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[G.R. No. 207246. April 18, 2017]

JOSE M. ROY III, *petitioner, vs.* **CHAIRPERSON TERESITA HERBOSA, THE SECURITIES AND EXCHANGE COMMISSION, and PHILIPPINE LONG DISTANCE TELEPHONE COMPANY,** *respondents.*

WILSON C. GAMBOA, JR., DANIEL V. CARTAGENA, JOHN WARREN P. GABINETE, ANTONIO V. PESINA, JR., MODESTO MARTIN Y. MAMON III, and GERARDO C. EREBAREN, *petitioners-in-intervention,*

PHILIPPINE STOCK EXCHANGE, INC., *respondent-in-intervention,*

SHAREHOLDERS' ASSOCIATION OF THE PHILIPPINES, INC., *respondent-in-intervention.*

SYLLABUS

1. POLITICAL LAW; NATIONAL ECONOMY AND PATRIMONY; PUBLIC UTILITY ENTITIES; CITIZENSHIP REQUIREMENT; THE FULL AND LEGAL BENEFICIAL OWNERSHIP OF SIXTY PERCENT OF THE OUTSTANDING CAPITAL STOCK, COUPLED WITH SIXTY PERCENT OF THE VOTING RIGHTS MUST REST IN THE HANDS OF FILIPINO NATIONALS.— The heart of the controversy is the interpretation of Section 11, Article XII of the Constitution, which provides: "No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens x x x." [W]hat the Constitution requires is "[f]ull [and legal] beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights x x x must rest in the hands of Filipino nationals x x x." **And, precisely**

that is what SEC-MC No. 8 provides, *viz*.: "x x x For purposes of determining compliance [with the constitutional or statutory ownership], the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote x x x."

2. ID.; ID.; ID.; ID.; BENEFICIAL OWNER OR BENEFICIAL OWNERSHIP OF STOCK; EXPLAINED.— [T]he definition of "beneficial owner or beneficial ownership" in the SRC-IRR, which is in consonance with the concept of "full beneficial ownership" in the FIA-IRR, is x x x relevant in resolving only the question of who is the beneficial owner or has beneficial ownership of each "specific stock" of the public utility company whose stocks are under review. **If** the Filipino has the **voting power** of the "specific stock", *i.e.*, he can **vote** the stock or direct another to vote for him, or the Filipino has the **investment power** over the "specific stock", *i.e.*, he can **dispose** of the stock or direct another to dispose of it for him, or both, *i.e.*, he can **vote and dispose** of that "specific stock" or direct another to vote or dispose it for him, **then** such Filipino is the "beneficial owner" of that "specific stock." Being considered Filipino, that "specific stock" is then to be counted as part of the 60% Filipino ownership requirement under the Constitution. The right to the dividends, *jus fruendi* – a right emanating from ownership of that "specific stock" necessarily accrues to its Filipino "beneficial owner."

3. ID.; ID.; ID.; ID.; THE PURPOSE THEREOF IS TO PREVENT ALIENS FROM ASSUMING CONTROL OF PUBLIC UTILITIES, WHICH MAY BE INIMICAL TO THE NATIONAL INTEREST.— [T]he evident purpose of the citizenship requirement is to prevent aliens from assuming control of public utilities, which may be inimical to the national interest. This purpose prescinds from the "benefits"/dividends that are derived from or accorded to the particular stocks held by Filipinos vis-a-vis the stocks held by aliens. So long as Filipinos have controlling interest of a public utility corporation, their decision to declare more dividends for a particular stock over other kinds of stock is their sole prerogative – an act of ownership that would presumably be for the benefit of the public utility corporation itself.

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VELASCO, JR., *J.*, *concurring opinion*:

1. POLITICAL LAW; ADMINISTRATIVE LAW; GOVERNMENT AGENCIES; SECURITIES AND EXCHANGE COMMISSION; BETTER-SUITED TO FAIRLY RULE, AFTER A FULL-BLOWN INVESTIGATION, ON THE COMPLIANCE BY CORPORATE UTILITIES WITH THE NATIONALITY REQUIREMENT, IT BEING THE GOVERNMENT AGENCY SPECIFICALLY TASKED TO REVIEW CORPORATE MATTERS.— [N]ot being a trier of facts nor specially equipped to investigate the intricacies of corporate structures and the identities of capital market participants, this Court cannot declare a corporation as non-compliant with the nationality requirement by, without more, a mere cursory review of its General Information Sheets. With the drastic consequences of such a ruling, which includes the possible revocation of its franchise, all parties affected—the corporate public utility, its investors both in equity and debt, and all its other stakeholders—deserve more than a passing treatment by this Court. The SEC, the government agency specifically tasked to review corporate matters, is better-suited to fairly rule, after a full-blown investigation, on the compliance by corporate public utilities with the nationality requirement.

2. ID.; NATIONAL ECONOMY AND PATRIMONY; PUBLIC UTILITY ENTITIES; CITIZENSHIP REQUIREMENT; CAPITAL IS CONSTRUED AS EQUIVALENT TO THE SHARES OF STOCKS ENTITLED TO VOTE IN THE ELECTION OF DIRECTORS.— [I]n *Gamboa*, this Court construed "capital" as equivalent to the "**shares of stock entitled to vote in the election of directors**" and so, sustaining the petitioner's contention that it is through voting that control over a corporation is exercised, it ruled that 60% of the **voting shares** or the **"shares of stock entitled to vote in the election of directors"** in corporate public utilities are reserved for Filipinos. x x x Thus, the Court cannot now feign that the construction in *Gamboa* of the term "capital" is confined and limited only to "common shares," to the exclusion of voting preferred shares. Adopting this regrettably myopic view will certainly revise and alter the final decision and resolution in *Gamboa*.

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CARPIO, *J.*, *dissenting opinion*:

1. POLITICAL LAW; NATIONAL ECONOMY AND PATRIMONY; PUBLIC UTILITY ENTITIES; CITIZENSHIP REQUIREMENT; THE SIXTY PERCENT FILIPINO OWNERSHIP APPLIES UNIFORMLY TO EACH CLASS OF SHARES.— [T]he 60 percent minimum Filipino ownership refers not only to voting rights but likewise to full beneficial ownership of the stocks. x x x [T]he 60 percent Filipino ownership applies uniformly to each class of shares. Such interpretation ensures effective control by Filipinos of public utilities, as expressly mandated by the Constitution. x x x PLDT's capital structure, as well as the disparity in the declared dividends between common and voting preferred shares, illustrates clearly the anomaly which will result in the interpretation by the SEC of the *Gamboa Decision* and *Resolution*. Applying the 60 percent Filipino ownership to the total voting stock and to the total outstanding stock, whether voting or non-voting, and not to each class of shares of PLDT clearly amounts to a blatant mockery of the Constitution.

