEPP on an "as is where is" basis[83] to buyer, K-Water. Excluded from the sale are Auxiliary Units 4 and 5, with a rated capacity of 10 MW and 18 MW, respectively. The non-power components of the Angat Dam Complex, including Angat Dam, while not subject to sale under the APA, are covered by the O & M Agreement.

On the matter of water rights, the APA, in its Art. 2.05, provides that the "NPC consents, subject to Philippine Law, to the (i) transfer of the Water Permit to the BUYER or its Affiliate, and (ii) use by the BUYER or its Affiliate of the water covered by the Water Permit."[84] The buyer shall then provide NPC with electricity and water free of charge.[85] This bolsters the claim that control over the waters of Angat Dam is, under the APA, handed over to K-Water.

As in the O & M Agreement, the APA also contains a provision on warranties on the buyer's qualification to engage in business in the country and to comply "at all times fully comply with Philippine Law."[86]

Clearly then, the purchase agreement grants the buyer not only ownership of the physical structure of AHEPP, but also the corresponding right to operate the hydropower facility for its intended purpose, which in turn requires the utilization of the water resources in Angat Dam. The use and exploitation of water resources critical for power generation is doubtless the underlying purpose of the contract involving the sale of the physical structure of AHEPP.

The waters of Angat Dam and
Reservoir form part of the natural
resources of the Philippines

Based on the foregoing factual backdrop, I submit that the APA and O & M Agreements, individually or as a package, are themselves infringing on the constitutional imperative limiting the exploration, development, and utilization of the natural resources of the Philippines to Filipino citizens and associations or corporations sixty percent of the capital of which is owned by Filipinos. I also take the view that K-Water was, from the start, disqualified from participating in the bidding for the two projects in question.

Consider:

The waters flowing through Angat River, and eventually to the Angat Dam and Reservoir, form part of the

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country's natural resources. There cannot be a substantial distinction between the waters in Angat River, on one hand, and those settling in the Angat Dam and Reservoir, on the other. There is no rhyme or reason to claim that the waters in the dam cease to be part of the protected natural resources envisaged in the Constitution.

First, the fact that an artificial structure was constructed to provide a temporary catchment for the naturally-flowing waters does not necessarily remove the waters from being part of the natural resources of the Philippines. The waters themselves are natural in that it is "brought about by nature, as opposed to artificial means."[87]

From the spillway gates of the Angat Dam, some of the waters are diverted to Ipo Dam, and others still flow to Bustos Dam. Eventually, the waters passing through Ipo Dam end up in Tullahan River in Metro Manila. If there is any detention of the waters, it is merely temporary, as Angat Dam is not meant to permanently impound the waters. An examination of the flow of waters from Angat River readily shows that the waters go through a contiguous series of dams and rivers, and the waters are not actually extracted from it, when they pass through structures such as the AHEPP.

To say that the waters in the Angat Dam and Reservoir have already been extracted or appropriated by the mere fact that there is a catchment system in Angat Dam would be to make a distinction between the nature of the waters in different parts of this contiguous series. On the contrary, the waters have not been extracted from its natural source, the river and the dam forming a unitary system. The waters naturally flowing through Angat River are the very same waters that are stored in Angat Dam. Their characteristics, quality, and purity cannot be distinguished from each other. It is the mechanisms in AHEPP that permanently extract water from its natural source. Angat Dam merely serves to temporarily impound the waters, which are later allowed to flow downstream.

Were We to hold that the waters in Angat Dam cease to become a natural resource, the same logic would lead to the conclusion that the waters downstream in Ipo Dam are sourced partly from natural resources (i.e. those directly flowing from Ipo River) and partly from artificial sources, since part of the waters passing through Ipo Dam already passed through Angat Dam. By extension, Tullahan River would not be considered a natural resource, as the waters there are sourced from La Mesa Dam. The law could not have intended such absurd distinctions. Lex simper intendit quod convenitrationi. The law always intends that which is agreeable to reason.

