

**NERI J. COLMENARES, BAYAN MUNA PARTY-LIST REPRESENTATIVE
CARLOS ISAGANI T. ZARATE, ANAKPAWIS PARTY-LIST
REPRESENTATIVE ARIEL B. CASILAO, GABRIELA WOMEN'S
PARTY-LIST REPRESENTATIVE...**

G.R. No. 245981. August 09, 2022

Ponente: LOPEZ, J.

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LOPEZ, J.:

Before the Court are two consolidated petitions for prohibition with applications for injunctive relief,[1] assailing the constitutionalities of the Preferential Buyer's Credit Loan Agreement on The Chico River Pump Irrigation Project[2] (CRPIP Loan Agreement) and the Preferential Buyer's Credit Loan Agreement on The New Centennial Water Source-Kaliwa Dam Project[3] (NCWS Loan Agreement) (collectively, Loan Agreements). Through a Resolution dated September 3, 2019,[4] the Court consolidated these petitions considering the similarities of the subject matters, issues raised, reliefs sought, and parties involved.

Factual Antecedents

On October 20, 2016, the Government of the Republic of the Philippines (GRP), represented by the Department of Finance (DOF), and the Chinese government-owned Export-Import Bank of China (EXIM Bank) entered into a Memorandum of Understanding on Financing Cooperation[5] (MOU). As disclosed through Articles 1.1,[6] 2.3,[7] 4.1,[8] and 4.2[9] thereof, the MOU was intended as a precursor agreement to more binding and detailed loan agreements for GRP-nominated priority infrastructure projects.

Invoking the MOU, the Department of Foreign Affairs (DFA) transmitted to the Embassy of the People's Republic of China (PRC Embassy) Note Verbale No. 17-0330[10] dated January 20, 2017, proposing the process by which the financing arrangement under the MOA would be activated and availed of. Then followed Note Verbale No. 17-1049[11] dated March 3, 2017, wherein the DFA confirmed its previous proposals. In response, China's Ministry of Commerce (MOFCOM) sent out Reply Note[12] dated March 8, 2017 (Reply Note), agreeing to the following procedure:

First, the DOF will submit a request for preferential/concessional loan financing for priority projects to the Chinese Government, through the PRC Embassy; second, the Chinese Government would proffer its considerations and provide a list of at least three qualified, legitimate, and reputable Chinese contractors for the project; third, the relevant implementing agency (IA) would conduct Limited Competitive Bidding (LCB) among the recommended Chinese contractors, and finalize the procurement by signing the relevant commercial contract; fourth, the DOF would submit to EXIM Bank the required documents, prompting the latter to conduct its due diligence; and finally, the DOF, on behalf of the GRP, and EXIM Bank would sign the loan agreement and, if any, guarantee agreement.

Aspects of the foregoing procedure were further particularized through a mutually agreed[13] Clarificatory Procedures for the Implementation of the Note Verbale No. 17-1049[14] (Clarificatory Procedures). Particularly,

the DOF and Chinese Government agreed that the pertinent IA shall adhere to provisions of Republic Act (R.A.) No. 9184, or the Government Procurement Reform Act (GPRA); the DOF shall request from the PRC Embassy the financing of priority projects, and a list of at least three qualified, legitimate, and reputable Chinese contractors; upon receipt of such list, the DOF would furnish the same to the IA, which would conduct its own due diligence and vetting, coursing through the DOF to the PRC Embassy whatever concerns it might have with the recommended firms; if found satisfactory, the IA would undertake LCB, incorporating some GPRA procedures; lastly, the IA and winning contractor would sign a contract agreement, stipulating therein that the effectivity thereof is contingent on the effectivity of the loan agreement to finance such project.

The CRPIP, with the National Irrigation Authority (NIA) as IA, was nominated for such finance assistance. Consequently, the MOFCOM recommended three Chinese contractors,[15] which the DOF relayed to the NIA for due diligence and vetting.[16] The NIA proceeded to conduct a background check by inquiring with various government agencies regarding ongoing transactions with these firms.[17] Then, the NIA's Bids and Awards Committee-A adopted Resolution No. CW-LCB 2018-1,[18] recording the conduct of the requisite LCB, declaring China CAMC Engineering Co., Ltd. as the bidder with the lower calculated and responsive bid, recommending the approval of such award and issuance of a notice to that effect, and urging the execution of a contract agreement between the NIA and China CAMC.

Meanwhile, the Bangko Sentral ng Pilipinas' (BSP) Monetary Board (MB) adopted Resolution No. 305[19] dated February 22, 2018, Approving-in- Principle the proposed loan of up to \$70 Million for the CRPIP, conditioned on certain documentary submissions, deposit arrangements, parameters for subsequent negotiations and approvals, and compliance with applicable laws. Thereafter, the CRPIP Loan Agreement was executed on April 10, 2018, by the EXIM Bank as lender, and the GRP, through the DOF, as borrower, which agreement features provisions covering Conditions and Utilization of the Facility, Disbursement of the Facility, Repayment of Principal and Payment of Interest, Representations and Warranties by the Borrower, Special Covenants, Default, Miscellaneous, Effectiveness. Through Resolution No. 813[20] dated May 17, 2018, the MB gave its Final Approval to the loan amounting to \$62,086,837.82.

The NCWS project, to be implemented by the Metropolitan Waterworks and Sewerage System (MWSS), was also nominated for financing assistance.[21] As the NCWS project was originally conceived as a public-private partnership scheme, the DOF and the National Economic Development Authority (NEDA) instructed the MWSS to review and adjust the project's financing strategy, considering the financing cooperation provided by the MOU. The MWSS Board of Trustees endorsed and confirmed the NCWS project's new estimated cost at P10.857 Billion, and tailored the scope and implementation thereof consistent with a financing shift to Official Development Assistance (ODA), thereby foregoing the then- ongoing procurement process pursuant to the Build-Operate-Transfer Law.[22]

The NEDA-Investment Coordinating Committee confirmed such shift in project financing.[23] Similar to the CRPIP project, the DOF forwarded to the MWSS the shortlist of MOFCOM-endorsed[24] Chinese contractors,[25] and urged the MWSS to conduct its due diligence in vetting the candidate firms.[26] Thereafter, the MWSS concurred in the shortlist of contractors and proceeded to conduct the LCB,[27] where China Energy Engineering Corporation Limited emerged with the lowest calculated bid.[28]

The MWSS then approved the proposed commercial contract, authorizing its administrator to sign the agreement, and submit the same to the DOF for loan processing.[29] For project financing, the DOF endorsed the MWSS's proposed loan to the MB for its Approval-in-Principle and willingness to guarantee, subject to certain conditions.[30] On September 28, 2018, the MB gave its Approval-in-Principle through Resolution No. 1581, imposing conditions necessary for Final Approval. The NCWS Loan Agreement was entered into on November

20, 2018 between the EXIM Bank as lender, and the GRP, through the DOF, as borrower, and features stipulations identical to those of the CRPIP Loan Agreement. Through Resolution No. 854[31] dated June 6, 2019, the BSP MB gave its Final Approval to the loan amounting to US\$211,214,646.54.

Issues

Petitioners in both G.R. Nos. 245981 and 246594 filed the instant petitions for prohibition to assail the validity of the Loan Agreements and seek the disclosure of documents related to such agreements, similarly praying:

(a) Upon the filing of this petition, a TEMPORARY RESTRAINING ORDER (TRO) and/or a WRIT OF PRELIMINARY PROHIBITORY INJUNCTION be immediately issued RESTRAINING and/or ENJOINING the Respondents, and all persons acting under their command, order, and responsibility from further enforcing the Preferential Buyer's Credit Loan Agreement on the Chico River Pump Irrigation Project [Preferential Buyer's Credit Loan Agreement on The New Centennial Water Source-Kaliwa Dam Project][32] between the Export-Import Bank of China and the Government of the Republic of the Philippines;

(b) An Order be issued directing Respondents to produce the following documents:

1. Procurement documents in granting the civil works to the Chinese contractor; and
2. Other relevant documents in connection with this case.

(c) An Order be issued to all concerned agencies of government to produce certified true copies, upon request, of [all] loan agreements [and other related documents,] executed by and between the Government of the Republic of the Philippines and China;

(d) After notice and hearing, a final order be issued declaring the assailed Preferential Buyer's Credit Loan Agreement on the Chico River Pump Irrigation Project [Preferential Buyer's Credit Loan Agreement on The New Centennial Water Source-Kaliwa Dam Project] including the implementation thereof, as UNCONSTITUTIONAL, ILLEGAL, and VOID.[33]

Parsing through the parties' arguments, the Court trims the issues as follows:

I.

PROCEDURALLY, WHETHER THE PETITIONS SHOULD BE DISMISSED FOR:

- FAILURE TO ESTABLISH THE REQUISITES OF JUDICIAL REVIEW.
- NON-OBSERVANCE OF THE DOCTRINE OF HIERARCHY OF COURTS.
- UNAVAILABILITY OF THE REMEDY OF PROHIBITION.

II.

WHETHER RESPONDENTS SHOULD RELEASE TO PETITIONERS THE DOCUMENTS SOUGHT ACCESS TO.

III.

WHETHER THE LOAN AGREEMENTS ARE UNCONSTITUTIONAL BECAUSE:

- THESE SUPPOSEDLY LACK PRIOR CONCURRENCE FROM THE BSP MB.
- THE CONDITIONS PRECEDENT TO THE RELEASE OF FUNDS ALLEGEDLY DEFEAT THE CONSTITUTIONAL POLICY TO GIVE PREFERENCE TO QUALIFIED FILIPINOS AND CIRCUMVENT PROCUREMENT LAWS.
- THE ARBITRATION CLAUSES, PARTICULARLY ON THE CHOICE OF LAW AND ARBITRAL

TRIBUNAL, ARE PURPORTEDLY SKEWED IN FAVOR OF THE CHINESE LENDER.

- THE WAIVER OF IMMUNITY CLAUSE OFFENDS THE CONSTITUTIONAL PROVISIONS ON THE NATIONAL ECONOMY AND PATRIMONY.

Our Ruling

I. Procedural considerations.

A. The President of the Philippines should be dropped as respondent.

Preliminarily, President Rodrigo Duterte must be dropped as a party respondent pursuant to privilege of presidential immunity from suit. As held in *Nepumuceno v. Duterte*:^[34]

Settled is the rule that the President of the Republic of the Philippines cannot be sued during his/her tenure. This immunity from suit applies to President Rodrigo Duterte (President Duterte) regardless of the nature of the suit filed against him for as long as he sits as the President of the Republic of the Philippines. In the case of *De Lima v. President Duterte*, Senator Leila De Lima (Senator De Lima) sued President Rodrigo Duterte in a petition for a writ of habeas data seeking to enjoin the latter from committing acts allegedly violative of her right to life, liberty and security. In her petition, Senator De Lima argued that President Duterte is not entitled to immunity from suit, especially from a petition for the issuance of the writ of habeas data, because his actions and statements were unlawful or made outside of his official conduct. The Office of the Solicitor General countered that the immunity of the sitting President is absolute, and it extends to all suits including petitions for the writ of amparo and writ of habeas data and that the present suit is the distraction that the immunity seeks to prevent because it will surely distract the President from discharging his duties as the Chief Executive. In resolving the petition, this Court pronounced that presidential immunity applies regardless of the nature of the suit brought against an incumbent President. The rationale for this rule was explained in this wise: The concept of presidential immunity is not explicitly spelled out in the 1987 Constitution. However, the Court has affirmed that there is no need to expressly provide for it either in the Constitution or in law. Furthermore, the reason for the omission from the actual text of the 1987 Constitution has been clarified by this exchange on the floor of the 1986 Constitutional Commission:

MR. SUAREZ: Thank you.

The last question is with reference to the Committee's omitting in the draft proposal the immunity suit provision for the President. I agree with Commissioner Nollado that the Committee did very well in striking out this second sentence, at the very least, of the original provision on immunity from suit under the 1973 Constitution. But would the Committee members not agree to a restoration of at least the first sentence that the President shall be immune from suit during his tenure, considering that if we do not provide him that kind of immunity he might be spending all of his time facing litigations, as the President-in-exile in Hawaii is now facing litigations almost daily?

FR. BERNAS: The reason for the omission is that we consider it understood in present jurisprudence that during his tenure he is immune from suit.

MR. SUAREZ: So, there is no need to express it here.

FR. BERNAS: There is no need. It was that way before. The only innovation made by the 1973 Constitution was to make that explicit and do add other things.

MR. SUAREZ: On that understanding, I will not press for any more query, Madam President.

The existence of the immunity under the 1987 Constitution was directly challenged in *Rubrico v. Macapagal-Arroyo*, but the Court steadfastly held that Presidential immunity from suit remained preserved in our constitutional system.

While the concept of immunity from suit originated elsewhere, the ratification of the 1981 constitutional amendments and the 1987 Constitution made our version of presidential immunity unique. Section 15, Article VII of the 1973 Constitution, as amended, provided for immunity at two distinct points in time: the first sentence of the provision related to immunity during the tenure of the President, and the second provided for immunity thereafter. At this juncture, we need only concern ourselves with immunity during the President's tenure, as this case involves the incumbent President. As the framers of our Constitution understood it, which view has been upheld by relevant jurisprudence, the President is immune from suit during his tenure.

Unlike its American counterpart, the concept of presidential immunity under our governmental and constitutional system does not distinguish whether or not the suit pertains to an official act of the President. Neither does immunity hinge on the nature of the suit. The lack of distinctions prevents us from making any distinctions. We should still be guided by our precedents.

Accordingly, the concept is clear and allows no qualifications or restrictions that the President cannot be sued while holding such office.

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Both Sen. De Lima and the OSG disagree on whether or not the statements of the President regarding her have been part of the discharge of the President's official duties, but our declaration herein that immunity applies regardless of the personal or official nature of the acts complained of have rendered their disagreement moot and academic.

Sen. De Lima argues that the rationale for Presidential immunity does not apply in her case because the proceedings for the writ of habeas data do not involve the determination of administrative, civil, or criminal liabilities. Again, we remind that immunity does not hinge on the nature of the suit. In short, presidential immunity is not intended to immunize the President from liability or accountability.

The rationale for the grant of immunity is stated in *Soliven v. Makasiar*, thus:

The rationale for the grant to the President of the privilege of immunity from suit is to assure the exercise of Presidential duties and functions free from any hindrance of distraction, considering that being the Chief Executive of the Government is a job that, aside from requiring all of the office-holder's time, also demands undivided attention.

The rationale has been expanded in *David v. Macapagal-Arroyo*:

x x x It will degrade the dignity of the high office of the President, the Head of State, if he can be dragged into court litigations while serving as such. Furthermore, it is important that he be freed from any form of harassment, hindrance or distraction to enable him to fully attend to the performance of his official duties and functions. Unlike the legislative and judicial branch, only one constitutes the executive branch and anything which impairs his usefulness in the discharge of the many great and important duties imposed upon him by the Constitution necessarily impairs the operation of the Government. However, this does not mean that the President is not accountable to anyone. Like any other official, he remains accountable to the people but he may be removed from office only in the mode provided by law and that is by impeachment.

With regard to the submission that the President must first invoke the privilege of immunity before the same may be applied by the courts, Sen. De Lima quotes from *Soliven* where the Court said that "this privilege of immunity from suit, pertains to the President by virtue of the office and may be invoked only by the holder of the office; not by any other person in the President's behalf." But that passage in *Soliven* was made only to point out that it was the President who had gone to court as the complainant, and the Court still stressed that the accused therein could not raise the presidential privilege as a defense against the President's complaint. At any rate, if this Court were to first require the President to respond to each and every complaint brought against him, and then to avail himself of presidential immunity on a case to case basis, then the rationale for the privilege - protecting the President from

harassment, hindrance or distraction in the discharge of his duties - would very well be defeated. It takes little imagination to foresee the possibility of the President being deluged with lawsuits, baseless or otherwise, should the President still need to invoke his immunity personally before a court may dismiss the case against him.

Apropos, this Court holds, and reminds litigants once again that an incumbent President of the Republic of the Philippines cannot be sued in any proceeding. With executive power solely vested in the President of the Philippines,[35] he should be freed from any distraction that would imperil the performance of his duties as mandated by the Constitution. Thus, presidential immunity from suit shields President Duterte from facing any complaint or petition during his tenure. While he remains accountable to the people, the only proceeding for which he may be involved in litigation during his term of office is an impeachment proceeding, which is clearly not the present case. Hence, he is not a proper party to be sued in the instant petition.[36]

B Except as to the issue concerning the Waiver of Immunity Clauses, the other substantive issues raised by the petitions may be the subject of judicial review.

The case of *Funa v. Acting Secretary Alberto C. Agra, et al.*,[37] enunciates the parameters of the exercise of the power of judicial review, thus:

The power of judicial review is subject to limitations, to wit: (1) there must be an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have the standing to assail the validity of the subject act or issuance, that is, he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.[38]

On the requisite of *locus standi* or legal standing, the Court finds that petitioners have sufficiently proven that they possess the same. As held in *Funa v. The Chairman, Commission on Audit, Reynaldo A. Villar*:[39]

x x x. However, the Court has time and again acted liberally on the *locus standi* requirements and has accorded certain individuals, not otherwise directly injured, or with material interest affected, by a Government act, standing to sue provided a constitutional issue of critical significance is at stake. The rule on *locus standi* is after all a mere procedural technicality in relation to which the Court, in a catena of cases involving a subject of transcendental import, has waived, or relaxed, thus allowing non-traditional plaintiffs, such as concerned citizens, taxpayers, voters or legislators, to sue in the public interest, albeit they may not have been personally injured by the operation of a law or any other government act.[40]

The assailed Loan Agreements are public contracts covering matters of public concern, considering that "[a] government or public contract has been defined as a contract entered into by state officers acting on behalf of the state, and in which the entire people of the state are directly interested." [41] Additionally, stability and predictability are key pillars on which the legal system must be founded and run to guarantee a business environment conducive to sustainable economic growth.[42] These petitions assail the validity of the Loan Agreements, touching upon issues of foreign debt and the manner of securing the same, foreign participation in high-end public works projects, and international implications of arbitration clauses-matters which require the Court's immediate attention. With far-reaching legal and economic implications, the Court finds that petitioners possess the personality to bring these petitions.

Except as to the issue concerning the validity of the Waiver of Immunity Clauses, the Court likewise finds there exists an actual case ripe for adjudication. As defined, an actual case or controversy is one that involves a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution; the case must not be moot or academic or based on extra-legal or other similar considerations not cognizable by a court of justice.[43]

Clearly, the existence of an actual clash between legal rights brought about by the assailed act is required before courts of justice may exercise the power of judicial review.

Here, petitioners allege that the Loan Agreements are invalid for running afoul of various Constitutional directives, particularly for failure to secure the necessary MB concurrence, in bypassing qualified Filipinos in favor of foreign project contractors, and for containing stipulations that defeat the State's pursuit of an independent foreign policy.

These are actionable issues. The very execution of the Loan Agreement already constituted a governmental act subject to the Court's scrutiny, since various Constitutional provisions, laws, and issuances are in place to regulate the manner by which such loans are entered into. What is more, petitioners sufficiently substantiate which of the various Loan Agreements' stipulations appear Constitutionally suspect. These are matters which deserve the Court's attention since, by the mere enactment of the questioned law or the approval of the challenged act, the dispute is said to have ripened into a judicial controversy even without any other overt act. Indeed, even a singular violation of the Constitution and/or the law is enough to awaken judicial duty.[44]

In any other situation, on the ground of mootness, the Court would have refrained from making any pronouncements on the issue regarding the disclosure of loan documents. In *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines)*,[45] the mootness of an action was explained in this wise:

An action is considered "moot" when it no longer presents a justiciable controversy because the issues involved have become academic or dead or when the matter in dispute has already been resolved and hence, one is not entitled to judicial intervention unless the issue is likely to be raised again between the parties. There is nothing for the court to resolve as the determination thereof has been overtaken by subsequent events.[46]

Accordingly, petitioners' prayers for the production of documents pertaining to the "1. Procurement documents in granting the civil works to the Chinese contractor; and 2. Other relevant documents in connection with this case" have been resolved following respondents' filing of their comments and the attachment thereto of petitioners' sought after documents.[47]

Yet, as Senior Associate Justice Marvic M.V.F. Leonen aptly points out,[48] the petitions raise matters that are capable of repetition but evading review, because, absent guiding principles thereon, the Executive branch could just as easily incorporate the assailed Confidentiality Clauses in future foreign loans, and invoke the same to bar the invocation of the right to information. If only to advise the bench, bar, and public, as well as to abate similar issues, the Court lays some guiding principles on this matter.

Additionally, petitioners sound the alarms over the Loan Agreements' Waiver of Immunity Clause,[49] arguing that these unconstitutionally bargain away the national economy and patrimony.[50] Hence, petitioners would have the Court completely strike down the Waiver of Immunity Clause. Respondents dismiss these contentions as speculative, especially since suability and liability are distinct concepts, also considering that no specific national assets have been collateralized, that an arbitral award against the Philippines may be refused recognition if contrary to public policy, and that, at all times, the GRP is solvent to pay its debts.[51] As these aspects of the Loan Agreement have yet to be of any concern, the Court shall not prematurely delve substantively into such matters.

Article 8.1 of the Loan Agreements similarly provide:

CRPIP Loan Agreement

NCWS Loan Agreement

8.1 Waiver of Immunity The Borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property in connection with any arbitration proceeding pursuant to Article 8.5 hereof or with the enforcement of any arbitral award thereto. Notwithstanding the foregoing, the Borrower does not waive any immunity of its assets which are; (i) used by a diplomatic or consular mission of the Republic of the Philippines, (ii) of a military character and under control of a military authority or defence agency of the Republic of the Philippines, or (iii) located in the Philippines and dedicated to a public or government use (as distinguished from patrimonial assets and assets dedicated to commercial use).[52]

8.1 Waiver of Immunity The Borrower hereby irrevocably waives any immunity on the grounds of sovereignty or otherwise for itself or its property in connection with any arbitration proceeding pursuant to Article 8.5 hereof or with the enforcement of any arbitral award pursuant thereto, except any other assets of the Borrower located within the territory of the Philippines to the extent that the Borrower is prohibited by the laws or public policies having force of law in the Republic of the Philippines, applicable and in effect at the signing of this Agreement from waiving such immunity,[53]

Readily apparent is that these provisions are meant to address the contingency of default on the Loan Agreements. These provide the mechanisms by which the GRP may be sued, liability could be imposed, and State assets may be subjected to the satisfaction of liability. However, petitioners do not allege, nor has it been shown, that the GRP has defaulted on its loan commitments, much less that the State has been hailed in arbitration proceedings, or that its assets are being seized. Without undertaking to survey the intricacies of the ripeness doctrine, it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[54]

Still, on the hierarchy of courts, petitioners' direct invocation of the Court's jurisdiction, as to the other substantive issues, is permitted as they raise only legal questions relative to the validity of the assailed Loan Agreements. As held in *Gios-Samar, Inc. v. Department of Transportation and Communications*: [55]

An examination of the cases wherein this Court used 'transcendental importance' of the constitutional issue raised to excuse violation of the principle of hierarchy of courts would show that resolution of factual issues was not necessary for the resolution of the constitutional issue/s." [56]

Coupled with the emphasis on the herein grave and far-reaching issues, petitioners did not raise any factual matters, limiting their arguments only to the legalities of the Loan Agreements. They appraise the agreements' allegedly contentious stipulations as against various Constitutional directives concerning the concurrence of the BSP MB prior to contracting foreign loans,[57] preference to Filipinos in transactions involving the national economy and patrimony,[58] the pursuit of an independent foreign policy,[59] and the State's waiver of immunity from suit[60] and ownership over patrimonial assets.[61]

C Prohibition is a viable remedy under the circumstances.