2. REMEDIAL LAW; ACTIONS; JUDGMENTS; A DECISION MUST BE CONSIDERED IN ITS ENTIRETY TO GRASP AND DELVE INTO ITS TRUE INTENT AND MEANING.— To avoid absurdity, and more importantly, to uphold the spirit and language of the Constitution, the Court is not only allowed, but is bound, to clarify, even rectify, any apparent conflict in its decisions. To grasp and delve into the true intent and meaning of a decision, no specific portion thereof should be resorted to – the decision must be considered in its entirety. x x x To refuse to clarify the dispositive portion of the *Gamboa Decision*, invoking conclusiveness of judgment and *obiter dictum*, among other things, is to shirk from this Court's sworn duty to uphold the Constitution. Consequently, the Court must reject the SEC's flimsy argument that the SEC's task is merely to implement the Court's directive as contained in the dispositive portion of the *Gamboa Decision*. Following such contention, the SEC deliberately ignores the crucial pronouncements of the Court in the body of the *Gamboa Decision* and *Resolution*.

LEONEN, *J.*, *dissenting opinion*:

1. POLITICAL LAW; NATIONAL ECONOMY AND PATRIMONY; PUBLIC UTILITY ENTITIES;

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CITIZENSHIP REQUIREMENT; CAPITAL MUST BE CONSTRUED IN SUCH A MANNER AS TO SECURE THE CONTROLLING INTEREST IN FAVOR OF FILIPINOS.— [L]imiting the conception of "capital" vis-a-vis foreign equity participation in public utilities under Article XII, Section 11 of the 1987 Constitution only to shares of stock entitled to vote for directors in a corporation fails to adequately effect the Constitution's dictum. Rather than guarding our patrimony, it has opened the door for foreign control of corporations engaged in nationalized economic activities. In keeping with the primacy of our patrimony and the charge of a "self-reliant and independent national economy," capital must be construed in such a manner as to secure "the controlling interest in favor of Filipinos." To limit capital to so-called voting shares is to be shortsighted. It fails to account for the reality that every class of shares exercises a measure of control over a corporation. Even so-called non-voting shares vote and may be pivotal in the most crucial corporate actions. x x x The majority's limitation of capital to so-called voting stocks entrenches an operational definition that can be a gateway to violating the Constitution's righteous protection of our heritage. It licentiously empowers foreign interests to overrun public utilities, which are enterprises whose primary objectives should be the common good and not commercial gain, to wrest control of rights to our natural resources, and to takeover other crucial areas of investment.

2. ID.; ID.; ID.; ID.; BENEFICIAL OWNERSHIP; MEANS HAVING OR SHARING VOTING POWER, AND HAVING OR SHARING INVESTMENT RETURNS OR POWER.— The constitutional imperative demands a consideration not just of nominal power and control or the identification of which shares are denominated as "voting" and "non-voting", but equally of beneficial ownership. The implementing rules and regulations (amended 2004) of Republic Act No. 8799, the Securities Regulation Code (SRC), define "beneficial owner or beneficial ownership." It identifies the two (2) facets of beneficial ownership: first, having or sharing voting power; second, having or sharing investment returns or power x x x. The concept of beneficial ownership uncovers that control is not entirely the end of participating in a stock corporation. As stock corporations are fundamentally business organizations, participating in their affairs by partaking in ownership is ultimately a matter of reaping gains from investments.

3. ID.; ID.; ID.; ID.; CONTROL TEST AND GRANDFATHER RULE; ENABLE AN ADEQUATE MECHANISM FOR STATE ORGANS TO EXAMINE WHETHER A STOCK CORPORATION IS EFFECTIVELY CONTROLLED AND BENEFICIALLY OWNED BY FILIPINOS.— Consistent with the composite character of stock ownership and impelled by the need to equip state organs with the most efficacious means for conserving our heritage are the correlative mechanisms of the Control Test and the Grandfather Rule. These are the guideposts through which foreign participation in nationalized economic activities is reckoned. Together, the Control Test and the Grandfather Rule enable an adequate mechanism for state organs to examine whether a stock corporation is *effectively* controlled and *beneficially* owned by Filipinos. x x x [T]he Control Test finds initial application and "must govern in reckoning foreign equity ownership in corporations engaged in nationalized economic activities." Further, "the Grandfather Rule may be used as a supplement to the Control Test, that is, as a further check to ensure that control and beneficial ownership of a corporation is in fact lodged in Filipinos." The correlation between the Control Test and the Grandfather Rule – where the former finds initial application, and the latter supplements – is settled in jurisprudence x x x.

4. ID.; ID.; ID.; ID.; GRANDFATHER RULE; INTENDED TO FRUSTRATE THE USE OF OSTENSIBLE EQUITY OWNERSHIP AS AN ARTIFICE FOR CIRCUMVENTING THE CONSTITUTIONAL IMPERATIVE OF DEVELOPING AN INDEPENDENT NATIONAL ECONOMY.— Characterizing the Grandfather Rule as a "supplement" or as a "*further* check" is not understating its importance. Precisely, the Grandfather Rule is intended to frustrate the use of ostensible equity ownership as an artifice for circumventing the constitutional imperatives of "conserv[ing] and develop[ing] our patrimony" and "develop[ing] a self-reliant and independent national economy." x x x The Grandfather Rule enables the piercing of ostensible control vested by ownership of 60% of a corporation's capital when methods are employed to disable Filipinos from exercising control and reaping the economic benefits of an enterprise. This – more assiduous – examination of who actually controls and benefits from holding such capital

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> may very well be a jealous means of protecting our patrimony, but fending off the challenges to our national integrity demands it. The application of the Grandfather Rule hinges on circumstances. It is an extraordinary mechanism the operation of which is impelled by a reasonable sense of doubt that even as 60% of a corporation's capital is ostensibly owned by Filipinos, a more scrupulous arrangement may underlie that compliance and that nominal Filipino owners have become parties to the besmirching of their own national integrity. x x x '[D]oubt' refers to various indicia that the 'beneficial ownership' and 'control' of the corporation do not in fact reside in Filipino shareholders but in foreign stakeholders." It is necessary then, that proper evidentiary bases sustain resort to the Grandfather Rule.

APPEARANCES OF COUNSEL

Cartagena & Associates for petitioners-in-intervention.

Angelo Patrick F. Advincula, et al. for Philippine Stock Exchange, Inc.

The Solicitor General for public respondents.

Angara Abello Concepcion Regala & Cruz for respondent PLDT.

Bodegon Estorninos Guerzon Borje & Gozos for respondent-intervenor Sharephil.

R E S O L U T I O N

CAGUIOA, *J.*:

Before the Court is the Motion for Reconsideration dated January 19, 2017[1] (the Motion) filed by petitioner Jose M. Roy III (movant) seeking the reversal and setting aside of the Decision dated November 22, 2016[2] (the Decision) which denied the movant's petition, and declared that the Securities and Exchange Commission (SEC) did not commit grave abuse of discretion in issuing Memorandum Circular No. 8, Series of 2013 (SEC-

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[1] *Rollo* (Vol. II), pp. 1262-1277.

[2] Decision, *id.* at 1154-1189.

