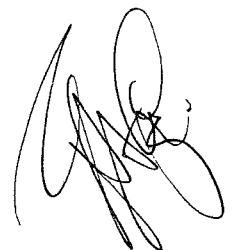


EN BANC

G.R. No. 245981 — 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, 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*.

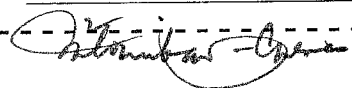
-and-

G.R. No. 246594 — NERI J. COLMENARES, BAYAN MUNA PARTYLIST REPRESENTATIVE CARLOS ISAGANI T. ZARATE, ANAKPAWIS PARTYLIST REPRESENTATIVE ARIEL B. CASILAO, GABRIELA WOMEN'S PARTYLIST REPRESENTATIVE EMMI A. DE JESUS, GABRIELA WOMEN'S PARTYLIST REPRESENTATIVE ARLENE D. BROSAS, ACT TEACHERS PARTYLIST REPRESENTATIVE ANTONIO L. TINIO, ACT TEACHERS PARTYLIST REPRESENTATIVE FRANCE L. CASTRO, KABATAAN PARTYLIST REPRESENTATIVE SARAH JANE I. ELAGO, CASEY ANNE CRUZ, FRANCISCA TOLENTINO, APRIL PORTERIA, JOSE DE LEON A. DULCE, MARIA FINESA COSICO, AND FR. ALEX BERCASIO, CSSR, *petitioners, versus* RODRIGO R. DUTERTE, PRESIDENT OF THE REPUBLIC OF THE PHILIPPINES, EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, METROPOLITAN WATERWORKS AND SEWERAGE SYSTEM ADMINISTRATOR REYNALDO V. VELASCO, DEPARTMENT OF FINANCE SECRETARY CARLOS G. DOMINGUEZ III, NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY SECRETARY ERNESTO M. PERNIA, OFFICE OF THE GOVERNMENT CORPORATE COUNSEL ELPIDIO J. VEGA AND DEPARTMENT OF JUSTICE SECRETARY MENARDO I. GUEVARRA, *respondents*.

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Promulgated:

August 9, 2022

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**SEPARATE CONCURRING OPINION****CAGUIOA, J.:**

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

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

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

Prior concurrence of the BSP MB

Section 20, Article VII of the Constitution provides:


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

¹ *Ponencia*, pp. 3-6.

² *Id.* at 2, Note 6.

³ *Id.* at 7.

⁴ *Id.* at 8.



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

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

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

Following the procedure set by the BSP, the CRPIP Loan Agreement was Approved-in-Principle by the BSP MB on February 22, 2018.⁸ The Approval-in-Principle was "conditioned on certain documentary submissions, deposit arrangements, parameters for subsequent negotiations and approvals, and compliance with applicable laws."⁹ Thereafter, the CRPIP Loan agreement was executed on April 10, 2018.¹⁰ Through Resolution No. 813, the BSP MB gave its Final Approval on the loan amounting to \$62,086,837.82 on May 17, 2018.¹¹ On the other hand, the NCWS Loan Agreement was Approved-in-Principle on September 28, 2018, after imposing conditions necessary for Final Approval.¹² The NCWS Loan Agreement was executed on November 20, 2018.¹³ After which, through Resolution No. 854, the BSP MB gave its Final Approval on the loan amounting to \$211,214,646.54 on June 6, 2019.¹⁴

⁵ Id. at 18.

⁶ *Bangko Sentral ng Pilipinas (BSP) Rules on Foreign Exchange Transactions*, available at <https://www.bsp.gov.ph/Lists/Download%20Section/Attachments/104/fxloan_primer.pdf>.

⁷ *Bangko Sentral ng Pilipinas (BSP) Rules On Foreign Exchange (Fx) Transactions*, p. 10, available at <https://www.bsp.gov.ph/Media_and_Research/Primers%20Faqs/faqfxreg.pdf>.

⁸ *Ponencia*, p. 5.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id. at 6.

¹³ Id.

¹⁴ Id.



