

Republic of the Philippines  
SUPREME COURT  
Manila

EN BANC

NERI J. COLMENARES,  
BAYAN MUNA PARTYLIST  
REPRESENTATIVE CARLOS  
ISAGANI T. ZARATE,  
ANAKPAWIS PARTYLIST  
REPRESENTATIVE ARIEL B.  
CASILAO, GABRIELA  
WOMEN'S PARTYLIST  
REPRESENTATIVE  
EMERENCIANA A. DE  
JESUS, GABRIELA  
WOMEN'S PARTYLIST  
REPRESENTATIVE ARLENE  
D. BROSAS, ACT  
TEACHERS PARTYLIST  
REPRESENTATIVE  
ANTONIO L. TINIO, ACT  
TEACHERS PARTYLIST  
REPRESENTATIVE  
FRANCISCA L. CASTRO,  
KABATAAN PARTYLIST  
REPRESENTATIVE SARAH  
JANE I. ELAGO, KILUSANG  
MAGBUBUKID NG  
PILIPINAS CHAIRPERSON  
DANILO H. RAMOS, and  
ELMA A. TUAZON,  
Petitioners,

G.R. No. \_\_\_\_\_

For: Prohibition (With  
Application for  
Temporary Restraining  
Order and/or Writ of  
Preliminary Injunction)

-versus-

RODRIGO R. DUTERTE,  
PRESIDENT OF THE  
REPUBLIC OF THE  
PHILIPPINES, EXECUTIVE  
SECRETARY SALVADOR C.  
MEDIALDEA, DEPARTMENT  
OF FINANCE SECRETARY  
CARLOS G. DOMINGUEZ  
III, NATIONAL  
ECONOMIC AND  
DEVELOPMENT AUTHORITY  
SECRETARY ERNESTO M.  
PERNIA, DEPARTMENT OF  
JUSTICE SECRETARY  
MENARDO I. GUEVARRA,  
NATIONAL IRRIGATION  
ADMINISTRATION  
ADMINISTRATOR  
RICARDO R. VISAYA,

Respondents,

X-----X

**PETITION FOR PROHIBITION**  
**(WITH URGENT PRAYER FOR THE ISSUANCE OF**  
**TEMPORARY RESTRAINING ORDER AND/OR WRIT OF**  
**PRELIMINARY INJUNCTION)**

PETITIONERS, by Counsel, most respectfully state that:

**PREFATORY STATEMENT**

**“Dangerous Loan Agreements within the framework of  
Pres. Rodrigo Duterte’s Kowtowing Foreign Policy”**

The Loan Agreement subject of this Petition actually stems from President Rodrigo Duterte's foreign relations policy. He probably endeared himself to many when he announced his “Jet Ski” Foreign Policy during the 2016 presidential campaign period but he surprised many when he completely turned around and espoused the current “Kowtowing” Foreign Policy of appeasing China right after he assumed office. What happened during the last months of the campaign period that changed his mind remains a mystery until now. This mysterious turn around becomes more pronounced because this policy is based on his analysis that asserting our sovereign rights in the West Philippine Sea will result in China invading us, does not seem to have come from a serious foreign policy study. After all, countries like Vietnam and Taiwan have been asserting their sovereign rights in the South China Sea and clashing with China for many years now, confident that China cannot invade them, as it will generate a swift response from the international community which does not want China to control the South China Sea.

What is clear, however, is that this Kowtowing Foreign Policy has been severely detrimental to our national interest. The Duterte administration's refusal to protect our fishermen who are being harassed by China in off-shore fishing grounds, and its acquiescence to the dictates of China in the loan agreements, as exemplified by the Chico River Irrigation Loan Agreement, are but manifestations of this policy of appeasement.

We can debate whether the patrimonial assets we will use as “collateral” in the Loan Agreements include our energy resources in the Reed Bank, but in the end it will be a Chinese tribunal using or applying the law of China which will decide whether China will trample on us within our territory in the same way that it is now trampling on us in the West Philippine Sea.

The answer to the question may actually be gleaned from experience of Ecuador who was forced to grant China control of eighty percent (80%) of its oil produce after it defaulted on a Chinese loan for its Coca Codo Hydro Dam. The experience of

Sri Lanka also serves as a lesson of the possible outcome of this loan should the Philippines fail to pay—China was allowed to control its Hambantota port after Sri Lanka failed to pay its loan.

China is a substantially different creditor compared to other creditor countries like South Korea. Firstly, it is a disputant in the West Philippine Sea who has refused to recognize not just the Tribunal decision in our favor, but international law itself, in its expansionism in the South China Sea. Secondly, it has also shown to be untrustworthy as it pretends to be our friend while it tramples on our sovereign rights in the West Philippine Sea. Thirdly, it has in fact defrauded the Philippines once when it cunningly retained important data on the location of resources in the West Philippine Sea while withholding the same from the Philippines during the supposedly “joint” exploration agreement in the 2005-2008 Joint Marine Seismic Undertaking (JMSU). The highly overpriced NBN-ZTE deal is an example of how China seeks to co-opt government officials through corruption and through onerous loan agreements.

This government should abandon its harebrained and dangerous “Kowtowing” foreign policy before we get ensnared in a debt trap with China for these loans. Government should instead chart a genuine independent foreign policy that will:

- 1) Continue the search for the peaceful resolution of the dispute without surrendering our sovereign rights in the West Philippine Sea, and demand the complete demilitarization of the South China Sea by all disputants;
- 2) Establish an alliance with other disputants such as Vietnam and Taiwan to strengthen opposition against Chinese expansionism and help protect fishermen from all countries to fish in common fishing grounds; and
- 3) Gather the support of the international community to demand a stop to China’s expansionism and isolate China if it persists disregarding the sovereign rights of other countries in the region.

To treat China in this Petition like any ordinary creditor State is a major mistake. *Tuso ang gobierno ng Tsina at hindi maaring pagkatiwalaan.*

**STATEMENT OF THE CASE**

1. This is a Petition for Prohibition, filed under Rule 65 of the Revised Rules of Court, with an application for urgent relief by way of Temporary Restraining Order (TRO) and/or Writ of Preliminary Injunction, to ENJOIN Respondents from enforcing the Preferential Buyer's Credit Loan Agreement on the Chico River Pump Irrigation Project, identified under No. 1420103052018210863 CHINA EXIMBANK PBC 2018 NO. 11 TOTAL NO. 468 ("Loan Agreement"), on the issues stated in pages 17 and 18 of this petition.

2. The present petition is filed pursuant to the Judiciary's constitutional power to exercise original jurisdiction over petitions for prohibition as enshrined in Article VIII of the 1987 Constitution:

SECTION 5. The Supreme Court shall have the following powers:

1. Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and habeas corpus.

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3. As a resolution of these constitutional questions has far-reaching implications - and would guide both the bench and the bar on issues concerning the limits of executive power, the right to information, waiver of State immunities over all the assets of the State except those 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 defense agency of the Republic of the Philippines, or (iii) located in the Philippines and dedicated to a public or governmental use, as distinguished from patrimonial asset and assets dedicated to commercial use - direct resort to this Honorable Court is being availed of.

4. Likewise, the assailed Loan Agreement, as one of the many other contracts the Philippine government entered with China, will have adverse consequences to this and the next generations of Filipinos, such as in relation to the exercise and

enjoyment of our country's patrimonial assets and sovereign rights.

5. These are genuine issues of constitutionality that must be addressed by none other than the Supreme Court at the most immediate time.

6. As such, Petitioners assert that the present petition falls under the exceptions to the doctrine of hierarchy of courts.

7. There is no factual issue in this instant case but concerns pure question of law.

8. Petitioners are all suing in their capacity as citizens of the Philippines whose interests are affected by the assailed Loan Agreement discussed below.

## **PARTIES**

### **THE PETITIONERS**

9. PETITIONER **NERI JAVIER COLMENARES** is a Filipino citizen, of legal age, former legislator in the 14<sup>th</sup> to 16<sup>th</sup> Congress, and the incumbent BAYAN MUNA Chairman. He has office address at Makabayang Koalisyon ng Mamamayan (MAKABAYAN) National Headquarters Block 31 Lot 13, A. Bonifacio Ave., New Capitol Estates I, Batasan Hills, Quezon City.

10. PETITIONER BAYAN MUNA REPRESENTATIVE **CARLOS ISAGANI T. ZARATE** is a Filipino citizen, of legal age, and the incumbent BAYAN MUNA Representative with office address at Room N-210 House of Representatives, Quezon City.

11. PETITIONER ANAKPAWIS REPRESENTATIVE **ARIEL B. CASILAO** is a Filipino citizen, of legal age, and the incumbent ANAKPAWIS Partylist Representative with office address at Room S-608 House of Representatives, Quezon City.

12. PETITIONER GABRIELA WOMEN'S PARTY REPRESENTATIVE **EMERENCIANA A. DE JESUS**, is a Filipino citizen, of legal age, and the incumbent GABRIELA WOMEN'S PARTY Representative with office address at Room SWA-426 House of Representatives, Quezon City.

13. PETITIONER GABRIELA WOMEN'S PARTY REPRESENTATIVE **ARLENE D. BROSAS**, is a Filipino citizen, of legal age, and the incumbent GABRIELA WOMEN'S PARTY Representative with address at Room 604 South Building, House of Representatives, Batasan Hills Quezon City.

14. PETITIONER ACT TEACHERS PARTYLIST REPRESENTATIVE **ANTONIO L. TINIO**, is a Filipino citizen, of legal age, and the incumbent ACT TEACHERS PARTYLIST Representative with office address at Room 511 South Building, House of Representatives, Quezon City.

15. PETITIONER ACT TEACHERS PARTYLIST REPRESENTATIVE **FRANCISCA L. CASTRO**, is a Filipino citizen, of legal age, and the incumbent ACT TEACHERS PARTYLIST Representative with office address at Room 611 South Building, House of Representatives, Quezon City.

16. PETITIONER KABATAAN PARTYLIST REPRESENTATIVE **SARAH JANE I. ELAGO**, is a Filipino citizen, of legal age, and the incumbent KABATAAN PARTYLIST Representative with office address at Room 616 North Building, House of Representatives, Quezon City.

17. PETITIONER **DANILO H. RAMOS**, is a Filipino citizen and of legal age. He is the Chairman of the Kilusang Magbubukid ng Pilipinas and holds office at No. 2-G Alley 27, Project 6, Quezon City.

18. PETITIONER **ELMA A. TUAZON**, is a Filipino citizen and of legal age with residential address at Cawagayan, Pinukpuk, Kalinga. She is a member of Limos Ethnolinguistic Group and member of the Advisory Council of the Mannalon ti Limos para iti Urnos, Dur-as ken Alluyon (MALUDA), a barangay-wide farmers association situated in the community where the Chico River Pump Irrigation Project is being implemented.

### **THE RESPONDENTS**

19. RESPONDENT **PRESIDENT RODRIGO ROA DUTERTE** is the President of the Philippines. His office address is at the Office of the President, Malacañang Palace, Manila.

