EN BANC

G.R. No. 192088 (*Initiatives for Dialogue and Empowerment Through Alternative Legal Services, Inc. [IDEALS, INC.], represented by its Executive Director, Mr. Edgardo Ligon, et al. v. Power Sector Assets and Liabilities Management Corporation [PSALM], represented by its Acting President and Chief Executive Officer Atty. Ma. Luz L. Caminero, et al.*)

Promulgated:

OCTOBER 09, 2012

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DISSENTING OPINION

VELASCO, JR., *J.*:

Subject of this petition for certiorari and prohibition are two Agreements entered into by and between Power Sector Assets and Liabilities Management Corporation (PSALM) and Korean Water Resources Corporation (K-Water), involving the Angat Hydro-Electric Power Plant (AHEPP) and the Angat Dam Complex. The first agreement, denominated as Asset Purchase Agreement (APA), covers AHEPP, while the second, the Operation and Maintenance Agreement (O & M), covers the non-power components of AHEPP, including Angat Dam. PSALM entered into the said agreements pursuant to its mandate under Republic Act No. (RA) 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA) to privatize the assets of National Power Corporation (NPC).

Petitioners question the validity of the said agreements for being repugnant to the 1987 Constitution, specifically Sec. 2, Art. XII thereof, Presidential Decree No. (PD) 1067 or the Water Code of the Philippines (Water Code), and the EPIRA. They allege that PSALM acted with grave abuse of discretion when it allowed K-Water, a corporate entity wholly

owned by the Republic of Korea, to participate in the bidding process, and thereafter declaring it the winning bidder.[1]

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

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

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

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

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[1] *Rollo*, p. 40.

The Facts

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

> **Section 47.** *NPC Privatization.*- Except for the assets of SPUG, the generating assets, real estate, and other disposable assets as well as generation contracts of NPC shall be privatized in accordance with this Act. Within six (6) months from the effectivity of this Act, the PSALM Corp. shall submit a plan for the endorsement by the Joint Congressional Power Commission and the approval of the President of the Philippines, on the total privatization of the generation assets, real estate, other disposable assets as well as existing generation contracts of NPC and thereafter, implement the same, in accordance with the following guidelines, except as provided for in paragraph (e) herein:
>
> > (a) The privatization value to the national government of the NPC generation assets, real estate, other disposable assets as well as IPP contracts shall be optimized;
> >
> > (b) The participation by Filipino citizens and corporations in the purchase of NPC assets shall be encouraged;
> >
> > In the case of foreign buyers at least seventy-five percent (75%) of the funds used to acquire NPC-generating assets and generating contracts shall be inwardly remitted and registered with the Bangko Sentral ng Pilipinas.
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[2] RA 9136, Sec. 2(i).
[3] Id., Sec. 50.
[4] Id., Sec. 49.

> (d) All generation assets and IPP contracts shall be sold in an open and transparent manner through public bidding;
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> x x x x
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> (h) Not later than three (3) years from the effectivity of this Act, and in no case later than the initial implementation of open access, at least seventy percent (70%) of the total capacity of generating assets of NPC and of the total capacity of the power plants under contract with NPC located in Luzon and Visayas shall have been privatized; and
>
> (i) NPC may generate and sell electricity only from the undisposed generating assets and IPP contracts of PSALM Corp.: Provided, That any unsold capacity shall be privatized not later than eight (8) years from the effectivity of this Act.

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

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

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

> The four main units each have a rated capacity of 50 MW. Main units 1 and 2 were commission[ed] in 1967 and main units 3 and 4 in 1968. Three auxiliary units each have a rated capacity of 6 MW and were commissioned as follows: auxiliary units 1 and 2 in 1967 and auxiliary unit 3 in 1978. <u>It is the foregoing 4 main units and 3 auxiliary units with an aggregate installed capacity of 218 MW that is the subject of the Bid.</u>
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[5] *Rollo*, p. 1055.

[6] Petition, p. 16; citing *"PSALM Launches Sale of Angat Hydro plant"*<http://www.psalm.gov.ph/News.asp?id=20100012>.