According to petitioners, the Loan Agreements failed to comply with the prior concurrence requirement provided in the Constitution because they were executed even prior to the BSP MB giving its Final Approval. This is also the position adopted by Senior Associate Justice Marvic M.V.F. Leonen¹⁵ (SAJ Leonen), *viz.*:

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

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

In this regard, as aptly observed by the *ponencia*, based on the Constitutional Commission deliberations, the requirement to obtain prior BSP MB concurrence was placed as a middle ground¹⁷ and “is intended to strike [a] balance between prudence and expediency in public sector foreign borrowings,”¹⁸ to wit:

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

In light of the foregoing, the insistence on obtaining full approval, *i.e.*, Final Approval from the BSP MB prior to the execution of foreign loan agreements is inconsistent with the intent of the framers of our Constitution as it imposes a very strict, time-consuming, and crippling approval

¹⁵ See Dissenting Opinion of Senior Associate Justice Marvic M.V.F. Leonen, pp. 10-17.

¹⁶ Id. at 16.

¹⁷ *Ponencia*, p. 21.

¹⁸ Id.

¹⁹ Id.



mechanism. In this case, for instance, it took the BSP MB several months from issuing its Approval-in-Principle before it gave its Final Approval for the CRPIP and NCWS Loan Agreements.

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

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

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

Filipino First Policy

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

The Filipino First Policy is espoused in the second paragraph of Article XII, Section 10 of the Constitution, which reads:

²⁰ *Manual Regulations on Foreign Exchange Transactions*, p. 32, available at <<https://www.bsp.gov.ph/Regulations/MORFXT/MORFXT.pdf>>.

²¹ *Id.*

²² *Ponencia*, p. 34.



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

At the outset, the statement of the *ponencia* that petitioners never questioned the validity or prayed for the nullity of the LCB²³ is inaccurate. As stated by the *ponencia* itself, petitioners questioned the constitutionality of the Loan Agreements because the “conditions precedent to the release of funds allegedly defeat the constitutional policy to give preference to qualified Filipinos.”²⁴ Specifically, according to the *ponencia*, “petitioners argue that the conditions precedent to the disbursement of the loans, **specifically the payments to be made to the chosen Chinese contractors**,”²⁵ offend the Filipino First Policy.²⁶ To my mind, what petitioners are effectively questioning is the constitutionality of the LCB insofar as it limits the bidding for the construction of the CRPIP and NCWS to the Chinese contractors endorsed by the Chinese Government, as a requirement or precondition for the financing extended by the EXIM Bank to the GRP.

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

On the other hand, patrimony pertains to heritage.³⁰ In *Manila Prince Hotel v. Government Service Insurance System*,³¹ the Court explained that “when the Constitution speaks of national patrimony, it refers not only to the natural resources of the Philippines, as the Constitution could have very well used the term natural resources, but also to the cultural heritage of the Filipinos.”³²

²³ Id. at 35.

²⁴ Id. at 8.

²⁵ Id. at 26. (Emphasis supplied)

²⁶ Id.

²⁷ See *Tañada v. Angara*, 338 Phil. 546, 556 (1997).

²⁸ Id.

²⁹ See III RECORD, CONSTITUTIONAL COMMISSION, 616 (August 22, 1986).

³⁰ *Manila Prince Hotel v. GSIS*, 335 Phil. 82, 107 (1997).

³¹ Id.

³² Id. at 107-108.



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

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

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

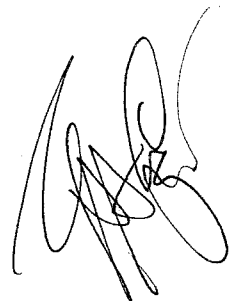
x x x the DOF shall request from the [Chinese] Embassy the financing of priority projects, and a list of at least three qualified, legitimate, and reputable Chinese contractors; upon receipt of such list, the DOF would furnish the same to the [Implementing Agency (IA)], which would conduct its own due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

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

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

³³ Ponencia, p. 4.

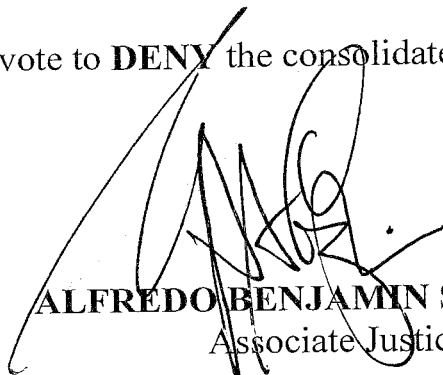
³⁴ Id. at 3-6.



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

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


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



ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

³⁵ Id. at 26.

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MARIA LUISA M. SANTILLA
Deputy Clerk of Court and
Executive Officer
OCC-En Banc, Supreme Court