The Court takes exception to respondents' claim that the remedy of prohibition is unavailing since the execution of the Loan Agreements is already fait accompli, ruling out any government action against which prohibition may be directed.

True, prohibition under Rule 65 of the Rules of Court is a preventive remedy seeking a judgment ordering the defendant to desist from continuing with the commission of an act perceived to be illegal.[62] Prohibition will not lie to restrain an act already done or one which is a fait accompli,[63] lest the subject petition be unmade as a mere subject matter of purely theoretical interest.[64]

Yet, as petitioners correctly point out, there consist three stages in the life of a contract, and the Loan Agreements have yet to complete the third stage of consummation. As summarized in *Insular Life Assurance Company, Ltd. v. Asset Builders Corp.*:^[65]

Equally important are the three distinct stages of a contract - its "preparation or negotiation, its perfection, and finally, its consummation." Negotiation begins when the prospective contracting parties manifest their interest in the contract and ends at the moment of their agreement. The perfection or birth of the contract occurs when they agree upon the essential elements thereof. The last stage is its consummation, wherein they "fulfill or perform the terms agreed upon in the contract, culminating in the extinguishment thereof."^[66]

Accordingly, the MOU, Note Verbale Nos. 17-0330 and 17-1049, and Clarificatory Procedures were all prefatory agreements that set the parameters for negotiations between the GRP and EXIM Bank. The various international correspondences, as well as the GRP's own internal processes (e.g., project nomination by the NIA and MWSS, NEDA confirmations, BSP approvals), precipitated the perfection of the Loan Agreements. Ostensibly, the Loan Agreements are now in the consummation stage, especially since some disbursement tranches are subject to certain conditions,^[67] and it does not appear that respondents have repaid any of the principal or paid any interest thereon.^[68] In other words the parties' mutual obligations under the Loan Agreements have yet to be fulfilled, and these petitions were filed precisely to enjoin the performance thereof, making prohibition a timely and viable remedy.

Subsidiarily, absurdity would result from respondents' argument that the remedy of prohibition should have been availed of prior to the execution of the contract, or during the negotiation stage. As the President is the chief architect of foreign policy, negotiation of foreign loans is an executive prerogative, thus, primarily a political question.^[69] Unless such "mandate is exceeded when acting outside what the Constitution or our laws allow" in a manner that "is so grave, whimsical, arbitrary, or attended by bad faith[,]"^[70] such actions lie beyond the scope of judicial review, and are much less a proper subject of a petition for prohibition.

II. The Loan Agreements were executed with the necessary BSP MB concurrence.

Petitioners argue that the Loan Agreements were executed without the Constitutionally-imposed prior concurrence of the BSP MB,^[71] or that the approval, if at all, came after the execution of the loans.^[72] Respondents point out that, in accordance with more nuanced regulations and protocols, the MB had in fact given the necessary concurrence to the foreign loans.^[73]

The Court rules in favor of respondents.

Section 20, Article VII of the 1987 Constitution provides:

The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. x x x

Petitioners insist on a literal interpretation of the words "prior concurrence," such that the MB must have given full approval to the subject loan before its execution (i.e., signing of the loan agreement). However, the deliberations of the 1986 Constitutional Commission, along with precursor and existing laws and regulations, contemplate more nuanced mechanics to this requirement. ·

The MB's prior concurrence requirement was absent in the counterpart provision of the 1973 Constitution.^[74] As explained by Commissioner Lorenzo Sumulong, this mechanism is a check and balance on the President's prerogative to contract foreign loans, meant to avert the improvidence in foreign borrowings under the rule of former President Ferdinand Marcos:·

In view of the fact that our foreign debt has amounted to \$26 billion - it may reach up to \$36 billion including

interests - we studied this provision in the 1973 Constitution, so that some limitations may be placed upon this power of the President. We consulted representatives of the Central Bank and the National Economic Development Authority on this matter. After studying this matter, we decided to provide in Section 18 that insofar as the power of the President to contract or guarantee foreign loans is concerned, it must receive the prior concurrence of the Monetary Board.

We placed this limitation because, as everyone knows, the Central Bank is the custodian of the foreign reserves of our country, and so, it is in the best position to determine whether an application for foreign loan initiated by the President is within the paying capacity of our country or not. That is the reason we require prior concurrence of the Monetary Board insofar as contracting and guaranteeing of foreign loans are concerned.[75]

More tangibly, Members of the Constitutional Commission understood that Article VII, Section 20, particularly its prior concurrence requirement, would be implemented through more detailed laws and regulations.[76] Thus, Section 1[77] of R.A. No. 4860, as amended,[78] statutorily empowers the President to contract loans with foreign entities. Meanwhile, Section 123 of R.A. No. 7653,[79] as amended by R.A. No. 11211,[80] requires that "the Government, through the Secretary of Finance, shall request the opinion, in writing, of the [MB] on the monetary implications of credit operations abroad. In Section 23 of its Manual of Regulations on Foreign Exchange Transactions, the BSP requires that "[p]rior [MB] approval shall be obtained for public sector foreign/foreign currency loans/borrowings[.]"

More on the procedure for securing MB concurrence, Letter of Instructions No. 128, Series of 1974, provides:

- All foreign borrowing proposals of the Government, Government Agencies and government financial institutions shall be submitted to the Central Bank for approval in principle by the Monetary Board as to purpose and credit terms among others, before commencement of actual negotiations.
- Actual negotiations for such foreign credits and/or accommodations shall be conducted by the Secretary of Finance and/or Central Bank Governor or their duly authorized representatives as chief or co-chief negotiators, together with the representatives of the Government, government agencies and government financial institutions or entities concerned.

These were supplemented by Administrative Order No. 99, Series of 1993,[81] providing that:

All government agencies, instrumentalities, political subdivisions, financial institutions and corporations, as well as local governments, shall submit to the Bangko Sentral ng Pilipinas their request for approval-in-principle by the Monetary Board of their foreign borrowings proposals even before issuing a mandate or commitment to foreign funders/arrangers. The request shall include, among others, information on the underlying project to be financed, magnitude and timing of funding requirements, indicative terms, as well as timetable/target date for entry into the capital markets.

The BSP synthesized the foregoing issuances into the Foreign Exchange Regulations (ForEx Regulations), summarizing the three stages of the MB's approval of public sector foreign loans as follows:

- (a) Approval-in-Principle, which refers to the approval granted by the MB to the indicative financial terms and purpose of the loan. Prior to commencement of actual negotiations or issuance of a mandate of commitment to foreign funders/arrangers, the borrower is required to secure the BSP approval-in-principle of its proposed foreign loan;
- (b) Review of Loan Documents, which involves the negotiation and review, finalization and clearance of loan documents; and
- (c) Final Approval, which refers to the approval granted by the MB to a loan previously approved-in-principle after its terms have been finalized, the covering loan agreement signed, and other preconditions for final

approval have been complied with. The MB final approval authorizes the borrower to draw on the loan/issue the bonds/notes/securities involved.

Contrary to petitioners' rigid interpretation of "prior concurrence," this requirement is really enabled through a more detailed and elaborate procedure. It is only the Approval-in-Principle which, strictly speaking, entails prior action from the MB, but which nevertheless allows negotiations to proceed with the indicative financial terms and purpose of the loan as starting points. After negotiations, the parties may already finalize the terms of the loan and sign the same, subject to fulfillment of certain conditions imposed by the Approval-in-Principle, before the MB grants its Final Approval.

The foregoing framework addresses Senior Associate Justice Leonen's apprehension, that the Majority unduly deems the Approval-in-Principle, by itself, as already constituting the MB 's prior concurrence.[82] To the contrary, the Majority only veers away from an absurdly literal interpretation of "prior concurrence", as petitioners insist, and presents instead a more nuanced framework in conjunction with relevant statutes and issuances. The Approval-in-Principle does not spell the end of the MB 's participation since, as elaborated in the ForEx Regulations, the MB must still extend its Final Approval after an approved-in-principle loan's terms have been finalized, signed, and its other preconditions fulfilled. Only then is the borrower authorized to draw on the loan.

As explained in the Constitutional Commission deliberations, the above nuances are intended to strike a balance between prudence and expediency in public sector foreign borrowings:

We were impaled on the horns of a dilemma. If we were to give the President unlimited power to contract foreign loans, then we may have a repeat performance of what we went through. On the other hand, if we were to be very strict with the President so much so that by the time the authorities here or the legislature give their consent that foreign loan sought to be contracted is no longer available. or the purpose which it was intended to subserve is already academic. Instead, we put this as a medium arrangement a middle ground, but with the participation also of the legislature in the sense that any action of the Monetary Board shall periodically be reported quarterly to the legislature. Instead of requiring approval of the Congress which might defeat the purpose for contracting the foreign loan, at least a quarterly report should be submitted within 30 days from the beginning of each quarter to inform the legislature about the foreign loans that it has acted upon or still to be contracted. Then, the legislature now participates either to give its concurrence if it is for a meritorious purpose or to curtail by law the powers of the Monetary Board.[83]

With Section 20 of Article VII clarifying the foregoing deliberations, laws, and issuances, petitioners' contentions must fail. The Loan Agreements had, in fact, undergone the above-described procedure, thereby securing the requisite MB concurrence.

Regarding the CRPIP Loan Agreement, on February 1, 2018, the DOF requested the MB for the issuance of an Approval-in-Principle on the proposed loan, which the MB granted on February 22, 2018 through Resolution No. 305. Negotiations proceeded between the EXIM Bank and various Philippine government agencies, as represented by the DOF, culminating in the signing of the CRPIP Loan Agreement on April 10, 2018. Following the DOF's request for the MB's Final Approval, the same was given on May 17, 2018, through Resolution No. 813.

In accordance with the ForEx Regulations, Resolution No. 305 indicates that the final approval was conditioned upon the submission of certain documents, pending which no disbursements could be made under the CRPIP Loan Agreement, and pursuant to which, negotiations between lender and borrower should ensue.

Consistently, under the CRPIP Loan Agreement's Representations and Warranties by the Borrower, particularly

Article 5.2, the GRP warranted compliance with all relevant rules and regulations "except for the final approval of the [MB of the BSP], which shall be secured after the signing of this Agreement[.]" Meanwhile, on Special Covenants under Article 6.4, the GRP undertook to fulfill the conditions necessary for the loan's effectivity, which" shall include the final approval of the [MB of the BSP]."

Contrary to petitioners' claims that these stipulations were meant to circumvent Article VII, Section 20 of the Constitution, like a "sign now, comply later" scheme, these stipulations are very much in accord with the pertinent rules and regulations. The MB's Resolution No. 305 prompted the EXIM Bank and DOF to negotiate the terms of the loan, also imposing certain conditions before Final Approval may be given. The undertakings in Articles 5.2 and 6.4 were precisely in contemplation of the ForEx Regulations, since Final Approval is given only after the terms of the loan have been finalized, the agreement signed, and other preconditions met.

The Court rules similarly on the NCWS Loan Agreement. On September 7, 2018, the DOF endorsed the MWSS's proposed loan to the MB,[84] for which the MB gave its Approval-in-Principle on September 28, 2018 through Resolution No. 1581. Negotiations ensued and on November 20, 2018, the NCWS Loan Agreement was entered into between the EXIM Bank and the GRP. Through Resolution No. 854[85] dated June 6, 2019, the MB finally approved the loan. As with the CRPIP Loan Agreement, the NCWS Loan Agreement's Representations and Warranties by the Borrower, particularly Article 5.3, as well as the Special Covenants, specifically Article 6.4, indicate undertakings to comply with the conditions attached to the Approval-in-Principle, in order to obtain the Final Approval.

III. As Worded, the Assailed Confidentiality Clause Unduly Restricts Public Access to Information on Foreign Loans.

As earlier discussed, the issue regarding the disclosure of the related loan documents has already been mooted since respondents had furnished petitioners with such. Yet, seeing as such issue arose from the Loan Agreements' Confidentiality Clauses, the Court sees fit to make some pronouncements thereon.

Section 21, Article XII of the Constitution provides:

Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public.[86]

This specific directive is further bolstered by its kindred provisions, Section 7 of Article III on the right to information on matters of public concern; and Section 28 of Article II on the State policy of full public disclosure on transactions involving public interest. As held in *Sereno v. Committee on Trade and Related Matters (CTRM)* of the National Economic and Development Authority:[87]

The constitutional guarantee of the right to information on matters of public concern enunciated in Section 7 of Article III of the 1987 Constitution complements the State's policy of full public disclosure in all transactions involving public interest expressed in Section 28 of Article II of the 1987 Constitution. These provisions are aimed at ensuring transparency in policy-making as well as in the operations of the Government, and at safeguarding the exercise by the people of the freedom of expression. In a democratic society like ours, the free exchange of information is necessary, and can be possible only if the people are provided the proper information on matters that affect them. x x x[88]

The language of the last sentence of Section 21, Article XII indicates proactive language, i.e., "shall be made available to the public", suggesting that relevant government bodies need not even wait for persons to request information on government-contracted foreign loans before these are made accessible. After all, this stance is consistent with the policy of transparency conveyed by the provision.[89] It is no coincidence that the framers of the 1987 Constitution saw fit to devote a specific provision directing access to information on foreign loans,

notwithstanding the broader guarantees already provided by Section 7 of Article III and Section 28 of Article II. At the time, especially considering the social costs and intergenerational tax burden inflicted by unscrupulous foreign borrowings, the Constitutional Commissioners were considering mechanisms for popular consultations in contracting foreign loans.[90]

The subject Confidentiality Clause reads:

8.8. Confidentiality The Borrower shall keep all the terms, conditions and the standard fee hereunder or in connection with this Agreement strictly confidential. Without the prior written consent of the Lender, the Borrower shall not disclose any information hereunder or in connection with this Agreement to any third party unless required to be disclosed by the Borrower to any courts of competent jurisdiction, relevant regulatory bodies, or any government institution and/or instrumentalities of the Borrower in accordance with any applicable Philippine law.[91]

With the above principles, the foregoing language unduly diminishes the State's obligation to allow public access to information on government- contracted foreign loans. The scope of confidentiality is far too sweeping, considering the commitment to "keep all the terms, conditions x x x strictly confidential." [92] Under the assailed clause, access to the information requires the lender's prior consent, whereas the policy of disclosure in Section 21 of Article XII is unqualified. The Confidentiality Clause grants access only to government entities, but the Constitutional provision ensures broader public availability of such information. Withal, the assailed clause makes disclosure the exception rather than the rule, when Section 21 of Article XII clearly mandates otherwise. In any case, such faulty language cannot surmount the Constitutionally-mandated public availability of information on government- contracted foreign loans.

Nevertheless, jurisprudence recognizes limited exceptions extending confidentiality, i.e., national security matters, trade secrets and banking transactions, criminal matters, and other confidential matters such as diplomatic correspondence,[93] closed-door Cabinet meetings and deliberations of this Court.[94] Still, that a type of information is recognized as privileged does not, however, necessarily mean that it would be considered privileged in all instances. For in determining the validity of a claim of privilege, the question that must be asked is not only whether the requested information falls within one of the traditional privileges, but also whether that privilege should be honored in a given procedural setting.[95]

While the issue on the disclosure of related loan documents has been rendered moot, the Court counsels that wordings similar to the assailed Confidentiality Clause cannot, for future purposes, withstand Constitutional scrutiny. Concerned government agencies are urged to be more circumspect before agreeing to such stipulations. In any case, such language cannot bar public availability of information on government-contracted foreign loans, as mandated by Section 21, Article XII of the Constitution.

IV. The Loan Agreements violate neither the Constitutional policy to give preference to qualified Filipinos nor the procurement laws.

Next, petitioners argue that conditions precedent to the disbursement of the loans, specifically the payments to be made to the chosen Chinese contractors, offend the Constitutional policy giving preference to Filipinos[96] and circumvent procurement laws.[97] Respondents counter that the "Filipino First" policy is more nuanced than petitioners make it appear, and that the MOU, Note Verbale Nos. 17-0330 and 17-1049, Clarificatory Procedures, and Loan Agreements are executive agreements beyond the scope of procurement laws, unless mutually agreed to be subject thereto.[98]

The Court sustains respondents' contentions.

Articles 3.1 and 8.12 of the CRPIP Loan Agreement, and Articles 3.1 and 8.13 of the NCWS Loan Agreement, similarly provide:

Article 3.1. The first disbursement is subject to the satisfaction of the conditions precedent set out in Appendix 1 attached hereto (or such conditions precedent have been waived by the Lender in writing).

Article 8.12. [8.13J The appendixes to this Agreement shall be deemed as an integral part of this Agreement and have the same legal effect as this Agreement.

Relatedly, Precedent Nos. (2) and (5) of the CRPIP Loan Agreement's Appendix 1, and Precedent Nos. (3) and (8) of the NCWS Loan Agreement's Appendix 1, correspondingly provide:

CRPIP Loan Agreement

NCWS Loan Agreement

Upon the Borrower's application to the lender for the making of the first disbursement, the Lender shall not be obliged to make any such disbursement to the Borrower unless the Borrower has fulfilled the following conditions and the Lender has received the following documents to its satisfaction:

Upon the Borrower's application to the lender for the making of the first disbursement, the Lender shall not be obliged to make any such disbursement to the Borrower unless the Borrower has fulfilled the following conditions and the Lender has received the following documents to its satisfaction:

x x x x

x x x x

(2) Certified true copies of the Commercial Contract and other relevant documents in connection therewith acceptable to the lender which have been duly signed by all parties thereto and have become effective;

(3) Certified true copies of the Commercial Contract and other relevant documents in connection therewith acceptable to the lender which have been duly signed by all parties thereto and have become effective;

x x x x

x x x x

(5) Certified true copies of any and all documents evidencing that the End-User has paid to the Chinese Contractor certain of the amount, which is equivalent to 15% of the advance payment under the Commercial Contract minus tax and fees dues payable related to the full amount of the advance payment under the Commercial Contract.

(8) Certified true copies of any and all documents evidencing that the End-User has paid to the Chinese Contractor certain amount, which is equivalent to 15% of the advance payment under the Commercial Contract

To clarify, the Loan Agreements are not the documents which definitively awarded the CRPIP and NCWS projects to Chinese contractors. Such awards were made following the procedure embodied in Note Verbale Nos. 17-0330 and 17-1049, confirmed by the MOFCOM's Reply Note, and amplified in the Clarificatory Procedures, wherein the MOFCOM would provide a list of at least three qualified, legitimate, and reputable Chinese contractors. These culminated in various resolutions and notices of award issued by the NIA and MWSS as the IAs of the pertinent projects. Petitioners seem to theorize, therefore, that the Conditions Precedent integrated into the Loan Agreements validate, reinforce, and operationalize the award of infrastructure projects to Chinese contractors, thus violating the Filipino First Policy and procurement laws.

This Court does not agree.

The second paragraph of Article XII, Section 10 of the Constitution encapsulates the Filipino First Policy. It ordains:

In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

As opposed to petitioners' overemphasis and one-sided interpretation of the foregoing provision, the Charter actually espouses a balanced ideology on Philippine industry relative to international economic relations.

Tañada, et al. v. Angara, et al.[99] instructs:

All told, while the Constitution indeed mandates a bias in favor of Filipino goods, services, labor and enterprises, at the same time, it recognizes the need for business exchange with the rest of the world on the bases of equality and reciprocity and limits protection of Filipino enterprises only against foreign competition and trade practices that are unfair. In other words, the Constitution did not intend to pursue an isolationist policy. It did not shut out foreign investments, goods and services in the development of the Philippine economy. While the Constitution does not encourage the unlimited entry of foreign goods, services and investments into the country, it does not prohibit them either. In fact, it allows an exchange on the basis of equality and reciprocity, frowning only on foreign competition that is unfair.[100]

Quite recently, in *Philippine Contractors Accreditation Board v. Manila Water Co. Inc.*,[101] the Court struck down a competitively-restrictive contractors' licensing scheme, which imposed more burdensome qualifications on foreign contractors but allowing them narrower industry participation compared to local firms. According to the Court, striking down the restrictions would encourage healthy competition among local and foreign contractors, and open opportunities for development and innovation, so that domestic industries would be globally competitive.

In any case, these constitutional provisions on the State's national patrimony and economy highlight that the common good, public interest, public welfare-the people-are of primary consideration.[102] Despite not being awarded to Filipino contractors, petitioners have not shown how the award of the projects to foreign firms would defeat the public good, when such an engagement will only usher in investments, facilitate the influx of skills and technology, and spur further economic development. It is not far-fetched to consider that the Philippines adopts a liberal approach in allowing foreign investments to enter the country. What the Constitution only restricted from foreign investors were enterprises such as public utilities, mass media, and use of natural resources. These restrictions are necessary to protect the welfare of Filipino citizens by removing the possibility of exploitation by foreign investors, who are not fully within the jurisdiction of Philippine laws.[103]

If only on the basis of Section 10, Article XII of the Constitution, the Court cannot invalidate the Loan Agreements which, while financing infrastructure projects to be undertaken by foreign contractors, are still consistent with the Constitutional policies expounded in the above rulings.

In other words, while Section 19, Article II of the 1987 Constitution requires the development of a self-reliant and independent national economy effectively controlled by Filipino entrepreneurs, it does not impose a policy of Filipino monopoly of the economic environment. The objective is simply to prohibit foreign powers or interests from maneuvering our economic policies and ensure that Filipinos are given preference in all areas of development.[104]

Again, the Loan Agreements themselves are distinct from the mutually adopted bidding procedures through which the infrastructure projects were awarded to foreign contractors. Relative to procurement laws, the award of

projects to the foreign contractors and their consequent financing under the Loan Agreements are outside the purview of the GPRA and the 2016 Revised Implementing Rules and Regulations (2016 RIRR) effective at the time the CRPIP and NCWS projects were awarded. Such matter has already been settled in *Abaya v. Ebdane, Jr.*[105] (*Abaya*), *Department of Budget and Management Procurement Service v. Kolonwel Trading*[106] (*Kolonwel*), and *Land Bank of the Phils. v. Atlanta Industries, Inc.*[107] (*Atlanta Industries*).

Similar to the instant controversy, *Abaya* involved an exchange of notes between the GRP and Government of Japan, concerning loans to be extended by the latter to the former, also embodying the salient terms of such loans. These international instruments specifically provided that the services would be procured in accordance with the guidelines prescribed by the Japanese government-owned bank, to which the GRP acceded. Upholding the validity of the procurement procedure, even while deviating from the GPRA, the Court ruled:

The petitioners' arguments fail to persuade. The Court holds that Loan Agreement No. PH-P204 taken in conjunction with the Exchange of Notes dated December 27, 1999 between the Japanese Government and the Philippine Government is an executive agreement.

To recall, Loan Agreement No. PH-P204 was executed by and between the JBIC and the Philippine Government pursuant to the Exchange of Notes executed by and between Mr. Yoshihisa Ara, Ambassador Extraordinary and Plenipotentiary of Japan to the Philippines, and then Foreign Affairs Secretary Siazon, in behalf of their respective governments. The Exchange of Notes expressed that the two governments have reached an understanding concerning Japanese loans to be extended to the Philippines and that these loans were aimed at promoting our country's economic stabilization and development efforts.

