Republic of the Philippines
Supreme Court
Manila

EN BANC

NERI J. COLMENARES, BAYAN MUNA PARTYLIST REPRESENTATIVE CARLOS ISAGANI T. ZARATE, ANAKPAWIS PARTY REPRESENTATIVE ARIEL B. CASILAO, GABRIELA WOMEN'S PARTY REPRESENTATIVE EMERENCIANA A. DE JESUS, GABRIELA WOMEN'S PARTY REPRESENTATIVE ARLENE D. BROSAS, ACT TEACHERS PARTY-LIST REPRESENTATIVE ANTONIO L. TINIO, ACT TEACHERS PARTY-LIST REPRESENTATIVE FRANCISCA L. CASTRO, KABATAAN PARTY-LIST 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.	**G.R. No. 245981**

NERI J. COLMENARES, BAYAN MUNA PARTYLIST REPRESENTATIVE CARLOS ISAGANI T. ZARATE, ANAKPAWIS PARTYLIST REPRESENTATIVE ARIEL B. CASILAO, GABRIELA WOMEN'S PARTY REPRESENTATIVE EMMI A. DE JESUS, GABRIELA WOMEN'S PARTY REPRESENTATIVE ARLENE D. BROSAS, ACT TEACHERS PARTY-LIST REPRESENTATIVE ANTONIO L. TINIO, ACT TEACHERS PARTY-LIST REPRESENTATIVE FRANCE L. CASTRO, KABATAAN PARTYLIST REPRESENTATIVE SARAH JANE I. ELAGO, CASEY ANNE CRUZ, FRANCISCA TOLENTINO, APRIL PORTERIA, JOSE 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.

G.R. No. 246594

Present:

GESMUNDO, *C.J.*,
LEONEN,
CAGUIOA,
HERNANDO,
LAZARO-JAVIER,
INTING,
ZALAMEDA,
LOPEZ, M.,*
GAERLAN,
ROSARIO,
LOPEZ, J.,
DIMAAMPAO,
MARQUEZ,
KHO, Jr., and,
SINGH, *J.J.*

Promulgated:

August 9, 2022

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

DECISION

LOPEZ, J.:

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

Factual Antecedents

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

Invoking the MOU, the Department of Foreign Affairs (*DFA*) transmitted to the Embassy of the People's Republic of China (*PRC Embassy*) Note Verbale No. 17-0330[10] dated January 20, 2017, proposing the process

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

2 *Rollo* (G.R. No. 245981), vol. 1, pp. 93-115.

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

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

5 *Rollo* (G.R. No. 245981), vol. 1, pp. 312-316.

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

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

8 4.1 This MOU is only intended to serve as guidance for further cooperation between the Parties, and is not legally binding or enforceable on either of the Parties under any jurisdiction, except the provision under Article 3, 4, 5, 6 and 7. Nothing in this MOU obligates either of GPH, represented by the Department of Finance, or the Bank to make any commitment or enter into any agreement or transaction; id. at 314-315.

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

10 Id. at 317-318.

by which the financing arrangement under the MOA would be activated and availed of. Then followed Note Verbale No. 17-1049[11] dated March 3, 2017, wherein the DFA confirmed its previous proposals. In response, China's Ministry of Commerce (*MOFCOM*) sent out Reply Note[12] dated March 8, 2017 (*Reply Note*), agreeing to the following procedure:

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

Aspects of the foregoing procedure were further particularized through a mutually agreed[13] Clarificatory Procedures for the Implementation of the Note Verbale No. 17-1049[14] (*Clarificatory Procedures*). Particularly, the DOF and Chinese Government agreed that the pertinent IA shall adhere to provisions of Republic Act (*R.A.*) No. 9184, or the Government Procurement Reform Act (*GPRA*); the DOF shall request from the PRC Embassy the financing of priority projects, and a list of at least three qualified, legitimate, and reputable Chinese contractors; upon receipt of such list, the DOF would furnish the same to the IA, which would conduct its own due diligence and vetting, coursing through the DOF to the PRC Embassy whatever concerns it might have with the recommended firms; if found satisfactory, the IA would undertake LCB, incorporating some GPRA procedures; lastly, the IA and winning contractor would sign a contract agreement, stipulating therein that the effectivity thereof is contingent on the effectivity of the loan agreement to finance such project.

The CRPIP, with the National Irrigation Authority (*NIA*) as IA, was nominated for such finance assistance. Consequently, the MOFCOM recommended three Chinese contractors,[15] which the DOF relayed to the NIA for due diligence and vetting.[16] The NIA proceeded to conduct a background check by inquiring with various government agencies regarding

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11 Id. at 319-321.
12 Id. at 322-323.
13 Letter dated June 29, 2017; id. at 326.
14 Id. at 327.
15 China CAMC Engineering Co., Ltd, China Geo-Engineering Corporation, and Qingdao Municipal Construction Group Co., Ltd.
16 Letter dated September 7, 2017; *rollo* (G.R. No. 245981), vol. 1, pp. 335-336.

ongoing transactions with these firms.[17] Then, the NIA's Bids and Awards Committee-A adopted Resolution No. CW-LCB 2018-1,[18] recording the conduct of the requisite LCB, declaring China CAMC Engineering Co., Ltd. as the bidder with the lower calculated and responsive bid, recommending the approval of such award and issuance of a notice to that effect, and urging the execution of a contract agreement between the NIA and China CAMC.