20. RESPONDENT **EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA** holds office address at the Office of the Executive

Secretary, Malacañang Complex, Ground Floor Premier Guest House, J.P. Laurel St. San Miguel, Manila.

21. RESPONDENT **DEPARTMENT OF FINANCE** represented by **SECRETARY CARLOS G. DOMINGUEZ III**, is the government agency which represented the Government of the Republic of the Philippines in the Preferential Buyer's Credit Loan Agreement dated April 10, 2019 between the GRP and Export-Import Bank of China for the Chico River Pump Irrigation Project. The DOF Secretary holds office at the DOF Building, BSP Complex, Roxas Boulevard, Malate, Manila 1004.

22. RESPONDENT **NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY** represented by **SECRETARY ERNESTO M. PERNIA** is the government agency which approved the Chico River Pump Irrigation Project. The NEDA Secretary holds office at 12 St. J.Escriva Drive, Ortigas Center, Pasig City.

23. RESPONDENT **DEPARTMENT OF JUSTICE** represented by **SECRETARY MENARDO I. GUEVARRA** is the government agency tasked to issue the Legal Opinion in the form and substance set forth in Appendix 6 of the Preferential Buyer's Credit Loan Agreement dated April 10, 2019 between the GRP and Export-Import Bank of China for the Chico River Pump Irrigation Project. The DOJ Secretary holds office at the DOJ Building, Padre Faura Street, Ermita, Manila 1000.

24. RESPONDENT **NATIONAL IRRIGATION ADMINISTRATION** represented by its **ADMINISTRATOR RICARDO R. VISAYA** is the government agency which represented the Government of the Republic of the Philippines in the Chico River Pump Irrigation Project Contract Agreement on March 8, 2018. The NIA Administrator holds office at 1100, NIA Complex, Diliman, Quezon City.

### **STATEMENT OF RELEVANT FACTS**

25. The facts relevant to this petition are not contested as they came from the whereas clause of the Loan Agreement, uploaded materials in the official websites of concerned agencies, as well as public and official pronouncements of Respondents.



26. The Chico River Pump Irrigation Project ("CRPIP") involves the installation of six (6) units of electric motor driven pumps, the construction of irrigation canals, facilities, and other appurtenant structures, and the construction of a pumping station located at the right bank facing downstream of the Chico River.<sup>1</sup>

27. As early as June 2015, the CRPIP was endorsed by the NEDA-Investment Coordination Committee Technical Board-Cabinet Committee (ICC TB-CC) to the NEDA Board with a cost of PhP 2,696.17 Million. The approval was deferred pending clarifications on issues raised by the former President of the Philippines.

28. More than a year later and fresh into the term of President Rodrigo Roa Duterte in September 2016, the NEDA-ICC-CC confirmed its earlier approval on the project cost of PhP 2,696.17 Million.

29. In an act paving the way for finance dealings between the Philippines and China under the Duterte Administration, the Government of the Republic of the Philippines (GRP), through the Department of Finance (DOF), and the Export-Import Bank of China (China EXIM Bank) signed a Memorandum of Understanding (MOU) on Financing Cooperation on October 20, 2016 "to facilitate the promotion of financing cooperation between the Parties and utilization of the financing being extended by the Lender to the Borrower for the purpose of financing projects mutually identified and agreed upon between the Government of the Republic of the Philippines and Government of the People's Republic of China."<sup>2</sup>

30. Immediately after the signing of the MOU, on November 14, 2016, the NEDA Board in its meeting instructed for the National Irrigation Authority (NIA) to "reconfigure the project design of the CRPIP to include a hydropower energy component."<sup>3</sup> This entailed a proposed shift in project financing from local financing/ General Appropriations Act (GAA) to the Official Development Assistance (ODA) to allow NIA to tap a

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<sup>1</sup> [http://www.neda.gov.ph/wp-content/uploads/2018/08/ICC-NB-Approved-Projects-as-of-June-18-2018-Duterte-Admin\\_jstm-editfor-website-uploading\\_3.pdf](http://www.neda.gov.ph/wp-content/uploads/2018/08/ICC-NB-Approved-Projects-as-of-June-18-2018-Duterte-Admin_jstm-editfor-website-uploading_3.pdf) Last accessed March 27, 2019.

<sup>2</sup> Preferential Buyer's Credit Loan Agreement on the Chico River Pump Irrigation Project, Export-Import Bank of China and the Government of the Republic of the Philippines, April 10, 2018. Last accessed March 28, 2019.

<sup>3</sup> Supra.

grant/technical assistance to comply with the directive of the NEDA Board.<sup>4</sup>

31. In less than six months since the signing of the MOU, on March 3, 2017, "the Government of the Republic of the Philippines, through the Department of Foreign Affairs, sent a Note Verbale No. 17-1049 to the Government of the People's Republic of China (PRC) through the Ministry of Commerce, related to the procedures and arrangements of the utilization of concessionary loans committed by the PRC to support priority projects of the Borrower, which was confirmed by PRC on March 8, 2017 (hereinafter referred to as the "Note Verbale")."<sup>5</sup>

32. Accordingly, on March 21, 2017, the Investment Coordination Committee (ICC) confirmed the proposed change in financing the CRPIP from the GAA to the ODA.<sup>6</sup> This was confirmed by the NEDA Board in June 2017.

33. As of June 27, 2017, the Project was included in the list of the NEDA Infrastructure Flagship Projects.<sup>7</sup>

34. On June 29, 2017, and only two days after the inclusion into the NEDA's flagship projects, the DOF and the Embassy of the PRC in the Republic of the Philippines, on behalf of both Governments, "executed the Clarificatory Letter on the Procedures and Arrangements for the Implementation of the Note Verbale to further implement and clarify the said Note Verbale (hereinafter referred to as the "Clarificatory Procedures and Arrangements")."<sup>8</sup>

35. In November 2017, the NEDA-ICC Technical Board approved the change in development scheme and increase in cost from PhP 2,696.17 Million to PhP4,372.897 Million.

36. On November 15, 2017, the Republic of the Philippines, represented by the DOF, and the Export-Import Bank of China signed the Financing Cooperation Agreement on the Chico River Pump Irrigation Project and New Centennial Water Source-Kaliwa Dam Project on the summary of the

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<sup>4</sup> Ibid.

<sup>5</sup> Preferential Buyer's Credit Loan Agreement on the Chico River Pump Irrigation Project, *supra*, paragraph (B) at page 2.

<sup>6</sup> [http://www.neda.gov.ph/wp-content/uploads/2017/07/Infrastructure-Flagship-Projects\\_with-Regional-Breakdown\\_As\\_of\\_Jun\\_27\\_2017.pdf](http://www.neda.gov.ph/wp-content/uploads/2017/07/Infrastructure-Flagship-Projects_with-Regional-Breakdown_As_of_Jun_27_2017.pdf) last accessed March 26, 2019.

<sup>7</sup> Ibid.

<sup>8</sup> Preferential Buyer's Credit Loan Agreement on the Chico River Pump Irrigation Project, *supra*, paragraph (C) at page 3.

progress and arrangements in implementing the two (2) projects to be financed by the Preferential Buyer's Credit facility.<sup>9</sup>

37. As the Philippines was bound to the MOU and the abovementioned Note Verbale and Clarificatory Procedures and arrangements, China CAMC Engineering Co. Ltd. has been selected as the Contractor (Chinese Contractor).<sup>10</sup>

38. On March 8, 2018, the NIA and the Chinese Contractor entered into the Chico River Pump Irrigation Project Contract Agreement ("CRPIP Contract Agreement") for the purpose of the implementation of the Project.<sup>11</sup>

39. A day after the contract signing by and between NIA and the Chinese Contractor, on March 9, 2018, the GRP requested the China EXIM Bank to "make available a loan facility of up to US\$ Dollar Sixty Two Million Eighty Six Thousand Eight Hundred and Thirty Seven and Eighty Two Cents only (US\$ 62, 086, 837.82)"<sup>12</sup> to finance the CRPIP Contract Agreement.

40. On April 10, 2018, the GRP, acting by and through the DOF and the China EXIM Bank signed the Preferential Buyer's Credit Loan Agreement ("Loan Agreement") on the Chico River Pump Irrigation Project. The project broke ground in June 2018 in Brgy. Pinococ, Pinukpuk, Kalinga.

41. In a belated act, the Monetary Board of the Bangko Sentral approved the Loan Agreement only on May 17, 2018<sup>13</sup>, more than a month after the Loan Agreement was entered into by the GRP and China EXIM Bank, and after a considerable period since negotiations on the financing scheme were undertaken.

42. When Chinese Premier Xi Jen Ping visited the Philippines in April 2018, the Presidential Communications Operations Office reported the signing of six bilateral agreements following the bilateral meeting held between the Philippines and China. Various groups, including the Petitioners, asked that the government release copies of the

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> [http://www.neda.gov.ph/wp-content/uploads/2018/08/ICC-NB-Approved-Projects-as-of-June-18-2018-Duterte-Admin\\_istm-editfor-website-uploading\\_3.pdf](http://www.neda.gov.ph/wp-content/uploads/2018/08/ICC-NB-Approved-Projects-as-of-June-18-2018-Duterte-Admin_istm-editfor-website-uploading_3.pdf) last accessed March 28, 2019.

loan for purposes of transparency, but not one copy of the loan agreement was released.<sup>14</sup>

43. Recently, Petitioner Neri Colmenares was discretely given a photocopy of the Loan Agreement subject of herein petition.

44. After studying some of the provisions of the Loan Agreement, Petitioner Colmenares made a critical analysis on the same in a public commentary published on February 26, 2019, and exposed the onerous and disadvantageous provisions of the agreement:

*" The Loan Agreement is onerous & highly favors China. It sets an annual interest rate of 2% for the Php3.6 Billion loan plus an annual "Commitment Fee" of .3% and a "Management Fee" of US\$ 186,260. China demands that the loan be 'paid in full without counterclaim or retention."*

*The 2% interest rate is exceedingly high compared to loans offered by other countries which only charge .25% per year. China is demanding that payment be automatically included in the General Appropriations Law, practically usurping the powers of Congress.*

*On top of the expensive rates, China still have the gall to require that the contractor be a Chinese company. The Chinese contractor would most likely hire Chinese workers, adding to an even greater influx of Chinese workers, leading to the displacement of Filipino workers.*

*A dangerous component of the Agreement is a vaguely worded provision that does not recognize our sovereign rights & could allow China to take control of our patrimonial properties should we fail*

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<sup>14</sup> [https://pcoo.gov.ph/news\\_releases/ph-china-sign-six-bilateral-agreements/](https://pcoo.gov.ph/news_releases/ph-china-sign-six-bilateral-agreements/)

to pay the loan, much like what happened to Sri Lanka's Hambatota Port.

It provides that any dispute such as a delay or default in payment shall be resolved by the China International Economic and Trade Arbitration Commission (CIETAC) and shall be governed by the laws of China. It even imposes that the venue shall be in Beijing.