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MC No. 8) as the same was in compliance with, and in fealty to, the decision of the Court in *Gamboa v. Finance Secretary Teves*,[3] (*Gamboa* Decision) and the resolution[4] denying the Motion for Reconsideration therein (*Gamboa* Resolution).

The Motion presents no compelling and new arguments to justify the reconsideration of the Decision.

The grounds raised by movant are: (1) He has the requisite standing because this case is one of transcendental importance; (2) The Court has the constitutional duty to exercise judicial review over any grave abuse of discretion by any instrumentality of government; (3) He did not rely on an *obiter dictum*; and (4) The Court should have treated the petition as the appropriate device to explain the *Gamboa* Decision.

The Decision has already exhaustively discussed and directly passed upon these grounds. Movant's petition was dismissed based on both procedural and substantive grounds.

Regarding the procedural grounds, the Court ruled that petitioners (movant and petitioners-in-intervention) failed to sufficiently allege and establish the existence of a case or controversy and *locus standi* on their part to warrant the Court's exercise of judicial review; the rule on the hierarchy of courts was violated; and petitioners failed to implead indispensable parties such as the Philippine Stock Exchange, Inc. and Shareholders' Association of the Philippines, Inc.[5]

In connection with the failure to implead indispensable parties, the Court's Decision held:

> Under Section 3, Rule 7 of the Rules of Court, an indispensable party is a party-in-interest without whom there can be no final determination of an action. Indispensable parties are those with such a material and direct interest in the controversy that a final decree would necessarily affect their rights, so that the court cannot proceed

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[3] 668 Phil. 1 (2011).

[4] *Heirs of Wilson P. Gamboa v. Finance Sec. Teves*, 696 Phil. 276 (2012).

[5] Decision, *rollo* (Vol. II), pp. 1160-1166.

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without their presence. The interests of such indispensable parties in the subject matter of the suit and the relief are so bound with those of the other parties that their legal presence as parties to the proceeding is an absolute necessity and a complete and efficient determination of the equities and rights of the parties is not possible if they are not joined.

Other than PLDT, the petitions failed to join or implead other public utility corporations subject to the same restriction imposed by Section 11, Article XII of the Constitution. These corporations are in danger of losing their franchise and property if they are found not compliant with the restrictive interpretation of the constitutional provision under review which is being espoused by petitioners. They should be afforded due notice and opportunity to be heard, lest they be deprived of their property without due process.

Not only are public utility corporations other than PLDT directly and materially affected by the outcome of the petitions, their shareholders also stand to suffer in case they will be forced to divest their shareholdings to ensure compliance with the said restrictive interpretation of the term "capital". As explained by SHAREPHIL, in five corporations alone, more than Php158 Billion worth of shares must be divested by foreign shareholders and absorbed by Filipino investors if petitioners' position is upheld.

Petitioners' disregard of the rights of these other corporations and numerous shareholders constitutes another fatal procedural flaw, justifying the dismissal of their petitions. **Without giving all of them their day in court, they will definitely be deprived of their property without due process of law**.[6]

This is highlighted to clear any misimpression that the *Gamboa* Decision and *Gamboa* Resolution made a categorical ruling on the meaning of the word "capital" under Section 11, Article XII of the Constitution only in respect of, or only confined to, respondent Philippine Long Distance Telephone Company (PLDT). Nothing is further from the truth. Indeed, a fair reading of the *Gamboa* Decision and *Gamboa* Resolution shows that the Court's pronouncements therein would affect all public utilities, and not just respondent PLDT.

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[6] Decision, *id*. at 1165; citations omitted.

On the substantive grounds, the Court disposed of the issue on whether the SEC gravely abused its discretion in ruling that respondent PLDT is compliant with the limitation on foreign ownership under the Constitution and other relevant laws as without merit. The Court reasoned that "in the absence of a definitive ruling by the SEC on PLDT's compliance with the capital requirement pursuant to the *Gamboa* Decision and Resolution, any question relative to the inexistent ruling is premature."[7]

In resolving the other substantive issue raised by petitioners, the Court held that:

> [E]ven if the resolution of the procedural issues were conceded in favor of petitioners, the petitions, being anchored on Rule 65, must nonetheless fail because the SEC did **not** commit grave abuse of discretion amounting to lack or excess of jurisdiction when it issued SEC-MC No. 8. **To the contrary**, the Court finds SEC-MC No. 8 to have been issued in fealty to the *Gamboa* Decision and Resolution.[8]

To belabor the point, movant's petition is not a continuation of the *Gamboa* case as the *Gamboa* Decision attained finality on October 18, 2012, and thereafter Entry of Judgment was issued on December 11, 2012.[9]

As regards movant's repeated invocation of the transcendental importance of the *Gamboa* case, this does not *ipso facto* accord *locus standi* to movant. Being a new petition, movant had the burden to justify his *locus standi* in his own petition. The Court, however, was not persuaded by his justification.

Pursuant to the Court's constitutional duty to exercise judicial review, the Court has conclusively found no grave abuse of discretion on the part of SEC in issuing SEC-MC No. 8.

The Decision has painstakingly explained why it considered as *obiter dictum* that pronouncement in the *Gamboa* Resolution that the constitutional requirement on Filipino ownership should

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[7] Decision, *id*. at 1159.

[8] Decision, *id*. at 1166.

[9] *Id*. at 605-609.

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"apply uniformly and across the board to all classes of shares, regardless of nomenclature and category, comprising the capital of a corporation."[9-a] The Court stated that:

> [T]he *fallo* or decretal/dispositive portions of both the *Gamboa* Decision and Resolution are definite, clear and unequivocal. While there is a passage in the body of the *Gamboa* Resolution that might have appeared contrary to the *fallo* of the *Gamboa* Decision x x x the definiteness and clarity of the *fallo* of the *Gamboa* Decision must control over the *obiter dictum* in the *Gamboa* Resolution regarding the application of the 60-40 Filipino-foreign ownership requirement to "each class of shares, regardless of differences in voting rights, privileges and restrictions."[10]

To the Court's mind and, as exhaustively demonstrated in the Decision, the dispositive portion of the *Gamboa* Decision was in no way modified by the *Gamboa* Resolution.

The heart of the controversy is the interpretation of Section 11, Article XII of the Constitution, which provides: "No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens x x x."

The *Gamboa* Decision already held, in no uncertain terms, that what the Constitution requires is "[f]ull [and legal] beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights x x x must rest in the hands of Filipino nationals x x x."[11] **And, precisely that is what SEC-MC No. 8 provides**, *viz.*: "x x x For purposes of determining compliance [with the constitutional or statutory ownership], the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total

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[9-a] *Supra* note 4, at 339.

[10] *Id.* at 1185.