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

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

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

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

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[7] *Rollo*, p. 1056.
[8] Id. at 1061.
[9] Id.

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

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

Korean Water Resources Corporation	USD 440,880,000
First Gen Northern Energy Corporation	365,000,678
San Miguel Corporation	312,500,000
SN Aboitiz Power-Pangasinan, Inc.	256,000,000
Trans-Asia Oil & Energy Development Corporation	237,000,000
DMCI Power Corporation	188,890,000

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

[10] Memorandum for Respondent PSALM, par. 40; *rollo*, p. 941.
[11] Id., par. 41.
[12] Id., par. 46.
[13] *Rollo*, pp. 169-175.

corporation. PSALM, however, in its Comment[14] admitted that K-Water is a Korean state-owned corporation.

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

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

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

In its Comment[19] dated June 17, 2010, respondent NIA disclaimed involvement in the bidding conducted by PSALM concerning AHEPP, adding that its interest is "only limited to the protection of its water

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[14] Id. at 54.
[15] Id. at 52-53.
[16] Id. at 43-45.
[17] Id. at 119-122.
[18] Id. at 149-154, 163-166, 127-134, 467-471.
[19] Id. at 474-478.

allocation drawn from the Angat Dam as determined by the National Water Resources Board (NWRB).”

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

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

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

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

[20] Id. at 240-308.

Respondent First Gen, in its Comment[21] dated June 23, 2010, supported the position of PSALM with respect to the AHEPP being subject to privatization under the terms of the EPIRA. AHEPP, it concurred, is merely one facility in the Angat Complex, exclusively owned and operated by NPC. Further, it claimed that the watershed is under the exclusive jurisdiction and control of NPC, pursuant to Executive Order No. (EO) 258,[22] which provides:

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

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

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

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[21] Id. at 191-237.
[22] Signed July 10, 1995.
[23] *Rollo*, pp. 529-553.
[24] RA 6234.

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

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

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

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

Petitioners, in their Consolidated Reply[25] dated October 29, 2010, traversed in some detail respondent PSALM's allegations and supportive arguments on the issues of legal standing, mootness of the petition, and on whether a political question is posed in the controversy. On the matter of mootness, they claimed that the issuance of a Notice of Award does not *ipso facto* render the case moot, as it is not the final step for the privatization of AHEPP. On the claim that the controversy constitutes a political question, they replied that they have amply argued that PSALM's exercise of power is limited by the Constitution, the EPIRA, other laws, as well as binding norms of international law. Thus, its acts in conducting the bidding process fall within the expanded jurisdiction of this Court. On the matter of standing, they claimed to have sufficient personality as the issue involves a public right. Moreover, they invoked the transcendental importance doctrine and the rule on liberality when it comes to public rights.

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

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

While conceding that Angat Dam is not being sold, petitioners nonetheless maintain that, by the terms of the Agreements in question, the

[25] *Rollo*, pp. 624-655.

control over Angat Dam, among other non-power components will also be given to the buyer. This, taken with the fact that the Water Protocol continues to be unsigned, the petitioners argue, leads to no other conclusion except PSALM's failure to provide safeguards to ensure adequate water supply coming from Angat Dam. This, they claimed, would result in the winning K-Water having complete control over the entire Angat Dam Complex.

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

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

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

PSALM also reiterated that AHEPP may be sold to a foreign entity, in accordance with the policy reforms espoused by EPIRA, i.e., to enable open access in the electricity market and then enable the government to concentrate more fully on the supply of basic needs of the people. Even assuming that the transfer of AHEPP to MWSS is allowed under EPIRA, the

[26] Id. at 670-694.

same would not serve the objective of EPIRA of liquidating all of the financial obligations of NPC.

The Issues

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

2.
WHETHER THE PETITION HAS BEEN RENDERED MOOT AND ACADEMIC BY THE ISSUANCE OF A NOTICE OF AWARD IN FAVOR OF RESPONDENT K-WATER ON MAY 5, 2010

3.
WHETHER THE PETITION INVOLVES A POLITICAL QUESTION

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

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

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

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

Discussion

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

The Court's jurisdiction over questions of grave abuse of discretion finds expression in Art. VIII, Sec. 1 of the Constitution vesting the Court the power to "determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any

branch or instrumentality of the government." This expanded power of judicial review allows the Court to review acts of other branches of the government, to determine whether such acts are committed with grave abuse of discretion amounting to lack or excess of jurisdiction.