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

The NCWS project, to be implemented by the Metropolitan Waterworks and Sewerage System (*MWSS*), was also nominated for financing assistance.[21] As the NCWS project was originally conceived as a public-private partnership scheme, the DOF and the National Economic Development Authority (*NEDA*) instructed the MWSS to review and adjust the project's financing strategy, considering the financing cooperation provided by the MOU. The MWSS Board of Trustees endorsed and confirmed the NCWS project's new estimated cost at ₱10.857 Billion, and tailored the scope and implementation thereof consistent with a financing shift to Official Development Assistance (*ODA*), thereby foregoing the then-ongoing procurement process pursuant to the Build-Operate-Transfer Law.[22]

The NEDA-Investment Coordinating Committee confirmed such shift in project financing.[23] Similar to the CRPIP project, the DOF forwarded to the MWSS the shortlist of MOFCOM-endorsed[24] Chinese contractors,[25] and

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17 Id. at 337-346.

18 Id. at 354-360.

19 Letter dated February 28, 2018; id. at 362-363.

20 Id. at 372-373.

21 Letter dated September 15, 2016, from the MWSS to the DOF, recommending the NCWS project for potential funding by the Chinese government; *rollo* (G.R. No. 246594), pp. 329-330; Letter dated January 26, 2017, from the DOF to the MWSS, endorsing the NCWS project for Chinese funding; id. at 337.

22 Resolution No. 2017-040-CO; id. at 340-341.

23 Letter dated April 3, 2017; id. at 338; July 11, 2017 Letter; id. at 342.

24 Letter dated September 6, 2017; id. at 343.

25 China Energy Engineering Company Limited, PowerChina Limited, and Consortium of

urged the MWSS to conduct its due diligence in vetting the candidate firms.[26] Thereafter, the MWSS concurred in the shortlist of contractors and proceeded to conduct the LCB, [27] where China Energy Engineering Corporation Limited emerged with the lowest calculated bid.[28]

The MWSS then approved the proposed commercial contract, authorizing its administrator to sign the agreement, and submit the same to the DOF for loan processing.[29] For project financing, the DOF endorsed the MWSS's proposed loan to the MB for its Approval-in-Principle and willingness to guarantee, subject to certain conditions.[30] On September 28, 2018, the MB gave its Approval-in-Principle through Resolution No. 1581, imposing conditions necessary for Final Approval. The NCWS Loan Agreement was entered into on November 20, 2018 between the EXIM Bank as lender, and the GRP, through the DOF, as borrower, and features stipulations identical to those of the CRPIP Loan Agreement. Through Resolution No. 854[31] dated June 6, 2019, the BSP MB gave its Final Approval to the loan amounting to US$211,214,646.54.

Issues

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

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

Guangdong Foreign Construction Company Limited and Guangdong Yuantian Engineering Company Limited.

26 Resolution No. 2017-162-CO; *rollo* (G.R. No. 246594), pp. 353.

27 Resolution No. 2017-162-CO; id. at 354.

28 Resolution No. 2018-132-CO; id. at 375.

29 Resolution No. 2018-140-CO; id. at 376-377.

30 Letter dated September 7, 2018; id. at 380.

31 Id. at 382-383.

32 Bracketed quotations pertain to dissimilar phrasings found in the NCWS Loan Agreement, otherwise identical with the CRPIP Loan Agreement's language.

1. Procurement documents in granting the civil works to the Chinese contractor; and

2. Other relevant documents in connection with this case.

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

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

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

I.
PROCEDURALLY, WHETHER THE PETITIONS SHOULD BE DISMISSED FOR:

A. FAILURE TO ESTABLISH THE REQUISITES OF JUDICIAL REVIEW.

B. NON-OBSERVANCE OF THE DOCTRINE OF HIERARCHY OF COURTS.

C. UNAVAILABILITY OF THE REMEDY OF PROHIBITION.

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

III.
WHETHER THE LOAN AGREEMENTS ARE UNCONSTITUTIONAL BECAUSE:

A. THESE SUPPOSEDLY LACK PRIOR CONCURRENCE FROM THE BSP MB.

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33 Id. at 52-53.

B. THE CONDITIONS PRECEDENT TO THE RELEASE OF FUNDS ALLEGEDLY DEFEAT THE CONSTITUTIONAL POLICY TO GIVE PREFERENCE TO QUALIFIED FILIPINOS AND CIRCUMVENT PROCUREMENT LAWS.

C. THE ARBITRATION CLAUSES, PARTICULARLY ON THE CHOICE OF LAW AND ARBITRAL TRIBUNAL, ARE PURPORTEDLY SKEWED IN FAVOR OF THE CHINESE LENDER.