[11] *Supra* note 3, at 57.

number of outstanding shares of stock, whether or not entitled to vote x x x."[12]

In construing "full beneficial ownership," the Implementing Rules and Regulations of the Foreign Investments Act of 1991 (FIA-IRR) provides:

> For stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. Full beneficial ownership of the stocks, coupled with appropriate voting rights is essential. Thus, stocks, the voting rights of which have been assigned or transferred to aliens cannot be considered held by Philippine citizens or Philippine nationals.[13]

In turn, "beneficial owner" or "beneficial ownership" is defined in the Implementing Rules and Regulations of the Securities Regulation Code (SRC-IRR) as:

> [A]ny person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares voting power (which includes the power to vote or direct the voting of such security) and/or investment returns or power (which includes the power to dispose of, or direct the disposition of such security) x x x.[14]

Thus, the definition of "beneficial owner or beneficial ownership" in the SRC-IRR, which is in consonance with the concept of "full beneficial ownership" in the FIA-IRR, is, as stressed in the Decision, relevant in resolving only the question of who is the beneficial owner or has beneficial ownership of each "specific stock" of the public utility company whose stocks are under review. **If** the Filipino has the **voting power** of the "specific stock", *i.e.*, he can **vote** the stock or direct another to vote for him, or the Filipino has the **investment power** over

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[12] SEC-MC No. 8, Sec. 2.

[13] Implementing Rules and Regulations of Republic Act No. 7042 (Foreign Investment Act of 1991) as amended by Republic Act No. 8179, Sec. 1, b.

[14] 2015 Implementing Rules and Regulations of the Securities Regulation Code, Sec. 3.1.2.

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the "specific stock", *i.e.*, he can **dispose** of the stock or direct another to dispose of it for him, or both, *i.e.*, he can **vote and dispose** of that "specific stock" or direct another to vote or dispose it for him, **then** such Filipino is the "beneficial owner" of that "specific stock." Being considered Filipino, that "specific stock" is then to be counted as part of the 60% Filipino ownership requirement under the Constitution. The right to the dividends, *jus fruendi* – a right emanating from ownership of that "specific stock" necessarily accrues to its Filipino "beneficial owner."

Once more, this is emphasized anew to disabuse any notion that the dividends accruing to any particular stock are determinative of that stock's "beneficial ownership." Dividend declaration is dictated by the corporation's unrestricted retained earnings. On the other hand, the corporation's need of capital for expansion programs and special reserve for probable contingencies may limit retained earnings available for dividend declaration.[15] It bears repeating here that the Court in the *Gamboa* Decision adopted the foregoing definition of the term "capital" in Section 11, Article XII of the 1987 Constitution in express recognition of the sensitive and vital position of public utilities both in the national economy and for national security, so that the evident purpose of the citizenship requirement is to prevent aliens from assuming control of public utilities, which may be inimical to the national interest.[16] This purpose prescinds from the "benefits"/dividends that are derived from or accorded to the particular stocks held by Filipinos vis-à-vis the stocks held by aliens. So long as Filipinos have controlling interest of a public utility corporation, their decision to declare more dividends for a particular stock over other kinds of stock is their sole prerogative — an act of ownership that would presumably be for the benefit of the public utility corporation itself. Thus, as explained in the Decision:

In this regard, it would be *apropos* to state that since Filipinos own at least 60% of the outstanding shares of stock entitled to vote

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[15] SEC Memorandum Circular No. 11, Series of 2008.

[16] *Supra* note 3, at 44.

directors, which is what the Constitution precisely requires, then the Filipino stockholders **control** the corporation, *i.e.*, they dictate corporate actions and decisions, and they have all the rights of ownership including, but not limited to, offering certain preferred shares that may have greater economic interest to foreign investors – as the need for capital for corporate pursuits (such as expansion), may be good for the corporation that they own. Surely, these "true owners" will not allow any dilution of their ownership and control if such move will not be beneficial to them.[17]

Finally, as to how the SEC will classify or treat certain stocks with voting rights held by a trust fund that is created by the public entity whose compliance with the limitation on foreign ownership under the Constitution is under scrutiny, and how the SEC will determine if such public utility does, in fact, control how the said stocks will be voted, and whether, resultantly, the trust fund would be considered as Philippine national or not — lengthily discussed in the dissenting opinion of Justice Carpio — is speculative at this juncture. The Court cannot engage in guesswork. Thus, there is need of an actual case or controversy before the Court may exercise its power of judicial review. The movant's petition is **not** that actual case or controversy.

Thus, the discussion of Justice Carpio's dissenting opinion as to the voting preferred shares created by respondent PLDT, their acquisition by BTF Holdings, Inc., which appears to be a wholly-owned company of the PLDT Beneficial Trust Fund (BTF), and whether or not it is respondent PLDT's management that controls BTF and BTF Holdings, Inc. — all these are factual matters that are outside the ambit of this Court's review which, as stated in the beginning, is confined to determining whether or not the SEC committed grave abuse of discretion in issuing SEC-MC No. 8; that is, whether or not SEC-MC No. 8 violated the ruling of the Court in *Gamboa v. Finance Secretary Teves*,[18] and the resolution

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[17] Decision, *rollo* (Vol. II), p. 1168.

[18] *Supra* note 3.

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in *Heirs of Wilson P. Gamboa v. Finance Sec. Teves*[19] denying the Motion for Reconsideration therein as to the proper understanding of "capital".

To be sure, it would be more prudent and advisable for the Court to await the SEC's prior determination of the citizenship of specific shares of stock held in trust — ***based on proven facts*** — before the Court proceeds to pass upon the legality of such determination.

As to whether respondent PLDT is currently in compliance with the Constitutional provision regarding public utility entities, the Court must likewise await the SEC's determination thereof applying SEC-MC No. 8. After all, as stated in the Decision, it is the SEC which is the government agency with the competent expertise and the mandate of law to make such determination.

In conclusion, the basic issues raised in the Motion having been duly considered and passed upon by the Court in the Decision and no substantial argument having been adduced to warrant the reconsideration sought, the Court resolves to **DENY** the Motion with **FINALITY**.

WHEREFORE, the subject Motion for Reconsideration is hereby **DENIED WITH FINALITY**. No further pleadings or motions shall be entertained in this case. Let entry of final judgment be issued immediately.

SO ORDERED.

Sereno, C.J., Peralta, Bersamin, del Castillo, Reyes, and *Tijam, JJ.,* concur.

Velasco, Jr., J., see concurring opinion.

Carpio and *Leonen, JJ.,* see dissenting opinions.

Leonardo-de Castro, Mendoza, and *Martires, JJ.,* join the dissent of *J.* Carpio.

Perlas-Bernabe and *Jardeleza, JJ.,* no part.

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[19] *Supra* note 4.

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CONCURRING OPINION

VELASCO, JR., *J.*:

I concur with the denial of the motion for reconsideration, which still fails to demonstrate any grave abuse of discretion committed by respondent Securities and Exchange Commission (SEC) when it issued Memorandum Circular (MC) No. 8.