Grave abuse of discretion generally refers to:

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

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

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

In determining the terms of reference of the public bidding to be conducted, as well as in determining the qualifications of the respective bidders, respondent PSALM exercises discretionary, not ministerial, powers. Corollarily, when it allowed K-Water to participate in the bidding, and when it eventually awarded the contract to K-Water as the highest bidder, PSALM

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[27] *De Vera v. De Vera*, G.R. No. 172832, April 7, 2009, 584 SCRA 506.
[28] *Villanueva v. Ople*, G.R. No. 165125, November 18, 2005, 475 SCRA 539.
[29] RA 9136, Sec. 47(d).

was engaged not in ministerial functions, but was actually exercising its discretionary powers.

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

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

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

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

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[30] G.R. No. 164527, August 15, 2007, 530 SCRA 235.
[31] *Chavez v. NHA*, supra.

Second Issue:
Mootness of the Petition

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

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

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

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[32] *Rollo*, p. 954.

Third Issue:
Application of the Political Question Doctrine

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

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

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

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

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

Respondent PSALM's contention that the petition partakes of the nature of a collateral attack on EPIRA[34] is misplaced. Petitioners' challenge

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[33] 103 Phil. 1051 (1957).
[34] *Rollo*, p. 959.

is not directed, as it were, against the wisdom of or the inherent infirmity of the EPIRA, but the legality of PSALM's acts, which, to the petitioners, violate their paramount constitutional rights. This falls squarely within the expanded jurisdiction of this Court.

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

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

Fourth Issue:
Legal Standing of Petitioners

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

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

On the first constitutional question, the petition urges the Court to compel PSALM to disclose publicly the details and records of the Agreements with K-Water. On the second issue, the petition seeks to declare the Agreements as unconstitutional, for violating the constitutional limitation

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[35] G.R. Nos. 100318, 100308, 100417 & 100420, July 30, 1991, 199 SCRA 750.
[36] CONSTITUTION, Art. III, Sec. 7.
[37] Id., Art. XII, Sec. 2.

that only Filipino citizens and Filipino corporations may engage in the exploration, development, and utilization of natural resources.

Where the issue revolves around the people's right to information, the requisite legal standing is met by the mere fact that the petitioner is a citizen. The Court said as much in *Akbayan Citizens Action Party v. Aquino*:[38]

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

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

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

On the second constitutional question, on the constitutional limitation on the exploration, development, and utilization of natural resources, the rule on *locus standi* is not sufficiently overcome by the mere fact that the petitioners are citizens. The general rule applies and the petition must show that the party filing has a "personal stake in the outcome of the controversy."[40] As stated in *Telecommunications and Broadcast Attorneys of the Philippines, Inc., v. COMELEC*,[41] "there must be a showing that the citizen personally suffered some actual or threatened injury arising from the alleged illegal official act." Thus, petitioners here technically lack the

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[38] G.R. No. 170516, July 16, 2008, 558 SCRA 468, 509.
[39] G.R. No. 191846, May 6, 2010, 620 SCRA 448, 460.
[40] *Pimentel v. Executive Secretary*, G.R. No. 158088, July 6, 2005, 462 SCRA 622, 630-631.
[41] G.R. No. 132922, April 21, 1998, 289 SCRA 337.

requisite legal standing to file the petition as taxpayers, as they have no direct and personal interest in the controversy.

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

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

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

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

Fifth Issue:
Alleged Violation of Petitioners' Right to Information

Petitioners fault PSALM for failing to provide them with information on the details of the transaction that PSALM was entering into, in breach of their constitutional right to information regarding matters of public concern. In particular, petitioners rue that the Invitation to Bid published by PSALM

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

did not specify crucial information related to the sale of the water facility, including the terms and conditions of the disposition, the qualification of bidders, the minimum price, and other basic details.[43] They allege that PSALM should have publicly disclosed such crucial information on the privatization of AHEPP, pursuant to its legal obligation to conduct the bidding in an open and transparent manner.