Our children will continue paying for this highly disadvantageous loan as we get enmeshed in a debt trap in the amount of hundreds of billions of dollars from China. Ang masama rito, ginigisa na nga tayo sa sarili nating mantika, tayo pa ang pinagbili ng bawang at sibuyas."<sup>15</sup>

45. On March 1, 2019, in reaction to the criticism of Petitioner Colmenares, DOF Assistant Secretary Antonio Joselito G. Lambino II told the BusinessMirror:

*"We negotiate to make sure that the arbitration mechanism protects our interests, but it must also be acceptable to each party."*<sup>16</sup>

46. On March 2, 2019, Presidential Spokesperson Salvador Panelo asserted:

*"Based on the report of the DOF on procurement, as part of the terms of agreement, China provided a list of three contractors of good standing and the implementing agency was given the opportunity to vet and request for a replacement, if needed,"* Panelo said.<sup>17</sup>*"For each loan agreement, the DOF mentions that an arbitration clause is negotiated. We negotiate to make sure*

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<sup>15</sup> <https://twitter.com/ColmenaresPH/status/1100651439062282241> last accessed March 28, 2019.

<sup>16</sup> <https://businessmirror.com.ph/2019/03/01/dof-highlights-benefits-of-chico-river-irrigation-project-with-beijing/> last accessed March 28, 2019.

<sup>17</sup> <https://www.sunstar.com.ph/article/1794977> last accessed March 28, 2019.

*that the arbitration mechanism protects our interests," Panelo said.*<sup>18</sup>

47. Meanwhile on March 25, 2019, Panelo further said:

*"Hindi ba pag nag-uutang tayo, mayroon ba tayong say? When we loan from the bank, it's always the terms from the bank. Natural lang 'yun na they will make sure na hindi sila malulugi sa kanilang pinautang sa atin,"* Panelo said during a Palace news briefing.

*"Eh wala ka namang – do you have any say when you're borrowing money? O sasabihin nila, 'Eh di 'wag na lang. 'Wag na lang kaming magpahiram sa inyo,"* he added.

*"Kasi 'yun nga ang standard ng terms ng kanilang mga ano eh (Because that's the standard terms of their contracts).... The onerous conditions that some are saying are **incorporated in the contract** [are] standard between lender and borrower to be sure that the lender will be getting what they have lent to the borrower,"* he said.<sup>19</sup>

48. Finance Undersecretary Bayani Agabin on March 27, 2019 added:

*" "May probisyon tayo sa batas, it's PD 1177, na awtomatikong naglalaan ng pambayad ng utang na nakapaloob po ito sa taunang General Appropriations Act. Meaning, all our indebtedness, it's automatically appropriated in our budget,"* Agabin said.

*"We fully trust China to comply with a loan agreement which they signed, in the same way as they trust us to comply with*

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<sup>18</sup> Ibid.

<sup>19</sup> <https://www.rappler.com/nation/226583-philippines-no-say-loan-deals-china-chico-river-deal>. Last accessed March 26, 2019.

*a loan agreement which we signed,”  
Joven said.*

*“We’re very well aware of what is  
happening in the world and we’re fiscally  
responsible enough not to do something  
which will endanger the fiscal position of  
our country,” he added.”<sup>20</sup>*

49. In reviewing the full copy of the assailed Loan Agreement, considering the official pronouncements of no less than the Presidential Spokesperson himself, and taking into account that the arbitration mechanisms incorporated into the Loan Agreement as mentioned by DOF Assistant Secretary actually endanger the national interest, the Petitioners seek relief from the Honorable Court in enjoining the Respondents from proceeding with the enforcement of the Loan Agreement, raising grave violations of their rights under the Constitution, and from further compromising national interests by waiving sovereign immunities guaranteed by the Constitution.

50. The issue of building a dam at the Chico River has been an issue for decades due to the opposition of indigenous peoples that such a project will destroy their community and their forests. The famous Macliing Dulag was killed as a result of that struggle of the people. The spectre of another battle on the Chico River is again at hand—this time not only just against “low landers” from Malacanang, but invaders from a rapacious imperialist from Asia—China.

51. Thus, this Petition.

## **DOCUMENTS ATTACHED TO THIS PETITION**

52. On March 14, 2019 Petitioner Colmenares filed a Letter/FOI request with the DOF requesting for Certified True Copies of the following documents, among others:

### **i. Preferential Buyer’s Credit Loan Agreement on the Chico River Pump Irrigation Project**

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<sup>20</sup> <http://tempo.com.ph/2019/03/27/govt-can-pay-62-m-chico-river-project-loan-finance-officials-say/>.  
Last accessed March 28, 2019.

between the Export-Import Bank of China (as Lender) and the Government of the Republic of the Philippines, Acting by and through the Department of Finance (as Borrower), dated April 10, 2018.

**ii. Financing Cooperation Agreement on the Chico River Pump Irrigation Project and New Centennial Water Source-Kaliwa Dam Project**

between the Export-Import Bank of China and the Government of the Republic of the Philippines, Acting by and through the Department of Finance, dated November 15, 2017.

**iii. Chico River Pump Irrigation Project Contract Agreement**

between the National Irrigation Administration and the China CAMC Engineering Co. Ltd., with Contract Number CRPIP-ICB-C-1, dated March 8, 2018.

A copy of the Letter is attached as **ANNEX "A"**.

53. On March 27, 2019, Petitioner Colmenares received the DOF Letter dated March 22, 2019, stating, among others, that (i) the copy of the Loan Agreement on the Chico River Pump Irrigation Project can be accessed by Petitioner through the DOF website; and (ii) that the DOF has provided Petitioner Colmenares with a copy of the Financing Cooperation Agreement on the Chico River Pump Irrigation Project and New Centennial Water Source-Kaliwa Dam Project.

A copy of the Letter is attached as **ANNEX "B"**.

54. Having been informed by the DOF that a copy of the Chico River Pump Irrigation Project could be secured from the NIA, Petitioner Colmenares filed a Letter/FOI request dated March 28, 2019 with the NIA Administrator requesting for Certified True Copy of the Contract Agreement on the Chico River Pump Irrigation Project between the National Irrigation Administration and the China CAMC Engineering Co. Ltd., with Contract Number CRPIP-ICB-C-1, dated March 8, 2018.

A copy of the Letter is attached as **ANNEX "C"**.

55. Attached to this Petition as **ANNEX "D"** is a copy of the Preferential Buyer's Credit Loan Agreement on the Chico River Pump Irrigation Project between the Export-Import Bank of China and the Government of the Republic of the Philippines



acting by and through the Department of Finance, dated April 10, 2018, as downloaded on April 1, 2019 from the DOF website referred in the above-mentioned DOF Letter.

56. Further attached to this Petition as **ANNEX "E"** is a copy of the Financing Cooperation Agreement on the Chico River Pump Irrigation Project and New Centennial Water Source-Kaliwa Dam Project, as attached by the DOF in its above-mentioned Letter.

57. On April 3, 2019, Petitioner Colmenares received the reply of NIA Administrator, furnishing him a certified photocopy of the following: i.) Contract Agreement under Contract No. CRPIP-ICB-C-1, and ii.) Supplemental Agreement under Contract No. CRPIP-ICB-C-1.

Attached herein as **ANNEX "F"** is the NIA letter/reply; **ANNEX "G"**, the certified photocopy of the aforesaid Contract Agreement; and **ANNEX "G-1"**, the certified photocopy of the aforesaid Supplemental Agreement.

## **ISSUES**

### **I.**

**WHETHER THE ASSAILED PREFERENTIAL BUYER'S CREDIT LOAN AGREEMENT ON THE CHICO RIVER PUMP IRRIGATION PROJECT EXECUTED BY AND BETWEEN THE EXPORT-IMPORT BANK OF CHINA AND THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE SUBSEQUENT IMPLEMENTATION THEREOF VIOLATE THE CONSTITUTION AND ARE, THEREFORE, VOID.**

### **A.**

**Is a loan agreement containing a Confidentiality Clause violative of the 1987 Constitution that provides for the right to information of the Filipino people on foreign loans contracted by the government?**

### **B.**

**Is a loan agreement approved after-the-fact by the Monetary Board properly considered cured as to be in conformity with the 1987 Constitution which states that the approval must be prior?**

**C.**

**Is a loan agreement which is conditioned on the signing of a contractor's agreement awarding the CRPIP to a Chinese construction firm and, thereby, doing away with the procurement laws of the country and the Filipino First Policy of the 1987 Constitution constitutionally valid?**

**D.**

**Is a loan agreement hauling the country to a Chinese arbitration tribunal, officiated by Chinese arbitrators using Chinese laws, in keeping with Article II Section 7 of the Constitution?**

**E.**

**Is a loan agreement containing express waiver of sovereign immunity over the State's patrimonial assets in favor of a foreign government allowed by the Constitution?**

**II.**

**WHETHER PETITIONERS ARE ENTITLED TO INJUNCTIVE RELIEF.**

## **DISCUSSION**

**I.**

**WHETHER THE ASSAILED PREFERENTIAL BUYER'S CREDIT LOAN AGREEMENT ON THE CHICO RIVER PUMP IRRIGATION PROJECT EXECUTED BY AND BETWEEN THE EXPORT-IMPORT BANK OF CHINA AND THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE**

**SUBSEQUENT IMPLEMENTATION THEREOF  
VIOLATE THE CONSTITUTION AND ARE,  
THEREFORE, VOID.**

**A. The Confidentiality Clause of the Preferential Buyer's Credit Loan Agreement is a brazen disregard of the constitutional right of the Filipino people to information on foreign loans obtained or guaranteed by the government, and is considered inimical to the national interest.**

58. Article XII Section 21 of the 1987 Constitution is unambiguous and controlling:

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 ours)

59. That the national interest is primordial and paramount in any dealings involving the national economy and patrimony is absolute. Thus, Article XII Section 22 provides:

Section 22. Acts which circumvent or negate any of the provisions of this Article shall be considered inimical to the national interest and subject to criminal and civil sanctions, as may be provided by law.

60. Further indicative of the policy on transparency is Article II, Section 28:

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 public interest.

61. Furthermore, the Bill of Rights guarantees the fundamental right to information in Article III Section 7 of the Constitution:

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.

62. The Respondents, in wanton disregard of Article XII Section 21, acceded to Article 8.8 of the Preferential Buyer's Credit Loan Agreement. Article 8.8 states:

**Article 8.8 Confidentiality.** 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. (emphasis ours)

63. By allowing the GRP to be bound by Article 8.8 of the Loan Agreement, Respondents, as representatives of the Filipino people, committed grave violation of Article XII Section 21, to the prejudice of the rights of the Filipino people and national interest.

64. Article XII Section 21 together with Section 22 "is a mandatory, positive command which is complete in itself and which needs no further guidelines or implementing laws or rules

for its enforcement. From its very words the provision does not require any legislation to put it in operation."<sup>21</sup>

65. To grasp its mandatory character, it is necessary to establish the distinction thereof against Article III Section 7 and Article II Section 28 of the 1987 Constitution.