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

Our Ruling

I. Procedural considerations.

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

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

> Settled is the rule that the President of the Republic of the Philippines cannot be sued during his/her tenure. This immunity from suit applies to President Rodrigo Duterte (*President Duterte*) regardless of the nature of the suit filed against him for as long as he sits as the President of the Republic of the Philippines. In the case of *De Lima v. President Duterte*, Senator Leila De Lima (*Senator De Lima*) sued President Rodrigo Roa Duterte in a petition for a writ of *habeas data* seeking to enjoin the latter from committing acts allegedly violative of her right to life, liberty and security. In her petition, Senator De Lima argued that President Duterte is not entitled to immunity from suit, especially from a petition for the issuance of the writ of *habeas data,* because his actions and statements were unlawful or made outside of his official conduct. The Office of the Solicitor General countered that the immunity of the sitting President is absolute, and it extends to all suits including petitions for the

34 UDK No. 16838, May 11, 2021.

writ of *amparo* and writ of *habeas data* and that the present suit is the distraction that the immunity seeks to prevent because it will surely distract the President from discharging his duties as the Chief Executive. In resolving the petition, this Court pronounced that presidential immunity applies regardless of the nature of the suit brought against an incumbent President. The rationale for this rule was explained in this wise:

> The concept of presidential immunity is not explicitly spelled out in the 1987 Constitution. However, the Court has affirmed that there is no need to expressly provide for it either in the Constitution or in law. Furthermore, the reason for the omission from the actual text of the 1987 Constitution has been clarified by this exchange on the floor of the 1986 Constitutional Commission:
>
> MR. SUAREZ: Thank you.
>
> The last question is with reference to the Committee's omitting in the draft proposal the immunity suit provision for the President. I agree with Commissioner Nolledo that the Committee did very well in striking out this second sentence, at the very least, of the original provision on immunity from suit under the 1973 Constitution. But would the Committee members not agree to a restoration of at least the first sentence that the President shall be immune from suit during his tenure, considering that if we do not provide him that kind of immunity he might be spending all of his time facing litigations, as the President-in-exile in Hawaii is now facing litigations almost daily?
>
> FR. BERNAS: The reason for the omission is that we consider it understood in present jurisprudence that during his tenure he is immune from suit.
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> MR. SUAREZ: So, there is no need to express it here.
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> FR. BERNAS: There is no need. It was that way before. The only innovation made by the 1973 Constitution was to make that explicit and do add other things.
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> MR. SUAREZ: On that understanding, I will not press for any more query, Madam President.
>
> The existence of the immunity under the 1987 Constitution was directly challenged in *Rubrico v. Macapagal-Arroyo*, but the Court steadfastly held that Presidential immunity from suit remained preserved in our current system.
>
> While the concept of immunity from suit originated elsewhere, the ratification of the 1981 constitutional amendments and the 1987 Constitution made our version of presidential immunity unique. Section 15, Article VII of the 1973 Constitution, as amended, provided for immunity at two distinct points in time: the first sentence of the provision related to immunity during the tenure of the President, and the second

provided for immunity thereafter. At this juncture, we need only concern ourselves with immunity during the President's tenure, as this case involves the incumbent President. As the framers of our Constitution understood it, which view has been upheld by relevant jurisprudence, the President is immune from suit *during his tenure.*

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

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

XXX XXX XXX

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

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

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

> The rationale for the grant to the President of the privilege of immunity from suit is to assure the exercise of Presidential duties and functions free from any hindrance of distraction, considering that being the Chief Executive of the Government is a job that, aside from requiring all of the office-holder's time, also demands undivided attention.
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> The rationale has been expanded in *David v. Macapagal-Arroyo*:
>
> x x x It will degrade the dignity of the high office of the President, the Head of State, if he can be dragged into court litigations while serving as such. Furthermore, it is important that he be

> freed from any form of harassment, hindrance or distraction to enable him to fully attend to the performance of his official duties and functions. Unlike the legislative and judicial branch, only one constitutes the executive branch and anything which impairs his usefulness in the discharge of the many great and important duties imposed upon him by the Constitution necessarily impairs the operation of the Government. However, this does not mean that the President is not accountable to anyone. Like any other official, he remains accountable to the people but he may be removed from office only in the mode provided by law and that is by impeachment.

With regard to the submission that the President must first invoke the privilege of immunity before the same may be applied by the courts, Sen. De Lima quotes from *Soliven* where the Court said that "this privilege of immunity from suit, pertains to the President by virtue of the office and may be invoked only by the holder of the office; not by any other person in the President's behalf." But that passage in *Soliven* was made only to point out that it was the President who had gone to court as the complainant, and the Court still stressed that the accused therein could not raise the presidential privilege as a defense against the President's complaint. At any rate, if this Court were to first require the President to respond to each and every complaint brought against him, and then to avail himself of presidential immunity on a case to case basis, then the rationale for the privilege – protecting the President from harassment, hindrance or distraction in the discharge of his duties – would very well be defeated. It takes little imagination to foresee the possibility of the President being deluged with lawsuits, baseless or otherwise, should the President still need to invoke his immunity personally before a court may dismiss the case against him.

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

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35 CONSTITUTION, Article VII, Sec. 1.

36 *Supra* note 33. (Citations omitted).

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

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

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

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

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

The assailed Loan Agreements are public contracts covering matters of public concern, considering that "[a] government or public contract has been defined as a contract entered into by state officers acting on behalf of the state, and in which the entire people of the state are directly interested."[41] Additionally, stability and predictability are key pillars on which the legal system must be founded and run to guarantee a business environment

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37 704 Phil. 205 (2013).
38 Id. at 217.
39 686 Phil. 571 (2012).
40 Id. at 585. (Underscoring supplied).
41 *Sargasso Construction & Development Corp. v. Philippine Ports Authority*, 637 Phil. 259, 274-275 (2010). (Underscoring supplied).

conducive to sustainable economic growth.[42] These petitions assail the validity of the Loan Agreements, touching upon issues of foreign debt and the manner of securing the same, foreign participation in high-end public works projects, and international implications of arbitration clauses—matters which require the Court's immediate attention. With far-reaching legal and economic implications, the Court finds that petitioners possess the personality to bring these petitions.