Appropriation of water implies beneficial use of the water, for any of the particular purposes enumerated in the Water Code. In the case of Angat Dam, the waters in the dam, so long as they remain in the dam or in the reservoir, carry with them no economic value—they cannot be directly used for any beneficial purpose. They cannot be directly used for any of the purposes specified in the Water Code, including power generation, the intended use of the waters in AHEPP.[88]

Second, the definition of water in the Water Code is broad enough to cover the waters of Angat Dam. Waters are defined simply as "water under the grounds, water above the ground, water in the atmosphere and the waters of the sea within the territorial jurisdiction of the Philippines."[89] The requirement of water permits is also broad enough to cover those coming from Angat Dam, because the only exceptions provided in the Code are waters appropriated by means of hand carried receptacles, and those used for bathing, washing, watering or dipping of domestic or farm animals, and navigation of watercrafts or transportation of logs and other objects by floatation.[90]

Pursuant to this water permit requirement, the waters of Angat Dam are presently covered by three separate water permits granted to three different entities, all for specific purposes: (1) Water Permit No. 6504[91] to NIA, for irrigation purposes; (2) Water Permit No. 6512[92] to NPC, for power purposes; and (3) Water Permit No.

11462[93] to MWSS for municipal/industrial purposes. Needless to state, all the entities currently holding water permits over Angat Dam are qualified to hold such permits, both under the Constitution and the Water Code.

The grant by NWRB of permits covering the waters not only within the Angat River but also those already impounded in the dam reveals an intention on the part of the agency to treat the waters of Angat River, including the waters in Angat Dam, as part of the water resources of the Philippines. There is an intention to treat the waters flowing from the river to the dam system as one contiguous system, all falling within the ambit of protection afforded by the Constitution and the Water Code to such water resources. Had NWRB through these years viewed the waters in Angat River as not part of the natural resources of the Philippines when they end up in the dam, how explain the water permits extended covering the waters in the dam itself; it would have suffice to grant a single water permit for the sole purpose of building and operating a dam.

Third, the DOJ Opinions cited by PSALM are not authoritative statements of the rule on the matter. Indeed, the DOJ Opinion[94] saying that the agreement between PSALM and K-Water does not violate the constitution is not binding on this Court. Its probative value is limited to just that, an opinion.

The opinion of the DOJ that the waters to be used in the operation of AHEPP have already been extracted is based on a misapplication of a US Supreme Court ruling. The cited U.S. v. State of New York,[95] concerning the Saratoga Springs Reservation, is not in point with the facts here. In that case, the issue revolves around the taxability of the bottling for sale and selling of mineral and table water from Saratoga Springs by the State of New York, Saratoga Springs Commission, and Saratoga Springs Authority. The US Supreme Court there ruled that they are subject to taxation, because the activity was a business enterprise and not merely a sale of natural resources. The US Supreme Court noted that the State: “took its natural resources and, through a bottling process, put those resources into a preserved condition where they could be sold to the public in competition with private waters.”[96]

The process of bottling water involves the permanent extraction of water from its natural source. There lies the difference. Here, there is no actual extraction of waters, as the waters remain in the river-dam system. What we have here is the operation of a power plant using resources that originate from Angat River and held in the Angat Dam and Reservoir.

The DOJ further opined that:

> The fact that under the proposal, the non-power components and structures shall be retained and maintained by the government entities concerned is, to us, not only a sufficient compliance of constitutional requirement of “full control and supervision of the State” in the exploration, development, and utilization of natural resources. It is also an enough safeguard against the evil sought to be avoided by the constitutional reservation x x x[97]

This opinion is based on a clear misapprehension of facts. A cursory reading of the express terms of the O & M Agreement reveals that the operation and management of Angat Dam is being handed over the operator, K-Water. There is no such safeguard anywhere in the APA and O & M Agreement.