66. In Article III Section 7 and Article II Section 28, the Supreme Court in the case of *Valmonte vs Belmonte* is instructive in saying that "the people's right to information is limited to "matters of public concern," and is further "subject to such limitations as may be provided by law." Similarly, the State's policy of full disclosure is limited to "transactions involving public interest" and is subject to reasonable conditions prescribed by law."<sup>22</sup>

67. In this case, the limitations and conditions to Article III Section 7 and Article II Section 28 do not apply.

68. Further, the recognized restrictions to the right to information as laid down by jurisprudence are not applicable in this case, as well.

69. The language of the Constitution on the right to information on foreign loans obtained or guaranteed by the government is complete, plain, clear and unambiguous. Any circumvention thereof shall be considered inimical to the national interest, and shall be dealt with accordingly as the law provides.

70. In *Manila Prince Hotel vs GSIS*<sup>23</sup>, the Supreme Court said:

"...a provision which is complete in itself and becomes operative without the aid of supplementary or enabling legislation, or that which supplies sufficient rule by means of which the right it grants may be enjoyed or protected, is self-executing. Thus a constitutional provision is self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action."

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<sup>21</sup> *Manila Prince Hotel vs. GSIS*, G.R. No. 122156, February 3, 1997.

<sup>22</sup> G.R. No. 74930, February 13, 1989.

<sup>23</sup> *Ibid* at 21

71. The Loan Agreement entered into by the GRP and China Exim Bank is a foreign loan directly affecting the national economy and patrimony by the provisions contained therein.

72. This particular Loan Agreement, like any foreign loan obtained through the use of the Official Development Assistance to finance infrastructure programs, shall impact on the government's total outstanding external debt. That public funds have already been diverted from basic social services to financing debt service payments speaks of the direct relation of the acquisition of foreign debt to the national economy of the State.

73. Thus, the information on the terms, conditions and the standard fees arising from or in connection with the Loan Agreement, as a matter directly affecting national economy and patrimony, should not be subject to restrictions when it comes to public disclosure thereof.

74. These matters fall within the ambit of information on foreign loans as prescribed by the Constitution, the disclosure of which cannot be limited nor restricted by a mere provision in a commercial loan agreement between two governments.

75. For the GRP to agree that said terms, conditions and standards fees be rendered "strictly confidential" undermines the general welfare of the public who bears the burden of external debts incurred by the government.

76. Furthermore, to require the "prior written consent of the Lender" is to condition the people's right to information and the government's obligation under the 1987 Constitution to the consent of a foreign entity. This is a gross and manifest transgression and amounts to submission to the dictates of foreign government.

77. Further, it is of grave concern that the Presidential Spokesperson himself found it wise to say that:

*"Kasi 'yun nga ang standard ng terms ng kanilang mga ano eh (Because that's the standard terms of their contracts) .... The onerous conditions that some are saying are **incorporated in the contract** [are] standard between lender and borrower to be sure that the lender will be getting*

what they have lent to the borrower," he said."<sup>24</sup>

78. The Respondents are not forthright because this is not standard. We challenge Respondents to produce before this Honorable Court, loan agreements entered by the GRP with many other countries that contain a "confidentiality clause" to prove that this is standard.

79. Even if, however, it is true that such is the normal standard in many loan agreements with other countries, constitutional guarantees cannot be bargained away by a mere commercial contract between two governments.

80. "Under the doctrine of constitutional supremacy, if a law or contract violates any norm of the constitution, that law or contract whether promulgated by the legislative or by the executive branch or entered into by private persons for private purposes is null and void and without any force and effect. Thus, ***since the Constitution is the fundamental, paramount and supreme law of the nation, it is deemed written in every statute and contract.***"<sup>25</sup>(emphasis ours)

81. For these reasons, it is clear that the challenged Confidentiality Clause contained in Article 8.8 of the Loan Agreement flagrantly violates the Constitution.

**B. A loan agreement approved after-the-fact by the Monetary Board is not in conformity with Section 20, Article VII of the 1987 Constitution which states that the approval must be prior.**

82. Article VII Section 20 of the 1987 Constitution requires:

Section 20. 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**. The Monetary Board shall, within thirty days from the end of

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<sup>24</sup> <https://www.rappler.com/nation/226583-philippines-no-say-loan-deals-china-chico-river-deal>. Last accessed on March 26, 2019.

<sup>25</sup> Ibid.

every quarter of the calendar year, submit to the Congress a complete report of its decision 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 ours)

83. Article XII Section 21 of the 1987 Constitution likewise supplies:

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 ours)

84. In accordance with the Constitution, Part Three, Chapter I of the BSP Manual of Operations on Foreign Trade Transactions issued under Circular No. 645 dated 13 February 2009, as amended provides:<sup>26</sup>

Section 23. Public Sector  
Loans/Borrowings

1. **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.

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<sup>26</sup> <http://www.bsp.gov.ph/downloads/Regulations/MORFXT/MORFXT.pdf>



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 reported 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. 16 Annex E.3 shall be submitted for initial reporting of foreign loans obtained without prior BSP approval/registration. Page 31 of 104 Back to top 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. (emphasis ours)

85. In direct contravention to the requirements stated above, and not being expressly excluded by applicable laws, rules and regulations on foreign loans, the Loan Agreement conveniently includes Articles 5.2 and 6.4 to justify the belated compliance to the requirements of the Constitution and applicable laws.

86. Article 5.2. provides:

The Borrower has completed all the authorizations, acts and procedures as required by the laws of the Borrower's Country in order for this Agreement to constitute valid and legally binding obligations of the Borrower in accordance with its terms, including obtaining all the approvals and authorizations from relevant authorities of the Borrower's Country, **except for the final approval of the Monetary Board of Bangko Sentral ng Pilipinas, which shall be secured after the signing of this agreement**, and effecting all the registrations or filings as required by the laws of the Borrower's Country, and such approvals, authorizations, registrations and filings are in full force and effect. (emphasis ours)

87. Article 6.4 states:

The Borrower hereby covenants to the lender that it **will take immediate steps and fulfill all the conditions necessary** to maintain in full force and effect all approvals, authorizations, registrations and filings specified in Article 5.2, **which**

**for the avoidance of doubt, shall include the final approval of the Monetary Board of Bangko Sentral ng Pilipinas.** (emphasis ours)

88. "The language of the Constitution is simple and clear as it is broad. It allows the President to contract and guarantee foreign loans. It makes no prohibition on the issuance of certain kinds of loans...The plain, clear and unambiguous language of the Constitution should be construed in a sense that will allow the full exercise of the power provided therein... **The only restriction that the Constitution provides, aside from the prior concurrence of the Monetary Board, is that the loans must be subject to limitations provided by law.**"<sup>27</sup> (emphasis ours)

89. It is further stressed in Section 22, Article XII of the Constitution that foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Acts which circumvent or negate any of the provisions therein shall be considered inimical to the national interest and subject to criminal and civil sanctions, as may be provided by law.

90. In that regard, the *BSP Manual of Operations on Foreign Trade Transactions* dictates that prior Monetary Board approval shall be obtained for public sector foreign/foreign currency loans/borrowings.

91. For this purpose, "(T)he approval/registration process helps control the size of the country's obligations and keep debt service burden at manageable levels, channel loan proceeds to priority purposes/projects supportive of the country's development objectives and promote optimum utilization of the country's FX resources."<sup>28</sup>

92. It is glaring that the Monetary Board approval was only granted **after** the signing of the CRPIP Contract Agreement and the Loan Agreement on the implementation of the Project.

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<sup>27</sup> Spouses Constantino et al. vs. Hon. Cuisia, et al., G.R. No. 106064, October 13, 2005.

<sup>28</sup> BSP Foreign Exchange Regulations December 2018 International Operations Department. <http://www.bsp.gov.ph/downloads/Publications/FAQs/faqfxreg.pdf>. Last accessed March 29, 2019.

93. To recall, the Monetary Board approved the Loan Agreement only on May 17, 2018, more than a month after the Loan Agreement was entered into on April 10, 2018 by both governments, and after a considerable period since negotiations on the financing scheme were undertaken in September 2016. This can be attested through the NEDA Board approved projects under the Duterte Administration for the period June 2016 to April 2018, with updates as of July 2018.<sup>29</sup>

94. This provision is intended to avoid the contracting of an onerous agreement or one that is detrimental to the people's interest through the filter of the BSP approval. By forcing the BSP approval as a *fait accompli* after the agreement has been signed not only violates the Constitution but renders the Republic and the taxpayers vulnerable to possible payment of penalties should the BSP disapprove an agreement prematurely signed by the Philippine government.

95. In a blatant display of disregard to the Constitutional provisions, the Respondents covenanted to first secure in the Loan Agreement the interest of China and then tried to cure their missteps by allowing the following:

Article 5.2.

**"... except for the final approval of the Monetary Board of Bangko Sentral ng Pilipinas, which shall be secured after the signing of this agreement ..."**

Article 6.4.

The Borrower hereby covenants to the lender that it **will take immediate steps and fulfill all the conditions necessary** to maintain in full force and effect all approvals, authorizations, registrations and filings specified in Article 5.2, **which for the avoidance of doubt, shall include the final approval of the Monetary Board of Bangko Sentral ng Pilipinas.** (emphasis ours)

96. Clearly, the above-quoted provisions indubitably bear badges of bad faith contrary to the Constitution. Thus the

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<sup>29</sup> Available at [http://www.neda.gov.ph/wp-content/uploads/2018/08/ICC-NB-Approved-Projects-as-of-June-18-2018-Duterte-Admin\\_jstm-editfor-website-uploading\\_3.pdf](http://www.neda.gov.ph/wp-content/uploads/2018/08/ICC-NB-Approved-Projects-as-of-June-18-2018-Duterte-Admin_jstm-editfor-website-uploading_3.pdf); last accessed March 28, 2019.

entire loan agreement must be voided for the above-mentioned violations.

**C. Articles 3.1, 8.12, and Condition Precedent Nos. (2) & (5) of the Loan Agreement run counter to the constitutional preference to qualified Filipinos and existing procurement laws.**

97. Being interrelated, the aforementioned violations on the Constitutional and statutory requirements governing the procurement of contractors will be discussed simultaneously.

98. Article 3.1 of the Loan Agreement expediently ensures:

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).

99. Concomitantly, Article 8.12 adds:

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

100. Appendix 1 on Condition Precedent No. (2) and (5) requires:

Appendix 1 Conditions Precedent to the First Disbursement

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:** xxx (emphasis ours)

(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;

(5) 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 minus tax and fees dues and payable related to the full amount of the advance payment under the Commercial Contract.

101. Meanwhile, the Constitution and existing laws are clear and exact.

102. Article XII Section 10 provides:

Section 10.

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

103. The Government Procurement Reform Act under R.A. No. 9184 sets out the scope and application of the same:

**SEC. 4. 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. (emphasis ours)

104. It sets out that:

SEC. 3. Governing Principles on Government Procurement. – All procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or -controlled corporations, government financial institutions and local government units, shall, in all cases, be governed by these principles:

**(a) Transparency in the procurement process and in the implementation of procurement contracts.**

(b) Competitiveness by extending **equal opportunity** to enable private contracting parties who are eligible and qualified to participate in public bidding. XXX (emphasis ours)

105. Public bidding is further stressed:

ARTICLE IV COMPETITIVE BIDDING

SEC. 10. Competitive Bidding. – **All Procurement** shall be done through Competitive Bidding, except as provided for in Article XVI of this Act.