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

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

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

In any other situation, on the ground of mootness, the Court would have refrained from making any pronouncements on the issue regarding the disclosure of loan documents. In *International Service for the Acquisition of*

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

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

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

Agri-Biotech Applications, Inv. v. Greenpeace Southeast Asia (Philippines),[45] the mootness of an action was explained in this wise:

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

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

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45 791 Phil. 243 (2016).

46 Id. at 259.

47 Particularly, but not limited to:

1. Memorandum of Understanding on Financing Cooperation Between The Export-Import Bank of China and The Government of the Republic of the Philippines, Represented by the Department of Finance dated October 20, 2016;
2. Note Verbale No. 17-0330 dated January 20, 2017;
3. Note Verbale No. 17-1049 dated March 3, 2017;
4. China MOFCOM transmittal dated March 8, 2017;
5. Letter dated June 29, 2017 from DOF Sec. Dominguez to the Chinese Embassy on the proposed Clarificatory Procedures concerning the financing negotiations;
6. Clarificatory Procedures for the Implementation of the Note Verbale No. 17-1049;
7. Letter dated September 7, 2017 from DOF Sec. Dominguez to NIA Administrator Visaya, regarding the shortlist of Chinese contractors;
8. Letter dated September 8, 2017 from DOF Sec. Dominguez to DPWH Sec. Villar seeking a background check on the proposed contractors;
9. Letter dated September 8, 2017 from DOF Sec. Dominguez to DOTr Sec. Tugade seeking a background check on the proposed contractors;
10. Letter dated October 3, 2017 from DBM Sec. Diokno to DOF Sec. Dominguez, providing comments on the proposed financing cooperation agreement;
11. NIA BAC-A Resolution No. CW-LCB-2018-1, awarding the CRPIP contract to China CAMC Engineering Co., Ltd.;
12. Letter dated September 15, 2016 from the MWSS Deputy Administrator to DOF Usec. Tan recommending pipeline projects that may require participation and funding by the Chinese government;
13. Letter dated January 17, 2016 from the MWSS OIC and Senior Deputy Administrator to the NEDA Deputy Director-General discussing the NCWS project, estimating project cost, and identifying sources of funding;
14. Letter dated February 8, 2017 from the MWSS Sr. Deputy Administrator to DOF Usec. Tan regarding submission of documents;
15. Letter dated January 26, 2017 from DOF Usec. Tan to the MWSS Deputy Administrator re: endorsement of the project for Chinese funding;
16. Letter dated April 3, 2017 from NEDA to MWSS stating that the Investment Coordination Committee-Cabinet Committee confirmed the proposed change in financing from PPP to ODA;
17. Letter dated April 6, 2017 from MWSS to NEDA saying the MWSS Board endorsed and confirmed the new estimated project cost and implementation arrangement;
18. Letter dated July 11, 2017 from NEDA to MWSS saying the NEDA Board confirmed the ICC's approval of the shift in financing from PPP to ODA, and change in total project cost;
19. Letter dated September 6, 2017 from the MOFCOM to the DOF recommending Chinese contractors;

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

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

Article 8.1 of the Loan Agreements similarly provide:

CRPIP Loan Agreement	NCWS Loan Agreement
8.1 <u>Waiver of Immunity</u> 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	**8.1 <u>Waiver of Immunity</u>** The Borrower hereby irrevocably waives any immunity on the grounds of sovereignty or otherwise for itself or its property in connection with any arbitration proceeding pursuant to Article 8.5 hereof or with the enforcement of any arbitral award pursuant thereto, except any other assets of the Borrower located within the territory of the Philippines to the extent that the Borrower

20. Letter dated September 7, 2017 from DOF to MWSS, forwarding the MOFCOM recommendations;
21. MWSS Resolution endorsing the three contractors;
22. MWSS Board Resolution specifying the bid documents;
23. MWSS Board Resolution declaring CEEC as bidder with the lowest calculated bid and lowest calculated responsive bid;
24. MWSS Board Resolution approving in principle the detailed engineering design and construction of the NCWS-KDP;
25. Letter dated September 7, 2018 from DOF to MWSS, saying that the DOF has endorsed to the BSP MB its Approval-in-Principle and Willingness to Guarantee;
26. Letter dated June 7, 2019 from the BSP International Operations Department regarding final approval to the MWSS loan from the EXIM Bank;
27. MWSS Board Resolution regarding final draft of the loan agreement and authority to sign.

48 Dissenting Opinion, pp. 6-7.

49 Article 8.1 of the Loan Agreements.

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

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

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 governmental use (as distinguished from patrimonial assets and assets dedicated to commercial use).[52]	is prohibited by the laws or public policies having force of law in the Republic of the Philippines, applicable and in effect at the signing of this Agreement from waiving such immunity.[53]

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

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

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

Coupled with the emphasis on the herein grave and far-reaching issues, petitioners did not raise any factual matters, limiting their arguments only to the legalities of the Loan Agreements. They appraise the agreements' allegedly contentious stipulations as against various Constitutional directives concerning the concurrence of the BSP MB prior to contracting foreign loans, [57] preference to Filipinos in transactions involving the national

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

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

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

55 896 SCRA 213.