K-Water is disqualified from
participating in the bidding

PSALM argues that NPC’s obligation to transfer its water permit is subject to a suspensive condition, i.e., K-Water has to become a Filipino corporation, to become the transferee of NPC of its water permit.[98] This is an implied admission that PSALM knew of K-Water’s disqualification to participate in the bidding. PSALM knew that the use of waters is indispensable in the operation of the power plant, and it goes against the spirit of EPIRA to sell the power plant to an entity which is legally barred from operating it. PSALM, therefore, should have

disqualified K-Water at the outset.

It is unfortunate that instead of disqualifying K-Water, PSALM allowed the former to bid and eventually inked an Agreement with it on the operation of Angat Dam. That PSALM allowed this course of events to transpire constitutes a grave abuse of discretion.

The Agreements Violate the Constitution

The APA transfers ownership of the Angat Hydro-electric Power Plant to the buyer, K-Water. To operate this power plant, K-Water, as the new owner, will have to utilize the waters coming from Angat Dam, as it is the energy generated by the downstream of water that will be used to generate electricity. The use of natural resources in the operation of a power plant by a foreign corporation is contrary to the words and spirit of the Constitution.

The O & M is more straightforward, in that it expressly authorizes the operator, K-Water, to administer and manage non-power components, which it defines as "the Angat Dam, non-power equipment, facilities and installations, and appurtenant devices and structures which are particularly described in Annex 1."[99] While it is true, as PSALM argues, that Angat Dam itself is not being sold, the operation and management of the same is being handed to a wholly foreign corporation. This is cannot be countenanced under the express limitations in Constitution and the Water Code.

In fine, the Agreements between PSALM and K-Water necessarily grant to corporation wholly owned by a foreign state not just access to but direct control over the water resources of Angat Dam, and consequently some portions of the Angat River as well. On this ground, both agreements are constitutionally and statutorily infirm. They must be nullified.

The ponencia would rule toward the validity of the Agreements, but would disallow the transfer or assignment of NPC of its Water Rights under its Water Permit to K-Water. NPC retains control over the flow of waters (presumably by maintaining control over the spillway gates of Angat Dam), while K-Water is given the right to use the waters coming from the dam to generate electricity.

The Water Permit of NPC itself however, states that the right given to NPC is limited to power generation, and precisely for the purpose of operating the AHEPP.[100] It is not given complete control over the waters of Angat River and Angat Dam, because the waters there are covered by separate water permits for different purposes. What NPC is actually giving up to K-Water is its right to utilize the waters of Angat River for power generation, the very right granted to it under its Water Permit. This, it cannot do, because of an express prohibition under the Water Code and the Constitution.

It would be splitting hairs to differentiate between the control of waters by the NPC and the K-Water's right to use the water for power generation. Water Permit No. 6512 granted to NPC will be rendered inutile if NPC assigns its right to use the water for power generation. That ensuing arrangement has the same effect as an assignment or transfer. To allow K-Water to utilize the waters without a corresponding water permit indirectly circumvents the regulatory measures imposed by the Water Code in appropriating water resources.

Thus, the Agreement concerning water rights is in direct contravention of the Water Code and Sec. 2, Art. XII of the Constitution. K-Water, being a wholly foreign-owned corporation, is disqualified from obtaining water permits and from being the transferee or assignee of an existing Water Permit. It is further barred from entering into any agreement that has the effect of transferring any of the water rights covered by existing water permits.

PSALM argues on this point that it will not be K-Water, as the operator of Angat Dam, which will extract or utilize the water from its natural source. They allege that it will be NPC, MWSS, and NIA that will continue to

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utilize and extract water, store them in the reservoir, then pass through Angat Dam where the operator, K-Water, will be subjected to rules on water releases.[101]

PSALM would have Us believe that the operator of Angat Dam will merely play a passive role in the control of the waters in Angat Dam, yielding instead to MWSS, NIA and NPC, the last being the very entity which grants the operator its rights under its water permit. This argument is hardly convincing, if not altogether implausible. It is foolhardy to believe that NPC, the assignor of the water permit, would get to retain some control over the water, much less retain the right to extract the waters. This goes contrary to the very nature of an assignment. Once it assigns its water permit to the operator, it necessarily relinquishes any right it may have under the water permit. In fact, if it does further engage in water-related activities in Angat River and Angat Dam, it will be violating the Water Code for engaging in appropriation of water without the requisite permit.