Loan Agreement No. PH-P204 was subsequently executed and it declared that it was so entered by the parties "[i]n the light of the contents of the Exchange of Notes between the Government of Japan and the Government of the Republic of the Philippines dated December 27, 1999, concerning Japanese loans to be extended with a view to promoting the economic stabilization and development efforts of the Republic of the Philippines." Under the circumstances, the JBIC may well be considered an adjunct of the Japanese Government. Further, Loan Agreement No. PH- P204 is indubitably an integral part of the Exchange of Notes. It forms part of the Exchange of Notes such that it cannot be properly taken independent thereof.

x x x x

Under the fundamental principle of international law of *pacta sunt servanda*, which is, in fact, embodied in Section 4 of RA 9184 as it provides that "[a]ny treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed." the DPWH, as the executing agency of the projects financed by Loan Agreement No. PH-P204, rightfully awarded the contract for the implementation of civil works for the CP I project to private respondent China Road & Bridge Corporation. [108]

This doctrine was later applied in *Kolonwel* where the Department of Education, pursuant to financing provided by the World Bank and the Asian Development Bank, conducted a bidding conforming to the WB's guidelines concerning International Competitive Bidding, since that was the method prescribed under the loan agreement. As in *Abaya*, the Court in *Kolonwel* ruled that a foreign loan agreement with international financial institutions partakes of an executive agreement,[109] further instructing that the borrower "[binds] itself to perform in good faith its duties and obligation" under such kinds of arrangements. In other words, pursuant to the principle of *pacta sunt servanda*, the GRP was duty-bound to follow the agreed procurement process, even if it deviated from GPRA-prescribed procedure.

In *Atlanta Industries*, the Court went further by pointing out the interconnection between the various international instruments leading up to the execution of the pertinent loan agreement, explaining that these instruments must be upheld and construed as a coherent whole:

As may be palpably observed, the terms and conditions of Loan Agreement No. 4833-PH, being a project-based and government- guaranteed loan facility, were incorporated and made part of the SLA that was subsequently entered into by Land Bank with the City Government of Iligan. Consequently, this means that the SLA cannot be treated as an independent and unrelated contract but as a conjunct of, or having a joint and simultaneous occurrence with, Loan Agreement No. 4833-PH. Its nature and consideration, being a mere accessory contract of Loan Agreement No. 4833-PH, are thus the same as that of its principal contract from which it receives life and without which it cannot exist as an independent contract. Indeed, the accessory follows the principal; and, concomitantly, accessory contracts should not be read independently of the main contract. Hence, as Land Bank correctly puts it, the SLA has attained indivisibility with the Loan Agreement and the Guarantee Agreement through the incorporation of each other's terms and conditions such that the character of one has likewise become the character of the other.

Considering that Loan Agreement No. 4833-PH expressly provides that the procurement of the goods to be financed from the loan proceeds shall be in accordance with the IBRD Guidelines and the provisions of Schedule 4, and that the accessory SLA contract merely follows its principal's terms and conditions, the procedure for competitive public bidding prescribed under RA 9184 therefore finds no application to the procurement of goods for the Iligan City Water Supply System Development and Expansion Project. The validity of similar stipulations in foreign loan agreements requiring the observance of IBRD Procurement Guidelines in the procurement process has, in fact, been previously upheld by the Court in the case of Department of Budget and Management Procurement Service (DBM-PS) v. Kolonwel Trading.[110]

The same principles apply to the assailed Loan Agreements. To be sure, the MOU, Note Verbale Nos. 17-0330 and 17-1049, Reply Note, Clarificatory Procedures, and Loan Agreements are coherently appreciated as exchanges of notes which partake of executive agreements, hence, binding on the parties, despite deviation from the GPRA. As discussed in *Mitsubishi Corp.-Manila Branch v. Commissioner of Internal Revenue*: [111]

An "exchange of notes" is a record of a routine agreement that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.

It is stated that "treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, *modus vivendi* and exchange of notes" all refer to "international instruments binding at international law."

x x x x x x x x

Significantly, an exchange of notes is considered a form of an executive agreement, which becomes binding through executive action without the need of a vote by the Senate or Congress.[112]

As indicated in Articles 1.1, 2.3, 4.1, and 4.2 therein, the MOU was executed as a prefatory agreement through which more specific financing arrangements would later on be determined:

1.1 For the purpose of promoting financing cooperation between the Parties, as well as contributing to the achievement of economic and social benefits in their respective countries, subject to the terms and conditions of this MOU, the Bank intends to make available financing to GPH to support projects to be mutually identified and agreed between the two Governments.

2.3 The rights and obligations of the Parties under each individual project shall be stipulated in the individual loan agreement (hereinafter referred to as the "Individual Loan Agreement.") and such other relevant finance documents.

4.1 This MOU is only intended to serve as guidance for further cooperation between the Parties, and is not legally binding or enforceable on either of the Parties under any jurisdiction, except the provision under Article 3, 4, 5, 6 and 7. Nothing in this MOU obligates either of GPH, represented by the Department of Finance, or the Bank to make any commitment or enter into any agreement or transaction.

4.2 The terms and conditions of each Individual Loan Agreement shall be subject to further negotiation between and by the Parties.

Then followed Note Verbale Nos. 17-0330 and 17-1049, the Reply Note, and the Clarificatory Procedures, all prescribing the manner of selecting the project contractors. As set forth in paragraphs 2 and 3 of the Reply Note:

2. The Chinese side shall provide the DOF its consideration to finance the project. For positively considering the project, the Chinese side, through the Embassy of the PRC in the Philippines, shall provide the DOF the list of at least three (3) qualified, legitimate, and in good standing Chinese contractors that can undertake the project upon discussion between the Chinese side and the relevant commercial chamber in China.

3. The Implementing Agency (IA) of the GPH shall commence the procurement process and undertake Limited Competitive Bidding (LCB) among the contractors provided by the Chinese side, following the Philippine Government Procurement Reform Act (GPRA). The IA shall finalize and sign the contract agreement in as timely a manner as possible, following the GPRA.

On the other hand, the Clarificatory Procedures provide that:

The IA shall commence the procurement process and undertake Limited Competitive Bidding (LCB) among said Chinese contractors following applicable procedures and documents under R.A. 9184.

Thus, the NIA as IA of the CRPIP project, and the MWSS as IA of the NCWS project, received the shortlist of Chinese contractors from the MOFCOM, conducted the necessary due diligence, held the LCB, and eventually signed the necessary commercial contracts, for which financing would be provided through the Loan Agreements.

Nevertheless, these instruments did not completely discard the GPRA. As indicated in Paragraph 3 of Note Verbale No. 17-1049, and as confirmed through the MOFCOM's Reply Note, the IAs "shall commence the procurement process and undertake Limited Competitive Bidding (LCB) among the contractors provided by the Chinese side, following the Philippine Government Procurement Reform Act (GPRA)." This was reiterated in the Clarificatory Procedures, subjecting the LCB to "applicable procedures and documents under R.A. 9184."

What the parties agreed upon was really a "hybrid" procurement approach, the steps of which were laid out largely through the Note Verbal es, Reply Note, and Clarificatory Procedures, but which also incorporated features from the GPRA. Such hybrid an-gements are sanctioned by relevant procurement laws and regulations. Section 4.3 of the 2016 RIRR states that "[u]nless the Treaty or International or Executive Agreement expressly provides another or different procurement procedures and guidelines, R.A. 9184 and this IRR shall apply to Foreign-funded Procurement of Goods, Infrastructure Projects, and Consulting Services[.]" On the other hand, Section 4 of R.A. No. 4860, as amended,[113] governing as it does the contracting of foreign loans, provides that "[i]n the contracting of any loan, credit or indebtedness under this Act, the President of the Philippines may, when necessary, agree to waive or modify the application of any law granting preferences in connection with, or imposing restrictions on, the procurement of goods or services[.]" This provision was substantially reproduced in Section 11-A[114] of R.A. No. 8182, The Official Development Assistance Act of 1996, as amended,[115] which applies to ODAs like herein Loan Agreements.

First, the LCB dispensed with the generally-prescribed advertisement requirement, which, in any case, is akin to Limited Source Bidding, which is an alternative procurement modality which foregoes advertisement pursuant to

Section 49.3[116] of the 2016 RIRR. Second, the participation of Chinese contractors was sanctioned by Section 23.4.2.2 of the 2016 RIRR providing that "[f]oreign bidders may be eligible to participate in the procurement of Infrastructure Projects when provided for under any Treaty or International or Executive Agreement[.]" Third, the track record requirements, on the other hand, followed those prescribed under the GPRA and 2016 RIRR, particularly requiring the submission of the contractors' Single Largest Completed Contract similar to those being bid, i.e., the CRPIP and NCWS projects. Fourth, the parties likewise waived the conditions on the use of Approved Budget for the Contract as ceiling for the bid prices, such waiver being permitted under Section 31.2 of the 2016 RIRR. Finally, the Certificate as to the Availability of Funds was nevertheless imposed as a requirement.[117]

While the Court cannot rule that the LCB violated the GPRA and its 2016 RIRR, such procedure apparently contravened the Filipino First Policy. Following Senior Associate Justice Leonen's apprehensions,[118] the Court observes the summary manner by which the DFA and DOF simply acceded to the MOFCOM's proposal to limit the bidders to three Chinese contractors, to the exclusion of qualified Filipino contractors; as well as the pertinent IAs' rote implementation thereof. Indeed, qualified Filipinos must be given preference to bid for infrastructure projects of this scale and significance.[119] Despite these arrangements being accorded the status of executive agreements, *pacta sunt servanda* cannot override Constitutional dictates.[120] In short, bidding rules for these kinds of projects must give preference, or at least equal opportunity, to qualified Filipinos.

Despite such observations, the Court cannot set aside the LCBs. To begin with, petitioners never prayed for the nullity of the LCBs conducted by the NIA and MWSS, only asking that the Loan Agreements be struck down. As earlier clarified, the Loan Agreements are not themselves the issuances that awarded the projects to foreign contractors, much less sanctioned the conduct of the LCBs. Lest the Court engage in judicial overreach, the courts cannot grant a relief not prayed for in the pleadings or in excess of what is being sought by a party to a case.[121]

While surely lamentable that qualified Filipinos had not participated in the bidding, the nullification of the LCB procedures and resultant awards would only deny to Filipinos the expected yields from the CRPIP and NCWS projects. Given the intricacies of diplomatic and commercial negotiations, the significant transaction costs in delivering such projects, and the massive resources entailed thereby, it is unlikely that these same projects will again be bid out (this time including Filipino contractors) if the awards were nullified at this point. Unfortunately, such move would also diminish the attractiveness of doing business in the Philippines. It need not be emphasized that stability and predictability are the key pillars on which our legal system must be founded and run to guarantee a business environment conducive to the country's sustainable economic growth. [122]

It has also been raised during the deliberations of this case that the LCBs did not violate the Filipino First Policy. [123] This is because such Constitutional preference is extended only to "qualified Filipinos"[124] whereas, to begin with, Filipinos were never qualified to bid for the infrastructure projects as the exchanges of notes limited the bidding to only three Chinese contractors. However, this only begs the issue.

By the time the LCBs were conducted, Filipino bidders were, indeed, disqualified-but only following the agreed procedure, and not by lack of merit. All throughout the exchanges of the Note Verbales and the China MOFCOM's Reply Note, the DFA could have insisted on the participation of Filipino bidders. That the Republic of the Philippines is the borrower of foreign funds does not obligate the government to outrightly accept proposed stipulations, especially if exclusionary to otherwise qualified Filipinos. Economic disparities with other much richer nations should not relegate the Philippine government to a "take it or leave it" stance.

As such, pertinent government bodies always have the leeway to assert the inclusion of qualified Filipinos on preferential opportunities in projects of such significance in future negotiations involving similar transactions. To

do otherwise, would lock out qualified Filipinos of big-ticket projects by diplomatic agreement to exclusionary arrangements. Even if the negotiation and contract of foreign loans is largely left to Executive policy, the Constitution still ingrains a policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.[125]

In any case, the Loan Agreements cannot be invalidated for giving effect to and financing the CRPIP and NCWS projects, even if awarded to foreign contractors.

V. The Constitutional policy on the pursuit of independent foreign relations cannot be used to nullify the Loan Agreements' arbitration clauses.

On to their final contention, petitioners argue that the choices of arbitral tribunal and applicable law are skewed in favor of the Chinese lender,[126] especially considering the purported partiality of the chosen tribunal,[127] thus defeating the State's pursuit of an independent foreign policy.[128] While respondents insist on the principle of party autonomy in contracts, particularly choice of applicable law and forum,[129] petitioners still point out that the Philippines is contending with a global superpower, thus upsetting any parity in bargaining power.[130]

The Court rules in favor of respondents.

Articles 8.4 to 8.6 of the Loan Agreements provide:

8.4 Governing Law This Agreement as well as the rights and obligations of the Parties hereunder shall be governed by and construed in accordance with the laws of China.

8.5 Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no settlement can be reached through such consultation, each party shall have the right to submit such dispute to the China International Economic and Trade Arbitration Commission (CIETAC) [Hong Kong International Arbitration Centre (HKIAC)] for arbitration. The arbitration shall be conducted in accordance with the CIETAC's [HKIAC] arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing. [The seat of arbitration shall be in Hong Kong. The arbitration shall be conducted in English. The Arbitral Tribunal shall consist of three (3) Arbitrators which shall be appointed pursuant to the arbitration rules of HKIAC.]

8.6 The arbitral award obtained in accordance with this Article against the Borrower will be recognized and be enforceable in the Republic of the Philippines provided that: (a) the arbitral tribunal had jurisdiction over the subject matter of the action in accordance with the jurisdictional rules; (b) the Republic of the Philippines had notice [Borrower had prompt notice] of the proceedings; (c) the arbitral award was not obtained through collusion or fraud, and such award was not based on a clear mistake of fact or law; and (d) the arbitral award is not contrary to public policy in the Republic of the Philippines.

Meanwhile, Section 7, Article II of the Constitution provides:

The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, Territorial integrity, national interest, and the right to self-determination.

Article 1306 of the Civil Code, on the other hand, provides that "[t]he contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy." Short of running afoul of the foregoing tenets, parties have the freedom to contract[131] and may freely stipulate whatever contractual terms they deem convenient.[132]

Respondents aptly point out that the assailed provisions embody the Loan Agreements' arbitration clause, which is a product of the fundamental arbitration principle of party autonomy. As expounded in *Koppel, Inc. v. Makati*

Rotary Club foundation, Inc.:^[133]

A pivotal feature of arbitration as an alternative mode of dispute resolution is that it is, first and foremost, a product of party autonomy or the freedom of the parties to "make their own arrangements to resolve their own disputes." Arbitration agreements manifest not only the desire of the parties in conflict for an expeditious resolution of their dispute. They also represent, if not more so, the parties' mutual aspiration to achieve such resolution outside of judicial auspices, in a more informal and less antagonistic environment under the terms of their choosing. Needless to state, this critical feature can never be satisfied in an ejection case no matter how summary it may be.^[134] (Citation omitted; italics in the original)

Given that these commercial relationships are contractual in nature, arbitration thereon is understood as a purely private system of adjudication facilitated by private citizens, which has been consistently recognized as valid, binding, and enforceable.^[135] Given such fundamental principles, courts should liberally construe arbitration clauses, adopting the interpretation that would render such clauses effective.^[136]

Particularly, in contracts with a foreign element, the courts have generally respected the contracting parties' stipulated choice of law. In *Philippine Export and Foreign Loan Guarantee Corp. v. VP Eusebio Construction Inc.*,^[137] the Court ruled that:

No conflicts rule on essential validity of contracts is expressly provided for in our laws. The rule followed by most legal systems, however, is that the intrinsic validity of a contract must be governed by the *lex contractus* or "proper law of the contract." This is the law voluntarily agreed upon by the parties (the *lex loci voluntatis*) or the law intended by them either expressly or implicitly (the *lex loci intentionis*). The law selected may be implied from such factors as substantial connection with the transaction, or the nationality or domicile of the parties. Philippine courts would do well to adopt the first and most basic rule in most legal systems, namely, to allow the parties to select the law applicable to their contract, subject to the limitation that it is not against the law, morals, or public policy of the forum and that the chosen law must bear a substantive relationship to the transaction.^[138]

Indeed, in several contract disputes involving foreign elements, the Court has given primacy to the principle of *lex loci intentionis*, or the law intended by the parties. ¹³⁹ In much the same way, even while the Loan Agreements stipulate the application of Chinese law and appoint the CIETAC and HKIAC as arbitral tribunals, absent any showing that the assailed stipulations offend the law, morals, or public policy, the same must be sustained.

At any rate, petitioners' contentions--that the choice of applicable law and forum are heavily skewed in favor of the lender EXIM Bank and will prove greatly disadvantageous to the Philippines in case a dispute arises--deserve no consideration. As Associate Justice Amy C. Lazaro-Javier pointed out,^[140] petitioners' contentions are speculative at best, there being no indications that the arbitration clause has been or is being enforced. Also, the Court cannot sustain such apprehensions as petitioners have failed to prove as fact the allegedly inequitable foreign laws, of which the courts do not take judicial notice.^[141] Well established in our jurisdiction is that foreign laws must be alleged and proven like any other material fact.

In view of the foregoing disquisitions, petitioners have failed to present any compelling issue to warrant the nullification of the CRPIP and NCWS Loan Agreements, or any of its clauses. Save for the apprehensive language of the Confidentiality Clauses--which issue is nevertheless already moot-- the Loan Agreements have sufficiently complied with the applicable procurement laws and conform with the pertinent provisions of the Constitution .

WHEREFORE, the consolidated petitions for prohibition in G.R. Nos. 245981 and 246594 are DENIED. The Court declares VALID and NOT UNCONSTITUTIONAL the Preferential Buyer's Credit Loan Agreement on The Chico River Pump Irrigation Project and the Preferential Buyer's Credit Loan Agreement on The New

Centennial Water Source-Kaliwa Dam Project.

SO ORDERED.

Gesmundo, C.J., Hernando, Inting, Zalameda, Rosario, Dimaampao, Marquez, Kho, Jr., and Singh, JJ., concur.
Leonen, SAJ., I dissent. See separate opinion.

Caguio, J., see separate concurring.

Lazaro-Javier, J., see concurrence.

Lopez, M.,[*] J., on official leave but left vote.

Gaerlan, J., With Separate Concurring Opinion.

* On official leave but left vote per Letter dated August 8, 2022.

[1]Captioned as a Petition for Prohibition (With Urgent Prayer for the Issuance of Temporary Restraining Order and/or Writ of Preliminary Injunction), rollo (G.R. No. 245981), Vol. 1, pp. 3-155; and a Petition for Prohibition (With Urgent Prayer for the Issuance of Temporary Restraining Order and/or Writ of Preliminary Injunction); rollo (G.R. No. 246594), pp. 3-54.

[2]Rollo (G.R. No. 245981), vol. I, pp. 93-115.

[3]Rollo (G.R. No. 246594), pp. 77-104.

[4]Id. at 150-A to 150-B.

[5]Rollo (G.R. No. 245981), vol. I, pp. 312-316.

[6]1.1 For the purpose of promoting financing cooperation between the Parties, as well as contributing to the achievement of economic and social benefits in their respective countries, subject to the terms and conditions of this MOU, the Bank intends to make available financing to GPH to support projects to be mutually identified and agreed between the two Governments. Id. at 313. (Underscoring supplied).

[7]2.3 The rights and obligations of the Parties under each individual project shall be stipulated in the individual loan agreement (hereinafter referred to as the "Individual Loan Agreement") and such other relevant finance documents; id. at 314.

[8]4.1 This MOU is only intended to serve as guidance for further cooperation between the Parties, and is not legally binding or enforceable on either of the Parties under any jurisdiction, except the provision under Article 3, 4, 5, 6 and 7. Nothing in this MOU obligates either of GPH, represented by the Department of Finance, or the Bank to make any commitment or enter into any agreement or transaction; id. at 314-3 15.

[9]4.2 The terms and conditions of each Individual Loan Agreement shall be subject to further negotiation between and by the Parties; id. at 315.

[10]Id. at 317-318.

[11]Id. at 319-321.

[12]Id. at 322-323.

[13]Letter dated June 29, 2017; id. at 326.

[14]Id. at 327.

- [15]China CAMC Engineering Co., Ltd, China Geo-Engineering Corporation, and Qingdao Municipal Construction Group Co., Ltd.
- [16]Letter dated September 7, 2017; rollo (G.R. No. 245981), vol. 1, pp. 335-336.
- [17]Id. at 337-346.
- [18]Id. at 354-360.
- [19]Letter dated February 28, 2018· id. at 362-363.
- [20]Id. at 372-373.
- [21]Letter dated September 15, 2016. from the MWSS to the DOF, recommending the NCWS project for potential funding by the Chinese government; rollo (G.R. No. 246594), pp. 329-330; Letter dated January 26, 2017, from the DOF to the MWSS, endorsing the NCWS project for Chinese funding; id. at 337.
- [22]Resolution No. 2017-040-CO; id. at 40-341.
- [23]Letter dated April 13, 2017; id. at 338; July 11, 2017 Letter; id. at 342.
- [24]Letter dated September 6, 2017; id. at 343.
- [25]China Energy Engineering Company Limited, PowerChina Limited, and Consortium of Guangdong Foreign Construction Company Limited and Guangdong Yuantian Engineering Company Limited.
- [26]Resolution No.2017-162-CO; rollo (G.R. No. 246594), pp. 353.
- [27]Resolution No. 2017-162-CO; id. at 354.
- [28]Resolution No. 2018-132-CO; id. at 375.
- [29]Resolution No. 2018-140-CO; id. at 376-377.
- [30]Letter dated September 7, 2018: id. cit 380.
- [31]Id. at 382-383.
- [32]Bracketed quotations pertain to dissimilar phrasings found in the NCWS Loan Agreement, otherwise identical with the CRPIP Loan Agreement language.
- [33]Id. at 52-53.
- [34]UDK No. 16838, May 11, 2021.
- [35]CONSTITUTION, Article Vil, Sec. I.
- [36]Supra note 33. (Citations omitted).
- [37]704 Phil. 205 (2013).
- [38]Id. at 217.
- [39]686 Phil. 571 (2012).
- [40]Id. at 585. (Underscoring supplied).
- [41]Sargasso Construction & Development Corp. v. Philippine Ports Authority, 637 Phil. 259, 274-275 (2010). (Underscoring supplied).

[42]Heirs of Gamboa v. Teves, 696 Phil. 276, 478 (2012). Velasco, J., dissenting states "Indeed, stability and predictability are the key pillars on which our legal system must be founded and run to guarantee a business environment conducive to the country's sustainable economic growth."

[43]Garcia v. The Executive Secretary, 602 Phil. 64, 73 (2009).

[44]Didipio Earth-Savers' Multi-Purpose Association, Inc. v. Gozun, 520 Phil. 457, 472 (2006), citing Pimentel, Jr. v. Hon. Aguirre, 391 Phil. 84, 107 (2000).

[45]791 Phil. 243 (2016).

[46]Id. at 259.