For purposes of emphasis, I restate part of my *Concurring Opinion* to the main Decision:

> The petition is anchored on the contention that the SEC committed grave abuse of discretion in issuing MC No. 8. By grave abuse of discretion, the petitioners must prove that the Commission's act was tainted with the quality of whim and caprice.[1] Abuse of discretion is not enough. It must be shown that the Commission exercised its power in an arbitrary or despotic manner because of passion or personal hostility that is so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined or to act at all in contemplation of law.[2]
>
> With this standard in mind, the petitioner and petitioners-in-intervention failed to demonstrate that the SEC's issuance of MC No. 8 was attended with grave abuse of discretion. On the contrary, the assailed circular sufficiently applied the Court's definitive ruling in *Gamboa*.
>
> To recall, *Gamboa* construed the word "capital" and the nationality requirement in Section 11, Article XII of the Constitution, which states:
>
> SECTION 11. **No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to**

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[1] *OKS Designtech, Inc. v. Caccam*, G.R. No. 211263, August 5, 2015.

[2] *Gold City Integrated Services, Inc. v. Intermediate Appellate Court*, G.R. Nos. 71771-73, March 31, 1989; citing *Arguelles v. Young*, No. 59880, September 11, 1987, 153 SCRA 690; *Republic v. Heirs of Spouses Molinyawe*, G.R. No. 217120, April 18, 2016; *Olaño v. Lim Eng Co*, G.R. No. 195835, March 14, 2016; *City of Iloilo v. Honrado*, G.R. No. 160399, December 9, 2015; *OKS Designtech, Inc. v. Caccam*, G.R. No. 211263, August 5, 2015.

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> **corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens**, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. **The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital**, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.[3]

The Court explained in the June 28, 2011 Decision in *Gamboa* that **the term "capital" in Section 11, Article XII refers "only to shares of stock entitled to vote in the election of directors."** The rationale provided by the majority was that this interpretation ensures that **control** of the Board of Directors stays in the hands of Filipinos, since foreigners can only own a maximum of 40% of said shares and, accordingly, can only elect the equivalent percentage of directors. As a necessary corollary, Filipino stockholders can always elect 60% of the Board of Directors which, to the majority of the Court, translates to control over the corporation. The June 28, 2011 Decision, thus, read:

> Considering that common shares have voting rights which translate to control, as opposed to preferred shares which usually have no voting rights, the term 'capital' in Section 11, Article XII of the Constitution refers only to common shares. However, if the preferred shares also have the right to vote in the election of directors, then the term "capital" shall include such preferred shares because **the right to participate in the control or management of the corporation is exercised through the right to vote in the election of directors. In short, the term "capital" in Section 11, Article XII of the Constitution refers only to shares of stock that can vote in the election of directors.**

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[3] Emphasis supplied.

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> This interpretation is consistent with the intent of the framers of the Constitution to place in the hands of Filipino citizens the control and management of public utilities. As revealed in the deliberations of the Constitutional Commission, "capital" refers to the voting stock or **controlling interest** of a corporation
> xxx

The dispositive portion of the June 28, 2011 Decision in *Gamboa* clearly spelled out the doctrinal declaration of the Court on the meaning of "capital" in Section 11, Article XII of the Constitution, *viz.*:

> WHEREFORE, we PARTLY GRANT the petition and rule that the term **"capital"** in Section 11, Article XII of the 1987 Constitution **refers only to shares of stock entitled to vote in the election of directors**, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares). Respondent Chairperson of the Securities and Exchange Commission is DIRECTED to apply this definition of the term "capital" in determining the extent of allowable foreign ownership in respondent Philippine Long Distance Telephone Company, and if there is a violation of Section 11, Article XII of the Constitution, to impose the appropriate sanctions under the law.[4]

The motions for reconsideration of the June 28, 2011 Decision filed by the movants in *Gamboa* argued against the application of the term "capital" to the voting shares alone and in favor of applying the term to the total outstanding capital stock (combined total of voting and non-voting shares). Notably, none of them contended or moved for the application of the capital or the 60-40 requirement to "each and every class of shares" of a public utility, as it was **never an issue in the case**.

In resolving the motions for reconsideration in *Gamboa*, it is relevant to stress that the majority **did not modify** the June 28, 2011 Decision. The *fallo* of the October 9, 2012 Resolution simply stated—

> WHEREFORE, we DENY the motions for reconsideration WITH FINALITY. No further pleadings shall be entertained.

Clearly, the Court had no intention, express or otherwise, to amend the construction of the term "capital" in the June 28, 2011 Decision

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[4] Emphasis supplied.

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in *Gamboa*, much less in the manner proposed by petitioner Roy. Hence, no grave abuse of discretion can be attributed to the SEC in applying the term "capital" to the "voting shares" of a corporation.

The portion quoted by the petitioners is nothing more than an obiter dictum that has never been discussed as an issue during the deliberations in Gamboa. As such, it is not a binding pronouncement of the Court[5] that can be used as basis to declare the SEC's circular as unconstitutional.

x x x x x x x x x

Thus, the zealous watchfulness demonstrated by the SEC in imposing another tier of protection for Filipino stockholders cannot, therefore, be penalized on a misreading of the October 9, 2012 Resolution in Gamboa, which neither added nor subtracted anything from the June 28, 2011 Decision defining capital as "shares of stock entitled to vote in the election of directors."

It must also be stressed that the Decision in *Gamboa* was issued pursuant to this Court's symbolic function. It was meant as a definitive ruling for the education of the bench, bar, and the public in general on the meaning of the word "capital" in Section 11, Article XII of the Constitution, and not as a resolution exclusively applicable to a particular public utility. Accordingly, instead of resolving the charges against PLDT, the Court directed the SEC to "apply this definition of the term 'capital' in determining the extent of allowable foreign ownership in respondent [PLDT]."

Presently, the SEC clarified that it "has not yet issued a definitive ruling anent PLDT's compliance with the limitation on foreign ownership imposed under the Constitution and relevant laws." It is, therefore, premature and presumptuous for this Court to adjudge as erroneous a ruling that is still to be rendered by the SEC.

Least of all, not being a trier of facts nor specially equipped to investigate the intricacies of corporate structures and the identities of capital market participants, this Court cannot declare

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[5] *Ocean East Agency, Corp. v. Lopez*, G.R. No. 194410, October 14, 2015.

a corporation as non-compliant with the nationality requirement by, without more, a mere cursory review of its General Information Sheets. With the drastic consequences of such a ruling, which includes the possible revocation of its franchise, all parties affected—the corporate public utility, its investors both in equity and debt, and all its other stakeholders— deserve more than a passing treatment by this Court. The SEC, the government agency specifically tasked to review corporate matters, is better-suited to fairly rule, after a full-blown investigation, on the compliance by corporate public utilities with the nationality requirement.