Moreover, PSALM made an express admission that it is not NPC alone that engages in water-related activities in Angat Dam, as MWSS and NIA, pursuant to their respective water permits, engage in appropriation of water in Angat Dam. Even PAGASA engages in activities within the dam complex. Yet the O&M Agreement readily grants the operator the power to administer the entire Dam, without consent from the other agencies operating in Angat Dam, as the Water Protocol between the concerned agencies and entities has yet to be finalized.

Power generation may not covered
by the nationality restrictions, but use of
natural resources for power generation is
subject to the limitation in the Constitution

While it is established that power generation is not considered a public utility operation,[102] thus not subject to the nationality requirement for public utilities, the operator of a power plant is nevertheless bound to comply with the pertinent constitutional provision when using natural resources of the Philippines, including water resources. As already discussed, the operation of AHEPP necessarily requires the utilization and extraction of water resources. Thus, its operation should be limited to Filipino citizens and corporations or associations at least sixty per centum of whose capital is owned by such citizens, following the clear mandate of the Constitution.

PSALM has no power to cede control over Angat Dam

The O&M Agreement, in no uncertain terms, confers the operation of Angat Dam, among other non-power components, to the operator; that is, the buyer of AHEPP. But by express admission[103] of respondent PSALM, the following governmental agencies jointly operate within the Angat Dam Complex:

First, NWRB controls the exploitation, development, and conservation of the waters. It regulates the water from Angat River and allocates them to the three water permit holders, NPC, MWSS, and NIA.

Second, NIA appropriates the water coming from the outflow of the main units of AHEPP to Bustos Dam, for use in its irrigation systems.

Third, MWSS appropriates water coming from the outflow of the auxiliary units of AHEPP, for domestic and other purposes through its two concessionaires, Manila Water Company, Inc. and Maynilad Water Services, Inc.

Fourth, PAGASA uses its facilities located within the Angat Complex to forecast weather in the area, forecasts which are vital to the operation of the complex itself.

Fifth, the Flood Forecasting and Warning System for Dam Operations (NPC-FFWSDO) is responsible for the opening of the spillway gates during the rainy season. It has sole authority to disseminate flood warning and notifies the public, particularly those residing along the riverbanks, during spilling operation.

Sixth, the NPC-Watershed is responsible for preserving and conserving the forest of Angat Watershed, vital to the maintenance of water storage in the Dam.

The O&M Agreement hands over to the operator, lock, stock, and barrel, the operation of the entire Angat Dam, among other non-power components within the Angat Dam Complex, to K-Water. This agreement undermines the capacity and power of the various governmental agencies to operate within the dam, as the operation thereof is being handed over to a private entity.

The distinction that PSALM intends to create is more illusory than real. The O&M Agreement is explicit in handing over the operation of the dam to the operator/buyer of AHEPP. There is an utter lack of supposed protocols in the management of water between the operator and the various government agencies, as there is yet no finalized Water Protocol. The provisions of the O&M Agreement by themselves unreasonably limit the powers and responsibilities of the different government agencies involved insofar as control of the waters of Angat Dam is concerned. Their participation in the finalization of the Water Protocol is already unjustly limited in that the provisions they may propose to include in the Protocol must respect the powers already given to the operator in the O&M Agreement.

This may result in dangerous consequences, as the operator can effectively inhibit the responsible governmental agencies from conducting activities within Angat Dam—activities that are vital not only to those entities with operation within Angat Dam, but also to the general public who will suffer the consequences of improper management of the waters in Angat Dam. In the event of unnatural swelling of the waters in the dam, for purposes of public accountability, the proper government agencies should be the ones to manage the outflow of water from the dam, and not a private operator.

To require the buyer to operate Angat Dam and the non-power components is null and void. The operation must always be in the hands of the government. The buyer can only be obliged to maintain the non-power components, but still under the control and supervision of the government.