56 Id. at 281.

57 CONSTITUTION, Art. VII, Sec. 20.

economy and patrimony,[58] the pursuit of an independent foreign policy,[59] and the State's waiver of immunity from suit[60] and ownership over patrimonial assets.[61]

C. Prohibition is a viable remedy under the circumstances.

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

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

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

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

Accordingly, the MOU, Note Verbale Nos. 17-0330 and 17-1049, and Clarificatory Procedures were all prefatory agreements that set the parameters for negotiations between the GRP and EXIM Bank. The various international correspondences, as well as the GRP's own internal processes

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58 CONSTITUTION, Art. XII, Sec. 10.
59 CONSTITUTION, Art. II, Sec. 7.
60 CONSTITUTION, Art. XVI, Sec. 3.
61 CONSTITUTION, Art. XII, Sec. 2 & Sec. 3.
62 *Spouses Guerrero v. Domingo*, 661 Phil. 528, 534 (2011).
63 *Menla, Jr. v. Aganan*, G.R. No. 247728 (Notice), July 29, 2019.
64 *Montes v. Court of Appeals*, 523 Phil. 98, 110 (2006).
65 466 Phil. 751 (2004). See also *Sargasso Construction & Development Corp. v. Philippine Ports Authority*, 637 Phil. 259, 274 (2010).
66 *Insular Life Assurance Company, Ltd. v. Asset Builders Corp.*, *supra.* at 766. (Citations omitted).

(*e.g.*, project nomination by the NIA and MWSS, NEDA confirmations, BSP approvals), precipitated the perfection of the Loan Agreements. Ostensibly, the Loan Agreements are now in the consummation stage, especially since some disbursement tranches are subject to certain conditions,[67] and it does not appear that respondents have repaid any of the principal or paid any interest thereon.[68] In other words, the parties' mutual obligations under the Loan Agreements have yet to be fulfilled, and these petitions were filed precisely to enjoin the performance thereof, making prohibition a timely and viable remedy.

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

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

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

The Court rules in favor of respondents.

Section 20, Article VII of the 1987 Constitution provides:

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

68 Article 4 of the Loan Agreements.

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

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

71 CONSTITUTION, Art. VII, Sec. 20.

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

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

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

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

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

> In view of the fact that our foreign debt has amounted to $26 billion — it may reach up to $36 billion including interests — we studied this provision in the 1973 Constitution, so that some limitations may be placed upon this power of the President. We consulted representatives of the Central Bank and the National Economic Development Authority on this matter. After studying this matter, we decided to provide in Section 18 that insofar as the power of the President to contract or guarantee foreign loans is concerned, it must receive the prior concurrence of the Monetary Board.
>
> We placed this limitation because, as everyone knows, the Central Bank is the custodian of the foreign reserves of our country, and so, it is in the best position to determine whether an application for foreign loan initiated by the President is within the paying capacity of our country or not. That is the reason we require prior concurrence of the Monetary Board insofar as contracting and guaranteeing of foreign loans are concerned.[75]

More tangibly, Members of the Constitutional Commission understood that Article VII, Section 20, particularly its prior concurrence requirement, would be implemented through more detailed laws and regulations.[76] Thus,

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

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

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

Section 1[77] of R.A. No. 4860, as amended,[78] statutorily empowers the President to contract loans with foreign entities. Meanwhile, Section 123 of R.A. No. 7653,[79] as amended by R.A. No. 11211,[80] requires that "the Government, through the Secretary of Finance, shall request the opinion, in writing, of the [MB] on the monetary implications of" credit operations abroad. In Section 23 of its *Manual of Regulations on Foreign Exchange Transactions*, the BSP requires that "[p]rior [MB] approval shall be obtained for public sector foreign/foreign currency loans/borrowings[.]"

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

> 1. All foreign borrowing proposals of the Government, Government Agencies and government financial institutions shall be submitted to the Central Bank for approval in principle by the Monetary Board as to purpose and credit terms among others, before commencement of actual negotiations.
>
> 2. Actual negotiations for such foreign credits and/or accommodations shall be conducted by the Secretary of Finance and/or Central Bank Governor or their duly authorized representatives as chief or co-chief negotiators, together with the representatives of the Government, government agencies and government financial institutions or entities concerned.

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

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

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77 Sec. 1. The President of the Philippines is hereby authorized, in behalf of the Republic of the Philippines, to contract such loans, credits, including supplier's credit, deferred payment arrangements, and to enter into and conclude bilateral agreements involving other forms of official assistance such as grants and commodity credit arrangements or indebtedness as may be necessary and upon such terms and conditions as may be agreed upon, not inconsistent with this Act, with Governments of foreign countries with whom the Philippines has diplomatic or trade relations or which are members of the United Nations, their agencies, instrumentalities or financial institutions or with reputable international lending institutions or firms extending supplier's credit or deferred payment arrangements to enable the government of the Republic of the Philippines to: x x x.

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

79 The New Central Bank Act.

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

81 Clarifying Procedures on Foreign Credit Operations of the Public Sector.

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

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

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

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

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

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82 Dissenting Opinion, pp. 10-17.