Furthermore, in *Gamboa*, this Court construed "capital" as equivalent to the "**shares of stock entitled to vote in the election of directors**" and so, sustaining the petitioner's contention that it is through voting that control over a corporation is exercised, it ruled that 60% of the **voting shares** or the "**shares of stock entitled to vote in the election of directors**" in corporate public utilities are reserved for Filipinos. Thus, the June 28, 2011 *Gamboa* Decision emphatically stated, *viz*.:

> Indisputably, **one of the rights of a stockholder is the right to participate in the control or management of the corporation. This is exercised through his vote in the election of directors because it is the board of directors that controls or manages the corporation. In the absence of provisions in the articles of incorporation denying voting rights to preferred shares, preferred shares have the same voting rights as common shares.** However, preferred shareholders are often excluded from any control, that is, deprived of the right to vote in the election of directors and on other matters, on the theory that the preferred shareholders are merely investors in the corporation for income in the same manner as bondholders. In fact, under the Corporation Code only preferred or redeemable shares can be deprived of the right to vote. Common shares cannot be deprived of the right to vote in any corporate meeting, and any provision in the articles of incorporation restricting the right of common shareholders to vote is invalid.
>
> Considering that common shares have voting rights which translate to control, as opposed to preferred shares which usually have no voting rights, the term capital in Section 11, Article XII of the

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Constitution refers only to common shares. However**, if the preferred shares also have the right to vote in the election of directors, then the term capital shall include such preferred shares because the right to participate in the control or management of the corporation is exercised through the right to vote in the election of directors. In short, the term capital in Section 11, Article XII of the Constitution refers only to shares of stock that can vote in the election of directors.**

Thus, the Court cannot now feign that the construction in *Gamboa* of the term "capital" is confined and limited only to "common shares," to the exclusion of voting preferred shares. Adopting this regrettably myopic view will certainly revise and alter the final decision and resolution in *Gamboa*.

For the foregoing, I vote to deny with finality the present Motion for Reconsideration.

DISSENTING OPINION

CARPIO, *J.*:

I dissent.

Section 11, Article XII of the Constitution provides: "No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least **sixty per centum of whose *capital* is owned by such citizens**, x x x."

In the *Gamboa Decision*,[1] the threshold issue before the Court was "whether the term 'capital' in Section 11, Article XII of the Constitution refers to the total common shares only or to the total outstanding capital stock (combined total of common and non-voting preferred shares) of **PLDT**, a public utility."

In resolving this issue, the Court looked into PLDT's capital structure at the time and found the glaring anomaly in treating the total outstanding capital stock as a single class of shares.

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[1] *Gamboa v. Teves,* 668 Phil. 1 (2011).

The Court showed how control and beneficial ownership of PLDT rest solely with the common shares, thus:

> x x x (1) foreigners own 64.27% of the common shares of PLDT, which class of shares exercises the sole right to vote in the election of directors, and thus exercise control over PLDT; (2) Filipinos own only 35.73% of PLDT's common shares, constituting a minority of the voting stock, and thus do not exercise control over PLDT; (3) preferred shares, 99.44% owned by Filipinos, have no voting rights; (4) preferred shares earn only 1/70 of the dividends that common shares earn; (5) preferred shares have twice the par value of common shares; and (6) preferred shares constitute 77.85% of the authorized capital stock of PLDT and common shares only 22.15%. This kind of ownership and control of a public utility is a mockery of the Constitution.
>
> Incidentally, the fact that PLDT common shares with a par value of ₱5.00 have a current stock market value of ₱2,328.00 per share, while PLDT preferred shares with a par value of ₱10.00 per share have a current stock market value ranging from only ₱10.92 to ₱11.06 per share, is a glaring confirmation by the market that control and beneficial ownership of PLDT rest with the common shares, not with the preferred shares.[2]

Clearly, PLDT's capital structure then, where 64.27% of the common shares were in the hands of foreigners, warranted the Court's ruling that the term "capital" refers to shares of stock that can vote in the election of directors. The Court further stated that "in the present case (in the case of PLDT), [the term 'capital' refers] only to common shares, and not to the total outstanding capital stock." The dispositive portion of the *Gamboa Decision* reads:

> WHEREFORE, we PARTLY GRANT the petition and rule that the term "capital" in Section 11, Article XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares). Respondent Chairperson of the Securities and Exchange Commission is DIRECTED to apply this definition of the term "capital"

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[2] *Id*. at 63-64.

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in determining the extent of allowable foreign ownership in respondent Philippine Long Distance Telephone Company, and if there is a violation of Section 11, Article XII of the Constitution, to impose the appropriate sanctions under the law.

SO ORDERED.[3]

Moreover, in the *Gamboa Decision,* the Court stated that "[m]ere legal title is insufficient to meet the 60 percent Filipino-owned 'capital' required in the Constitution."[4] Full beneficial ownership of 60 percent of the total outstanding capital stock, coupled with 60 percent of the voting rights, is the minimum constitutional requirement for a corporation to operate a public utility, thus:

> x x x. Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is required. **The legal and beneficial ownership of 60 percent of the outstanding capital stock must rest in the hands of Filipino nationals in accordance with the constitutional mandate**. Otherwise, the corporation is "considered as non-Philippine national[s]."[5] (Emphasis supplied)

Significantly, in the 9 October 2012 *Gamboa Resolution*[6] denying the motion for reconsideration, the Court reiterated the requirement of full beneficial ownership by Filipinos of at least 60 percent of the outstanding capital stock and at least 60 percent Filipino ownership of the voting rights. This is consistent with the Foreign Investments Act, as well as its Implementing Rules, thus:

> This is consistent with Section 3 of the FIA which provides that where 100% of the capital stock is held by "a trustee of funds for pension or other employee retirement or separation benefits," the trustee is a Philippine national if "at least sixty percent (60%) of the fund will accrue to the

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[3] *Id*. at 69-70.

[4] *Id*. at 57.

[5] *Id*.

[6] 696 Phil. 276 (2012).

benefit of Philippine nationals." Likewise, Section 1(b) of the Implementing Rules of the FIA provides that "for stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. **Full beneficial ownership of the stocks, coupled with appropriate voting rights, is essential."**[7] (Emphasis in the original)

The Court clarified, in no uncertain terms, that the 60 percent constitutional requirement of Filipino ownership applies uniformly and across the board to all classes of shares comprising the capital of a corporation. The 60 percent Filipino ownership requirement applies to each class of share, not to the total outstanding capital stock as a single class of share.

Since the constitutional requirement of at least 60 percent Filipino ownership applies not only to voting control of the corporation but also to the beneficial ownership of the corporation, it is therefore imperative that such requirement apply uniformly and across the board to all classes of shares, regardless of nomenclature and category, comprising the capital of a corporation. Under the Corporation Code, capital stock consists of all classes of shares issued to stockholders, that is, common shares as well as preferred shares, which may have different rights, privileges or restrictions as stated in the articles of incorporation.