The flow of waters to and from Angat Dam must at all times be within the control of the government, lest it lose control over vital functions including ensuring water security and flood control. Water security of the consuming public must take precedence over proprietary interests such as the operation of a power plant. Flood control, an increasingly important government function in light of the changing times, should never be left to a private entity, especially one with proprietary interests.

The operation of Angat Dam not only involves the utilization and extraction of waters, but also important government functions, including flood control, weather forecasting, and providing adequate water supply to the populace. Had it only been the former, the government under the Constitution is permitted to enter into joint venture agreements with those entities qualified under Sec. 2, Art. XII of the Constitution. However, the latter are necessary government functions which the government cannot devolve to private entities, including Filipino citizens and corporations.

It leads Us then to conclude that the pivotal provisions of the O&M Agreement entered into with K-Water, specifically those referring to the operation of Angat Dam, are repugnant to the letter and spirit of the 1987 Constitution.[104] The control and supervision of such areas must at all times be under the direct control and supervision of the government.

The maintenance of the dam, however, is a different matter. It is a proprietary function that the government may assign or impose to private entities. In the case here, We find it just to impose such duty to maintain the facility to the buyer of AHEPP, as it is in the best interest of the operations of AHEPP to ensure the optimal conditions of

the structures of the dam. The performance of this duty, however, must still be under the supervision of the government.

In view of the urgency and time constraints in the privatization of AHEPP, PSALM has the option to award the sale of AHEPP to any of the losing qualified bidders, provided that the Angat Water Protocol is executed and signed by all the concerned government agencies and that the Operations & Maintenance Agreement shall contain the provision that the operation of the Angat Dam, and the non-power components shall remain with the government while the maintenance and repair of the Dam and other non-power components shall be shouldered by the winning bidder, under the supervision and control of the government.

For the foregoing reasons, I vote to GRANT the Petition. The following dispositions are in order:

(1)

PSALM should FURNISH the petitioners with copies of official documents, acts, and records relating to the bidding process for AHEPP;

(2)

The award by PSALM of the AHEPP to K-Water is NULL AND VOID and UNCONSTITUTIONAL, as K-Water is DISQUALIFIED from participating in the bidding to privatize AHEPP. Accordingly, the APA and O&M Agreements entered into between PSALM and K-Water should be declared NULL AND VOID for being repugnant to Sec. 2, Art. XII of the Constitution; PSALM should be PERMANENTLY ENJOINED from further pursuing the sale of AHEPP in favor of K-Water; and

(3)

ONLY Filipino citizens and corporations at least sixty per centum (60%) of whose capital is owned by Filipino citizens are QUALIFIED to participate in the bidding for the sale of AHEPP.

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[1] Rollo, p. 40.

[2] RA 9136, Sec. 2(i).

[3] Id., Sec. 50.

[4] Id., Sec. 49.

[5] Rollo, p. 1055.

[6] Petition, p. 16; citing “PSALM Launches Sale of Angat Hydro plant”.

[7] Rollo, p. 1056.

[8] Id. at 1061.

[9] Id.

[10] Memorandum for Respondent PSALM, par. 40; rollo, p. 941.

[11] Id., par. 41.

[12] Id., par. 46.

[13] Rollo, pp. 169-175.

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[14] Id. at 54.

[15] Id. at 52-53.

[16] Id. at 43-45.

[17] Id. at 119-122.

[18] Id. at 149-154, 163-166, 127-134, 467-471.

[19] Id. at 474-478.

[20] Id. at 240-308.

[21] Id. at 191-237.

[22] Signed July 10, 1995.

[23] Rollo, pp. 529-553.

[24] RA 6234.

[25] Rollo, pp. 624-655.

[26] Id. at 670-694.

[27] De Vera v. De Vera, G.R. No. 172832, April 7, 2009, 584 SCRA 506.

[28] Villanueva v. Ople, G.R. No. 165125, November 18, 2005, 475 SCRA 539.