106. In addition to the requirement of public bidding on the procurement of contractors, the preferential treatment for Filipino contractors is provided by existing procurement laws, as well.

107. In Section 11, R.A. 8182 ("Official Development Assistance Act of 1996", it is stated that:

Section 11. Implementation, Restrictions, Rules and Regulations.

In the implementation of the projects:

XXX

(c) In the hiring of consultants, contractors, architects, engineers, and other professionals necessary for a project's implementation, **Filipinos shall be given preference;**

(d) In the purchase of supplies and materials, preference shall be given to Filipino suppliers and manufacturers, so long as the same shall not adversely alter or affect the project, and such supplies and materials are to the standards specified by the consultants, contractors, architects, engineers, and other professionals connected with the projects; and

XXX

108. The Implementing Rules and Regulations (IRR) for R.A. 8182 clarifies:

**SEC. 6.2 Filipino Preference/Association by Foreign Firms with Local Firms/Practitioners.** In order to develop/upgrade a pool of Filipino experts and managers, the role of technology transfer in the implementation of development projects shall be ensured. To effect technology transfer to local firms/individuals, foreign consulting and/or construction firms wishing to participate in development projects in the Philippines shall be required to associate themselves with local firms and/or shall be required to engage Filipinos in carrying out the projects which they have selected to undertake. Such



preference shall not adversely affect the project and shall meet the minimum standards/specifications required thereof.

The foregoing paragraph shall be without prejudice to existing laws including but not limited to R.A. 4860 (Foreign Borrowings Act), Presidential Decree (P.D.) 1594 (for procurement of civil works), Executive Orders (E.O.s) 164 (for the procurement of consulting services) and 302 (for procurement of goods/equipment).

SEC. 6.3 Competitive Procurement. All **procurement shall be conducted in an open, fair, transparent and competitive manner** in accordance with the provisions of P.D. 1594, E.O. 164 and E.O. 302 and their respective IRRs.

109. In amending R.A. 8182, R.A. 8555 provides:

SECTION 1. Republic Act No. 8182 is hereby amended to include a new Section 11-A to read as follows:

“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 of

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."

110. Additionally, P.D. 1594 Section 3 allows:

**Section 3.** *Prequalification of Prospective Contractors.* A prospective contractor may prequalified to offer his bid or tender for a construction project only if he meets the following requirements.

XXX

(d) Filipino participation. The Government shall **promote maximum participation of eligible Filipino contractors in all construction projects.**

111. In E.O. No. 278, the Constitutional provision on giving preference to qualified Filipinos the grant of rights, privileges and concessions covering the national economy and patrimony was stressed:

EXECUTIVE ORDER NO. 278 PRESCRIBING  
GUIDELINES FOR PROJECT LOAN  
NEGOTIATIONS AND PACKAGING OF  
GOVERNMENT FOREIGN-ASSISTED  
INFRASTRUCTURE PROJECTS

WHEREAS, the **1987 Constitution and existing laws such as Commonwealth Act. Nos. 138 & 541, Republic Act (RA) No. 5183, the Official Development Assistance (ODA) Act of 1996, as amended, and Republic Act (RA) No. 9184 (otherwise known as the Government Procurement Act) mandate the government to give**

**preference to qualified Filipinos** in the grant of rights, privileges, and concessions covering the national economy and patrimony, including the purchase of materials, supplies, goods, and equipment as well as in the hiring of consultants, contractors, architects, engineers and other professionals necessary for a project's implementation;

WHEREAS, for recent foreign-assisted infrastructure projects bid out by various government agencies, there have been concerns raised by the Philippine Constructors Association (PCA) and the Confederation of Filipino Consulting Organizations (COFILCO) that the **Filipino constructors and consultants are experiencing difficulty in participating in the bidding of such projects** due to various reasons such as, among others, that the contracts have been packaged in sizes too large or beyond local financial capabilities or that the criteria and requirements for participation have been set above local capabilities and experience, or the criteria are set beyond the requirements of the project;

WHEREAS, there is a need to prescribe guidelines in the areas of preparation and packaging of projects/contracts and loan negotiations for government foreign-assisted infrastructure projects which will **provide Filipino constructors and consultants with better market opportunities and allow them to upgrade their capabilities and compete internationally;**

112. And in the IRR of E.O. No. 278, Section 6, it is stated thus:

Section 6. Determination of Filipino Capabilities

6.1. During the project appraisal stage, the appropriate authorities shall refer to the list of PCAB-licensed and registered constructors and/or the roster of consultants accredited by the umbrella organization of consultants recognized by the Government, and other appropriate sources **to determine sufficiency of Filipino capability in undertaking specific requirements for consulting services and/or construction of infrastructure projects**, in accordance with the criteria/guidelines to be prescribed by the Construction Industry Authority of the Philippines (CIAP) and approved by the INFRACOM.

6.2. The appropriate authorities shall endeavor to secure, during the project appraisal stage, all inputs for the packaging of infrastructure projects, including but not limited to, the Philippines Constructors Association, Inc. (PCA) and the Confederation of Filipino Consulting Organizations, Inc. (COFILCO).

113. The Supreme Court did not relax the Filipino First Policy as required by the Constitution. In the case of *Manila Prince Hotel vs GSIS*, the Court elucidated:

"Respondents argue that Sec. 10, second par., Art. XII, of the 1987 Constitution is clearly not self-executing, as they quote from discussions on the floor of the 1986 Constitutional Commission -

MR. RODRIGO. Madam President, I am asking this question as the Chairman of the Committee on Style. If the wording of PREFERENCE is given to QUALIFIED FILIPINOS, can it be understood as a preference to qualified Filipinos *vis-a-*

vis Filipinos who are not qualified. So, why do we not make it clear? To qualified Filipinos as against aliens?

THE PRESIDENT. What is the question of Commissioner Rodrigo? Is it to remove the word QUALIFIED?

MR. RODRIGO. No, no, but say definitely TO QUALIFIED FILIPINOS as against whom? As against aliens or over aliens ?

MR. NOLLEDO. Madam President, I think that is understood. We use the word QUALIFIED because the existing laws or prospective laws will always lay down conditions under which business may be done. For example, qualifications on capital, qualifications on the setting up of other financial structures, et cetera (underscoring supplied by respondents).

MR. RODRIGO. It is just a matter of style.

MR. NOLLEDO. Yes.

Quite apparently, Sec. 10, second par., of Art XII is couched in such a way as not to make it appear that it is non-self-executing but simply for purposes of style. But, certainly, the legislature is not precluded from enacting further laws to enforce the constitutional provision so long as the contemplated statute squares with the Constitution. Minor details may be left to the legislature without impairing the self-executing nature of constitutional provisions."<sup>30</sup>

114. The Court further clarified:

"In self-executing constitutional provisions, the legislature may still enact legislation to facilitate the exercise of powers directly granted by the constitution, further the operation of such a provision, prescribe a

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<sup>30</sup> Ibid.

practice to be used for its enforcement, provide a convenient remedy for the protection of the rights secured or the determination thereof, or place reasonable safeguards around the exercise of the right. The mere fact that legislation may supplement and add to or prescribe a penalty for the violation of a self-executing constitutional provision does not render such a provision ineffective in the absence of such legislation. The omission from a constitution of any express provision for a remedy for enforcing a right or liability is not necessarily an indication that it was not intended to be self-executing. The rule is that a self-executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution, further the exercise of constitutional right and make it more available. Subsequent legislation however does not necessarily mean that the subject constitutional provision is not, by itself, fully enforceable."<sup>31</sup> (citations omitted)

115. Hence, jurisprudence and existing procurement laws are replete with provisions on the public bidding requirement and on the preferential treatment for Filipino contractors.

116. Be that as it may, while sanctimoniously claiming that the procurement requirements were complied with, Presidential Spokesperson Salvador Panelo only proceeded to reveal the irregularity in the bidding process when he defended on March 2, 2019 that:

*“Based on the report of the DOF on procurement, as part of the terms of agreement, China provided a list of three contractors of good standing and the implementing agency was given the*

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<sup>31</sup> Ibid.

*opportunity to vet and request for a replacement, if needed," Panelo said.<sup>32</sup>*

117. The statement of Panelo merely exposes the flawed selection process railroading the requirement for public bidding and preferential treatment to Filipino contractors.

118. However, notwithstanding the assertions of Panelo, in the case of *Suplico vs NEDA*<sup>33</sup>:

" Respondents admit that there was no public bidding for the ZTE Supply Contract. Respondents do not claim that the ZTE Supply Contract falls under any of the exceptions to public bidding in Article XVI of the Government Procurement Reform Act. Instead, private respondent ZTE Corporation claims that the ZTE Supply Contract, being part of an executive agreement, is exempt from public bidding under the last sentence of Section 4 of the Government Procurement Reform Act. Thus, private respondent ZTE Corporation argues:

x x x Section 4 of RA 9184 itself expressly provides that executive agreements that deal on subject matters covered by said law shall be observed. Hence, the requirement of competitive bidding under section 10 of the law is not applicable. XXX

Private respondent ZTE Corporation's argument will hold water if an executive agreement can amend the mandatory statutory requirement of public bidding in the Government Procurement Reform Act. **In short, the issue turns on the novel question of whether an executive agreement can amend or repeal a prior law. The obvious answer is that an**

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<sup>32</sup> <https://www.sunstar.com.ph/article/1794977> last accessed March 28, 2019.

<sup>33</sup> G.R. No. 178830, July 14, 2008.

**executive agreement cannot amend or repeal a prior law.**

**Admittedly, an executive agreement has the force and effect of law, just like implementing rules of executive agencies. However, just like implementing rules of executive agencies, executive agreements cannot amend or repeal prior laws but must comply with the laws they implement. Only a treaty, upon ratification by the Senate, acquires the status of a municipal law. Thus, a treaty may amend or repeal a prior law and vice-versa. Hence, a treaty may change state policy embodied in a prior law.**

In sharp contrast, an executive agreement, being an exclusive act of the Executive branch, does not have the status of a municipal law. Acting alone, the Executive has no law-making power. While the Executive does possess rule-making power, such power must be exercised consistent with the law it seeks to implement." (G.R. No. 178830, July 14, 2008, citations removed, emphasis supplied)

119. Further in the case of *Bayan Muna vs DOTC*, the Supreme Court expounded on the merits of conducting a public bidding:

"The requirement of a public bidding is not an idle ceremony. Public bidding is the policy and medium adhered to in government procurement and construction contracts. It is the accepted method for arriving at a fair and reasonable price and ensures that overpricing, favoritism and other anomalous practices are eliminated or minimized. Public biddings are intended to minimize occasions for corruption and



temptations to abuse discretion on the part of government authorities when awarding contracts."<sup>34</sup>

120. In an earlier article published online on March 2, 2019, Petitioner Colmenares sharply raised that "China wants a Chinese firm to be the contractor for the project. He said a Chinese company would only hire Chinese nationals as workers which will lead to further displacement of Filipino workers."<sup>35</sup>

121. In this kind of set up, where a Chinese contractor is pre-selected to implement the project, the government stands to lose millions, if not billions, in income tax collection. In a recent news report, the government, through the DOLE, Bureau of Immigration and the PAGCOR revealed that Chinese offshore gaming employs over 56,000 Chinese workers who escape paying the correct income tax to the Philippines.<sup>36</sup>

122. The sequence of events leading to the selection of China CAMC Engineering Co. Ltd. as the winning contractor reeks of ill motives.