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x x x. Thus, if a corporation, engaged in a partially nationalized industry, issues a mixture of common and preferred non-voting shares, at least 60 percent of the common shares and at least 60 percent of the preferred non-voting shares must be owned by Filipinos. Of course, if a corporation issues only a single class of shares, at least 60 percent of such shares must necessarily be owned by Filipinos. **In short, the 60-40 ownership requirement in favor of Filipino citizens must apply separately to each class of shares, whether common, preferred non-voting, preferred voting or any other class of shares.** This uniform application of the 60-40 ownership requirement in favor of Filipino citizens clearly breathes life to the constitutional command that the ownership and operation of public utilities shall be reserved exclusively to corporations at least 60 percent of whose capital is

[7] *Id*. at 338-339.

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Filipino-owned. Applying uniformly the 60-40 ownership requirement in favor of Filipino citizens to each class of shares, regardless of differences in voting rights, privileges and restrictions, guarantees effective Filipino control of public utilities, as mandated by the Constitution.

Moreover, such uniform application to each class of shares insures that the "controlling interest" in public utilities always lies in the hands of Filipino citizens. x x x.

As we held in our 28 June 2011 Decision, to construe broadly the term "capital" as the total outstanding capital stock, treated as a single class regardless of the actual classification of shares, grossly contravenes the intent and letter of the Constitution that the "State shall develop a self-reliant and independent national economy effectively controlled by Filipinos." We illustrated the glaring anomaly which would result in defining the term "capital" as the total outstanding capital stock of a corporation, treated as a single class of shares regardless of the actual classification of shares, to wit:

> Let us assume that a corporation has 100 common shares owned by foreigners and 1,000,000 non-voting preferred shares owned by Filipinos, with both classes of share having a par value of one peso (₱1.00) per share. Under the broad definition of the term "capital," such corporation would be considered compliant with the 40 percent constitutional limit on foreign equity of public utilities since the overwhelming majority, or more than 99.999 percent, of the total outstanding capital stock is Filipino owned. This is obviously absurd.
>
> In the example given, only the foreigners holding the common shares have voting rights in the election of directors, even if they hold only 100 shares. The foreigners, with a minuscule equity of less than 0.001 percent, exercise control over the public utility. On the other hand, the Filipinos, holding more than 99.999 percent of the equity, cannot vote in the election of directors and hence, have no control over the public utility. This starkly circumvents the intent of the framers of the Constitution, as well as the clear language of the Constitution, to place the control of public utilities in the hands of Filipinos. x x x.[8] (Emphasis supplied)

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[8] *Id*. at 339, 341, 345.

Clearly, in both *Gamboa Decision* and *Resolution*, the Court categorically declared that the 60 percent minimum Filipino ownership refers not only to voting rights but likewise to full beneficial ownership of the stocks. Moreover, in the *Gamboa Resolution*, the Court explicitly stated that the 60 percent Filipino ownership applies uniformly to each class of shares. Such interpretation ensures effective control by Filipinos of public utilities, as expressly mandated by the Constitution.

Capital Structure of PLDT

Let us examine PLDT's capital structure to determine whether it complies with the *Gamboa Decision* and *Resolution* where the Court expressly held that the 60 percent minimum Filipino ownership refers not only to voting rights but also to full beneficial ownership of the stocks. Further, the 60 percent Filipino ownership applies uniformly to each class of shares.

In the 2011 General Information Sheet of PLDT, before the finality of the *Gamboa Decision* and *Resolution*, its shares were divided into common and preferred. **Filipinos owned 35.77% while foreigners owned 64.23% of the common shares.** Filipinos owned 99.67% while foreigners owned 0.33% of the preferred shares. Filipinos owned 86.30% while foreigners owned 13.70% of the total outstanding capital stock. There was no dispute that in 2011, before the *Gamboa Decision* and *Resolution* were promulgated, the common shares of PLDT had the right to vote in the election of the board of directors, whereas the preferred shares had no such right.

In the 2012 General Information Sheet of PLDT, after the promulgation of the *Gamboa Decision* and *Resolution*, the preferred shares were sub-classified into (a) voting preferred shares and (b) non-voting serial preferred shares. The newly-created voting preferred shares, which have voting rights in the election of directors, are fully owned by BTF Holdings, Inc. These voting preferred shares are not listed in the

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Philippine Stock Exchange. With the newly-created preferred shares, it appears that Filipinos owned 65.53% while foreigners owned 34.47% of the total voting shares. However, based on common shares only, Filipinos owned 41.60% while foreigners owned 58.40%. Based on PLDT's 2012 General Information Sheet, Filipinos owned 100% of the non-voting preferred shares.

In the 2013 General Information Sheet of PLDT, it appears that Filipinos owned 67.32% while foreigners owned 32.68% of the total voting shares. However, based on common shares only, Filipinos owned 44.63% while 55.37% were owned by foreigners. Based on PLDT's 2013 General Information Sheet, Filipinos owned 100% of the non-voting preferred shares.

In the 2014 General Information Sheet of PLDT, it appears that Filipinos owned 68.34% while foreigners owned 31.66% of the total voting shares. However, based on common shares only, Filipinos owned 46.35% while foreigners owned 53.65%. Based on PLDT's 2014 General Information Sheet, Filipinos owned 100% of the non-voting preferred shares.

In the 2015 General Information Sheet of PLDT, it appears that Filipinos owned 67.95% while foreigners owned 32.05% of the total voting shares. However, based on common shares only, Filipinos owned 45.70% while foreigners owned 54.30%. Based on PLDT's 2015 General Information Sheet, Filipinos owned 100% of the non-voting preferred shares.

In the 2016 General Information Sheet of PLDT, it appears that Filipinos owned 69.82% while foreigners owned 30.18% of the total voting shares. However, based on common shares only, Filipinos owned 48.87% while foreigners owned 51.13%. Based on PLDT's 2016 General Information Sheet, Filipinos owned 100% of the non-voting preferred shares.

To summarize, the table below shows that from 2011 to 2016, the majority of the common shares remained in the hands of foreigners and less than 60% of the common shares were owned by Filipinos.

Number of PLDTshares	2011 in %	2012 in %	2013 in %	2014 in %	2015 in %	2016 in %
COMMON						
A. Filipino	35.77	41.60	44.63	46.35	45.70	48.87
B. Foreigners	64.23	58.40	55.37	53.65	54.30	51.13
PREFERRED (NON-VOTING)						
A. Filipino	99.67	100	100	100	100	100
B. Foreigners	0.33	0	0	0	0	0
PREFERRED (VOTING)						
A. Filipino	–	100	100	100	100	100
B. Foreigners	–	0	0	0	0	0
TOTAL VOTING						
A. Filipino	35.77	65.53	67.32	68.34	67.95	69.82
B. Foreigners	64.23	34.47	32.68	31.66	32.05	30.18

To repeat, the issue in the *Gamboa Decision* was "whether the term 'capital' in Section 11, Article XII of the Constitution refers to the total **common shares only** or to the total outstanding capital stock (combined total of common and non-voting preferred shares) of PLDT, a public utility."

Considering PLDT's capital structure at the time, indicating that control and ownership rest with the common shares, the Court stated in the dispositive portion of the *Gamboa Decision* that "the term 'capital' in Section 11, Article XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares)."