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

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

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

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

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

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

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

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

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

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

Section 21, Article XII of the Constitution provides:

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

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84 September 7, 2018 Letter; *rollo* (G.R. No. 246594), p. 380.
85 Id. at 382-383.
86 Underscoring supplied.

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

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

The language of the last sentence of Section 21, Article XII indicates proactive language, *i.e.*, "shall be made available to the public", suggesting that relevant government bodies need not even wait for persons to request information on government-contracted foreign loans before these are made accessible. After all, this stance is consistent with the policy of transparency conveyed by the provision.[89] It is no coincidence that the framers of the 1987 Constitution saw fit to devote a specific provision directing access to information on foreign loans, notwithstanding the broader guarantees already provided by Section 7 of Article III and Section 28 of Article II. At the time, especially considering the social costs and intergenerational tax burden inflicted by unscrupulous foreign borrowings, the Constitutional Commissioners were considering mechanisms for popular consultations in contracting foreign loans.[90]

The subject Confidentiality Clause reads:

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87 780 Phil. 1 (2016).

88 Id. at 12. (Underscoring supplied).

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

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

> 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.[91]

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

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

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

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91 *Rollo* (G.R. No. 245981), p. 112.
92 Underscoring supplied.
93 *Chavez v. Presidential Commission on Good Governance*, 360 Phil. 133, 160-162 (1998).
94 Id at. 162.
95 *Senate of the Philippines v. Exec. Sec. Ermita*, 522 Phil. 1, 39 (2006).

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

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

The Court sustains respondents' contentions.

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

> Article 3.1. The first disbursement is subject to the satisfaction of the conditions precedent set out in Appendix 1 attached hereto (or such conditions precedent have been waived by the Lender in writing).
>
> Article 8.12. [8.13] The appendixes to this Agreement shall be deemed as an integral part of this Agreement and have the same legal effect as this Agreement.

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

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

96 CONSTITUTION, Art. XII, Sec. 10.
97 *Rollo* (G.R. No. 245981), Vol. 1, pp. 31-44; *rollo* (G.R. No. 246594), pp. 35-44.
98 *Rollo* (G.R. No. 245981), Vol. 1, pp. 240-256; *rollo* (G.R. No. 246594), pp. 262-278, 416-424.

x x x x (2) Certified true copies of the Commercial Contract and other relevant documents in connection therewith acceptable to the lender which have been duly signed by all parties thereto and have become effective; x x x x (5) Certified true copies of any and all documents evidencing that the End-User has paid to the Chinese Contractor certain 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.	x x x x (3) Certified true copies of the Commercial Contract and other relevant documents in connection therewith acceptable to the lender which have been duly signed by all parties thereto and have become effective; x x x x (8) Certified true copies of any and all documents evidencing that the End-User has paid to the Chinese Contractor certain amount, which is equivalent to 15% of the advance payment under the Commercial Contract.

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

This Court does not agree.

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

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

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

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

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

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

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

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

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99 338 Phil. 546 (1997).

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

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

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

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

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

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

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

> The petitioners' arguments fail to persuade. The Court holds that Loan Agreement No. PH-P204 taken in conjunction with the Exchange of Notes dated December 27, 1999 between the Japanese Government and the Philippine Government is an executive agreement.
>
> To recall, Loan Agreement No. PH-P204 was executed by and between the JBIC and the Philippine Government pursuant to the Exchange of Notes executed by and between Mr. Yoshihisa Ara, Ambassador Extraordinary and Plenipotentiary of Japan to the Philippines, and then Foreign Affairs Secretary Siazon, in behalf of their respective governments. The Exchange of Notes expressed that the two governments have reached an understanding concerning Japanese loans to be extended to the Philippines and that these loans were aimed at promoting our country's economic stabilization and development efforts.

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

105 544 Phil. 645 (2007).

106 551 Phil. 1030, 1049 (2007).

107 738 Phil. 243, 262 (2014).

> Loan Agreement No. PH-P204 was subsequently executed and it declared that it was so entered by the parties "[i]n the light of the contents of the Exchange of Notes between the Government of Japan and the Government of the Republic of the Philippines dated December 27, 1999, concerning Japanese loans to be extended with a view to promoting the economic stabilization and development efforts of the Republic of the Philippines." Under the circumstances, the JBIC may well be considered an adjunct of the Japanese Government. Further, Loan Agreement No. PH-P204 is indubitably an integral part of the Exchange of Notes. It forms part of the Exchange of Notes such that it cannot be properly taken independent thereof.
>
> x x x x
>
> Under the fundamental principle of international law of *pacta sunt servanda*, which is, in fact, embodied in Section 4 of RA 9184 as it provides that "[a]ny treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed," the DPWH, as the executing agency of the projects financed by Loan Agreement No. PH-P204, rightfully awarded the contract for the implementation of civil works for the CP I project to private respondent China Road & Bridge Corporation.[108]

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

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

> As may be palpably observed, the terms and conditions of Loan Agreement No. 4833-PH, being a project-based and government-guaranteed loan facility, were **incorporated and made part of the SLA** that was subsequently entered into by Land Bank with the City Government of Iligan. Consequently, this means that the SLA cannot be treated as an independent and unrelated contract but as a conjunct of, or having a joint and simultaneous occurrence with, Loan Agreement No. 4833-PH. **Its nature and consideration, being a mere accessory**

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

109 *Supra* note 101, at 1049.