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

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

On May 14, 2010, the petitioners sent a second letter specifically requesting for detailed information on the winning bidder, including its company profile, contact person or responsible officer, office address and

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[43] *Rollo*, p. 811
[44] Memorandum for Respondent PSALM, par. 58; *rollo*, p. 971.
[45] Id., par. 59.

Philippine registration. PSALM replied, in a letter dated May 19, 2010, that the petitioner's request has been referred to the counsel of K-Water.

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

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

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

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

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

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

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

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

matters are of public concern and authority to determine the manner of access to them.[47]

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

> We must first distinguish between information the law on public bidding requires PEA to disclose publicly, and information the constitutional right to information requires PEA to release to the public. **Before the consummation of the contract, PEA must, on its own and without demand from anyone, disclose to the public matters relating to the disposition of its property. These include the size, location, technical description and nature of the property being disposed of, the terms and conditions of the disposition, the parties qualified to bid, the minimum price and similar information.** PEA must prepare all these data and disclose them to the public at the start of the disposition process, long before the consummation of the contract, because the Government Auditing Code requires public bidding. **If PEA fails to make this disclosure, any citizen can demand from PEA this information at any time during the bidding process.**
>
> **Information, however, on on-going evaluation or review of bids or proposals being undertaken by the bidding or review committee is not immediately accessible under the right to information.** While the evaluation or review is still on-going, there are no "official acts, transactions, or decisions" on the bids or proposals. However, once the committee makes its official recommendation, there arises a "definite proposition" on the part of the government. From this moment, the public's right to information attaches, and any citizen can access all the non-proprietary information leading to such definite proposition. In *Chavez v. PCGG*, the Court ruled as follows:
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> > "Considering the intent of the framers of the Constitution, we believe that it is incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they have decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, though, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the "exploratory" stage. There is need, of course, to observe the same restrictions on disclosure of information in general, as discussed earlier – such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information." (Emphasis supplied.)
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> **The right covers three categories of information which are "matters of public concern," namely: (1) official records; (2) documents and papers pertaining to official acts, transactions and**

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

> **decisions; and (3) government research data used in formulating policies.** The first category refers to any document that is part of the public records in the custody of government agencies or officials. The second category refers to documents and papers recording, evidencing, establishing, confirming, supporting, justifying or explaining official acts, transactions or decisions of government agencies or officials. The third category refers to research data, whether raw, collated or processed, owned by the government and used in formulating government policies.
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> x x x x
>
> We rule, therefore, that **the constitutional right to information includes official information on on-going negotiations before a final contract.** The information, however, must constitute definite propositions by the government and should not cover recognized exceptions like privileged information, military and diplomatic secrets and similar matters affecting national security and public order. Congress has also prescribed other limitations on the right to information in several legislations. (Emphasis supplied, citations omitted.)

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

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

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

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[48] Supra note 30.

[49] <http://www.psalm.gov.ph>.

compliance of its duty under the Constitution. As We observed in *Chavez v. NHA*:

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

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

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

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[50] Supra note 30.
[51] *Chavez v. NHA*, supra.

access thereto must be granted to the petitioner. On the contrary, the documents requested partake of the nature of official information.

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

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

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

Sixth Issue:
The Legality of the Privatization of AHEPP

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

> (a) To formulate and implement a program for the sale and privatization of the NPC assets and IPP contracts and the liquidation of NPC debts and stranded contract costs, such liquidation to be completed within the Corporation's term of existence;
>
> (b) To take title to and possession of, administer and conserve the assets and IPP contracts transferred to it; to sell or dispose of the same at such

> price and under such terms and conditions as it may deem necessary or proper, subject to applicable laws, rules and regulations;
>
> x x x x
>
> (i) To own, hold, acquire, or lease real and personal properties as may be necessary or required in the discharge of its functions.[52]

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

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

[52] RA 9136, Sec. 51.