123. To recall, in a month's time since the NEDA-ICC-CC confirmed its earlier approval on the project cost in September 2016, the Philippines and China executed the MOU to finance projects mutually identified and agreed between the two governments.

124. In less than a month from the execution of the MOU on October 20, 2016, NEDA issued a directive to reconfigure the project design which would then entail a proposed shift from the GAA to the ODA.

125. Note Verbale No. 17-1049 was then sent by the GRP to the PRC. Said Note Verbale relates to the procedures and arrangements of the utilization of concessionary loans committed by the PRC to support priority projects of the GRP.

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<sup>34</sup> G.R. No. 190431, January 31, 2017.

<sup>35</sup> <https://www.gmanetwork.com/news/money/economy/686671/palace-colmenares-just-seeking-publicity-in-criticizing-chico-river-irrigation-deal/story/>. Last accessed March 30, 2019.

<sup>36</sup> [https://www.gmanetwork.com/news/news/nation/689692/gov-t-losing-p22b-in-income-taxes-from-56k-chinese-other-aliens-in-gaming-ops/story/?utm\\_source=GMANews&utm\\_medium=Facebook&fbclid=IwAR1JnztXZeGINqO1Oc3T5WjW5zJXKrTPalzQu03m\\_pg-dYEXziHYIVEHtw](https://www.gmanetwork.com/news/news/nation/689692/gov-t-losing-p22b-in-income-taxes-from-56k-chinese-other-aliens-in-gaming-ops/story/?utm_source=GMANews&utm_medium=Facebook&fbclid=IwAR1JnztXZeGINqO1Oc3T5WjW5zJXKrTPalzQu03m_pg-dYEXziHYIVEHtw)

126. The project was then included in the NEDA Infrastructure Flagship Projects, in compliance with the requirements of R.A. No. 8555, as of June 27, 2017.

127. And only two days after, on June 29, 2017, the Clarificatory Letter on the Procedures and Arrangements was executed between the two governments.

128. Unbeknownst to the public, the manner by which the Chinese contractor shall be chosen was prematurely agreed upon by both governments pursuant to the Note Verbale and Clarificatory Procedures and Arrangements executed earlier on.

129. Thus, the Chinese contractor China CAMC Engineering Co. Ltd. is one of the three Chinese contractors pre-selected pursuant to the Note Verbale and Clarificatory Procedures and Arrangements, contrary to the Constitution and our domestic laws on procurement.

130. Ultimately, the challenged provisions arise from these incidents and are part of the whole scheme borne of the secretive character of the GRP-PRC finance dealings crafted by China, for the benefit of China.

131. It is in this context that the Loan Agreement must be struck down. Articles 3.1, 8.12 and Condition Precedent No. (2) and (5) in the proforma Appendix 1 have no basis in law for having been executed contrary to the Constitution and existing laws.

**D. The choice of China International Economic and Trade Arbitration Commission (CIETAC) as tribunal and the choice of Chinese law as the governing law of the agreement circumvent Article II Section 7 of the Constitution.**

132. In international relations, Article II Section 7 of the Constitution requires:

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.** (emphasis ours)

133. This constitutional injunction serves as the backdrop when the same Constitution reposes on the President the power to contract foreign loans.

134. As the Constitution is the fundamental law of the land, this delimitation is deemed adopted in every contractual relation entered into by the GRP in protecting national interest.

135. In this case, Respondents have agreed to submit any form of dispute arising out of or in connection with the Loan Agreement to the China International Economic and Trade Arbitration Commission (CIETAC) for arbitration.

136. By doing so, Respondents betrayed the lack of sensitivity to the Constitution and gravely abused their discretion, when they acceded to the arbitration provision in the Loan Agreement which are manifestly and grossly disadvantageous to the GRP and so one-sided in favor of China. Such one-sidedness is plain even to the uninitiated eye.

137. The choice of law highly favors China. Article 8.4 of the Loan Agreement shows:

Article 8.4 Governing Law. This Agreement as well as the rights and obligations of the Parties hereunder shall be governed and construed in accordance with the **laws of China.** (emphasis ours)

138. The choice of tribunal puts into question the impartiality or neutrality expected of a tribunal in arbitration proceedings. Article 8.5 reveals:

Article 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) for arbitration. The arbitration shall be conducted in accordance with the CIETAC's 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.

139. CIETAC is a tribunal which is based in Beijing;<sup>37</sup> It describes itself in its official website<sup>38</sup> as a creation of China's Government Administration Council and China's State Council, to wit:

Formerly known as the Foreign Trade Arbitration Commission, CIETAC was set up in April 1956 under the China Council for the Promotion of International Trade (CCPIT) in accordance with the Decision Concerning the Establishment of A Foreign Trade Arbitration Commission Within the China Council For the Promotion of International Trade adopted on May 6, 1954 at the 215th session of the Government Administration Council. To meet the needs of China's ever-developing economic and trade relations with foreign countries after the adoption of the "reform and opening-up" policy, the Foreign Trade arbitration was first renamed as Foreign Economic and Trade Arbitration Commission in 1980 pursuant to the State Council's Notice Concerning the Conversion of the Foreign Trade Arbitration Commission Into the Foreign Economic and Trade Arbitration Commission, and then as the China International Economic and Trade Arbitration Commission in 1988 pursuant to the State Council's Official Reply Concerning the Renaming of the Arbitration Commission as the China International Economic and Trade

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<sup>37</sup> China International Economic and Trade Arbitration Commission, Arbitration Rules, revised and adopted on November 4, 2014, effective as of January 1, 2015.

<sup>38</sup> Available at <http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en>; last accessed April 1, 2019.

Arbitration Commission and Amendment of Its Arbitration Rules. Since 2000, CIETAC is also known as the Arbitration Court of the China Chamber of International Commerce (CCOIC).

140. In Article 6 of the CIETAC Arbitration Rules on Objection to the Arbitration Agreement and/or jurisdiction, it states:

Article 6 Objection to Arbitration Agreement and/or Jurisdiction

(1) CIETAC has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal. XXX<sup>39</sup>

141. By choosing CIETAC, the GRP is bound to nominate arbitrators from the Panel of Arbitrators maintained by CIETAC itself. In the instance that both governments agree to nominate arbitrators from outside CIETAC's Panel of Arbitrators, an arbitrator so nominated by the parties or nominated according to the agreement of the parties may act as arbitrator only upon the confirmation by the Chairman of CIETAC. (Article 26, CIETAC).<sup>40</sup>

142. The arbitral award is final and binding upon both the Philippines and China. The GRP party may not bring a lawsuit before a court or make a request to any other organization for revision of the award. (Article 49, CIETAC Rules).<sup>41</sup>

143. Respondents have bound the State to a Chinese tribunal, applying Chinese laws, to settle disputes arising from or in connection with a Loan Agreement, the terms and conditions of which were drafted by the Chinese.

144. In Philippine Courts, the cold impartiality of a judge is expected. There is none to be assumed here.

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

145. It is of no moment that Finance Undersecretary Bayani Agabin on March 27, 2019 reverently claimed:

*"May probisyon tayo sa batas, it's PD 1177, na awtomatikong naglalaan ng pambayad ng utang na nakapaloob po ito sa taunang General Appropriations Act. Meaning, all our indebtedness, it's automatically appropriated in our budget," Agabin said.*

*"We fully trust China to comply with a loan agreement which they signed, in the same way as they trust us to comply with a loan agreement which we signed," Joven said.*

*"We're very well aware of what is happening in the world and we're fiscally responsible enough not to do something which will endanger the fiscal position of our country," he added.<sup>42</sup>*

146. Firstly, there is no way that the current administration can assure, must less know, that the future government 20 years down the line, would be willing or able to pay these Chinese loans. The Duterte administration will end in 2022 and in fact, after the midterm elections in the Philippines, presidents normally descend into a lameduck position when the talk now would center on the next president.

147. Secondly, the loans with China is not a simple few billion pesos but is a staggering PhP 731.7 Billion as Respondent Pernia publicly admitted:

### **China loans, grants to fund 18 projects<sup>43</sup>**

Amid closer ties between Manila and Beijing, 18 projects and programs worth a total of P731.7 billion will be rolled out

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<sup>42</sup> <http://tempo.com.ph/2019/03/27/govt-can-pay-62-m-chico-river-project-loan-finance-officials-say/>. Last accessed March 28, 2019.

<sup>43</sup> Available at Inquirer.net, published on August 13, 2018, <https://business.inquirer.net/255548/china-loans-grants-fund-18-projects>, last accessed April 1, 2019.

during President Duterte's term through loans and grants from China.

National Economic and Development Authority documents showed that 16 projects with a combined project cost of P731.2 billion would be funded by Chinese loans.

Two projects worth at least P500 million—the Department of Agriculture's P500-million Philippine-Sino Center for Agricultural Technology-Technical Cooperation Program Phase 3, and the Seawater Desalination Complete Equipment Project in Dausi, Bohol—will be financed by Chinese grants.

A loan from China was already extended to the National Irrigation Authority's P4.4-billion Chico River Pump Irrigation Project.

So far, the Duterte administration had signed only one Chinese loan agreement, worth P3.14-billion agreement for the irrigation facility, the first flagship infrastructure project to be financed by the mainland under the ambitious "Build, Build, Build" program.

The \$62.09-million US-dollar denominated loan will cover 85 percent of the total contract amount of P3.7 billion and carried an interest of 2 percent a year, maturing in 20 years inclusive of a seven-year grace period.

Currently under negotiations for loans from China are the Metropolitan Waterworks and Sewerage System's P12.2-billion New Centennial Water Source-Kaliwa Dam Project; the Department of Transportation's P175.3-billion North-South Railway Project-South Line (Long Haul); and the Bases Conversion and Development Authority's

P57.2-billion Subic-Clark Railway Project; the P39.2-billion Ambal-Simuay River and Rio Grande de Mindanao River Flood Control Projects; P25.6-billion Davao City Expressway Project; P97.3-billion Panay-Guimaras-Negros Island Bridges; P56.6-billion Cebu-Bohol Link Bridge; P44.6-billion North Luzon Expressway East Project; P47.4-billion Dinagat (Leyte)-Surigao Link Bridge; P57.6-billion Luzon-Samar Link Bridge; P72.1-billion Bohol-Leyte Link Bridge; P14.4-billion Negros-Cebu Link Bridge, and P2.3-billion Camarines Sur Expressway Project.

The Camarines Sur provincial government's P4.7-billion Pasacao-Balatan Tourism Coastal Development Program as well as the Department of the Interior and Local Government's P20.3-billion Safe Philippines Project-Phase 1 are also seeking Chinese loan financing.