> **contract of Loan Agreement No. 4833-PH, are thus the same as that of its principal contract from which it receives life and without which it cannot exist as an independent contract.** Indeed, the accessory follows the principal; and, concomitantly, accessory contracts should not be read independently of the main contract. Hence, as Land Bank correctly puts it, the SLA has attained indivisibility with the Loan Agreement and the Guarantee Agreement through the incorporation of each other's terms and conditions such that the character of one has likewise become the character of the other.
>
> Considering that Loan Agreement No. 4833-PH expressly provides that the procurement of the goods to be financed from the loan proceeds shall be in accordance with the IBRD Guidelines and the provisions of Schedule 4, and that the accessory SLA contract merely follows its principal's terms and conditions, the procedure for competitive public bidding prescribed under RA 9184 therefore finds no application to the procurement of goods for the Iligan City Water Supply System Development and Expansion Project. The validity of similar stipulations in foreign loan agreements requiring the observance of IBRD Procurement Guidelines in the procurement process has, in fact, been previously upheld by the Court in the case of *Department of Budget and Management Procurement Service (DBM-PS) v. Kolonwel Trading*[.][110]

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

> An "exchange of notes" is a record of a routine agreement that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or, sometimes, to avoid the process of legislative approval.
>
> It is stated that "treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, modus vivendi and exchange of notes" all refer to "international instruments binding at international law."
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> x x x x x x x x x

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

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

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

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

> 1.1 For the purpose of promoting financing cooperation between the Parties, as well as contributing to the achievement of economic and social benefits in their respective countries, subject to the terms and conditions of this MOU, the Bank intends to make available financing to GPH to support projects to be mutually identified and agreed between the two Governments.
>
> 2.3 The rights and obligations of the Parties under each individual project shall be stipulated in the individual loan agreement (hereinafter referred to as the "Individual Loan Agreement") and such other relevant finance documents.
>
> 4.1 This MOU is only intended to serve as guidance for further cooperation between the Parties, and is not legally binding or enforceable on either of the Parties under any jurisdiction, except the provision under Article 3, 4, 5, 6 and 7. Nothing in this MOU obligates either of GPH, represented by the Department of Finance, or the Bank to make any commitment or enter into any agreement or transaction.
>
> 4.2 The terms and conditions of each Individual Loan Agreement shall be subject to further negotiation between and by the Parties.

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

> 2. The Chinese side shall provide the DOF its consideration to finance the project. For positively considering the project, the Chinese side, through the Embassy of the PRC in the Philippines, shall provide the DOF the list of at least three (3) qualified, legitimate, and in good standing Chinese contractors that can undertake the project upon discussion between the Chinese side and the relevant commercial chamber in China.
>
> 3. The Implementing Agency (IA) of the GPH shall commence the procurement process and undertake Limited Competitive Bidding (LCB) among the contractors provided by the Chinese side, following the Philippine Government Procurement Reform Act (GPRA). The IA shall finalize and sign the contract agreement in as timely a manner as possible, following the GPRA.

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112 Id. at 25.

On the other hand, the Clarificatory Procedures provide that:

> The IA shall commence the procurement process and undertake Limited Competitive Bidding (LCB) among said Chinese contractors following applicable procedures and documents under R.A. 9184.
>
> Thus, the NIA as IA of the CRPIP project, and the MWSS as IA of the NCWS project, received the shortlist of Chinese contractors from the MOFCOM, conducted the necessary due diligence, held the LCB, and eventually signed the necessary commercial contracts, for which financing would be provided through the Loan Agreements.

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

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

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113 Presidential Decree No. 588, Series of 1974.

114 SEC. 11-A. In the contracting of any loan, credit or indebtedness under this Act or any law, the President of the Philippines may, when necessary, agree to waive or modify the application of any provision of law granting preferences in connection with, or imposing restrictions on, the procurement of goods or services: Provided, however, That as far as practicable, utilization of the services of qualified Filipino citizens or corporations or associations owned by such citizens in the prosecution of projects financed under this Act shall be prepared on the basis of the standards set for a particular project: Provided, further, That the matter 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.

Development Assistance Act of 1996, as amended,[115] which applies to ODAs like herein Loan Agreements.

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

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

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115 Republic Act No. 8555.

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

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

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

118 Reflections dated July 11, 2022, pp. 16-22.

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

120 See *Intellectual Property Association of the Philippines v. Ochoa*, 790 Phil. 276, 300-301 (2016).

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

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

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

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

As such, pertinent government bodies always have the leeway to assert the inclusion of qualified Filipinos on preferential opportunities in projects

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121 *Social Security System v. Seno, Jr.*, G.R. No. 183478, February 10, 2020.
122 *Commissioner of Internal Revenue v. Puregold Duty Free, Inc.*, 761 Phil. 419, 440 (2015).
123 Reflections dated July 26, 2022, pp. 2-3.
124 CONSTITUTION, Article XII, Sec. 10. (Underscoring supplied).

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

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

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

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

The Court rules in favor of respondents.