[47]Particularly, but not limited to:

- Memorandum of Understanding on Financing Cooperation Between The Export- Import Bank of China and The Government of the Republic of the Philippines, Represented by the Department of Finance dated October 20, 2016;
- Note Verbale No. 17-0330 dated January 20, 2017;
- Note Verbale No. 17-1049 dated March 3, 2017;
- China MOFCOM transmittal dated March 8, 2017;
- Letter dated June 29, 2017 from DOF Sec. Dominguez to the Chinese Embassy on the proposed Clarificatory Procedures concerning the financing negotiations;
- Clarificatory Procedures for the Implementation of the Note Verbale No. 17-1049;
- Letter dated September 7, 2017 from DOF Sec. Dominguez to NIA Administrator Visaya, regarding the shortlist of Chinese contractors;
- Letter dated September 8, 2017 from DOF Sec. Dominguez to DPWH Sec. Villar seeking a background check on the proposed contractors;
- Letter dated September 8, 2017 from DOF Sec. Dominguez to DOTr Sec. Tugade seeking a background check on the proposed contractors;
- Letter dated October 3, 2017 from DBM Sec. Diokno to DOF Sec. Dominguez, providing comments on the proposed financing cooperation agreement;
- NIA BAC-A Resolution No. CW-LCB-2018-1, awarding the CRPJP contract to China CAMC Engineering Co., Ltd.;
- Letter dated September 15, 2016 from the MWSS Deputy Administrator to DOF Usec. Tan recommending pipeline projects that may require participation and funding by the Chinese government;
- Letter dated. January 17, 2016 from the MWSS OIC and Senior Deputy Administrator to the NEDA Deputy Director-General discussing the NCWS project, estimating project cost, and identifying sources of funding;
- Letter dated February 8, 2017 from the MWSS Sr. Deputy Administrator to DOF Usec. Tan regarding submission of documents;
- Letter dated January 26, 2017 from DOF Usec. Tan to the MWSS Deputy Administrator re: endorsement of the project for Chinese funding;

- Letter dated April 3, 2017 from NEDA to MWSS stating that the Investment Coordination Committee-Cabinet Committee confirmed the proposed change in financing from PPP to ODA;
- Letter dated April 6, 2017 from MWSS to NEDA saying the MWSS Board endorsed and confirmed the new estimated project cost and implementation arrangement;
- Letter dated July 11, 2017 from NEDA to MWSS saying the NEDA Board confirmed the ICC's approval of the shift in financing from PPP to ODA, and change in total project cost;
- Letter dated September 6, 2017 from the MOFCOM to the DOF recommending Chinese contractors;
- Letter dated September 7, 2017 from DOF to MWSS, forwarding the MOFCOM recommendations;
- MWSS Resolution endorsing the three contractors;
- MWSS Board Resolution specifying the bid documents;
- MWSS Board Resolution declaring CEEC as bidder with the lowest calculated bid and lowest calculated responsive bid;
- MWSS Board Resolution approving in principle the detailed engineering design and construction of the NCWS-KDP;
- Letter dated September 7, 2018 from DOF to MWSS, saying that the DOF has endorsed to the BSP MB its Approval-in-Principle and Willingness to Guarantee;
- Letter dated June 7, 2019 from the BSP International Operations Department regarding final approval to the MWSS loan from the EXIM Bank;
- MWSS Board Resolution regarding final draft of the loan agreement and authority to sign.

[48]Dissenting Opinion, pp. 6-7.

[49]Article 8.1 of the Loan Agreements.

[50]Rollo (G.R. No. 245981), Vol. 1, pp. 58-68; rollo (G.R. No. 246594), pp. 46-51.

[51]Rollo (G.R. No. 245981), Vol. 1, pp. 271-290; rollo (G.R. No. 246594), pp. 295-315.

[52]Rollo (G.R. No. 245981), p. 110.

[53]Rollo (G.R. No. 246594), pp. 98-99.

[54]De Borja v. Pinalakas na Ugnayan ng Maliliit na Mangingisda ng Luzon, Mindanao at Visayas, 809 Phil. 65, 85 (2017).

[55]896 SCRA 213.

[56]Id. at 281.

[57] CONSTITUTION, Art. VII, Sec. 20.

[58]CONSTITUTION, Art. XII, Sec. 10.

[59]CONSTITUTION, Art. 11, Sec. 7.

[60]CONSTITUTION , Art. XVI, Sec. 3.

[61]CONSTITUTION, Art. XII, Sec. 2 & Sec. 3.

[62]Spouses Guerrero v. Domingo, 661 Phil. 528, 534 (2011).

[63]Menla, Jr. v. Aganan, G.R. No. 247728 (Notice), July 29, 2019.

[64]Montes v. Court of Appeals, 523 Phil. 98, 110 (2006).

[65]466 Phil. 751 (2004). See also Sargasso Construction & Development Corp. v. Philippine Ports Authority, 637 Phil. 259, 274 (2010).

[66]Insulur Life Assurance Company. Ltd. v. Asset Builders Corp., supra. at 766. (Citations omitted).

[67]Articles 2, 3. 1, & 8.12 of the CRIPIP Loan Agreement; Articles 2, 3.1, & 8.13 of the NCWS Loan Agreement.

[68]Article 4 of the Loan Agreements.

[69]Vinuya v. Romulo, 633 Phil. 538, 568 (2010): "Certain types of cases often have been found to present political questions. One such category involves questions of foreign relations. It is well-established that '[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative - 'the political' - departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'" (Citations omitted).

[70]Pangilinan v. Cayetano, G.R. Nos. 238875, 239483 & 240954, March 16, 2021.

[71]CONSTITUTION, Art. VII, Sec. 20.

[72]Rollo (G.R. No. 245981), vol. 1, pp. 25-31; rollo,) (G.R. No. 246594), pp. 32-35.

[73]Rollo (G.R. No. 245981), vol 1, pp. 235-240: rollo (G.R. No. 246594), pp. 256-262, 412-416.

[74]CONSTITUTION (1973), Art. VII, Sec. 12: "The President may contract and guarantee foreign and domestic loans on behalf of the Republic of the Philippines. subject to such limitations as may be provided by law."

[75]Record of the Constitutional Commission No. 42 (July 29, 1986), Sponsorship Speech of Commissioner Lorenzo Sumulong. (Underscoring supplied).

[76]Record of the Constitutional Commission No. 42 (July 29, 1986), Interpellations of Commissioner Florenz Regalado: "While it is not stated here - although it says here that the prior concurrence of the Monetary Board is required - it is, of course, implicit therein that the Monetary Board shall act as may be provided by law. In fact, right now the powers of the Monetary Board are provided by law."

[77]Sec. I. The President of the Philippines is hereby authorized, in behalf of the Republic of the Philippines, to contract such loans, credits, including supplier's credit, deferred payment arrangements, and to enter into and conclude bilateral agreements involving other forms of official assistance such as grants and commodity credit arrangements or indebtedness as may be necessary and upon such terms and conditions as may be agreed upon, not inconsistent with this Act, with Governments of foreign countries with whom the Philippines has diplomatic or trade relations or which are members of the United Nations, their agencies, instrumentalities or financial institutions or with reputable international lending institutions or firms extending supplier's credit or deferred payment arrangements to enable the government of the Republic of the Philippines to: x x x.

[78]See Republic Act No. 6142; Presidential Decree (P.D.) No. 81, Series of 1972; and P.O. No. 150, Series of 1973.

[79]The New Central Bank Act.

[80]An Act Amending Republic Act Number 7653, Otherwise Known as "The New Central Bank Act", and for Other Purposes.

[81]Clarifying Procedures on foreign Credit Operations of the Public Sector.

[82]Dissenting Opinion, pp. 10-17.

[83]RECORD. CONSTITUTIONAL COMMISSION No. 42 (July 29, 1986), Interpellations of Commissioner Florenz Regalado. (Underscoring supplied).

[84]September 7, 2018 Letter; rollo (G.R. No. 246594), p. 380.

[85]Id. at 382-383.

[86]Underscoring supplied.

[87]780 Phil. 1 (2016).

[88]Id. at 12. (Underscoring supplied).

[89]Valmonte v. Belmonte, Jr., 252 Phil. 264, 275-278 (1989).

[90]Record of the Constitutional Commission No. 42 (July 29, 1986), Comments of Commissioner Edmundo Garcia: "x x x I think we have here two instances where we can democratize the exercise of political power by the President with regard to the responsibility of the President to contract or guarantee foreign loans on behalf of the Republic, and also the right of the President to make effective international agreements or treaties. Has the Committee considered the possibility of creating a mechanism for popular consultations with regard to this specific power to contract foreign loans and also make effective international agreements? Our experience in the past shows that, for example, in the friendship and amity treaty with Japan which included foreign loans, the social costs were passed on to the greater number when the IMF required austerity measures. So, very often, when the social costs are passed on to the majority, they do not have a way of responding to this order of priorities; they would consider that those loans are not to their benefit. But if a system of popular consultation were instituted, it would in fact help to democratize the power of the President in this regard. I would like to ask the Gentleman whether it has been discussed in the Committee."

[91]Rollo (G.R. No. 245981), p. 112.

[92]Underscoring supplied.

[93]Chavez v. Presidential Commission on Good Governance, 360 Phil. 133, 160-162 (1998).

[94]Id at. 162.

[95]Senate of the Philippines v. Exec. Sec. Ermita, 522 Phil., 39 (2006).

[96]CONSTITUTION, Art. XII, Sec. 10.

[97]Rollo (G.R. No. 245981), Vol. 1, pp. 31-44; rollo (G.R. No. 246594), pp. 35-44.

[98]Rollo (G.R. No. 245981), Vol. 1, pp. 240-256; rollo (G.R. No. 246594), pp. 262-278, 416-424.

[99]338 Phil. 546 (1997).

[100]Id. at 46. (Citations omitted: italics in the original).

[101]G.R. No. 217590, March 10, 2020.

[102]Maynilad Water Services, Inc. v. Secretary of the Department of Environment and Natural Resources, G.R. Nos. 202897, 206823 & 207969, August 6, 2019.

[103]National Federation of Hog Farmers, Inc. v. Board of Investments, G.R. No. 205835, June 23, 2020.

[104]Representative Espina, et al. v. Hon. Zamora, Jr. (Executive Secretary), et al., 645 Phil. 269, 279 (2010).

[105]544 Phil. 645 (2007).

[106]551 Phil. 1030, 1049 (2007).

[107]738 Phil. 243, 262(2014).

[108]Supra note 101, at 672. (Citations omitted; italics in the original; underscoring supplied).

[109]Supra note 101, at 1049.

[110]Supra note 103, at 260-262 (Citations omitted; emphasis and italics in the original; underscoring supplied).

[111]Mitsubishi Corp.-Manila Branch v. Commissioner of Internal Revenue, 810 Phil. 16 (2017).

[112]Id. at 25.

[113]Presidential Decree No. 588, Series of 1974.

[114]SEC. 11-A. In the contracting of any loan, credit or indebtedness under this Act or any law, the President of the Philippines may, when necessary, agree to waive or modify the application of any provision of law granting preferences in connection with, or imposing restrictions on, the procurement of goods or services: Provided, however, That as far as practicable, utilization of the services of qualified Filipino citizens or corporations or associations Owned by such citizens in the prosecution of projects financed under this Act shall be prepared on the basis of the standards set for a particular project: Provided, further, That the matter or preference in favor of articles, materials, or supplies of the growth, production or manufacture of the Philippines, including the method or procedure in the comparison of bids for purposes therefor, shall be the subject of agreement between the Philippine Government and the lending institution.

[115]Republic Act No. 8555.

[116]49.3 The pre-selection shall be based upon the capability and resources of the bidders to perform the contract taking into account their experience and past performance on similar contracts, capabilities with respect to personnel equipment or manufacturing facilities, and financial position. Pre-selection shall be done in accordance with the following procedures provided in the GPMs.

The BAC of the concerned Procuring Entity shall directly invite all the suppliers or consultants appearing in the pre-selected list. All other procedures for competitive bidding shall be undertaken, except for the advertisement of Invitation to Bid/Request for Expression of Interest under Section 21.2.1 of this IRR.

[117]See October 3, 2017 Letter from DBM Sec. Diokno to DOF Sec. Dominguez providing comments on the proposed financing cooperation agreement; supra note 45.

[118]Reflections dated July 11, 2022, pp. 66-22.

[119]CONSTITUTION, Article XII, Sec. 10; See Manila Prince Hotel v. Government Service Insurance System, 335 Phil. 82 (1997).

- [120]See *Intellectual Property Association of the Philippines v. Ochoa*, 790 Phil. 276, 300-301 (2016).
- [121]*Social Security System v. Seno. Jr.*, G.R. No. 183478, February 10, 2020.
- [122]*Commissioner of Internal Revenue v. Puregold Duty Free, Inc.*, 761 Phil. 419, 440 (2015).
- [123]Reflections dated July 26, 2022, pp. 2-3.
- [124]CONSTITUTION, Article XII, Sec. 10. (Underscoring supplied).
- [125]CONSTITUTION, Art. XII, Section 13.
- [126]Rollo (G.R. No. 245981), Vol. 1, pp. 44-SS: rollo (G.R. No. 246594), pp. 44-46.
- [127]Rollo (G.R. No. 245981), Vol. 1, pp. 425-428.
- [128]CONSTITUTION, Art. II, Sec. 7.
- [129]Rollo (G.R. No. 245981), Vol. 1, pp. 256-270; rollo (G.R. No. 246594), pp. 278-295, 424-426.
- [130]Rollo (G.R. No. 245981), Vol. 1, p. 424.
- [131]*Ermita-Malate Hotel and Motel Operators Association. Inc. v. City Mayor of Manila*, 127 Phil. 306, 322 (1967).
- [132]*Spouses Pascual v. Ramos*, 433 Phil. 449, 460 (2002).
- [133]717 Phil. 337 (2013).
- [134]*Id.* at 361.
- [135]*Strickland v. Ernst & Young LLP*, 838 Phil. 25, 46 (2018).
- [136]*Bases Conversion Development Authority v. DMCI Project Developers, Inc.*, 776 Phil. 192, 205 (2016).
- [137]478 Phil. 269 (2004).
- [138]*Id.* at 288-289. (Citations omitted).
- [139]*Alcala Vda. de Alcañeses v. Alcañeses*, G.R. No. 187847, June 30, 2021; *Continental Micronesia, Inc. v. Basso*, 770 Phil. 201, 220-222 (2015); *Saudi Arabian Airlines v. Court of Appeals*, 358 Phil. 105, 125 (1998).
- [140]Concurring Opinion, pp. 5-7.
- [141] *Orion Savings Bank v. Shigekane Suzuki*, 746 Phil. 971, 984 (2014) states that "However, the party invoking the application of a foreign law has the burden of proving the foreign law. The foreign law is a question of fact to be properly pleaded and proved as the judge cannot take judicial notice of a foreign law. He is presumed to know only domestic or the law of the forum." (Citations omitted).

DISSENTING OPINION

LEONEN, J.:

Philippine history tells us that an unbridled discretion on the part of the government to enter into a foreign loan and contracting agreements have often led to the imposition of more burden on the Filipinos, which we carry to this day. To protect against these dangers, the 1987 Constitution has placed several safeguards that will ensure

transparency and accountability in the government. These also guarantee that all undertakings of the government will always be in the best interest of the Filipino people.

Petitioners assail the constitutionality of the Preferential Buyer's Credit Loan Agreements on the Chico River Pump Irrigation Project (Chico River Pump Loan Agreement), and the New Centennial Water Source- Kaliwa Dam Project (New Centennial Loan Agreement) (collectively, the Loan Agreements) entered into by the Philippine government and the Chinese-government owned Export-Import Bank of China (EXIM Bank). They argue that the Loan Agreements violate several provisions of the 1987 Constitution, such as the provisions on prior concurrence from the Monetary Board and the Filipino First policy.[1]

The majority has chosen to uphold the loan agreements' constitutionality by ruling that the process involved in finalizing these contracts complied with the prevailing measures set by the Constitution and procurement laws. However, a reading of the Loan Agreements shows that these contain glaring defects that transgress the very safeguards placed by the Constitution to protect against disadvantageous transactions for the Filipino people.

On this account and with respect to my colleagues, I disagree with the majority's position. The execution of the Loan Agreements failed to comply not only with the Constitution, but applicable laws as well. It must be stricken down as unconstitutional.

I

Article VIII, Section 1 of the 1987 Constitution provides the definition and scope of this Court's power of judicial review. It states:

Section I. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

Francisco, Jr. v. House of Representatives,[2] citing Justice Jose P. Laurel, characterized judicial review as the "moderating power" to "determine the proper allocation of powers of the different branches of government[.]"[3] It includes the duty of this Court to determine whether the acts of the "two coordinate branches have adhered to the mandate of the fundamental law." [4]

In Angara v. Electoral Commission,[5] this Court clarified that in exercising its power of judicial review, the judiciary is not asserting superiority over the other branches of the government but merely ensures that the allocated constitutional boundaries are followed. Its checks and balance mechanism guarantees that no department exceeds its constitutionally allocated power, thus:

But in the main, the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government. The overlapping and interlacing of functions and duties between the several departments, however, sometimes makes it hard to say just where the one leaves off and the other begins. In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In cases of conflict, the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral or constituent units thereof.

As any human production, our Constitution is of course lacking perfection and perfectibility, but as much as it was within the power of our people, acting through their delegates to so provide, that instrument which is the expression of their sovereignty however limited, has established a republican government intended to operate

and function as a harmonious whole, under a system of checks and balances, and subject to specific limitations and restrictions provided in the said instrument. The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms. Certainly, the limitations and restrictions embodied in our Constitution are real as they should be in any living constitution. In the United States where no express constitutional grant is found in their constitution, the possession of this moderating power of the comts, not to speak of its historical origin and development there, has been set at rest by popular acquiescence for a period of more than one and a half centuries. In our case, this moderating power is granted, if not expressly, by clear implication from section 2 of article VIII of our Constitution.

The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed "judicial supremacy" which properly is the power of judicial review under the Constitution. Even then, this power of judicial review is limited to actual cases and controversies to be exercised after full opportunity of argument by the parties, and limited further to the constitutional question raised or the very *lis mota* presented. Any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions of wisdom, justice or expediency of legislation. More than that, courts accord the presumption of constitutionality to legislative enactments, not only because the legislature is presumed to abide by the Constitution but also because the judiciary in the determination of actual cases and controversies must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of the government.[6]

Under the present constitution, judicial review is no longer limited to the authority to settle actual controversies. It now includes 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." The incorporation of this new power was meant to narrow the reach of the political question doctrine and "[to] broaden the scope of judicial inquiry[.]"[7] *Saguisag v. Ochoa, Jr.*,[8] teaches:

The power of judicial review has since been strengthened in the 1987 Constitution. The scope of that power has been extended to the determination of whether in matters traditionally considered to be within the sphere of appreciation of another branch of government, an exercise of discretion has been attended with grave abuse. The expansion of this power has made the political question doctrine "no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review." [9] (Citations omitted)

Nonetheless, this Court's power of judicial review is not without limitations. Redress from this Court may be had only upon a showing of the existence of the following requisites:

Like almost all powers conferred by the Constitution, the power of judicial review is subject to limitations, to wit: (1) there must be an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have the standing to question the validity of the subject act or issuance; otherwise stated, he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest

opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.[10] (Citations omitted)

Among these requisites, the existence of an actual case or controversy is the most crucial and a requirement demanded by the Constitution itself.

Jurisprudence dictates an actual case or controversy arises when the proceedings present "a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished from a hypothetical or abstract difference or dispute." [11] The requirement was explained in *Guingona, Jr. v. Court of Appeals*: [12]

An actual case or controversy exists when there is a conflict of legal rights or an assertion of opposite legal claims, which can be resolved on the basis of existing law and jurisprudence. A justiciable controversy is distinguished from a hypothetical or abstract difference or dispute, in that the former involves a definite and concrete dispute touching on the legal relations of parties having adverse legal interests. A justiciable controversy admits of specific relief through a decree that is conclusive in character, whereas an opinion only advises what the law would be upon a hypothetical state of facts. [13] (Citations omitted)

The requirement of an actual case demands that the issues presented must not be conjectural or speculative. Nor must it have been rendered moot by the occurrence of supervening events making the resolution of the case of no practical value. *Reyes v. Insular Life Assurance Co., Ltd.* [14] teaches:

The existence of an actual case or controversy is a condition precedent for the court's exercise of its power of adjudication. An actual case or controversy exists when there is a conflict of legal rights or an assertion of opposite legal claims between the parties that is susceptible or ripe for judicial resolution. In negative terms, a justiciable controversy must neither be conjectural nor moot and academic. There must be a definite and concrete dispute touching on the legal relations of the parties who have adverse legal interests. The reason is that the issue ceases to be justiciable when a controversy becomes moot and academic; otherwise, the court would engage in rendering an advisory opinion on what the law would be upon a hypothetical state of facts. The disposition of the case would not have any practical use or value as there is no actual substantial relief to which the applicant would be entitled to and which would be negated by the dismissal or denial of the petition. [15] (Citations omitted)

The danger in deciding a case that has been rendered moot is that the ruling would be a mere "academic disquisition on a hypothetical problem." [16] Further, "[t]he judgment will not serve any useful purpose or have any practical legal effect because, in the nature of things, it cannot be enforced." [17]

Apart from avoiding the rendition of advisory opinions, the need for an actual case or controversy is based on the respect for the principle of separation of powers [18] which "ordains that each of the three great branches of government has exclusive cognizance of and is supreme in matters falling within its own constitutionally allocated sphere." [19]

For these reasons, courts generally decline to assume jurisdiction over cases that do not present judicial controversy and are deemed moot. However, the rule admits exceptions. In *Republic v. Moldex Realty, Inc.*, [20] we held:

It is true that this court does not always refuse to assume jurisdiction over a case that has been rendered moot and academic by supervening events. Courts assume jurisdiction over cases otherwise rendered moot and academic when any of the following instances are present:

- (1) Grave constitutional violations;
- (2) Exceptional character of the case;
- (3) Paramount public interest;

(4) The case presents an opportunity to guide the bench, the bar, and the public; or

(5) The case is capable of repetition yet evading review.[21] (Citations omitted)

In this case, I agree with the majority that petitioners' plea for producing relevant documents relating to the loan agreements has been rendered moot[22] since respondents gave them copies of the requested documents, and the loan agreements are now available online.[23]

I further agree that the exceptional character of the case and the paramount public interest involved warranting the resolution of the issue regarding petitioners' right to access and production of the requested documents.[24] The loan agreements involve significant amounts of public funds, which will be used to finance the construction of an irrigation project and the development of a new source of water.[25]

Additionally, it must be stressed that the Loan Agreements subject of this case were executed pursuant to the Memorandum of Understanding on Financing Cooperation (Memorandum of Understanding) between the Republic of the Philippines and EXIM Bank. The majority pointed out the Memorandum of Understanding between is a "precursor agreement" to more detailed loan agreements involving Philippine infrastructure projects.[26] As there is a possibility that new loan agreements will be executed pursuant to the Memorandum of Understanding, this case presents an opportunity for this Court to "formulate controlling principles relative to the issues raised herein to guide the bench, the bar, and the public[.]"[27] The need to craft guiding principles will aid the government in resolving the issue concerning access to new loan agreements executed under the Memorandum of Understanding.

Accordingly, while the issue is rendered moot, it is appropriate to discuss the alleged violation of petitioners' right to information.

II

I agree with the majority that the Confidentiality Clauses contained in the Loan Agreements violate the right to information. Article III, Section 7 of the 1987 Constitution provides for the right of the people to information. It states:

ARTICLE III

Section 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.