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

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

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

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

This brings Us to the substantive issue of the case. But first, a brief background on the subject Angat Dam Complex is in order, the assailed

Agreements revolving as it were on that enormous infrastructure, its features and operations.

The Angat Dam Complex

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

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

(1) to provide irrigation to about 31,000 hectares of land in 20 municipalities and towns in Pampanga and Bulacan;

(2) to supply the domestic and industrial water requirements of the residents in Metro Manila;

(3) to generate hydroelectric power to feed the Luzon Grid; and

(4) to reduce flooding to downstream towns and villages.[54]

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

AHEPP, meanwhile, is a 246 Megawatts (MW) rated hydroelectric power plant also located in San Lorenzo, Norzagaray, Bulacan. It is part of the Angat Dam Complex and is situated near the Angat Dam, as it relies on the waters coming from the dam to generate power. AHEPP consists of four

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[53] "Rain Water Sources" <http://www.manilawater.com/section.php?section_id=6&category_id=35&article_ id=6>.

[54] Id.

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

[56] Id., par. 7.

(4) main units, producing 200 MW of power, and five (5) auxiliary units, producing 46MW of power.[57]

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

From the Angat Dam Complex, the waters may flow in either of two directions. The waters may be directed to Ipo Dam, near its confluence with Ipo River.[59] From there, the waters downstream are diverted to the Novaliches Portal and the La Mesa Dam in Quezon City.[60] From there, the waters are treated to supply water to end consumers in Metro Manila. The waters may also continue to go through the Balara Treatment Plant, and also finally to end consumers in Metro Manila. The waters coming from Angat Dam may also flow through Bustos Dam in Bustos, Bulacan, where the waters are eventually used for irrigation purposes by the National Irrigation Administration (NIA).[61]

Nature, Ownership, and Appropriation of Waters

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

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[57] Id., par. 5.
[58] *Rollo*, p. 244
[59] "Rain Water Sources," supra note 53.
[60] Id.
[61] Memorandum for Respondent, par. 7; *rollo*, p. 925
[62] Separate Opinion, J. Puno, *Cruz v. Secretary of Environment and Natural Resources*, G.R. No. 135385, December 6, 2000, 347 SCRA 128, 171; citing 2 Aruguego, The Framing of the Philippine Constitution, p. 592 (1937).

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

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

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

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

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

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

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

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

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

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

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

The 1973 Constitution carried a similar provision, to wit:

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

The 1987 Constitution couched the limitations a bit differently:

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

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

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[65] PD 1067, Art. 3(a).
[66] Sec. 1, Art. XIII, 1935 Constitution
[67] Sec. 9, Art. XIV, 1973 Constitution
[68] Sec. 2, Art. XII, 1987 Constitution
[69] G.R. No. 127882, December 1, 2004, 445 SCRA 1.

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

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

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

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[70] PD 1067, Art. 3(c).
[71] *Amistoso v. Ong*, No. L-60219, June 29, 1984, 130 SCRA 228, 235.
[72] PD 1067, Art. 9.
[73] Id., Art. 15.
[74] Id., Art. 3.
[75] Pursuant to Executive Order No. 124-A, July 22, 1987.

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

The Operations and Maintenance Agreement

By the O & M Agreement, PSALM cedes to K-Water, as operator, the administration, management, operation, maintenance, preservation, repair, and rehabilitation of what the contract considers as the Non-Power Components,[76] defined thereunder as "the **Angat Dam**, non-power equipment, facilities and installations, and appurtenant devices and structures which are particularly described in Annex 1."[77] The O & M Agreement is for a period of twenty-five (25) years, renewable for another twenty-five (25) years, maximum, upon mutual and written agreement of the parties.[78]

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

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[76] *Rollo*, p. 1383.
[77] Id. at 1382.
[78] Id. at 1383.
[79] Id. at 1389.

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

The Asset Purchase Agreement

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

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

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

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[80] Id. at 1393.
[81] Id.
[82] Id.
[83] Id. at 1113.
[84] Id., id. at 1341.
[85] Id.
[86] Id. at 1358.