[29] RA 9136, Sec. 47(d).

[30] G.R. No. 164527, August 15, 2007, 530 SCRA 235.

[31] Chavez v. NHA, supra.

[32] Rollo, p. 954.

[33] 103 Phil. 1051 (1957).

[34] Rollo, p. 959.

[35] G.R. Nos. 100318, 100308, 100417 & 100420, July 30, 1991, 199 SCRA 750.

[36] Constitution, Art. III, Sec. 7.

[37] Id., Art. XII, Sec. 2.

[38] G.R. No. 170516, July 16, 2008, 558 SCRA 468, 509.

[39] G.R. No. 191846, May 6, 2010, 620 SCRA 448, 460.

[40] Pimentel v. Executive Secretary, G.R. No. 158088, July 6, 2005, 462 SCRA 622, 630-631.

[41] G.R. No. 132922, April 21, 1998, 289 SCRA 337.

[42] IBP v. Zamora, G.R. No. 141284, August 15, 2000, 338 SCRA 81.

[43] Rollo, p. 811

[44] Memorandum for Respondent PSALM, par. 58; rollo, p. 971.

[45] Id., par. 59.

[46] G.R. No. 133250, July 9, 2002, 384 SCRA 152, 184.

[47] Bernas, Joaquin G., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 381 (2009); citing I RECORD CONSTITUTIONAL COMMISSION 677.
[48] Supra note 30.

[49] .

[50] Supra note 30.

[51] Chavez v. NHA, supra.

[52] RA 9136, Sec. 51.

[53] “Rain Water Sources” .

[54] Id.

[55] Memorandum for Respondent, par. 6; rollo, p. 925.

[56] Id., par. 7.

[57] Id., par. 5.

[58] Rollo, p. 244

[59] “Rain Water Sources,” supra note 53.

[60] Id.

[61] Memorandum for Respondent, par. 7; rollo, p. 925

[62] Separate Opinion, J. Puno, Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385, December 6, 2000, 347 SCRA 128, 171; citing 2 Aruguego, The Framing of the Philippine Constitution, p. 592 (1937).

[63] Id.

[64] G.R. No. 98332, January 16, 1995, 240 SCRA 100, 119.

[65] PD 1067, Art. 3(a).

[66] Sec. 1, Art. XIII, 1935 Constitution

[67] Sec. 9, Art. XIV, 1973 Constitution

[68] Sec. 2, Art. XII, 1987 Constitution

[69] G.R. No. 127882, December 1, 2004, 445 SCRA 1.

[70] PD 1067, Art. 3(c).

[71] Amistoso v. Ong, No. L-60219, June 29, 1984, 130 SCRA 228, 235.

[72] PD 1067, Art. 9.

[73] Id., Art. 15.

[74] Id., Art. 3.

[75] Pursuant to Executive Order No. 124-A, July 22, 1987.

[76] Rollo, p. 1383.

[77] Id. at 1382.

[78] Id. at 1383.

[79] Id. at 1389.

[80] Id. at 1393.

[81] Id.

[82] Id.

[83] Id. at 1113.

[84] Id., id. at 1341.

[85] Id.

[86] Id. at 1358.

[87] cf. Black's Law Dictionary, 9th Ed., p. 1126.

[88] See PD 1067, Art. 10.

[89] Id., Art. 4.

[90] Id., Art. 14.

[91] Rollo, p. 1158.

[92] Id. at 1156.

[93] Id. at 1161.

[94] DOJ Opinion No. 052, s. 2005, November 22, 2005.

[95] 48 F. Supp. 15, November 17, 1942.

[96] Id. at 18.

[97] Id.

[98] Rollo, p. 1012.

[99] Art. 1.03, O & M Agreement, rollo, p. 1381.

[100] Rollo, p. 1157.

[101] Id. at 1007-1008.

[102] RA 9136, Sec. 6.

[103] Comment of Respondent PSALM, pars. 17, 17.1-17.6.

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[104] See Constitution, Art. XII, Sec. 2.

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