This provision is complemented by Article II, Section 28 which expresses the State's "policy of public disclosure" of all the transactions of the Government:[28]

ARTICLE II

Section 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving following public interest.

According to petitioners, these constitutional provisions are violated by the Confidentiality Clauses found in the Loan Agreements.

Respondents counter that the provisions pertaining to the right to information are not immediately operational and cannot be invoked directly by petitioners to dispute the constitutionality of the Confidentiality Clause absent an enabling law.

The language of the contentious clauses of the Loan Agreement state:

The Borrower shall keep all the terms, conditions and the standard fees hereunder or in connection with this Agreement, strictly confidential. Without the prior written consent of the Lender, the Borrower shall not disclose any information hereunder or in connection with this Agreement / to any third party unless required to be disclosed by the Borrower to any courts of competent jurisdiction, relevant regulatory bodies, or any government institution and/or instrumentalities of the Borrower in accordance with any applicable Philippine law.[29]

In my dissenting opinion in *De-Leon v. Duterte*,^[30] I highlighted the significant purpose of the constitutional guarantee to information on matters relating to public concern:

The freedom of information is the instrument that empowers the people. The right to information is so central to a representative government such as ours that it was integrated as an enforceable constitutional right. It was enunciated in *Legaspi v. Civil Service Commission*:

The incorporation in the Constitution of a guarantee of access to information of public concern is a recognition of the essentiality of the free flow of ideas and information in a democracy[.] In the same way that free discussion enables members of society to cope with the exigencies of their time[,], access to information of general interest aids the people in democratic decision-making. . . by giving them a better perspective of the vital issues confronting the nation.

It is the access to information that appraises the people of their leader's actions and gives the citizens an opportunity to shape the landscape they live in by making informed decisions. It makes them capable of exercising their rights and protecting the same against actions of the state. The access of a citizen to information is a basic requirement for the functioning of a democratic society.^[31] (Citations omitted)

Transparency in government dealings, such as contracting foreign loans, is pivotal in implementing the public policy of "full public disclosure"^[32] and ensuring that the Filipino people remain knowledgeable and involved in the transactions entered into by the government.

The scope of this constitutional guarantee to the right to information covers matters of public concern. In *Legaspi v. Civil Service Commission*,^[33] this Court explained what matters may be the subject of this provision:

In determining whether or not a particular information is of public concern there is no rigid test which can be applied. 'Public concern' like 'public interest' is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.^[34] (Emphasis supplied)

Though the scope of matters covering public concern may be broad, *Chavez v. Presidential Commission on Good Governance*^[35] identifies certain topics that may not be divulged to the public, namely: national security matters, trade secrets, banking transactions, criminal matters, and other confidential matters such as diplomatic correspondence,^[36] closed-door Cabinet meetings, and Supreme Court deliberations.^[37]

As these present Petitions deal with foreign loans, it cannot be denied that these are matters of public concern as it will directly affect the lives of the Filipinos who are effectively carrying the responsibility to repay these debts. Foreign loans are not within those identified in jurisprudence as a limitation to the right to information. No less than the Constitution requires that information regarding foreign loans should be made accessible to the public:

ARTICLE XII

Section 21. Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the government shall be made available to the public.[38] (Emphasis supplied)

It must be stressed that contrary to respondents' position, there is no need for an enabling law to invoke the aforementioned constitutional provision. The language of the Constitution is clear and without any ambiguity. Copies of the documents pertaining to foreign loan transactions that the government ought to incur should always remain accessible to the public. It is the public's, as taxpayers, hard-earned money that is at stake. As the public is a crucial participant in meeting the obligations involved in foreign loans, they are entitled, under the Constitution, to know the process involved in contracting these loans.

III

Petitioners next allege that the public respondents failed to secure the prior concurrence of the Monetary Board in undertaking the Loan Agreements. They pointed out that there appears to be a circumvention in the stipulations in the Loan Agreements where the parties may belatedly obtain the approval of the Monetary Board, thus negating the requirement of prior concurrence under the 1987 Constitution.

Respondents countered these arguments by contending that they followed the process of obtaining the approval of the Monetary Board as outlined in the relevant regulations.

I have to strongly disagree with the position of the majority that "[i]t is only the Approval-in-Principle, which strictly speaking, entails prior action from the "[Monetary Board]."[39] This statement makes it appear that the participation of the Monetary Board is only confined during the Approval-in-Principle stage, where only indicative financial terms have been discussed. I fear this interpretation will greatly undermine the Final Approval stage, where the parties' actual agreements and source of obligation exist.

Prior to the 1987 Constitution, the only limitations placed on the power of the President to contract foreign loans on behalf of the Philippines were those provided by law.[40] At that time, the prevailing regulations on contracting foreign loans were Republic Act No. 4860[41] and Letter of Instructions No. 158, series of 1974. The salient provisions of Republic Act No. 4860 state:

SECTION 1. The President of the Philippines is hereby authorized in behalf of the Republic of the Philippines to contract such loans, credits and indebtedness with foreign governments, agencies or instrumentalities of such foreign governments, foreign financial institutions, or other international organizations, with whom, or belonging to countries with which, the Philippines has diplomatic relations, as may be necessary and upon such terms and conditions as may be agreed upon, to enable the Government of the Republic of the Philippines to finance, either directly or through any government office, agency or instrumentality or any government-owned or controlled corporation, industrial, agricultural or other economic development purposes or projects authorized by law: Provided, That at least seventy-five per cent shall be spent for purposes or projects which are revenue-producing and self-liquidating, such as electrification, irrigation, river control and drainage, telecommunication, housing, construction and improvement of highways and bridges, airports, ports and harbors, school buildings, waterworks and artesian wells, air navigation facilities, development of fishing industry, and others: Provided, That such foreign loans shall be used to meet the foreign exchange requirements or liabilities incurred in connection with said development projects to cover the cost of equipment, related technical services and supplies, where the same are not obtainable within the Philippines at competitive prices as well as part of the pesos costs, other than working capital and operational expenses not exceeding twenty per cent of the loan: Provided, further, That in the case of roads, bridges, irrigation, portworks, river control, airports, and power, the amount shall not exceed seventy per cent of the loan.

The authority of the President of the Philippines as herein provided shall include the power to issue, for the purposes hereinbefore stated, bonds for sale in the international markets the income from which shall be fully tax- exempt in the Philippines.

SECTION 2. The total amount of loans, credit and indebtedness, excluding interests, which the President of the Philippines is authorized to incur under this Act shall not exceed one billion United States dollars or its equivalent in other foreign currencies at the exchange rate prevailing at the time the loans, credits and indebtedness are incurred: Provided, however, That the total loans, credits and indebtedness incurred under this Act shall not exceed two hundred fifty million in the fiscal year of the approval of this Act, and two hundred fifty million every fiscal year thereafter, all in United States dollars or its equivalent in other currencies.

All loans, credits and indebtedness under the preceding section shall be incurred only for particular projects in accordance with the approved economic program of the Government and after the plans of such projects shall have been prepared by the offices or agencies concerned, recommended by the National Economic Council and the Monetary Board of the Central Bank of the Philippines, and approved by the President of the Philippines.

Meanwhile, Letter of Instructions No. 158, series of 1974, provides:

- All foreign borrowing proposals of the Government, Government Agencies and government financial institutions shall be submitted to the Central Bank for approval in principle by the Monetary Board as to purpose and credit terms among others, before commencement of actual negotiations.
- Actual negotiations for such foreign credits and/or accommodations shall be conducted by the Secretary of Finance and/or Central Bank Governor or their duly authorized representatives of the Government, government agencies and government financial institutions or entities concerned.

A reading of these policies would show that the participation of the Monetary Board in contracting foreign loans was already sought in relation to the other conditions prescribed by law even before the President may / contract foreign loans. However, these restrictions proved futile as the country became largely indebted to various foreign banks. This resulted from the massive loans incurred by then President Ferdinand Marcos with little or no oversight, even with the involvement of the Monetary Board.[42]

To protect the country from being gravely indebted once again, the 1987 Constitution placed safeguards that would ensure accountability on the part of the President and transparency regarding the status of the foreign loans.

Article VII, Section 20 of the Constitution provides:

Section 20. The President may contract or guarantee foreign loans in behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board and subject to such limitations as may be provided under law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law. (Emphasis supplied)

Article XII, Section 21 of the Constitution states:

Section 21. Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public. (Emphasis supplied)

By codifying the role of the Monetary Board in contracting foreign loans, the 1987 Constitution recognized the responsibility of the Monetary Board to ensure the capacity of the country to meet its obligations and to alleviate the burden of the Filipino public in paying back the loans that the government has incurred. Thus, the Monetary Board is also bound by the measures established by law before it provides its prior concurrence.

The majority enumerates the various regulations in implementing the authority of the Monetary Board to provide its prior concurrence to a foreign loan.[43] Republic Act No. 7653,[44] as amended by Republic Act No. 11211,[45] requires that before a foreign loan may be contracted, the Monetary Board shall release an opinion, upon the request of the government through the Secretary of Finance, regarding "the probable effects of the proposed operation on monetary aggregates, the price level, and the balance of payments"[46] which shall be based on "on the gold and foreign exchange resources and obligations of the nation and on the effects of the proposed operation on the balance of payments and on monetary aggregates." [47]

In relation, the Monetary Board shall also comply with the procedure established under the Bangko Sentral ng Pilipinas (Bangko Sentral) Rules on Foreign Exchange Transactions[48] (Foreign Exchange Regulations),[49] which outlines the three stages involved in the approval of public sector foreign loans, namely:

- a. Approval-In-Principle - which refers to the approval granted by the Monetary Board (MB) to the indicative financial terms and purpose of the loan. Prior to commencement of actual negotiations or issuance of a mandate of commitment to foreign funders/arrangers, the borrower is required to secure the BSP approval-in-principle of its proposed foreign loan;
- b. Finalization and clearance of loan documents; and
- c. Final Approval - which refers to the approval granted by the [Monetary Board] to a loan previously approved-in-principle after its terms have been finalized and found consistent with the terms approved-in-principle, the covering loan agreement signed, and other preconditions for final approval have been complied with. The MB final approval authorizes the borrower to draw on the loan/issue the bonds/notes/securities involved.[50]

The majority states that among the stages in approving foreign loans, It IS "only the Approval-in-Principle, which strictly speaking, entails prior action from the [Monetary Board.]"[51] However, to my mind, this may have diminished the crucial role imposed by the 1987 Constitution on the Monetary Board in providing prior concurrence.

Although the 1973 Constitution does not explicitly mention the involvement of the Monetary Board in contracting foreign loans, its approval was still sought under Letter of Instructions No. 158, series of 1974. In particular, the regulation directed that "[a]ll foreign borrowing proposals of the Government, Government Agencies and government financial institutions shall be submitted to the Central Bank for approval in principle by the Monetary Board as to purpose and credit terms, among others, before the commencement of actual negotiations." [52]

It is worthy to note that the phrase "approval in principle" already appeared in the language of the Letter of Instruction No. 158, series of 1974, in that the Monetary Board has been providing these even prior to the 1987 Constitution. However, as previously discussed, the volume of foreign loans incurred was not controlled despite the Monetary Board's approval in principle. The amounts of indebtedness ballooned to the point that the obligation of the Filipino people to repay these loans persists to this day. As such, the 1987 Constitution rectified this by imposing that the prior concurrence of the Monetary Board shall be first secured before the government enters into a foreign loan agreement.

If it is indeed only the "approval in principle" that would suffice in the process of securing the prior concurrence of the Monetary Board, then the 1987 Constitution would not have placed great emphasis on the role of the Monetary Board in the process of contracting public sector foreign loans.

The regulations enacted after the promulgation of the 1987 Constitution prove the Monetary Board's increased role in obtaining foreign loans that would not only be confined to approving the foreign loan proposals. Under Republic Act No. 7653, as amended by Republic Act No. 11211, the Monetary Board is required to study the

terms of the proposal and provide an opinion. The Foreign Exchange Regulations also directed the Monetary Board to provide a Final Approval to complete the process of giving its prior concurrence.

These are in line with the mandate of the Bangko Sentral to "(1) maintain price stability and financial stability; and (2) promote and maintain monetary stability and convertibility of the peso." [53] Thus, the Monetary Board of the Bangko Sentral is responsible in monitoring the country's repayment capacity. It carefully reviews and analyzes the foreign loan proposals and their implications for the economy. [54]

It would then be difficult to state that the crucial role of the Monetary Board is only required at the first stage or when it gives it Approval-in- Principle. At this point, only the "indicative financial terms and purpose of the loan" are available. In applying for the Approval-in-Principle, the government agency in charge is tasked to submit forms prescribed by the Bangko Sentral, which only require minimal details regarding the proposed loan. [55] No actual negotiations of the actual terms of the loan contract have been conducted. The Approval-in-Principle only allows the implementing agency of the government, as the borrower, to commence the negotiations with the lending institution.

A reading of Resolution Nos. 305 and 1581, which embody the Approval-in-Principle of the Monetary Board for the Chico River Pump Loan Agreement and New Centennial Loan Agreement, respectively, show that only bare information of the loan proposals was provided, such as (1) the identity of the borrower and creditor; (2) loan amount; (3) brief description of the project; (4) maturity; and (5) interest rate. Actual payment terms and other obligations of the Philippines, as the borrower, were not yet provided.

Thus, the third stage - Final Approval - is the most critical in obtaining the prior concurrence of the Monetary Board under the 1987 Constitution. At this point, the actual loan contract exists where the terms are established and the obligations of the Philippines, as the borrower, are determined.⁵⁶ This is where the Monetary Board conducts its full review of the loan contract to be undertaken by the Philippine government. Without a contract, the Monetary Board cannot be considered to have given its prior concurrence as contemplated under the 1987 Constitution.

The danger in pronouncing that it is only the Approval-in-Principle that is necessary to comply with the requirement under the 1987 Constitution is that it weakens the importance of the Final Approval stage and the presence of an actual contract before the Monetary Board provide its prior concurrence. The Final Approval may be mistakenly understood as an automatic action or even an after-thought on the part of the Monetary Board when there are still numerous factors to be analyzed at this stage, such as the compliance of the terms of the final loan contract with the preconditions provided by the Monetary Board, among others.

In addition, there is nothing in the relevant laws and regulations that would suggest that it is only at the Approval-in-Principle stage where prior action from the Monetary Board is needed.

The inclusion in the 1987 Constitution of the requirement regarding the prior concurrence of the Monetary Board in contracting foreign loans must be viewed as an important protection against the possibility that the country may be gravely indebted again. Therefore, the Monetary Board must be considered a significant actor in every stage of the negotiation and approval process, and not only at the Approval-in-Principle stage where no actual contract yet exists.

IV

Finally, I am likewise unable to join the majority in its ruling that the Loan Agreements do not violate the constitutional policy of giving preference to qualified Filipinos. The preference given to Chinese contractors contravenes the Filipino First Policy enshrined in our fundamental law.

Article XII, Section 10 of the 1987 Constitution expresses the policy of our State to ensure that qualified Filipinos are given preference in granting rights and privileges, among others. It states:

Section 10. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

Dubbed the Filipino First Policy, this Constitutional provision is not merely a guiding principle,[57] but a positive command addressed to all branches of the government. It is a directive that must be brought into play not only in legislative acts, but in every undertaking of the State.[58]

This Constitutional policy results from our nationalism, a concept inherent in our democratic and republican forms of government. It is a notion that instills the attitude of ensuring that our country's development and the Filipino's welfare are the primordial considerations.[59] The policy was discussed in *Manila Prince Hotel v. Government Service Insurance System*: [60]

The Filipino First Policy is a product of Philippine nationalism. It is embodied in the 1987 Constitution not merely to be used as a guideline for future legislation but primarily to be enforced; so must to be enforced. This Court as the ultimate guardian of the Constitution will never shun, under any reasonable circumstance, the duty of upholding the majesty of the Constitution which it is tasked to defend. It is worth emphasizing that it is not the intention of this Court to impede and diminish, much less undermine, the influx of foreign investments. Far from it, the Court encourages and welcomes more business opportunities but avowedly sanctions the preference for Filipinos whenever such preference is ordained by the Constitution. The position of the Court on this matter could have not been more appropriately articulated by Chief Justice Narvasa [.]

Privatization of a business asset for purposes of enhancing its business viability and preventing further losses, regardless of the character of the asset, should not take precedence over non-material values. A commercial, nay even a budgetary, objective should not be pursued at the expense of national pride and dignity. For the Constitution enshrines higher and nobler non-material values. Indeed, the Court will always defer to the Constitution in the proper governance of a free society; after all, there is nothing so sacrosanct in any economic policy as to draw itself beyond judicial review when the Constitution is involved.

Nationalism is inherent in the very concept of the Philippines being a democratic and republican state, with sovereignty residing in the Filipino people and from whom all government authority emanates. In nationalism, the happiness and welfare of the people must be the goal. The nation-state can have no higher purpose. Any interpretation of any constitutional provision must adhere to such basic concept. Protection of foreign investments, while laudable, is merely a policy. It cannot override the demands of nationalism.[61] (Emphasis supplied and citations omitted.)

It must, however, be clarified that "[n]ationalism is not a mindless ideal." The constitutional mandate of giving preference to qualified Filipinos does not constitute a prohibition on the entry of foreign investment in the Philippines.[62] *Tañada v. Angara*[63] teaches:

All told, while the Constitution indeed mandates a bias in favor of Filipino goods, services, labor and enterprises, at the same time, it recognizes the need for business exchange with the rest of the world on the

bases of equality and reciprocity and limits protection of Filipino enterprises only against foreign competition and trade practices that are unfair. In other words, the Constitution did not intend to pursue an isolationist policy. It did not shut out foreign investments, goods and services in the development of the Philippine economy. While the Constitution does not encourage the unlimited entry of foreign goods, services and investments into the country, it does not prohibit them either. In fact, it allows an exchange on the basis of equality and reciprocity, frowning only on foreign competition that is unfair. (Citations omitted)

Likewise, in *National Federation of Hog Farmers, Inc. v. Board of Investments*:^[64]

Nationalism is not a mindless ideal. It should not unreasonably exclude people of a different citizenship from participating in our economy. If it were so, nationalism will not foster social justice; rather, it will sponsor a kind of racism quite like what our ancestors had suffered from in our colonial past.^[65]

That our fundamental law does not foster an isolationist policy is further reinforced by the following constitutional provisions:

ARTICLE II STATE POLICIES

Section 7. The State shall pursue an independent foreign policy. In its relations with other states, the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.

ARTICLE XII NATIONAL ECONOMY AND PATRIMONY

Section 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full of efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.

Section 13. The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.

These constitutional provisions tacitly recognize the need for foreign investment as a means to achieve our goal of economic development. These provisions demonstrate that "the Philippines adopts a liberal approach in allowing foreign investments to enter the country."^[66] Accordingly, I agree with the majority that the mere awarding of the projects to foreign investors does not constitute a violation of the Filipino First Policy.^[67] To reiterate, while the Constitution mandates that preference be given to qualified Filipinos, it "recognizes the need for business exchange with the rest of the world[.]"^[68]

This notwithstanding, it is my opinion that limiting the projects to Chinese contractors without giving qualified Filipinos an equal opportunity to participate constitutes a violation of the Filipino First Policy under Article XII, Section 10.

To my mind, this constitutional mandate of giving preference to qualified Filipinos will be rendered nugatory if in the field of public bidding involving projects of wide magnitude and primordial concern to our country, qualified Filipinos will not be permitted to at least be given the same prerogative of participating. In any case, individuals or corporations who wish to participate in the bidding process will be required to comply with certain requirements to ascertain their capability.

Manila Prince Hotel expounded on the importance of this constitutional provision.^[69] The case involved the sale of 51% of the shares of the Manila Hotel Corporation through close bidding participated by petitioner and Renong Berhad (Berhad), a Malaysian firm. During the bidding conducted by Government Service Insurance System, the price per share tendered by Berhad was considered higher than that offered by petitioner.^[70]

Subsequently, petitioner wrote to Government Service Insurance System offering to match the tendered bid price of Berhad. When Government Service Insurance System refused to accept, petitioner filed before this Court a petition for prohibition and mandamus, seeking, among others, to enjoin respondent Government Service Insurance System from perfecting and consummating the sale of the shares to Berhad.^[71]

In ruling for petitioner, this Court decreed that Article XII, Section 10 of the Constitution is deemed a sufficient reason not to award the shares to the foreign bidder notwithstanding its submission of the highest price, thus:

It should be stressed that while the Malaysian firm offered the higher bid it is not yet the winning bidder. The bidding rules expressly provide that the highest bidder shall only be declared the winning bidder after it has negotiated and executed the necessary contracts, and secured the requisite approvals. Since the Filipino First Policy provision of the Constitution bestows preference on qualified Filipinos the mere tending of the highest bid is not an assurance that the highest bidder will be declared the winning bidder. Resultantly, respondents are not bound to make the award yet, nor are they under obligation to enter into one with the highest bidder. For in choosing the awardee respondents are mandated to abide by the dictates of the 1987 Constitution the provisions of which are presumed to be known to all the bidders and other interested parties.

Adhering to the doctrine of constitutional supremacy, the subject constitutional provision is, as it should be, impliedly written in the bidding rules issued by respondent GSIS, lest the bidding rules be nullified for being violative of the Constitution. It is a basic principle in constitutional law that all laws and contracts must conform with the fundamental law of the land. Those which violate the Constitution lose their reason for being.

Paragraph V. J. 1 of the bidding rules provides that [i]f for any reason the Highest Bidder cannot be awarded the Block of Shares, GSIS may offer this to other Qualified Bidders that have validly submitted bids provided that these Qualified Bidders are willing to match the highest bid in terms of price per share. Certainly, the constitutional mandate itself is reason enough not to award the block of shares immediately to the foreign bidder notwithstanding its submission of a higher, or even the highest, bid. In fact, we cannot conceive of a stronger reason than the constitutional injunction itself.

In the instant case, where a foreign firm submits the highest bid in a public bidding concerning the grant of rights, privileges and concessions covering the national economy and patrimony, thereby exceeding the bid of a Filipino, there is no question that the Filipino will have to be allowed to match the bid of the foreign entity. And if the Filipino matches the bid of a foreign firm the award should go to the Filipino. It must be so if we are to give life and meaning to the Filipino First Policy provision of the 1987 Constitution. For, while this may neither be expressly stated nor contemplated in the bidding rules, the constitutional fiat is omnipresent to be simply disregarded. To ignore it would be to sanction a perilous skirting of the basic law.