Articles 8.4 to 8.6 of the Loan Agreements provide:

> 8.4 **Governing Law** This Agreement as well as the rights and obligations of the Parties hereunder shall be governed by and construed in accordance with the laws of China.
>
> 8.5 Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no settlement can be reached through such consultation, each party shall have the right to submit such dispute to the China International Economic and Trade Arbitration Commission (CIETAC) [Hong Kong International Arbitration

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125 CONSTITUTION, Art. XII, Section 13.
126 *Rollo* (G.R. No. 245981), Vol. 1, pp. 44-58; *rollo* (G.R. No. 246594), pp. 44-46.
127 *Rollo* (G.R. No. 245981), Vol. 1, pp. 425-428.
128 CONSTITUTION, Art. II, Sec. 7.
129 *Rollo* (G.R. No. 245981), Vol. 1, pp. 256-270; *rollo* (G.R. No. 246594), pp. 278-295, 424-426.
130 *Rollo* (G.R. No. 245981), Vol. 1, p. 424.

> Centre (HKIAC)] for arbitration. The arbitration shall be conducted in accordance with the CIETAC's [HKIAC] arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The arbitration shall take place in Beijing. [The seat of arbitration shall be in Hong Kong. The arbitration shall be conducted in English. The Arbitral Tribunal shall consist of three (3) Arbitrators which shall be appointed pursuant to the arbitration rules of HKIAC.]
>
> 8.6 The arbitral award obtained in accordance with this Article against the Borrower will be recognized and be enforceable in the Republic of the Philippines provided that: (a) the arbitral tribunal had jurisdiction over the subject matter of the action in accordance with the jurisdictional rules; (b) the Republic of the Philippines had notice [Borrower had prompt notice] of the proceedings; (c) the arbitral award was not obtained through collusion or fraud, and such award was not based on a clear mistake of fact or law; and (d) the arbitral award is not contrary to public policy in the Republic of the Philippines.

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

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

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

Respondents aptly point out that the assailed provisions embody the Loan Agreements' arbitration clause, which is a product of the fundamental arbitration principle of party autonomy. As expounded in *Koppel, Inc. v. Makati Rotary Club foundation, Inc.*:[133]

> A pivotal feature of arbitration as an alternative mode of dispute resolution is that it is, first and foremost, a product of party autonomy or the freedom of the parties to "*make their own arrangements to resolve their own disputes.*" Arbitration agreements manifest not only the desire of the parties in conflict for an expeditious resolution of their dispute. They also represent, if not more so, the parties' mutual aspiration to achieve such resolution outside of judicial auspices, in a more informal and less antagonistic environment under the terms of their choosing. Needless to

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131 *Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila*, 127 Phil. 306, 322 (1967).

132 *Spouses Pascual v. Ramos*, 433 Phil. 449, 460 (2002).

133 717 Phil. 337 (2013).

> state, this critical feature can never be satisfied in an ejectment case no matter how summary it may be.[134] (Citation omitted; italics in the original)

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

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

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

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

At any rate, petitioners' contentions—that the choice of applicable law and forum are heavily skewed in favor of the lender EXIM Bank and will prove greatly disadvantageous to the Philippines in case a dispute arises—

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134 Id. at 361.

135 *Strickland v. Ernst & Young LLP*, 838 Phil. 25, 46 (2018).

136 *Bases Conversion Development Authority v. DMCI Project Developers, Inc.*, 776 Phil. 192, 205 (2016).

137 478 Phil. 269 (2004).

138 Id. at 288-289. (Citations omitted).

139 *Alcala Vda. de Alcañeses v. Alcañeses*, G.R. No. 187847, June 30, 2021; *Continental Micronesia, Inc. v. Basso*, 770 Phil. 201, 220-222 (2015); *Saudi Arabian Airlines v. Court of Appeals*, 358 Phil. 105, 125 (1998).

deserve no consideration. As Associate Justice Amy C. Lazaro-Javier pointed out,[140] petitioners' contentions are speculative at best, there being no indications that the arbitration clause has been or is being enforced. Also, the Court cannot sustain such apprehensions as petitioners have failed to prove as fact the allegedly inequitable foreign laws, of which the courts do not take judicial notice.[141] Well established in our jurisdiction is that foreign laws must be alleged and proven like any other material fact.

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

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

SO ORDERED.

JHOSEP Y. LOPEZ
Associate Justice

ALEXANDER G. GESMUNDO
Chief Justice

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140 Concurring Opinion, pp. 5-7.

141 *Orion Savings Bank v. Shigekane Suzuki*, 746 Phil. 971, 984 (2014) states that "However, the party invoking the application of a foreign law has the burden of proving the foreign law. The foreign law is a question of fact to be properly pleaded and proved as the judge cannot take judicial notice of a foreign law. He is presumed to know only domestic or the law of the forum." (Citations omitted).

I dissent. See separate opinion

MARVIC M.V.F. LEONEN
Senior Associate Justice

See Separate Concurring

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

See Concurrence

RAMON PAUL L. HERNANDO
Associate Justice

AMY C. LAZARO-JAVIER
Associate Justice

HENRI JEAN PAUL B. INTING
Associate Justice

RODIL V. ZALAMEDA
Associate Justice

on official leave but left vote

MARIO V. LOPEZ
Associate Justice

With separate concurring opinion

SAMUEL H. GAERLAN
Associate Justice

RICARDO R. ROSARIO
Associate Justice

JAPAR B. DIMAAMPAO
Associate Justice

JOSE MIDAS P. MARQUEZ
Associate Justice

ANTONIO T. KHO, JR.
Associate Justice

MARIA FILOMENA D. SINGH
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

ALEXANDER G. GESMUNDO
Chief Justice

CERTIFIED TRUE COPY

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