Socioeconomic Planning Secretary and NEDA chief Ernesto M. Pernia earlier said that amid lingering concerns on a "Chinese debt trap," the Philippines was "more cautious" and "extra careful in having projects funded by China."

Under the pipeline of programs and projects for official development assistance (ODA) as of June, 17 were being pitched for loans and 20 for grants or technical assistance from the Manila-based multilateral lender Asian Development Bank; seven for loans from the World Bank; and one for a loan from the International Fund for Agricultural Development.

148. Thirdly, even if, and presuming, without admitting that China's loans are not considerable, the Philippines has big loans with other countries as well, which of course impacts on



our capacity to pay our loans to all these countries including China. Philippine debt, according to an analyst in a Forbes article<sup>44</sup> could balloon from US\$ 167 Billion to a staggering US\$ 453 Billion which is certainly no longer easy to pay:

### **New Philippine Debt of \$167 Billion Could Balloon To \$452 Billion: China Will Benefit**

According to the South China Morning Post on May 12, "Philippine Secretary of Budget and Management Benjamin Diokno estimated some US\$167 billion would be spent on infrastructure during Duterte's six-year term, under the slogan 'Build! Build! Build!'" That could increase current Philippine national government debt of approximately \$123 billion, to \$290 billion. But that does not include interest. High rates of interest that China, the most likely lender, could impose on the new debt could balloon it to over a trillion U.S. dollars in 10 years. More likely according to my analysis, at 10% interest the new debt could go to \$452 billion, bringing Philippines' debt:GDP ratio to 197%, second-to-worst in the world. That understates the burden to the Philippines, as existing national government debt would also accrue interest over that time, and such interest was not included in the analysis. Dutertenomics, fueled by expensive loans from China, will put the Philippines into virtual debt bondage if allowed to proceed.

Effect of \$167 billion in new debt on the Philippines, in terms of principal plus interest and debt:GDP ratio, over ten years.

Duterte and his influential friends and business associates could each benefit with hundreds of millions of dollars in

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<sup>44</sup> Available at Forbes website, published on May 13, 2017, at <https://www.forbes.com/sites/anderscorr/2017/05/13/new-philippine-debt-of-167-billion-could-balloon-to-452-billion-china-will-benefit/#90612482fb68>, last accessed April 1, 2019.

finders fees, of 2-7%, for such deals. Duterte reportedly sought to fast track some deals, and has publicly mooted the possibility of declaring martial law for a wide range of issues, including drugs, traffic, and the situation on Mindanao. Debt imposed on the public through corruption, fast-tracking or under martial law should be considered odious debt, and not repayable. The only way to stop such unjust debt is for the terms to be entirely transparent to the Philippine public in advance, for full cost-benefit analyses to be done by an independent authority on each deal, and for the Philippine Congress to vote on whether each deal proceeds. Failing that will lead to virtual Philippine debt bondage to China.

The attached chart shows how \$167 billion of new Philippine debt will affect the Philippine economy over a period of 10 years, at different possible interest rates. It assumes monthly compounding of interest and is based on a standard compound interest formula. The effect will be very different depending on the rate of interest — which neither the Duterte Administration nor China has divulged. The Philippine people must demand to know and agree to this interest rate before the deals are signed.

Even at 5%, which is nearest the lending rate of interest published by the IMF and World Bank for the Philippines, the effect of such a large sum would be an increase in debt (in addition to existing debt) of \$275 billion after 10 years. That would bring the Philippines' debt:GDP ratio to approximately 136%. But at 20%, the maximum interest rate that might occur in a debt-distressed country like Argentina or Venezuela, the debt could balloon to \$1.2

trillion in 10 years. That is an unlikely worst-case scenario, but worth calculating as an illustration of the importance of the interest rate.

The interest rate that China will offer the Philippines on such a large sum relative to GDP is likely higher than the World Bank rate, but likely lower than say 15%. Without much needed transparency from the Duterte government and China on the rate, conditionality, and repayment terms of \$167 billion of new debt for the Philippines, the public should assume, to forestall a worst-case scenario, that the rate would be somewhere between 10% and 15%. Over 10 years, that could balloon Philippines' debt:GDP ratio as high as 296%, the highest in the world.

149. The possibility of default therefore or even debt moratorium which the Philippines once underwent, cannot be simply dismissed by people who have no knowledge, authority, nor expertise to give such assurance. The choice of law therefore, whether it is in a neutral arbitration body in London or Singapore, or in highly suspect tribunal in China in a loaded process that uses the laws of China, is a valid legal and constitutional concern.

150. While the fact that the selection of CEITAC, the choice of law and venue has practically and unfairly loaded the dice against the Philippines so to speak, the imposition of China that the Secretary of the Department of Justice issue a certification that, inter alia, such selection of CEITAC and choice of law are valid, only ensures the impossibility of the Philippines getting a fair hearing in case of dispute. Appendix 1 of the subject loan agreement, which form part of the entire Loan Agreement provides that:

Appendix 1

Conditions Precedent to the First Disbursement

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:

Xxx

(8) A legal opinion in the form and substance set forth in Appendix 6 or in the form and substance otherwise approved by the Lender in writing issued by the Secretary of Justice of the Borrower's Country in connection with the transactions contemplated hereunder.

Xxx"

151. An excerpt of Appendix 6 shows:

APPENDIX 6  
FORM OF LEGAL OPINION

To: The Export-Import Bank of China

Date: \_\_\_\_\_

Re: The Preferential Buyer's Credit Loan Agreement on the \_\_\_\_\_ Project (No. \_\_\_\_\_)

I am the Secretary of Justice of the Republic of the Philippines, qualified and authorized to issue this legal opinion in connection with the Preferential Buyer's Credit Loan Agreement on the \_\_\_\_\_ Project dated \_\_\_\_\_ (No. \_\_\_\_\_, the "Loan Agreement") between the Export-Import Bank of China as the lender (the "Lender") and the Government of the Republic of the Philippines acting through

by the Department of Finance as the borrower (the Borrower).

Unless otherwise defined herein, the terms defined in the Loan Agreement shall have the same meanings when used in this opinion.

For the purposes of this legal opinion, I have examined copies of the following documents:

- (1) the executed Loan Agreement;
- (2) such laws and regulations and such other documents, certificates, records and instruments as necessary and appropriate to render the opinions hereinafter set forth.

This legal opinion is given on the basis of the laws of the Republic of the Philippines effective as at the date hereof.

Based on the foregoing, I am of the opinion that XXX:

- (4) The signing, delivery and performance of the Loan Agreement by the Borrower do not violate or conflict with or result in a breach of any law or regulation of the Republic of the Philippines.

Xxx

- (6) All amount payable by the Borrower under the Loan Agreement may be made free and clear of and without deduction for or on account of any tax, levy, deduction or charge by the Republic of the Philippines or any political subdivision or taxing authority thereof. No withholding would be made in respect of any payment to be made by the Borrower to the Lender under the Loan Agreement.

(7) The signing and performance of the Loan Agreement by the Borrower constitutes commercial acts, and the declaration that the Borrower shall not have any right of immunity in connection with any proceeding or any enforcement of an arbitral award, court decision on the ground of sovereignty or otherwise is valid and irrevocably binding on the Borrower. 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 commercial use.

(9) The choice of Chinese law as the governing law under the Loan Agreement is a valid choice of law. The submission of any dispute arising out of or in connection with the Loan Agreement by the Borrower to the China International Economic and Trade Arbitration Commission for arbitration under the Loan Agreement does not contravene any law of the Republic of the Philippines. The appointment by the Borrower of a process agent in China does not violate any provision of any law or regulation of the Republic of the Philippines. XXX

As to the questions of fact material to my conclusions expressed herein, to the extent I have not independently established the facts, I have relied upon statements of fact contained in the documents

152. At first glance, it is unmistakable that the Legal Opinion appended to the Loan Agreement is a templated document prepared by China for the purposes of loan transactions in its favor.

153. Further, this legal opinion required to be executed by the Justice Secretary is *ultra vires* and an act beyond his authority.

154. Under the Mandate of the Department of Justice as derived from the Administrative Code of 1987 (E.O. 292), the Justice Secretary is empowered to act on all queries and/or requests for legal advice and guidance from private parties and other officials and employees of the government.

155. While the Secretary is empowered to act on requests for legal advice and guidance, such authority is not an automatic appropriation of power to waive certain immunities of the State.

156. As it is, Article VIII Section 5 (5) of the Constitution vests the power to promulgate rules concerning the protection and enforcement of constitutional rights upon the Supreme Court.

157. In this case, opening the patrimonial assets of the State as being subject to execution arising from suit is a Constitutional issue and must first be passed upon by the Supreme Court.

158. By arrogating upon the DOJ Secretary the authority to waive sovereign and state immunities contained in Articles 5.5 and 8.1 the said provisions must therefore be struck down for having been made contrary to the Constitution and law.

159. China cannot order the Philippine DOJ Secretary to issue a legal opinion in its favour, as if we are vassals to be ordered around. Nor can it circumvent the power of the Supreme Court to decide whether the agreement is valid or legal.

160. The arbitration mechanisms, choice of law and tribunal open the Philippines to abuse. The policy on according "paramount consideration to national sovereignty, territorial integrity, national interest and the right to self-determination" has been violated.

**E. ARTICLES 5.5 and 8.1 of the Loan Agreement are void for being violative of Section 7, Article XII, Section 7 Article II, and Section 2, Article XII of the 1987 Constitution.**

161. The Loan Agreement contains express waiver by the GRP of its sovereign immunity from execution against its patrimonial assets.

162. The assailed provisions of the Loan Agreement provide:

Article 5.5 The signing of this Agreement by the Borrower constitutes and the Borrower's performance of its obligations under this Agreement will constitute commercial acts. Neither the borrower nor any of its assets is entitled to any right of immunity on the grounds of sovereign or otherwise, from arbitration, suit, execution or any other legal process with respect to its obligations under this Agreement, as the case may be, in any jurisdiction. 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 defense agency of the Republic of the Philippines, or (iii) located in the Philippines and dedicated to a public or governmental use, as distinguished from patrimonial asset and assets dedicated to commercial use.

**Article 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 defense agency of the Republic of the Philippines, or (iii) **located in the Philippines** and dedicated to a public or governmental use **(as distinguished from patrimonial assets and assets dedicated to commercial use.)**

163. A reading of these provisions leads us to assert that the GRP has allowed its patrimonial assets to stand as security for unpaid obligations under this Loan Agreement. "Collateralization" of patrimonial property for unpaid obligations under a foreign loan contract or as an award in an arbitral proceeding is unconstitutional and illegal.

164. Our New Civil Code provides for the definition of patrimonial property:

Art. 419. Property is either of public dominion or of private ownership.

Art. 420. The following things are property of public dominion:

(1) Those intended for public use, such as roads, canals, rivers, torrents, ports and bridges constructed by the State, banks, shores, roadsteads, and others of similar character;

(2) Those which belong to the State, without being for public use, and are intended for some public service or for the development of the national wealth.

Art. 421. All other property of the State, which is not of the character stated in the preceding article, is patrimonial property.