This Court does not discount the apprehension that this policy may discourage foreign investors. But the Constitution and laws of the Philippines are understood to be always open to public scrutiny. These are given factors which investors must consider when venturing into business in a foreign jurisdiction. Any person therefore desiring to do business in the Philippines or with any of its agencies or instrumentalities is presumed

to know his rights and obligations under the Constitution and the laws of the forum.[72] (Emphasis in the original and citations omitted)

Notably, in resolving the issue in *Manila Prince Hotel*, this Court applied the doctrine of constitutional supremacy, which dictates that the Constitution is the fundamental law of the land that establishes not only our governmental framework, the duties and responsibilities of each department but likewise, the "principles on which [our] government is founded." [73] Being the paramount and supreme law of the nation, its provisions are "deemed written in every statute and contract." All laws, rules, and contracts, regardless if "promulgated by the legislative or by the executive branch or entered into by private persons for private purposes," [74] must be in conformity with the Constitution. Otherwise, they shall be deemed "void and without any force and effect." [75]

The doctrine of constitutional supremacy likewise applies to treaties and other agreements entered into by the executive branch of the government. In *Pangilinan v. Cayetano*, [76] this Court discussed:

The Constitution is the fundamental law of the land. It mandates the president to "ensure that the laws be faithfully executed." Both in negotiating and enforcing treaties, the president must ensure that all actions are in keeping with the Constitution and statutes. Accordingly, during negotiations, the president can insist on terms that are consistent with the Constitution and statutes, or refuse to pursue negotiations if those negotiations' direction is such that the treaty will turn out to be repugnant to the Constitution and our statutes. Moreover, the president should not be bound to abide by a treaty previously entered into should it be established that such treaty runs afoul of the Constitution and our statutes. [77] (Citations omitted)

In this regard, while I agree with the majority that Republic Act No. 9184 or the Government Procurement Reform Act and its implementing rules and regulations recognize that a different procurement procedure may be applied if agreed upon through a treaty or executive agreement, the wordings of the treaty or executive agreements must be in accordance with the provisions of the Constitution. [78] The alternative procedure adopted must conform with the constitutional mandate, particularly that which gives preference to qualified Filipinos.

Considering that no Filipino was given an opportunity to participate in the procurement process and only Chinese contractors were allowed to take part in the project, it is my opinion that the alternative mode of bidding procedure adopted by the parties is unconstitutional for being violative of the Filipino First Policy.

Let it not be forgotten that Filipino nationalism has always been a moving force within the annals of our history. It has evolved from being a rudimentary call for independence against external forces to being a disposition of ensuring that the welfare and development of the Philippines, and its citizens, be the State's primary objectives. Filipino nationalism has shaped our social, economic, and political identity. It ties every citizen into a mutual affinity, regardless of place and time.

Accordingly, I vote to GRANT the petitions.

[1] Ponencia, p. 1.

[2] 460 Phil. 830 (2003) [Per J. Carpio-Morales, En Banc].

[3] *Id.* at 880.

[4] J. Fernando, Dissenting and Concurring Opinion in *In re Aquino, Jr. v. Enrile*, 158-A Phil. 1 (1974) [Per C.J. Makalintal, En Banc].

[5] 63 Phil. 139 (1936) [Per J. Laurel, En Banc].

[6] *Id.* at 157.

- [7] *Marcos v. Manglapus*, 258 Phil. 479,506 (1989) [Per J. Cortes, En Banc].
- [8] 777 Phil. 280 (2016) [Per C.J. Sereno, En Banc].
- [9] *Id.* at 347-348. I
- [10] *Biraogo v. The Philippine Truth Commission of 2010*, 651 Phil. 374, 438 (2010) [Per J. Mendoza, En Banc].
- [11] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, 589 Phil. 387,481(2008) [Per J. Carpio-Morales, En Banc].
- [12] 354 Phil. 415 (1998) [Per J. Panganiban, First Division].
- [13] *Id.* at 481.
- [14] 731 Phil. 155 (2014) [Per J. Brion, Second Division].
- [15] *Id.* at 160.
- [16] *Guingona, Jr. v. Court of Appeals*, 354 Phil. 415, 420 (1998) [Per J. Panganiban, First Division].
- [17] *Philippine Savings Bank v. Senate Impeachment Court*, 699 Phil. 34, 36(2012) [Per J. Perlas-Bernabe, En Banc].
- [18] J. Leonen, Separate Opinion in *Council of Teachers and Staff of Colleges and Universities of the Philippines v. Secretary of Education*, G.R. Nos. 216930, 217451. 217752, 218045, 218098, 218123, & 218465, October 9, 2018, [Per J. Caguioa, En Banc]. See also J. Leonen, Separate Opinion in *Private Hospitals Association of the Philippines, Inc. v. Medialdea*, G.R. No. 234448, November 6, 2018, [Per J. Tijam, En Banc].
- [19] *Abakada Guro Party list v. Ermita*, 506 Phil. I, 107 (2005) [Per J. Austria-Martinez, En Banc].
- [20] 780 Phil. 553 (2016) [Per J. Leonen, Second Division].
- [21] *Id.* at 561.
- [22] Ponencia, pp. 13-14.
- [23] *Id.* at 23.
- [24] *Id.* at 14.
- [25] *New Centennial Water Source - Kaliwa Dam Project* (last accessed, July 8, 2022)
- [26] Ponencia, p. 3.
- [27] *Belgica v. Ochoa*, 721 Phil. 416, 524 (2013) [Per J. Perlas-Bernabe, En Banc].
- [28] *Bantay Republic Act or BA-RA 7941 v. Commission on Elections*, 551 Phil. 1,12 (2007) [Per J. Garcia, En Banc].
- [29] The wording of the Confidentiality Clause for both the Credit Loan Agreements on the Chico River Pump Irrigation Project and the New Centennial Water Source-Kaliwa Dam Project Loan Agreement are identical.
- [30] G.R. No. 252118, May 8, 2020 [En Banc].
- [31] J. Leonen, Dissenting Opinion in *De Leon v. Duterte*, G.R. No. 252118, May 8, 2020 < <https://sc.judiciary.gov.ph/12172/> > [En Banc].

[32]CONST., art. III sec. 7.

[33]234 Phil. 521 (1987) [Per J. Cortes, En Banc].

[34]Id. at 535

[35]360 Phil. 133 (1998) [Per J. Panganiban, First Division].

[36]Id. at 160.

[37]Id. at 162.

[38]CONST., at1. XII, sec. 12.

[39]Ponencia, p. 20.

[40]CONST. (1973) art. VII, sec. 12.

[41]An Act Authorizing the President of the Philippines to Obtain Such Foreign Loans And Credits, or to Incur Such Foreign Indebtedness, As May Be Necessary To Finance Approved Economic Development Purposes Or Projects. And To Guarantee, In Behalf of the Republic Of The Philippines, Foreign Loans Obtained Or Bonds Issued By Corporations Owned or Controlled by the Government of the Philippines For Economic Development Purposes Including Those Incurred For Purposes Of Re-Lending To The Private Sector, Appropriating The Necessary Funds Therefor, And For Other Purposes

[42]JOAQUIN G. BERNAS, S.J. THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 934 (2009 ED.)

[43]Ponencia, pp. 20-21.

[44]The New Central Bank Act.

[45]An Act Amending Republic Act Number 7653, Otherwise Known as "The New Central Bank Act", and for Other Purposes.

[46]Republic Act No. 7653, as amended by Republic Act No. 11211, Section 123.

[47]Republic Act No. 7653, as amended by Republic Act No. 11211, Section 123.

[48]Bangko Sentral ng Pilipinas Rules on Foreign Exchange Transactions, part V(B), 23 available al https://www.bsp.gov.ph/Media_and_Research/Primers%20Faqs/faqfxreg.pdf (last accessed August 19, 2022).

[49]Bangko Sentral ng Pilipinas Rules on Foreign Exchange Transactions, part V(B), 23 available at https://www.bsp.gov.ph/Media_and_Research/Primers%20Faqs/faqfxreg.pdf (last accessed August 19, 2022).

[50]Bangko Sentral ng Pilipinas Rules on Foreign Exchange Transactions, part V(B), 23 available at https://www.bsp.gov.ph/Media_and_Research/Primers%20Faqs/faqfxreg.pdf (last accessed August 19, 2022).

[51]Ponencia, p. 20.

[52]Letter of Instructions No. 158, I (1984).

[53]Bangko Sentral ng Pilipinas, International Operations Department, Primer on Foreign/Foreign Currency Loans/Borrowings, available at https://www.bsp.gov.ph/Lists/Download%20Section/Attachments/104/fxloan_primer.pdf (last accessed August 19, 2022)

[54]Bangko Sentral ng Pilipinas, International Operations Department. Primer on Foreign/Foreign Currency Loans/Borrowings, available at https://www.bsp.gov.ph/Lists/Download%20Section/Attachments/104/fxloan_primer.pdf (last accessed August 19, 2022)

[55]Bangko Sentral ng Pilipinas, Manual on Foreign Exchange Transactions, Section 23.3, available at <https://www.bsp.gov.ph/Regulations/MORFXT/MORFXTpdf> (last accessed August 19, 2022).

[56]Bangko Sentral ng Pilipinas Rules on Foreign Exchange Transactions, part V(B), 23 available at https://www.bsp.gov.ph/Media_and_Research/Primers%20Faqs/faqfxreg.pdf (last accessed July 7, 2022).

[57]J. Puno, Dissenting Opinion in Manila Prince Hotel v. Government Service Insurance System, 335 Phil. 82, 141 (1997) [Per J. Bellosillo, En Banc].

[58]Id. at 141-142.

[59]J. Padilla, Separate Opinion in Manila Prince Hotel v. Government Service Insurance System, 335 Phil. 82, 120 (1997) [Per J. Bellosillo, En Banc].

[60]335 Phil. 82 (1997) (Per J. Bellosillo, En Banc).

[61]Id. at 116-118.

[62]National Federation of Hog Farmers, Inc. v. Board of Investments, G.R. No. 205835, June 23, 2020 [Per J. Leonen, En Banc].

[63]338 Phil. 546, 585 (1997) [Per J. Panganiban, En Banc].

[64]G.R. No. 205835, June 23, 2020 [Per J. Leonen, En Banc].

[65]Id.

[66]G.R. No. 205835, June 23, 2020 [Per J. Leonen, En Banc].

[67]Ponencia, p. 26.

[68]Tañada v. Angara, 338 Phil. 546, 584 (1997) [Per J. Panganiban, En Banc].

[69]Manila Prince Hotel v. Government Service Insurance System, 335 Phil. 82 (1997) [Per J. Bellosillo, En Banc].

[70]Id. at 99.

[71]Id. at 98.

[72]Id. at 114-115.

[73]Id. at 101.

[74]Id.

[75]Id.

[76]G.R. Nos. 238875, 239483, & 240954, March 16, 2021, [Per J. Leon en, En Banc].

[77]Id.

[78]Ponencia, pp. 27-32.

SEPARATE CONCURRING OPINION

CAGUIOA, J.:

The Government of the Republic of the Philippines (GRP), represented by the Department of Finance (DOF), as borrower, and the Chinese government-owned Export-Import Bank of China (EXIM Bank), as lender, entered into Preferential Buyer's Credit Loan Agreements (Loan Agreements) to fund GRP-nominated priority infrastructure projects, namely The Chico River Pump Irrigation Project (CRPIP) and the New Centennial Water Source-Kaliwa Dam Project (NCWS).[1] These Loan Agreements were executed pursuant to the Memorandum of Understanding on Financing Cooperation (MOU), wherein the EXIM Bank agreed to make available financing to the GRP "to support projects to be mutually identified and agreed between the two Governments." [2]

Petitioners herein question the constitutionality of the Loan Agreements because they "supposedly lack prior concurrence from the [Bangko Sentral ng Pilipinas Monetary Board (BSP MB)]" [3] and the "conditions precedent to the release of funds allegedly defeat the constitutional policy to give preference to qualified Filipinos," [4] among others.

Ultimately, I concur with the ponencia that the Loan Agreements are valid and constitutional, and that the consolidated petitions should be denied accordingly. However, I submit this separate opinion to offer a nuanced discussion on the constitutional provisions regarding BSP MB's concurrence when contracting foreign loans, as well as the Filipino First policy.

Prior concurrence of the BSP MB

Section 20, Article VII of the Constitution provides:

The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law.
(Emphasis and underscoring supplied)

Petitioners insist that based on the language of the Constitution, the BSP MB should have given its full approval to the subject foreign loans before the corresponding Loan Agreements were executed.[5]

The BSP's approval process involves the "evaluation of loan proposals to determine implications of financial/credit proposals on monetary aggregates, balance of payments, international reserves, key debt indicators[,] and the [foreign exchange] market." [6] The three stages in the approval of public sector foreign loans are succinctly summarized by the BSP in its Rules on Foreign Exchange (FX) Transactions, to wit:

- Approval-In-Principle - which refers to the approval granted by the [BSP MB] to the indicative financial terms and purpose of the loan. Prior to commencement of actual negotiations or issuance of a mandate of commitment to foreign funders/arrangers, the borrower is required to secure the BSP [MB's] approval-in-principle of its proposed foreign loan;
- Finalization and clearance of loan documents; and
- Final Approval - which refers to the approval granted by the [BSP MB] to a loan previously approved-in-principle after its terms have been finalized and found consistent with the terms approved-in-principle, the covering loan agreement signed, and other preconditions for final approval have been complied with. The [BSP] MB final approval authorizes the borrower to draw on the loan/issue the bonds/notes/securities involved.[7]

Following the procedure set by the BSP, the CRPIP Loan Agreement was Approved-in-Principle by the BSP MB on February 22, 2018.[8] The Approval-in-Principle was "conditioned on certain documentary submissions, deposit arrangements, parameters for subsequent negotiations and approvals, and compliance with applicable laws." [9] Thereafter, the CRPIP Loan agreement was executed on April 10, 2018.[10] Through Resolution No. 813, the BSP MB gave its Final Approval on the loan amounting to \$62,086,837.82 on May 17, 2018.[11] On the other hand, the NCWS Loan Agreement was Approved-in- Principle on September 28, 2018, after imposing conditions necessary for Final Approval.[12] The NCWS Loan Agreement was executed on November 20, 2018.[13] After which, through Resolution No. 854, the BSP MB gave its Final Approval on the loan amounting to \$211,214,646.54 on June 6, 2019.[14]

According to petitioners, the Loan Agreements failed to comply with the prior concurrence requirement provided in the Constitution because they were executed even prior to the BSP MB giving its Final Approval. This is also the position adopted by Senior Associate Justice Marvic M.V.F. Leonen[15] (SAJ Leonen), viz.:

The danger in pronouncing that it is only the Approval-in-Principle that is necessary to comply with the requirement under the 1987 Constitution is that it may undermine the importance of the Final Approval stage and the presence of an actual contract before the Monetary [Board] provide its prior concurrence. The Final Approval may be mistakenly understood as an automatic action on the part of the Monetary Board when there are still factors to be analyzed at this stage, such as the compliance of the terms of the final loan contract with the pre-conditions provided by the Monetary Board, among others.[16] (Emphasis supplied)

As stated at the outset, I concur with the ponencia that the Loan Agreements complied with the prior concurrence requirement, and disagree with petitioners' restrictive interpretation of Section 20, Article VII of the Constitution. As applied in this case, the BSP MB 's Approval-in-Principle prior to the execution of the foreign loans already contained the conditions it deemed important to incorporate in the Loan Agreements - such that when such agreements were subsequently executed with the conditions of the BSP MB addressed and/or incorporated, then the execution of the Loan Agreements was in compliance with Section 20, Article VII of the Constitution, even if the Final Approvals of the BSP MB were given subsequent to the execution of the said Loan Agreements. To be sure, such Final Approvals would not have been given if the BSP MB were not satisfied with the final text of the Loan Agreements.

In this regard, as aptly observed by the ponencia, based on the Constitutional Commission deliberations, the requirement to obtain prior BSP MB concurrence was placed as a middle ground[17] and "is intended to strike [a] balance between prudence and expediency in public sector foreign borrowings,"[18] to wit:

x x x if we were to be very strict with the President so much so that by the time the authorities here or the legislative give their consent, that foreign loan sought to be contracted is no longer available, or the purpose which it was intended to subserve is already academic.[19]

In light of the foregoing, the insistence on obtaining full approval, i.e., Final Approval from the BSP MB prior to the execution of foreign loan agreements is inconsistent with the intent of the framers of our Constitution as it imposes a very strict, time-consuming, and crippling approval mechanism. In this case, for instance, it took the BSP MB several months from issuing its Approval-in-Principle before it gave its Final Approval for the CRPIP and NCWS Loan Agreements.

In any case, I submit that the apprehensions of petitioners, as well as the fears expressed by SAJ Leonen are more apparent than real considering that there are measures in place to ensure that the BSP MB's full approval is still obtained. Based on the Manual of Regulations on Foreign Exchange Transactions, as updated, "requests for [F]inal [A]pproval of a loan must be filed after signing of the loan/borrowing documents but before drawdown/receipt of proceeds from [the loan]."[20] Accordingly, the GRP is required to first obtain the Final

Approval from the BSP MB before it can receive the proceeds from its loan with the EXIM Bank and actually incur demandable indebtedness.

Prior to giving its Final Approval, the BSP then has the opportunity, as it is actually required, to review the loan agreements and ensure that the terms therein are consistent with the terms approved-in-principle and the loan agreements signed, and that the preconditions for final approval have all been duly complied with. Otherwise, the BSP MB is mandated to withhold its Final Approval. To reiterate, without the final approval, the GRP cannot receive the proceeds from the loan.[21] Without the Final Approval of the BSP MB, and without the GRP actually receiving the proceeds from the loan, the GRP will not be harmed.

In light of the foregoing, I concur with the ponencia that obtaining the BSP MB's Approval-in-Principle prior to the execution of the subject Loan Agreements is due compliance with the requirement under Section 20, Article VII of the Constitution. Stated otherwise, I concur with the ponencia that the BSP MB's Final Approval need not be obtained prior to execution of the subject Loan Agreements. As discussed, obtaining the BSP MB's Approval-in-Principle before the execution of the contract already satisfies both the language of the Constitution, as well as the intention of the framers thereof.

Filipino First Policy

The ponencia observes that the related Limited Competitive Bidding (LCB) violates the Filipino First Policy when it limited the bidding for the construction of the CRPIP and NCWS to the Chinese contractors endorsed by the Chinese Government.[22]

The Filipino First Policy is espoused in the second paragraph of Article XII, Section IO of the Constitution, which reads:

In the grant of rights, privileges, and concessions covering national economy and patrimony, the State shall give preference to qualified Filipinos. (Emphasis and underscoring supplied)

At the outset, the statement of the ponencia that petitioners never questioned the validity or prayed for the nullity of the LCB[23] is inaccurate. As stated by the ponencia itself, petitioners questioned the constitutionality of the Loan Agreements because the "conditions precedent to the release of funds allegedly defeat the constitutional policy to give preference to qualified Filipinos." [24] Specifically, according to the ponencia, "petitioners argue that the conditions precedent to the disbursement of the loans, specifically the payments to be made to the chosen Chinese contractors," [25] offend the Filipino First Policy. [26] To my mind, what petitioners are effectively questioning is the constitutionality of the LCB insofar as it limits the bidding for the construction of the CRPIP and NCWS to the Chinese contractors endorsed by the Chinese Government, as a requirement or precondition for the financing extended by the EXIM Bank to the GRP.

To petitioners' point, I submit that the Filipino First Policy does not apply to the grant or award of localized irrigation and dam projects as they do not concern national economy or patrimony. To be sure, national economy involves wide scale management of available resources, such as liberalization, globalization, deregulation, privatization, or imposition of tariffs, export subsidies, import quotas, quantitative restrictions, tax exemptions and currency controls. [27] An example of a matter covering national economy, that was questioned before the Court for allegedly violating the Filipino First Policy, is the Philippines' concurrence with the World Trade Organization Agreement (WTO Agreement). [28] Validly so, the WTO Agreement is indeed a matter of nationwide, if not international, scope because it affects our country's foreign trade policy which, based on the constitutional deliberations, is one of the critical areas of the national economy. [29]

On the other hand, patrimony pertains to heritage. [30] In *Manila Prince Hotel v. Government Service Insurance*

System,[31] the Court explained that "when the Constitution speaks of national patrimony, it refers not only to the natural resources of the Philippines, as the Constitution could have very well used the term natural resources, but also to the cultural heritage of the Filipinos." [32]

Based on the foregoing definitions, it cannot be said that the mere construction of new infrastructure projects is part of the Philippines' national economy and patrimony.

More importantly, even on the gratuitous assumption that the grant of the CRPIP and NCWS concerns national economy or patrimony, I submit that Filipino contractors are, in the first place, not qualified to bid for both projects. Thus, the argument that the LCB violates the Filipino First Policy should deserve scant consideration.

In order to activate the financing arrangement under the MOU, the DOF and the Chinese Government agreed that:

x x x the DOF shall request from the [Chinese] Embassy the financing of priority projects, and a list of at least three qualified, legitimate, and reputable Chinese contractors; upon receipt of such list, the DOF would furnish the same to the [Implementing Agency (IA)], which would conduct its own due diligence and vetting, coursing through the DOF to the [Chinese] Embassy whatever concerns it might have with the recommended firms; if found satisfactory, the IA would undertake LCB, incorporating some GPRA procedures; lastly, the IA and winning contractor would sign a contract agreement, stipulating therein that the effectivity thereof is contingent on the effectivity of the loan agreement to finance such project.[33] (Emphasis supplied)

The CRPIP and NCWS were nominated for such financial assistance. Pursuant to the agreed procedure under the MOU, China's Ministry of Commerce recommended three Chinese contractors for each of the projects. Thereafter, the IAs, the National Irrigation Authority (NIA) and the Metropolitan Waterworks and Sewerage System (MWSS), respectively, conducted their own due diligence in vetting the endorsed Chinese contractors. After the NIA and the MWSS concurred in the shortlist of contractors, they proceeded to conduct the LCB and awarded the projects to the lowest bidders.[34]

In other words, since the GRP requested the financing of both the CRPIP and NCWS from the Chinese Government pursuant to the MOU, then the GRP is constrained to follow the related procedure and parameters agreed upon in the MOU. Based on these parameters, only Chinese contractors are qualified to participate in the LCB for the construction of projects that are financed by the EXIM Bank. Filipino contractors, or any other contractors for that matter, are disqualified to bid for projects to be financed by China pursuant to the MOU. This is completely understandable because EXIM Bank, as the financier of multimillion-dollar projects, should be allowed to impose certain measures to ensure completion of the projects, and consequently, payment of the loans.

In view of the foregoing, the LCB is outside the scope of the Filipino First Policy enshrined in our Constitution. Unlike other government projects, the CRPIP and the NCWS are funded by the Chinese Government pursuant to its MOU with the GRP. In consideration of this funding, the GRP agreed to limit the bidders for these projects to Chinese contractors. Hence, preference cannot be given for these projects to Filipino contractors, because they are not qualified bidders to begin with. Plainly stated, if the Court were to consider the Filipino First Policy as applicable to the MOU, then the GRP will not get the loan. That is the simple reality of this agreement with China. And to insist on this position, would be for the Court to go beyond its jurisdiction and again dip its fingers in policy considerations of the Executive.

In any case, I reiterate that I concur with the ponencia that the Loan Agreements themselves do not run counter to the constitutional policy giving preference to qualified Filipinos.[35]

In light of the foregoing, I vote to DENY the consolidated petitions.

- [1]Ponencia, pp. 3-6.
- [2]Id. at 2, Note 6.
- [3]Id. at 7.
- [4]Id. at 8.
- [5]Id. at 18.
- [6]Bangko Sentral ng Pilipinas (BSP) Rules on Foreign Exchange Transactions, available at .
- [7]Bangko Sentral ng Pilipinas (BSP) Rules On Foreign Exchange (Fx) Transactions, p.10, available at .
- [8]Ponencia, p. 5.
- [9]Id.
- [10]Id.
- [11]Id.
- [12]Id. at 6.
- [13]Id.
- [14]Id.
- [15]See Dissenting Opinion of Senior Associate Justice Marvic M.V.F. Leonen, pp. 10-17.
- [16]Id. at 16.
- [17]Ponencia, p. 21.
- [18]Id.
- [19]Id.
- [20]Manual Regulations on Foreign Exchange Transactions, p. 32, available at .
- [21]Id.
- [22]Ponencia, p. 34.
- [23]Id. at 35.
- [24]Id. at 8.
- [25]Id. at 26. (Emphasis supplied)
- [26]Id.
- [27]See Tañada v. Angara, 338 Phil. 546,556 (1997).
- [28]Id.
- [29]See III RECORD, CONSTITUTIONAL COMMISSION, 616 (August 22, 1986).
- [30]Manila Prince Hotel v. GSIS, 335 Phil. 82, 107 (1997).
- [31]Id.