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

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

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

Consider:

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

First, the fact that an artificial structure was constructed to provide a temporary catchment for the naturally-flowing waters does not necessarily remove the waters from being part of the natural resources of the

Philippines. The waters themselves are natural in that it is "brought about by nature, as opposed to artificial means."[87]

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

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

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

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

intended such absurd distinctions. *Lex simper intendit quod convenitrationi.* The law always intends that which is agreeable to reason.

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

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

Pursuant to this water permit requirement, the waters of Angat Dam are presently covered by three separate water permits granted to three different entities, all for specific purposes: (1) Water Permit No. 6504[91] to NIA, for irrigation purposes; (2) Water Permit No. 6512[92] to NPC, for power purposes; and (3) Water Permit No. 11462[93] to MWSS for municipal/industrial purposes. Needless to state, all the entities currently

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[88] *See* PD 1067, Art. 10.
[89] Id., Art. 4.
[90] Id., Art. 14.
[91] *Rollo*, p. 1158.
[92] Id. at 1156.
[93] Id. at 1161.

holding water permits over Angat Dam are qualified to hold such permits, both under the Constitution and the Water Code.

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

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

The opinion of the DOJ that the waters to be used in the operation of AHEPP have already been extracted is based on a misapplication of a US Supreme Court ruling. The cited *U.S. v. State of New York*,[95] concerning the Saratoga Springs Reservation, is not in point with the facts here. In that case, the issue revolves around the taxability of the bottling for sale and selling of mineral and table water from Saratoga Springs by the State of New York, Saratoga Springs Commission, and Saratoga Springs Authority. The US Supreme Court there ruled that they are subject to taxation, because the activity was a business enterprise and not merely a sale of natural resources.

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[94] DOJ Opinion No. 052, s. 2005, November 22, 2005.
[95] 48 F. Supp. 15, November 17, 1942.

The US Supreme Court noted that the State: "took its natural resources and, through a bottling process, put those resources into a preserved condition where they could be sold to the public in competition with private waters."[96]

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

The DOJ further opined that:

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

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

K-Water is disqualified from participating in the bidding

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

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[96] Id. at 18.
[97] Id.
[98] *Rollo*, p. 1012.

from operating it. PSALM, therefore, should have disqualified K-Water at the outset.

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

The Agreements Violate the Constitution

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

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

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

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

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

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

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

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

[100] *Rollo*, p. 1157.

that has the effect of transferring any of the water rights covered by existing water permits.

PSALM argues on this point that it will not be K-Water, as the operator of Angat Dam, which will extract or utilize the water from its natural source. They allege that it will be NPC, MWSS, and NIA that will continue to utilize and extract water, store them in the reservoir, then pass through Angat Dam where the operator, K-Water, will be subjected to rules on water releases.[101]

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

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

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[101] Id. at 1007-1008.

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

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

PSALM has no power to cede control over Angat Dam

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

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

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

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[102] RA 9136, Sec. 6.
[103] Comment of Respondent PSALM, pars. 17, 17.1-17.6.

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

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

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

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

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

The distinction that PSALM intends to create is more illusory than real. The O&M Agreement is explicit in handing over the operation of the dam to the operator/buyer of AHEPP. There is an utter lack of supposed protocols in the management of water between the operator and the various government agencies, as there is yet no finalized Water Protocol. The provisions of the O&M Agreement by themselves unreasonably limit the powers and responsibilities of the different government agencies involved

insofar as control of the waters of Angat Dam is concerned. Their participation in the finalization of the Water Protocol is already unjustly limited in that the provisions they may propose to include in the Protocol must respect the powers already given to the operator in the O&M Agreement.

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

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

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

The operation of Angat Dam not only involves the utilization and extraction of waters, but also important government functions, including flood control, weather forecasting, and providing adequate water supply to the populace. Had it only been the former, the government under the

Constitution is permitted to enter into joint venture agreements with those entities qualified under Sec. 2, Art. XII of the Constitution. However, the latter are necessary government functions which the government cannot devolve to private entities, including Filipino citizens and corporations.

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

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

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

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

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[104] *See* CONSTITUTION, Art. XII, Sec. 2.

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

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

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

PRESBITERO J. VELASCO, JR.
Associate Justice