Art. 422. Property of public dominion, when no longer intended for public use or

for public service, shall form part of the patrimonial property of the State.

Art. 423. The property of provinces, cities, and municipalities is divided into property for public use and patrimonial property.

Art. 424. Property for public use, in the provinces, cities, and municipalities, consist of the provincial roads, city streets, municipal streets, the squares, fountains, public waters, promenades, and public works for public service paid for by said provinces, cities, or municipalities.

All other property possessed by any of them is patrimonial and shall be governed by this Code, without prejudice to the provisions of special laws.

Art. 425. Property of private ownership, besides the patrimonial property of the State, provinces, cities, and municipalities, consists of all property belonging to private persons, either individually or collectively.

165. In *Republic v. Nicolas* (G.R. No. 181435, October 02, 2017), the Supreme Court explained how lands are classified by the Executive:

The Court has emphasized in a long line of cases that an applicant for registration under Section 14(1) must prove that the subject property has been classified as alienable and disposable agricultural land by virtue of a positive act of the Executive Department. In *Heirs of Malabanan v. Republic*, we declared:

Alienable and disposable lands of the State fall into two categories, to wit: (a) patrimonial lands of the State, or those classified as lands of private ownership under Article 425 of the Civil Code, without limitation; and (b) lands of the public domain, or the public lands as provided by the Constitution, but with the limitation that the lands

must only be agricultural. Consequently, **lands classified as forest or timber, mineral, or national parks are not susceptible of alienation or disposition unless they are reclassified as agricultural. A positive act of the Government is necessary to enable such reclassification, and the exclusive prerogative to classify public lands under existing laws is vested in the Executive Department**, not in the courts. xxx Thus, until the Executive Department exercises its prerogative to classify or reclassify lands, or until Congress or the President declares that the State no longer intends the land to be used for public service or for the development of national wealth, the Regalian Doctrine is applicable. (emphasis supplied; citations omitted)

166. Patrimonial property, although already susceptible of appropriation, may only be acquired by Filipino citizens or by Corporations or Partnerships which are at least 60% Filipino-owned, not by aliens. Thus the provision which allows “collateralization” of patrimonial assets directly contravenes Section 7, Article XII of the 1987 Constitution which provides:

SECTION 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.

167. Since the Chinese Government, being a foreign entity, is not qualified to acquire or hold lands in the Philippines, then the provisions on the collateralization of patrimonial property therefore runs counter to the Constitution.

168. Further, allowing a foreign state to acquire lands in the Philippines, an archipelago at that, is to violate Section 7, Article II of the 1987 Constitution, which provides:

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.

169. These assailed provisions open the possibility for China to acquire patrimonial properties in the Philippines is tantamount to ceding in favour of China certain territories in the Philippines by virtue of our default in our contractual obligations. This situation obviously impacts negatively on our national sovereignty, territorial integrity, and is inimical to our national interest.

170. Petitioners allege that patrimonial assets could include assets that are important to the Filipino people, such as ports, energy resources, etc. depending on the interpretation of the Chinese tribunal applying Chinese law.

171. First, because the signatories on behalf of the GRP have no assurance that under Chinese laws, patrimonial properties would not include assets of the Philippines, such as port, energy resources, etc.

172. Second, because through Presidential Decree No. 87 (amending PD No. 8) the government already classified petroleum, a natural resource, to be subject to the commerce of man and hence of the nature of patrimonial property.

173. As such, patrimonial assets could include our very natural resources.

174. Third, if CEITAC or any Chinese law for that matter defines the extent of patrimonial property to include patrimonial asset such as our energy sources and marine resources in areas deemed by China to be “outside the Philippine territory” such as in Scarborough Shoal or those in the West Philippine Sea, then that would run counter to the constitutional requirement under Article XII on Patrimony of the State’s full control of our lands of public domain and natural resources.

175. Therefore, these assailed provisions are in violation of Section 2, Article XII of the 1987 Constitution which provides:

**Section 2.** All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential

energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources **shall be under the full control and supervision of the State**. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least 60 per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of waterpower, beneficial use may be the measure and limit of the grant.

176. In violation of the above constitutional mandate, the Philippines practically relinquishes “control” of energy or marine resources if the agreement allows China to control said resources in the West Philippine Sea including those covered by Special Contracts, and even those within Philippine territory.

177. Fr. Bernas made the following commentaries in his book *The 1987 Constitution of the Republic of the Philippines: A Commentary* (2003 edition), pages 1136-1139 thereof, on the exploration, development, and utilization of inalienable natural resources, to wit:

“3. Exploration, development and utilization of inalienable natural resources.

With regard to natural resources other than agricultural land, two questions need be answered. **First, who may**

participate in their exploration, development and utilization? Second, if natural resources, except agricultural land, cannot be alienated, how may they be explored, developed, or utilized?

The answer to the first question is that only Filipinos and Filipino corporations may engage in the exploration, development, and utilization of these natural resources. The rationale for this reservation, also found in both the 1935 and 1973 Constitutions, was earlier summed up by Vicente G. Sinco thus:

It should be emphatically stated that the provisions of our Constitution which limit to Filipinos the rights to develop the natural resources and to operate the public utilities of the Philippines is one of the bulwarks of our national integrity. The Filipino people decided to include it in our Constitution in order that it may have the stability and permanency that its importance requires. It is written in our Constitution so that it may neither be the subject of barter nor be impaired in the give and take of politics. With our natural resources, our sources of power and energy, our public lands, and our public utilities, the material basis of the nation's existence, in the hands of aliens over whom the Philippine Government does not have complete control, the Filipinos may soon find themselves deprived of their patrimony and living as it were, in a house that no longer belongs to them.

The answer to the second question departed from earlier provisions which had prescribed that natural resources could be explored, developed or utilized only by “license, concession, or lease.” The 1987 Constitution no longer speaks of “grant, lease, or concession” **but of either direct undertaking of activities by the State or “co-production, joint venture, or production-sharing agreements” with the State and all “under the full control and supervision of the State.**

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There are therefore **two levels of control** that must be considered. The first level is the control over the corporation which may engage with the State in “co-production, joint venture, or production-sharing agreements.” If individuals, they must be Filipino citizens; if corporations, the ownership must be 60% Filipino.

The second level is the control of the “co-production, joint venture, or production-sharing” operation. This must be under the “full control and supervision of the State.”

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What appears from these levels of control is that the 1987 rule is more strict than the 1935 and 1973 rules. What the new rules says is that whenever natural resources are involved, particularly in the case of inalienable natural resources, the

State must always have some control of the exploration, development and utilization even if the individual or corporation engaged in the operation is Filipino." (Emphasis supplied)

178. In this case, Articles 5.5 and 8.1 of the Loan Agreement directly violate the Constitution as these provisions allow the surrender of the State's power of control, even ownership, over its natural resources, in favor of China.

179. To state the obvious, China is a sovereign state and not a corporation at least sixty *per centum* of whose capital is owned by Filipino citizens, over which the GRP could exercise full control and supervision over the exploration, development and utilization of our petroleum and other mineral oils.

180. The corresponding condition under Article 3.1 of the Loan Agreement, which requires that the DOJ Secretary of the GRP to execute a Legal Opinion in the form mandated under Appendix 6 of the Loan Agreement, is likewise unconstitutional and would be ultra vires on the part of the DOJ Secretary.

181. The Sri Lankan experience, wherein Sri Lanka was forced to hand over their port in favor of China, as a result of huge debts from its loans with China, should caution us as to how the Chinese interpret and implement their loan contracts. The New York Times reported, in part:

How China got Sri Lanka to Cough Up a Port<sup>45</sup>

HAMBANTOTA, Sri Lanka — Every time Sri Lanka's president, Mahinda Rajapaksa, turned to his Chinese allies for loans and assistance with an ambitious port project, the answer was yes.

Yes, though feasibility studies said the port wouldn't work. Yes, though other frequent lenders like India had refused. Yes, though Sri Lanka's debt was ballooning rapidly under Mr. Rajapaksa.

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<sup>45</sup> <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html>; last accessed April 1, 2019



Over years of construction and renegotiation with China Harbor Engineering Company, one of Beijing's largest state-owned enterprises, the Hambantota Port Development Project distinguished itself mostly by failing, as predicted. With tens of thousands of ships passing by along one of the world's busiest shipping lanes, the port drew only 34 ships in 2012.

And then the port became China's.

Mr. Rajapaksa was voted out of office in 2015, but Sri Lanka's new government struggled to make payments on the debt he had taken on. Under heavy pressure and after months of negotiations with the Chinese, the government handed over the port and 15,000 acres of land around it for 99 years in December.

The transfer gave China control of territory just a few hundred miles off the shores of a rival, India, and a strategic foothold along a critical commercial and military waterway.

The case is one of the most vivid examples of China's ambitious use of loans and aid to gain influence around the world — and of its willingness to play hardball to collect.

The debt deal also intensified some of the harshest accusations about President Xi Jinping's signature Belt and Road Initiative: that the global investment and lending program amounts to a debt trap for vulnerable countries around the world, fueling corruption and autocratic behavior in struggling democracies.

Ecuador and Maldives likewise face the same problem of the China debt trap.

II.

**PETITIONERS ARE ENTITLED TO THE  
ISSUANCE OF A WRIT OF PRELIMINARY  
INJUNCTION AND/OR TEMPORARY  
RESTRAINING ORDER (TRO).**

182. Petitioners move for the issuance of a Writ of Preliminary Injunction and/or Temporary Restraining Order (TRO) to enjoin the implementation of the assailed Loan Agreement. This is in order to protect the substantive rights and interests of the Petitioners while the case is pending before the Honorable Court.

183. Petitioners were able to clearly show that they are entitled to the issuance of an injunctive relief for having complied with the requirements set forth under the Rules, to wit:

- a. The invasion of right sought to be protected is material and substantial;
- b. The right of the complainant is clear and unmistakable; and
- c. There is an urgent and paramount necessity for the writ to prevent serious damage.<sup>46</sup>

184. These requisites are satisfied by *prima facie* evidence, hence, an applicant need not substantiate his or her claim with complete and conclusive evidence.<sup>47</sup>

185. Petitioners have clearly shown that the assailed acts of Respondents constitute an evident invasion of their fundamental rights to information and sovereign immunities. They have likewise demonstrated that the continuing implementation thereof poses an actual and imminent danger to the State, hence, the necessity and urgency for the issuance of an injunction against the same.

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<sup>46</sup> *PSBA vs. Tolentino-Genilo*, G.R. No. 159277, December 21, 2004.

<sup>47</sup> *Bicol Medical Center vs. Botor*, G.R. No. 214073, October 4, 2017.

**PRAYER**

WHEREFORE, in view of the foregoing, it is most respectfully prayed of this Honorable Court that this petition be given DUE COURSE and that:

- (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 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 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 including the implementation thereof, as UNCONSTITUTIONAL, ILLEGAL, and VOID.

Other reliefs just and equitable under the premises are similarly prayed for.

RESPECTFULLY SUBMITTED, April 4, 2019. Quezon City for the City of Manila.