[32]Id. at 107-108.

[33]Ponencia, p. 4.

[34]Id. at 3-6.

[35]Id. at 26.

CONCURRENCE

LAZARO-JAVIER, J:

I concur.

Antecedents

On October 20, 2016, the Government of the Republic of the Philippines (GRP), represented by the Department of Finance (DOF), and the Export-Import Bank of China (EXIM Bank) entered into a Memorandum of Understanding on Financing Cooperation (MOU). The MOU was intended as a precursor to more binding and detailed loan agreements for GRP-nominated infrastructure projects.

Thereafter, the Department of Foreign Affairs (DFA) transmitted various Notes Verbale to the Embassy of the People's Republic of China (PRC Embassy), proposing the process for activating and utilizing the financing arrangement. The Chinese Ministry of Commerce (MOFCOM) sent out a Reply Note agreeing to the following procedure:

- first, the DOF will submit a request for preferential/concessional loan financing for priority projects to the Chinese Government, through the PRC Embassy;
- second, the Chinese Government would proffer its considerations and provide a list of at least three qualified, legitimate, and reputable Chinese contractors for the project;
- third, the relevant implementing agency (IA) would conduct Limited Competitive Bidding (LCB) among the recommended Chinese contractors, and finalize the procurement by signing the relevant commercial contract; and,
- fourth, the DOF would submit the required documents to EXIM Bank which will conduct its due diligence; and finally, the DOF, on behalf of the GRP and EXIM Bank would sign the loan agreement and any guarantee agreement.

Chico River Pump Irrigation Project

The Chico River Pump Irrigation Project (CRPIP), with the National Irrigation Authority as IA, was nominated for financing assistance. Consequently, the MOFCOM recommended Chinese contractors, which the DOF relayed to the NIA for vetting. The NIA conducted a background check by inquiring from various government agencies regarding ongoing transactions with the recommended contractors. Then, the NIA Bids and Awards Committee adopted Resolution No. CW-LCB 2018-1 recording the conduct of the requisite LCB, declaring China CAMC

Engineering Co., Ltd. as the bidder with the lower calculated and responsive bid, recommending the approval of the award and issuance of a notice to that effect and urging the execution of a contract between NIA and China CAMC.

Consequently, the Bangko Sentral ng Pilipinas (BSP) Monetary Board (MB) adopted Resolution No. 305 dated February 22, 2018 approving- in-principle the proposed loan of up to \$70 Million for CRPIP conditioned on certain documentary submissions, deposit arrangements, parameters for subsequent negotiations and approvals and compliance with applicable laws. Thereafter, the CRPIP Loan Agreement was executed on April 10, 2018 between EXIM Bank as lender and the GRP as borrower. The MB gave its Final Approval to the CRPIP Loan Agreement worth \$62,086,837.82 on May 17, 2018.

New Centennial Water Source-Kaliwa Dam Project

The New Centennial Water Source-Kaliwa Dam Project (NCWS) to be implemented by the Metropolitan Waterworks and Sewerage System (MWSS) was also nominated for financing assistance. The DOF and the National Economic Development Authority (NEDA) instructed the MWSS to review the project's financing strategy in light of the MOU. The MWSS Board of Trustees confirmed the project cost to be P10.857 Billion. Subsequently, the DOF forwarded the shortlist of MOFCOM-endorsed Chinese contractors to MWSS and urged the MWSS to vet the recommended firms. Thereafter, the MWSS conducted the LCB where China Energy Engineering Corporation Limited emerged with the lowest calculated bid. The MWSS then approved the proposed contract, authorizing its administrator to sign and submit the same to the DOF for loan processing.

The DOF endorsed MWSS 's proposed loan to the MB for approval-in- principle. On September 28, 2018, the MB approved the loan in principle through Resolution No. 1581, imposing conditions necessary for final approval. Eventually, the NCWS Loan Agreement was entered into on November 20, 2018 between EXIM Bank as lender and the GRP as borrower. The MB gave its Final Approval to the NCWS Loan Agreement worth \$211,214,646.54 on June 6, 2019.

The CRPIP Loan Agreement and the NCWS Loan Agreement (collectively, Loan Agreements) contain identical stipulations. Petitioners in

G.R. Nos. 245981 and 246594 filed their respective petitions to assail the validity of the Loan Agreements, enjoin their enforcement, and seek the disclosure of relevant documents. Ultimately, petitioners pray that the Loan Agreements and the implementation thereof be declared unconstitutional and illegal.

The Ruling

The ponencia ruled on the following issues:

- On the procedural aspects: (a) President Rodrigo Duterte must be dropped as a respondent because he enjoys the presidential immunity from suit; (b) except as to the issues concerning access to documents and the Waiver of Immunity Clauses, the other substantive issues raised by the petitions may be the subject of judicial review; and (c) prohibition is a proper remedy in this case.
- On the substantive aspects: (a) the Loan Agreements were executed with the necessary MB concurrence; (b) the Loan Agreements are exempt from our procurement laws pursuant to Republic Act No. 9184 (RA 9184), and the constitutional policy to give preference to qualified Filipinos in the grant of rights, privileges, and concessions covering the national economy and patrimony does not mean monopoly only for Filipino nationals; and (c) the constitutional policy on the pursuit of independent foreign relations is a motherhood statement that cannot be used to nullify the Loan Agreements' arbitration clauses.

The ponencia upheld the following provisions in the Loan Agreements:

8.4 Governing Law This Agreement as well as the rights and obligations of the Parties hereunder shall be governed by and construed in accordance with the laws of China.

8.5 Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no settlement can be reached through such consultation, each party shall have the right to submit such dispute to the China International Economic and Trade Arbitration Commission (CIETAC) [Hong Kong International Arbitration Centre (HKIAC)] for arbitration. The arbitration shall be conducted in accordance with the CIETAC's [HKIAC] arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing. [The seat of arbitration shall be in Hong Kong. The arbitration shall be conducted in English. The Arbitral Tribunal shall consist of three (3) Arbitrators which shall be appointed pursuant to the arbitration rules of HKIAC.]

8.6 The arbitral award obtained in accordance with this Article against the Borrower will be recognized and be enforceable in the Republic of the Philippines provided that: (a) the arbitral tribunal had jurisdiction over the subject matter of the action in accordance with the jurisdictional rules; (b) the Republic of the Philippines had notice [Borrower had prompt notice] of the proceedings; (c) the arbitral award was not obtained through collusion or fraud, and such award was not based on a clear mistake of fact or law; and (cl) the arbitral award is not contrary to public policy in the Republic of the Philippines.

It recognized party autonomy as being impervious to the State Policy of an independent and national interest-based foreign policy under Article II, Section 7 of the Constitution.

The ponencia, too, upheld and applied Section 4, Republic Act No. (RA) 9184, Government Procurement Reform Act, which immunizes the provisions of any treaty, international or executive agreements from RA 9184's coverage:

Scope and Application. - This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or -controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.

It ruled that the hallmarks of RA 9184 of transparency, competitiveness, and public monitoring can be trumped by contrary provisions in any treaty or international or executive agreement.

What is clear from the ponencia is the sovereign immunity accorded to the Loan Agreements that is auto-limited^[1] to some degree solely by the provisions of the Loan Agreements themselves.

As it was, petitioners utterly failed to muster and adduce evidence-based facts of the egregious impact and consequences of the Loan Agreements and the projects they intend to fund, if and when they are implemented. The benefits of establishing evidence-based facts in determining the relevance of our State Policies in relation to international loan agreements in general cannot be overemphasized. It is through these facts that we would be able to witness the social evils that the State Policies are meant to combat and overcome.^[2] When these facts are available, and they show concretely why the State Policies were enacted and what they were enacted to undo, for being anathema to our core existence as a country and nation, I am sure that the Court will be the first to grab on to the State Policies to nullify egregious governmental acts.

Indeed, petitioners would have better served their rightful cause had they developed more nuanced bases than what they already alleged, for resorting to public policy in assailing the international Loan Agreements. This is

because their argument is not self-evident. It needs facts. It requires patterns of conduct. Petitioners have to prove that these Loan Agreements are contrary to public policy. This means they should have had an evidentiary record to show, not just say, that the Loan Agreements -

... [have] a tendency to injure the public, is against the public good, or contravenes some established interests of society, or is inconsistent with sound policy and good morals, or tends clearly to undermine the security of individual rights, whether of personal liability or of private property [t]he illegality or immorality [of these loan agreements have reached] a certain threshold such that, enforcement of the same would be against Our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society.[3]

This is a mouthful of what contrary to public policy means which petitioners have to prove painstakingly vis-a-vis the challenged Loan Agreements. The standard requires facts. Facts are brought about by evidence. Taken individually or together, evidence-based facts produce proof. Only when the facts have settled can the Court meaningfully come in. We cannot short-circuit this process without upsetting the government order. This is the rule, no matter how valid and noble the cause is. The Court has to locate itself and perform its work within the system. I am reminded of what a young Filipino legal luminary once observed to be vigilante lawyering-

But this is the natural outcome when we constantly push institutions to bend to politics. We care only about results. We dismiss underlying legal principles as technicalities, as malleable and negotiable, at least for our side.... Are we willing to be loyal to law itself above the political fray, to rebuke legal vigilantism using outlandish cases, even the ones that suit us? If not, Sisyphus' lament is that we cannot protest how laws are never followed. Law ultimately draws strength not from intellect, but from society's conviction.[4]

The invocation of public policies, especially the State Policies in our Constitution, as an argument to invalidate juridical acts of the government, necessarily requires the elucidation of adjudicative facts including -

- what the alleged public policy is in relation to the claim or claims before the Court - its cause, purpose, nature, breadth, and consequences, together with the societal ills it seeks to address and how;
- what the alleged government's breach of the public policy is all about;
- what and how the breach's impact is on the public policy;
- validity of the governmental objectives;
- reasonableness and proportionality of the means used in relation to the goals the government seeks to achieve, i.e., there must have been as little infringement as possible to the alleged public policy;
- remedial measures, like compensation or other incentives, to alleviate the impact of the breach to the public policy; and,
- manner and extent of consultation if any with the affected sectors.

In light of the importance and the impact which the ponencia or any similar decisions may have in the future, the Court has every right to expect and indeed to insist upon the careful preparation and presentation of a factual background. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned Loan Agreements and the result of this ponencia pertaining to it may be of great assistance as a precedent. To underscore the importance of an evidentiary record, these facts may prove to be the clincher that will persuade the Court to invalidate a government act on the basis of specific public policies.

Decisions on the Constitution should not and must not be made in a factual vacuum. To attempt to do so would trivialize the State Policies if not the Constitution itself and may inevitably result in ill-considered opinions. The presentation of adjudicative facts is not a mere technicality; rather, it is essential to a proper consideration of the constitutional issues. A party cannot, by simply consenting to dispense with the factual background, require or expect the Court to deal with an issue such as this in a factual void. A decision on transcendental issues cannot be based upon the unsupported hypotheses of enthusiastic counsel.

ACCORDINGLY, I vote to dismiss the petition for failure to prove the invalidity of the assailed Loan Agreements or any portion thereof on the grounds alleged by petitioners.

[1]See *Tañada v. Angara*, 338 Phil. 546, 593 (1997), citing *Reagan v. Commissioner of Internal Revenue*, 141 Phil. 621,625 (1969), where the Court discussed the concept of auto-limitation, viz.: "It is to be admitted that any State may by its consent, express or implied, submit to a restriction of its sovereignty rights. That is the concept of sovereignty as auto-limitation which, in the succinct language of Jellinek, 'is the property of a state-force due to which it has the exclusive capacity of legal-self determination and self-restriction.' A State then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence."

[2]See, e.g., if we have facts showing that "China's loans to other countries are causing 'hidden' debt. That may be a problem," CNBC at <https://www.cnbc.com/2019/06/12/chinas-loans-causing-hidden-debt-risk-to-economies.html> (June 11, 2019) (last accessed on April 22, 2022), or Helmut Reisen, "Is China Actually Helping Improve Debt Sustainability in Africa?," G-24 Policy Brief No. 9 at <https://www.oecd.org/dev/39628269.pdf> (last accessed on April 22, 2022).

[3]*Mabuhay Holdings Corporation v. Sembcorp logistics limited*, G.R. No. 212734, December 5, 2018.

[4]*Oscar Franklin Tan, We must end vigilante lawyering, Sisyphus Lament*, at <https://opinion.inquirer.net/111677/must-end-vigilante-lawyering#ixzz7R736sNbq> (March 12, 2018) (last accessed on April 22 2022).

CONCURRING OPINION

GAERLAN, J.:

I concur in the well-written ponencia of our esteemed colleague, Justice Jhosep Y. Lopez. I write separately to express my thoughts on the legal foundations of the sovereign borrowing power.

Nature and allocation of the
sovereign borrowing power in
Philippine law

The sovereign borrowing power is but one manifestation of the state's power to incur obligations and enter into contracts, which is in turn an inherent component of state sovereignty.[1] The sovereign borrowing power is normally deployed as a tool of fiscal policy, alongside taxation and money printing;[2] and is therefore often vested in the legislature, which is generally vested with the "power of the purse." In *Perry v. United States*: [3]

[T]he right to make binding obligations is a competence attaching to sovereignty. In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. x x x The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government, - upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. x x x [4]

Thus, the United States Constitution, portions of which were in force in this jurisdiction [5] until November 15, 1935, expressly provides that "the Congress shall have power to borrow money on the credit of the United States." [6] Likewise, under Title XII of the 1899 Malolos Constitution, the government can borrow money on the "credit of the Nation" [7] only "in accordance with the provisions of this Constitution," [8] and when it is "authorized by special law"; [9] with the further limitation that "no debt shall be contracted unless the means of paying the same are also voted upon." [10]

As applied to the Philippines under the American regime, the United States Congress, through Sections 66 and 70 of the Philippine Bill of 1902, [11] authorized the then Government of the Philippine Islands to permit municipalities, including the City of Manila, to "incur indebtedness, borrow money, and to issue and sell xx x, upon such terms and conditions as it may deem best, registered or coupon bonds x x x," for the purpose of providing "all kinds of municipal betterments and improvements in municipalities," subject to the "consent and approval of the President and the Congress of the United States," in the case of municipalities, and the approval of the President of the United States alone, in the case of the City of Manila. Section 64 of the same law authorized the Government of the Philippine Islands to incur indebtedness and issue bonds for the purpose of acquiring the friar lands. Later, Section 2(a)(6) of the Philippine Independence Act [12] provided that "[t]he public debt of the Philippine Islands and its subordinate branches shall not exceed limits now or hereafter fixed by the Congress of the United States; and no loans shall be contracted in foreign countries without the approval of the President of the United States." This provision was retained as Section 1(6) of the Ordinance Appended to the original version of the 1935 Constitution.

Upon the full realization of Philippine independence in 1946, the sovereign borrowing power reverted to the Philippine legislature. [13] Under the fiscal regime provided in the amended [14] Article VI, Sections 18 and 19 of the 1935 Constitution, bills authorizing the increase of the public debt, among other economic measures, must emanate from the House of Representatives, leading contemporary commentators to assert that the 1935 Constitution, as amended, made the House of Representatives "responsible for the direction of the financial policy of the government and the economic life of the country." [15] Furthermore, Article XVII, Section 1(3) thereof recognizes the effectivity of bonds "issued under authority of an Act of Congress of the United States by the Philippine Islands, or any province, city or municipality therein" and mandates the provision of funds for the payment thereof.

In 1948, through Republic Act (R.A.) No. 245, [16] Congress delegated a portion of the sovereign borrowing power to the Secretary of Finance. Section 1 of said law provides in part:

SECTION 1. In order to meet public expenditures authorized by law or to provide for the purchase, redemption, or refunding of any obligations, either direct or guaranteed, of the Philippine Government, the Secretary of Finance, with the approval of the President, after consultation with the Monetary Board, is authorized to borrow from time to time on the credit of the Republic of the Philippines such sum or sums as in his judgment may be necessary, and to issue therefor evidences of indebtedness of the Philippine Government. Such evidences of indebtedness may be of the following types:

(a) Treasury bills issued on a discount basis and payable at maturity without interest. Treasury bills may be offered for sale either on a competitive basis or at a fixed rate of discount and may be made payable at any date not later than one year from the date of issue.

(b) Interest-bearing certificates of indebtedness having maturities not exceeding eighteen months from the date of issue.

(c) Interest-bearing notes having maturities of not less than one or more than five years from the date of issue.

The Secretary of Finance, in consultation with the Monetary Board, shall prescribe the form or forms, the interest and discount rates, the denominations, maturities, negotiability, convertibility, call and redemption features, and all other terms and conditions of issuance, placement, sale, servicing, redemption, and payment of all evidences of indebtedness issued under the authority of this Act: Provided, however, That with respect to treasury bills, certificates of indebtedness, and notes, such terms and conditions shall be within the limitations prescribed in subsections (a) through (c) of the preceding paragraph: And provided, further, That the actual issue, placement, servicing, and redemption of such securities shall be done through the Central Bank of the Philippines, as provided in sections one hundred and twenty-two, one hundred and twenty-three and one hundred and twenty-four of the Central Bank Act. The evidences of indebtedness issued under the authority of this section may be made payable, both as to principal and interest, in any readily convertible foreign currency.

x x x

In *Spouses Constantino v. Cuisia*,^[17] the Supreme Court held that R.A. No. 245 expressly authorizes the Secretary of Finance to enter into foreign borrowing contracts.^[18]

In 1966, through R.A. No. 4860,^[19] Congress again delegated a portion of the sovereign borrowing power, particularly the power to obtain and guarantee loans and other forms of indebtedness from foreign sources, this time to the President. The pertinent portions of the statute provide:

SECTION 1. The President of the Philippines is hereby authorized in behalf of the Republic of the Philippines to contract such loans, credits and indebtedness with foreign governments, agencies or instrumentalities of such foreign governments, foreign financial institutions, or other international organizations, with whom, or belonging to countries with which, the Philippines has diplomatic relations, as may be necessary and upon such terms and conditions as may be agreed upon, to enable the Government of the Republic of the Philippines to finance, either directly or through any government office, agency or instrumentality or any government-owned or controlled corporation, industrial, agricultural or other economic development purposes or projects authorized by law x x x. The authority of the President of the Philippines as herein provided shall include the power to issue, for the purposes hereinbefore stated, bonds for sale in the international markets the income from which shall be fully tax- exempt in the Philippines.

x x x x

SECTION 3. The President of the Philippines is, likewise, hereby authorized, in behalf of the Republic of the Philippines, to guarantee, upon such terms and conditions as may be agreed upon, foreign loans extended directly to, or bonds for sale in international markets issued by, corporations owned or controlled by the Government of the Philippines for industrial, agricultural or other economic development purposes or projects authorized by law x x x.

In the 1973 Constitution, as amended, this delegated authority was transformed into a direct vestiture of sovereign borrowing power in the executive. Article IX, Section 15 thereof provides that "[t]he Prime Minister[20] may contract and guarantee foreign and domestic loans on behalf of the Republic of the Philippines, subject to such limitations as may be provided by law." The change was justified as "being necessitated by the imperatives of sophisticated modern economics";[21] since the President is the official best-supplied with information and assistance to determine not only the advisability of obtaining loans but also the country's capacity to utilize such credit.[22]

The transfer of sovereign borrowing prerogatives from the legislature to the executive was confirmed in the present Constitution, Article VII, Section 20 of which authorizes the President to contract foreign loans without legislative approval.[23] The implications of this transposition were first explored in *Spouses Constantino v. Cuisia*,[24] where the Supreme Court rejected the assertion that the sovereign borrowing power must be exercised personally by the President. The Court explained that the sovereign borrowing power, as vested in the President by the Constitution, is now subject to the doctrine of qualified political agency, for two reasons: 1) having the President personally exercise every aspect of the power "would negate the very existence of cabinet positions and the respective expertise which the holders thereof are accorded and would unduly hamper the President's effectivity in running the government";[25] and 2) the sovereign borrowing power, as already mentioned, is but a consequence of the state's power to enter into binding obligations, and thus arises not from extraordinary or exceptional circumstances, but from the "established functions of governance." [26] Moreover, any exercise of the power by the President's delegates remains subject to the President's consent, ratification, or repudiation.[27]

Nevertheless, the President's sovereign borrowing power remains subject to the following controls: 1) limitations provided by law; 2) regular reporting to Congress; 3) prior concurrence and regulation by the Monetary Board; and 4) scrutiny by the public. These controls fall into three categories: legislative, administrative, and popular.

Legislative controls: Legislation and reporting

Section 20, Article VII of the 1987 Constitution explicitly states that the President's sovereign borrowing powers are subject to such limitations as may be provided by law. This legislative control over the sovereign borrowing power is reiterated in Article XII, Section 21, with respect to foreign loans. Being an inherent component of sovereignty and an indispensable tool of fiscal policy, the sovereign borrowing power has traditionally been lodged in the legislature, which is the body elected directly by the people to represent them in matters of policymaking. As already mentioned, the transfer of the sovereign borrowing power to the executive was primarily motivated by reasons of economics and expediency, to enhance the State's speed and flexibility in conducting international credit operations. Thus, the 1986 Constitutional Commission recognized that "Congress will enact - they already have - a Foreign Borrowings Act,[28] and put all the conditions under which loans may be incurred." [29] By empowering Congress to control the President's sovereign borrowing power through legislation, the Constitution balances the primacy of the legislature in the realm of fiscal policy and the primacy of the executive in the realms of diplomacy and policy implementation.

Thus, the Supreme Court has held that the limitations set by Congress when it initially delegated the sovereign borrowing power to the executive remain applicable even after the power has been vested directly in the President. In *Spouses Constantino v. Cuisia*,[30] the Supreme Court held that the parameters provided in R.A. No. 245 remain applicable to the current constitutional iteration of the sovereign borrowing power. While the sovereign borrowing power may be exercised by the Secretary of Finance, such exercise of power must be made with the approval of the President and after consultation with the Monetary Board.[31] Similarly, the ponencia correctly rules that the current iteration of the sovereign borrowing power remains circumscribed by the parameters set forth not only in the original delegation laws, i.e., R.A. No. 245 and R.A. No. 4860, but also in

subsequent laws such as the New Central Bank Act, as amended.[32]

The second form of legislative control over the sovereign borrowing power is found in the second sentence of Article VII, Section 20 of the Constitution:

The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

This provision is another manifestation of the constitutional effort to balance traditional legislative fiscal prerogatives with the expediency-based vestiture of the sovereign borrowing power in the executive. As explained by Commissioner Regalado, the legislature, as the representatives of the people who ultimately bear the burden of the sovereign debt, must be apprised of the Monetary Board's sovereign debt decisions.[33] As the branch of the government traditionally entrusted with the state's fiscal prerogatives, particularly the increase of the public debt, Congress is entitled to information on all components of the State's fiscal operations, even when prerogatives over such particular components have been reallocated to the other branches of government. Furthermore, Congress can use the reports submitted by the Monetary Board as basis to exercise its investigatory powers if needed.[34]

Popular controls: Public scrutiny

Article XII, Section 21 of the Constitution, as worded, was a compromise which omitted proposals to enshrine certain limitations on the sovereign borrowing power such as: 1) limiting the State's resort to foreign loans to "vital undertakings in line with the national development program"; and 2) empowering Congress to fix a determinate foreign debt ceiling.[35] These limitations were deemed too far into the realm of economic policy to be enshrined as constitutional fiat.[36] As an alternative, the Commission agreed to retain a third proposed limitation: making the terms and conditions of foreign loans obtained by the government available to the public, while vesting in Congress and in the Monetary Board the prerogative to set the conditions and the criteria under which the sovereign borrowing power shall be exercised. In accepting the compromise proposal which ultimately became Article XII, Section 21, Commissioner Garcia explained that:

It can be observed that the committee's proposal takes into account two things: the regulation of foreign loans and public information - that the information regarding foreign loans be made public.

I will accept this proposal with the understanding that the section would treat as serious matters the nation's ability to pay and the fact that foreign borrowings are matters of interest to the majority, many of whom have to shoulder the actual payment. And, therefore, ceilings are being imposed on interest and principal payments so that the priority will be placed on economic development, unlike economies in the Third World which very often have to sacrifice the benefits, the goods, the productive growth of the economy for the sake of repayment and debt servicing.[37] (Emphasis and underscoring supplied)

Thus, in its final form, Article XII, Section 21 enshrines a popular control on the sovereign borrowing power, by which the government is explicitly obliged to make information on the terms and conditions of foreign loans available to the public. Since the sovereign borrowing power is an inherent component of state sovereignty, it is only fitting that the people - who comprise an essential element of the State and are the ultimate bearers of the sovereign debt - be given the right to inquire into and be informed of the details of the exercise of this power. On this note, the Supreme Court has consistently upheld the enforceability of the constitutional right to information on matters of public interest, subject only to limitations that may be imposed by Congress which must nevertheless be in line with the constitutional policy of full public disclosure.[38] In this particular case, the full disclosure is directly and explicitly ordered by the Constitution.

Administrative controls: Regulation
and prior concurrence of the
Monetary Board

One of the innovations introduced by the 1973 Constitution is the constitutional establishment of a central monetary authority with policymaking, supervisory, and regulatory powers in the areas of money, banking, and credit. Section 14, Article XV of the 1973 Constitution, as amended, states:

SEC. 14. The Batasang Pambansa shall establish a central monetary authority which shall provide policy direction in the areas of money, banking, and credit. It shall have supervisory authority over the operations of banks and exercise such regulatory authority as may be provided by law over the operations of finance companies and other institutions performing similar functions. Until the Batasang Pambansa shall otherwise provide, the Central Bank of the Philippines, operating under existing laws, shall function as the central monetary authority.

The "existing laws" referred to in the provision are primarily R.A. Nos. 245 and 265. R.A. No. 265^[39] established the Central Bank of the Philippines as a corporate^[40] governmental entity with the responsibility of "administer[ing] the monetary and banking system of the Republic."^[41] As a corporate entity, the powers and functions of the Central Bank of the Philippines were exercised through a Monetary Board.^[42] As already mentioned, R.A. No. 245, which was enacted a mere three days before R.A. No. 265, gave the Monetary Board a consultative role in the exercise of the borrowing power delegated therein.

Section 20, Article XII of the present Constitution retains and reiterates the establishment of the central monetary authority:

Section 20. The Congress shall establish an independent central monetary authority, the members of whose governing board must be natural-born Filipino citizens, of known probity, integrity, and patriotism, the majority of whom shall come from the private sector. They shall also be subject to such other qualifications and disabilities as may be prescribed by law. The authority shall provide policy direction in the areas of money, banking, and credit. It shall have supervision over the operations of banks and exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions.

Until the Congress otherwise provides, the Central Bank of the Philippines operating under existing laws, shall function as the central monetary authority.

In voting to approve on third reading the draft provisions of Article XII, Section 20 and Article VII, Section 20 which eventually became part of the present Constitution, Commissioner Lorenzo Sumulong explained the need to reiterate the independence of the central monetary authority:

Regarding the power of the President to contract and guarantee foreign loans, the one-man rule of President Marcos contracted and guaranteed foreign loans without any check. And there could be no check at all because he exercised not only executive power but also legislative power. Because of this absence of any check he was able to incur in the name of our Republic a foreign debt amounting to \$26 billion and if the interests are to be added it will exceed \$30 billion. That is why in this new Constitution, the President in exercising the power to contract or guarantee foreign loans, concurrence on the part of the monetary board is required. We are providing that the majority of the members of the monetary board shall come from the private sector; they shall not be subject to influence or dictation by the President so that there is an effective check now. x x x^[43]

In 1993, pursuant to the constitutional mandate, Congress established the Bangko Sentral ng Pilipinas (BSP) to serve as the independent central monetary authority.^[44] Like its predecessor, the BSP is also a corporate governmental entity whose powers and functions are exercised by a Monetary Board.^[45]

As the body which discharges the powers and functions of the constitutionally designated central monetary authority, the Monetary Board has long been given certain prerogatives in the realm of sovereign borrowing. In 1948, during the era of legislative supremacy in sovereign borrowing, Chapter V, Article III of R.A. No. 265 ordained the Monetary Board as the "financial advisor of the government." In this capacity, Section 128 of said law mandated the Government, through the Secretary of Finance, to request the written opinion of the Monetary Board before undertaking any credit operation abroad. Likewise, Section 1 of the earlier-cited R.A. No. 245 provides for a consultative role for the Monetary Board in the formulation of terms and conditions governing the forms of indebtedness sanctioned under said law. Under R.A. No. 4860, the Monetary Board was tasked with recommending the projects which will be funded through foreign loans. Section 4 of R.A. No. 4860 further subjects sovereign borrowing operations to the provisions of Executive Order No. 236, series of 1957;^[46] Section 4 of which authorizes the Monetary Board, among others, to "establish maximum limits governing aggregate disbursements from the proceeds of government securities which may be permitted in the ensuing fiscal year or other planning period."

The present Constitution strengthens the Monetary Board's financial advisory functions by giving it two prerogatives with respect to the sovereign borrowing power: regulation and prior concurrence.

Section 21, Article XII of the Constitution decrees in part that "[f]oreign loans may only be incurred in accordance with law and the regulation of the monetary authority." The intent was to subject the President's sovereign borrowing power to both legislative and administrative controls:

MR. MONSOD. We agree completely with the Commissioner's sentiment on this and, as a matter of fact, the present government is already implementing this kind of strategy and approach, as he well knows. We are only trying to say here that Congress will enact - they already have - a Foreign Borrowings Act, and put all the conditions under which loans may be incurred. We also added regulations of the monetary authority because this is the authority that imposes the economic criteria, the terms and conditions, and so on, on the loans.

With respect to linking it to the capacity to pay, that is the very essence of the regulations and the law on foreign borrowings, and we just wanted to say that there are many alternatives to implement that. We do not want to preempt Congress or the monetary authority on these alternatives, but we agree with the principles and we make it of record.^[47]

The BSP has three unique attributes: 1) its creation, functions, and powers are particularly mandated in the Constitution but subjected to further delineation through statute; 2) it is a corporate governmental entity; and 3) it is an administrative agency which performs quasi-judicial, supervisory, and regulatory functions. In *Bank of Commerce v. Planters Development Bank*:^[48]

In *United Coconut Planters Bank v. E. Ganzon, Inc.*, the Court considered the BSP as an administrative agency, exercising quasi-judicial functions through its Monetary Board. It held:

A quasi-judicial agency or body is an organ of government other than a court and other than a legislature, which affects the rights of private parties through either adjudication or rule-making. The very definition of an administrative agency includes its being vested with quasi-judicial powers. The ever-increasing variety of powers and functions given to administrative agencies recognizes the need for the active intervention of administrative agencies in matters calling for technical knowledge and speed in countless controversies which cannot possibly be handled by regular courts. A "quasi-judicial function" is a term which applies to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action and to exercise discretion of a judicial nature.

Undoubtedly, the BSP Monetary Board is a quasi-judicial agency exercising quasi-judicial powers or functions. As aptly observed by the Court of Appeals, the BSP Monetary Board is an independent central

monetary authority and a body corporate with fiscal and administrative autonomy, mandated to provide policy directions in the areas of money, banking and credit. It has power to issue subpoena, to sue for contempt those refusing to obey the subpoena without justifiable reason, to administer oaths and compel presentation of books, records and others, needed in its examination, to impose fines and other sanctions and to issue cease and desist order. Section 37 of Republic Act No. 7653, in particular, explicitly provides that the BSP Monetary Board shall exercise its discretion in determining whether administrative sanctions should be imposed on banks and quasi-banks, which necessarily implies that the BSP Monetary Board must conduct some form of investigation or hearing regarding the same. x x x

The BSP is not simply a corporate entity but qualifies as an administrative agency created, pursuant to constitutional mandate, to carry out a particular governmental function. To be able to perform its role as central monetary authority, the Constitution granted it fiscal and administrative autonomy. In general, administrative agencies exercise powers and/or functions which may be characterized as administrative, investigatory, regulatory, quasi-legislative, or quasi-judicial, or a mix of these five, as may be conferred by the Constitution or by statute.

x x x x

x x x What the law grants the BSP is a continuing role to shape and carry out the country's monetary policy - not the authority to adjudicate competing claims of ownership over the securities it has issued - since this authority would not fall under the BSP's purposes under its charter.[49] (Emphasis supplied; citations omitted)

Given this background, I submit that the overarching role of the central monetary authority over the sovereign borrowing power is regulatory in nature. Nevertheless, the Constitution explicitly gave it another prerogative with respect to sovereign borrowing: the power of prior concurrence. This power is distinct from the BSP's regulatory power, which involves the imposition of economic parameters and administrative procedures on the exercise of the sovereign borrowing power.[50] The prior concurrence power gives the BSP the right to review and to recommend the amendment of the terms and conditions of specific exercises of the sovereign borrowing power, pursuant to the economic parameters it has set by virtue of its regulatory power thereover. Thus, when Commissioner Regalado explained that

[W]hile it is not stated here - although it says here that the prior concurrence of the Monetary Board is required - it is, of course, implicit therein that the Monetary Board shall act as may be provided by law. In fact, right now the powers of the Monetary Board are provided by law.[51]

this means that the Monetary Board's prior concurrence power is subject to the congressional power to: 1) fill in the details of the powers already conferred by the Constitution to the BSP, or 2) vest additional powers in the BSP.

As explained in the ponencia, the detailed steps for the exercise of the sovereign borrowing power with respect to foreign loans are provided in R.A. No. 4860, Letter of Instruction No. 128, series of 1974, and Administrative Order No. 99, series of 1993. These laws and issuances essentially provide for a three-stage process: 1) the borrowing agency seeks approval-in-principle from the BSP; 2) the parties to the loan negotiate the final terms and conditions thereof, subject to BSP review; and 3) after final review and negotiation, the Monetary Board issues a final approval, which will allow the borrower to draw on the loan. Likewise, the ponencia mentions that the BSP, pursuant to its regulatory prerogatives over the sovereign borrowing power, has synthesized the regulations on foreign exchange operations, sovereign credit, and non-sovereign borrowing into the 2021 Manual of Regulations on Foreign Exchange Transactions (FX Manual).[52] With respect to sovereign borrowing from foreign sources, Sections 22 and 23, Chapter I, Part Three of the FX Manual retain the two-approval framework, thus:

Section 22. General Policy. The BSP shall regulate foreign/foreign currency loans/bon-owings (including those in the form of bonds/notes/other debt instruments) so that these can be serviced in an orderly manner and with due regard to the economy's overall debt servicing capacity.

1. Projects/programs/purposes to be funded by the foreign/foreign currency loans/borrowings (including those in the form of bonds/notes/other debt instruments) must be legitimate and not contrary to laws, regulations, public order, public health, public safety, or public policy.

2. Foreign loans/borrowings (including those in the form of bonds/ notes/other debt instruments and those covered by derivatives transactions) as well as foreign currency loans from banks operating in the Philippines to be obtained by the public sector as well as the private sector that will be publicly-guaranteed shall require prior BSP approval unless otherwise indicated in the FX Manual.

x x x x

7. To allow the BSP to determine the possible magnitude of foreign funding requirements of the economy for the succeeding year, all resident entities (public and private sectors) intending to obtain medium- and long-term foreign loans/borrowings (including offshore issuances of debt instruments) shall submit to the BSP, through the International Operations Department (10D), their medium- and long-term foreign borrowings plan (FBP) using the prescribed form (Annex D.3) not later than end-September of each year for borrowings for the fourth quarter of the current year and the succeeding full year. Proposed onshore issuances by residents of debt instruments that require settlement in foreign currency shall likewise be reported in the FBP.

Any changes to the submitted plans shall be communicated in writing to the BSP, through the IOD, within two (2) weeks from availability of information for monitoring purposes.

xxxx

Section 23. Public Sector Loans/Borrowings -

I. Prior Monetary Board approval shall be obtained for public sector foreign/foreign currency loans/borrowings, including issuances of the following except those covered by Section 23.2:

a. FX-denominated bonds/notes/other debt instruments, whether to be issued onshore or offshore; and

b. Peso-denominated bonds/notes/other debt instruments issued offshore, whether to be settled in foreign or local currency.

2. The following public sector loans shall not require prior BSP approval:

a. Short-term interbank borrowings; and

b. Short-term foreign currency loans of the following from banks operating in the Philippines that are duly repaid to the BSP using the prescribed forms (Annexes E.4 and E.5):

i. Commodity and service exporters: Provided, That these loans are used to finance export-related import costs of goods and services as well as peso cost requirements.

Service exporters shall refer to Philippine residents engaged or proposing to engage in rendering technical, professional or other services which are paid for in FX.

Indirect exporters may likewise borrow in foreign currency from banks operating in the Philippines to fund export-related costs in FX and pesos. Indirect exporters shall refer to cottage/small and medium industries (producers/manufacturers) that have supply arrangements with direct exporters who are holders of an export letter of credit or a confirmed purchase order/sales contract from a foreign buyer.

ii. Producers/manufacturers, including oil companies and public utility firms: Provided, That the loans are used

to finance import costs of goods and services necessary in the production of goods by the borrower concerned. Producers/manufacturers shall refer to Philippine residents that undertake the processing/conversion of raw materials into marketable form through physical, mechanical, chemical, or other means, or by special treatment, or a series of actions that result in a change in the nature or state of the products.

Public utility firms shall refer to business organizations that regularly supply the public with commodities or services such as electricity, gas, water, transportation, telegraph/telephone services and the like.

3. Applications for approval of foreign/foreign currency loans/borrowings shall be submitted using the prescribed form (Annex D.1), supported by required documents/information:

- a. For approval-in-principle: Requests shall be filed before commencement of actual negotiations or issuance of mandate/commitment to foreign funders/arrangers; and
- b. For final approval: Requests shall be filed after signing of the loan/borrowing documents but before drawdown/receipt of proceeds from loans and issuances of bonds/notes/other debt instruments.

Signed loan/borrowing documents/agreements submitted for final approval shall not be notarized.

4. Proceeds of foreign/foreign currency loans/borrowings (including those from issuances of bonds/notes/other debt instruments) of the National Government, its political subdivisions and instrumentalities, and GOCCs shall be deposited with the BSP pending utilization, pursuant to Section 113 of Republic Act (R.A.) No. 7653 (The New Central Bank Act) dated 14 June 1993. (Citations omitted)

As it stands, the framework for the exercise of the sovereign borrowing power is defined by a mixture of statutes and administrative issuances by the President and the BSP. It must be emphasized that these issuances derive their binding force and effect either from the sovereign borrowing power itself (as vested in the President) or the regulatory prerogatives vested by the Constitution in the legislature and in the BSP over the sovereign borrowing power. These regulatory prerogatives, although related, are distinct from the prior concurrence power particularly vested in the Monetary Board by the Constitution.

With these considerations in mind, I concur in the ponencia's finding that both loans in question were compliant with the currently prevailing framework for regulating exercises of the sovereign borrowing power. With respect to the CR.PIP Loan Agreement, the National Government even refrained from warranting the final approval of the loan,^[53] precisely because such final approval can only be secured upon the BSP's independent review of the loan's final terms and conditions, as signed. Nevertheless, it must be noted that petitioners limited themselves to assailing the validity of the CR.PIP and NCWS Loan Agreements. They do not question the validity or the constitutionality of the prevailing "approval-negotiation-approval" framework developed under Letter of Instruction No. 128, series of 1974, and Administrative Order No. 99, series of 1993, and reiterated in the aforementioned provisions of the BSP's FX Manual. Thus, I submit that the question of whether these issuances are compliant with the prior concurrence requirement of the Constitution remains open. Ultimately, the questions are: 1) Does the Monetary Board's power of prior concurrence include the power to define that very concept? 2) Is the power to define and operationalize the concept of prior concurrence vested in the BSP pursuant to its regulatory prerogatives over the sovereign borrowing power; or is it lodged in Congress, pursuant to its power to fill in the details of the BSP's constitutional powers; or is it lodged in both organs?

[1]Perry v. United States, *infra* note 3.

[2]"The traditional channels through which a sovereign State raises financial resources are taxation, money printing, and borrowing." Mauro Megliani, SOVEREIGN DEBT: GENESIS - RESTRUCTURING -

LITIGATION (2015), p. 3.

[3]294 U.S. 330 (1935).

[4]Id. at 353.

[5]See *United States v. Dorr*, 2 Phil. 269 (1903), affirmed in *Dorr v. United States*, 195 U.S. 138 (1904); *Smith, Bell & Co. (Ltd.) v. Natividad*, 40 Phil. 136 (1919); *31st Infantry Post Exchange v. Posadas, Jr.*, 54 Phil. 866 (1930); *Yu Cong Eng v. Trinidad*, 47 Phil. 385 (1925); *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660 (1919).

[6]United States Constitution, Article I, Section 8.

[7]1899 MALOLOS CONSTITUTION, Title XII, Article 85, as translated into English in Sulpicio Guevara, *THE LAWS OF THE FIRST PHILIPPINE REPUBLIC (THE LAWS OF MALOLOS) 1898-1899* (1998), p. 116.

[8]Id., Article 86.

[9]Id., Article 85, id.

[10]Id., Article 86, id.

[11]United States: An Act Temporarily to provide for the administration of the affairs of the civil government in the Philippine Islands, and for other purposes, 32 Stat. 6912 (1902).

[12]United States: Pub. L. 73-127, 48 Stat. 456 (1934). More popularly known as the Tydings-McDuffie Act.

[13]Vicente G. Sinco, *PHILIPPINE POLITICAL LAW*, (1950), pp. 211-212.

[14]In 1940, the 1935 Constitution was amended to provide for a bicameral legislature. See *Philippine Constitution Association, Inc. v. Gimenez*, 122 Phil. 894 (1965); *Philippine Constitution Association, Inc. v. Mathay*, 124 Phil. 890 (1966), and concurring opinion of Zaldivar, J.; Brion, J., concurring in *Intellectual Property Association of the Philippines v. Ochoa*, 790 Phil. 276(2016).

[15]Vicente G. Sinco, *supra* note 12 at 209; I Lorenzo M. Taiada and Francisco Caneon, *POLITICAL. LAW OF THE PHILIPPINES*, (1961), pp. 247-248.

[16]AN ACT AUTHORIZING THE SECRETARY OF FINANCE TO BORROW TO MEET PUBLIC EXPENDITURES AUTHORIZED BY LAW, AND FOR OTHER PURPOSES.

[17]509 Phil. 486 (2005).

[18]Id. at 520.

[19]AN ACT AUTHORIZING THE PRESIDENT OF THE PHILIPPINES TO OBTAIN SUCH FOREIGN LOANS AND CREDITS, OR TO INCUR SUCH FOREIGN INDEBTEDNESS, AS MAY BE NECESSARY TO FINANCE APPROVED ECONOMIC DEVELOPMENT PURPOSES OR PROJECTS, AND TO GUARANTEE, IN BEHALF OF THE REPUBLIC OF THE PHILIPPINES, FOREIGN LOANS OBTAINED OR BONDS ISSUED BY CORPORATIONS OWNED OR CONTROLLED BY THE GOVERNMENT OF THE PHILIPPINES FOR ECONOMIC DEVELOPMENT PURPOSES INCLUDING THOSE INCURRED FOR PURPOSES OF RE-LENDING TO THE PRIVATE SECTOR, APPROPRIATING THE NECESSARY FUNDS THEREFOR, AND FOR OTHER PURPOSES.

[20]Under the 1973 CONSTITUTION, Article IX, Section I, executive power was vested in the Prime Minister.

[21]Miriam Defensor Santiago, THE 1972 CONSTITUTION: A GUIDE FOR STUDY AND REFERENCE, (1973), p. 105.

[22]II Hector S. De Leon and Hector M. De Leon, Jr., PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES, (2017), p. 439, citing Miguel P. Cuaderno, Sr., "The Cabinet Government," in Cirilo Roy Montejo, On the 1973 Constitution, p. 151.

[23]Id. Legislative approval was done away with for reasons of expediency and to prevent the use of such approval as a political bargaining tool. De Leon and De Leon Jr., id. at 440. See also 2 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 393.

[24]Supra note 16.

[25]Id. at 516.

[26]Id. at 518.

[27]Id. at 519.

[28]REPUBLIC ACT NO. 4860.

[29]3 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 639.

[30]Supra note 15.

[31]Id. at 519.

[32]REPUBLIC ACT No. 7653, as amended by REPUBLIC ACT No. 11211.

[33]2 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), pp. 396-397.

[34]5 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), 937.

[35]3 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), 639.

[36]Id. at 617.

[37]Id. at 639.

[38]Pambansang Koalisyon ng mga Samahang Magsasaka at Manggagawa sa Niyugan v. Executive Secretary, 685 Phil. 295 (2012); Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain, 589 Phil. 387 (2008); Valmonte v. Belmonte, Jr., 252 Phil. 264 (1989); Legaspi v. Civil Service Commission, 234 Phil. 521 (1987).

[39]AN ACT ESTABLISHING THE CENTRAL BANK OF THE PHILIPPINES, DEFINING ITS POWERS IN THE ADMINISTRATION OF THE MONETARY AND BANKING SYSTEM, AMENDING THE PERTINENT PROVISIONS OF THE ADMINISTRATIVE CODE WITH RESPECT TO THE CURRENCY AND THE BUREAU OF BANKING, AND FOR OTHER PURPOSES.

[40]REPUBLIC ACT No. 265, Section 4.

[41]Id., Section 2.

[42]Id., Section 5.

[43]5 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 937.

[44]REPUBLIC ACT No. 7653 (as amended), Section 2.

[45]Id. (as amended), Sections 5 and 6.

[46]"Prescribing Procedures for the Planning of Development Finances, the Issuance of Government Securities, and the Disbursement of Proceeds."

[47]3 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 639.

[48]695 Phil. 627 (2012).

[49]Id. at 658-659,666.

[50]Supra note 44.

[51]2 RECORD OF THE CONSTITUTIONAL COMMISSION (1990), p. 393.

[52]<https://www.bsp.gov.ph/Regulations/MORFXT/MORFXT.pdf>. Accessed, March 30, 2022.

[53]Draft ponencia, p. 22.

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