If we apply the term "capital" as referring only to common shares and not to the total outstanding capital stock of PLDT, as stated in the *Gamboa Decision*, then since 2011, before the promulgation of the *Gamboa Decision* and *Resolution*, until 2016, after the promulgation of the *Gamboa Decision* and *Resolution*, PLDT's capital structure has failed to comply with the constitutional requirement that at least 60 percent of its common shares, which control PLDT, are Filipino-owned.

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Voting Preferred Shares

In October 2012, PLDT created a new class of shares – the voting preferred shares – to comply allegedly with the *Gamboa Decision.* All the 150,000,000 newly-issued voting preferred shares were acquired by BTF Holdings, Inc., a wholly-owned company of the PLDT Beneficial Trust Fund (BTF). The voting preferred shares have a par value of ₱1.00 per share, while the common shares have a par value of ₱5.00 per share.

The BTF was established by the Board of Directors of PLDT as a retirement plan for PLDT's employees. As stated in PLDT's By-Laws, among the express powers of the Board of Directors of PLDT is to establish pension or retirement plans for the employees, and to determine the persons to participate in such plans and the amount of their participation.[9] The Board of Directors appoints the BTF's Board of Trustees, which manages the BTF and consists of two members of PLDT's Board of Directors, a senior member of the executive staff of PLDT, and two persons who are neither executives nor employees of PLDT.[10] Since the PLDT Board of Directors appoints the Board of Trustees of the BTF, in effect, it is PLDT's management which controls the BTF.

In 2011, when the *Gamboa Decision* was promulgated, PLDT's Board of Directors was elected by foreigners comprising more than 60 percent of the common shares who had the right to elect the Board of Directors. After the creation of the voting preferred shares in 2012, PLDT's Board of Directors continued to be manned by the same set of persons, and the management of PLDT remained in the hands of the same persons.

The table[11] below shows that the total voting preferred shares of 150,000,000 comprised 40.98% of the total voting capital of

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[9] Article V, Section 9(i) of the Amended By-Laws of PLDT dated 20 February 2015.

[10] Page F-119 of SEC Form 17-A (Annual Report) for the fiscal year 2015 <http://www.pds.com.ph/wp-content/uploads/2016/03/Disclosure-No.-490-2016-Annual-Report-for-Fiscal-Year-Ended-December-31-2015-SEC-FORM-17-A.pdf> (accessed on 12 March 2017).

[11] Based on PLDT's General Information Sheets from 2011 to 2016.

PLDT from 2012 until 2016. However, for the same period, the number of voting preferred shares comprised only 22.5% of the total paid-up capital of PLDT. The number of common shares, which was owned by a majority of foreigners, comprised 77.5% of the total paid-up capital of PLDT.

Number of PLDT Shares	2012 (as of 16 Oct. 2012)	2013 (as of 3 Oct. 2013)	2014 (as of 11 April 2014)	2015 (as of 10 April 2015)	2016 (as of 15 April 2016)
FILIPINO					
Common	89,882,436	96,429,568	100,150,726	98,743,500	105,577,491
Voting Preferred	150,000,000	150,000,000	150,000,000	150,000,000	150,000,000
FOREIGNERS					
Common	126,173,339	119,626,207	115,905,049	117,312,275	110,478,284
Voting Preferred	0	0	0	0	0
TOTAL VOTING	366,055,775	366,055,775	366,055,775	366,055,775	366,055,775
% OF VOTING PREFERRED VS. TOTAL VOTING (PAID-UP CAPITAL)	40.98%	40.98%	40.98%	40.98%	40.98%
% OF VOTING PREFERRED VS. TOTAL PAID-UP CAPITAL[12]	22.52%	22.52%	22.52%	22.73%	22.52%

2011: http://ww.pldt.com/docs/default-source/general-information/pldt-2011-gis.pdf?sfvrsn=0 (accessed on 7 March 2017).

2012: http://www.pldt.com/docs/default-source/general-information/amended-general-information-sheet_final-2012.pdf?sfvrsn=0 (accessed on 7 March 2017).

2013: http://www.pldt.com/docs/default-source/general-information/amended-gis_decrease-in-capital-stock_10-03-13.pdf?sfvrsn=0 (accessed on 7 March 2017)

2014: http://www.pldt.com/docs/default-source/general-information/2014-gis-with-certification.pdf?sfvrsn=0 (accessed on 7 March 2017)

2015: http://www.pldt.com/docs/default-source/general-information/2015-pldt-gis-with-certification.pdf?sfvrsn=2 (accessed on 7 March 2017).

2016: http://www.pldt.com/docs/default-source/general-information/pldt-2016-amended-general-information-sheet-(gis).pdf?sfvrsn=0 (accessed on 7 March 2017).

[12] The number of shares comprising the total paid-up capital for 2012 was 666,058,745; for 2013 it was 666,056,345; for 2014 it was 666,056,345; for 2015 it was 666,056,145; and for 2016 it was 666,057,015. Based on PLDT's General Information Sheets.

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There is no question that the 150,000,000 voting preferred shares have the right to vote in the election of the Board of Directors. However, the Board of Trustees of the BTF is appointed by the Board of Directors of PLDT. The BTF controls how the voting preferred shares of BTF Holdings, Inc. are voted. In short, BTF Holdings, Inc. is controlled by the Board of Directors of PLDT, including how the voting preferred shares of BTF Holdings, Inc. will be voted. In essence, whoever controls PLDT also controls BTF and BTF Holdings, Inc. When the voting preferred shares were created and issued to BTF Holdings, Inc., PLDT, BTF, and BTF Holdings, Inc. were **all controlled by the same PLDT Board of Directors**, who was elected by the owners of the PLDT common shares. The majority of these PLDT common shares were then, and even up to now, foreign-owned and controlled.

In 2012, when the voting preferred shares were created and issued, the common shares with a par value of ₱5.00 were traded in the stock market for a price which reached ₱2,650.[13] Meanwhile, the voting preferred shares with a par value of ₱1.00 were not traded or listed in the stock exchange. While voting rights had been extended to the newly-created voting preferred shares, the beneficial ownership of PLDT remained indisputably with the common shares.

Clearly, the issuance of the voting preferred shares is a farce. PLDT created and issued the voting preferred shares to "comply" allegedly with the *Gamboa Decision* and *Gamboa Resolution.* With its "modified" capital structure, PLDT ostensibly qualifies as a "Philippine national" with at least 60 percent of its voting stock in the hands of Filipinos. However, in truth and in fact, it is nothing but a "sweetheart deal," a disingenuous device, which not only circumvents the ruling in *Gamboa;* but worse, illegally evades the constitutional mandate of 60-40 Filipino ownership of capital. This ploy is a plain and simple travesty of the Constitution.

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[13] On 23 October 2012. <http://edge.pse.com.ph/companyPage/stockData.do?cmpy_id=6> (accessed on 10 March 2017).

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Beneficial Ownership

The table below shows the disparity in the amounts of dividends declared from 2013 to 2016[14] between PLDT's common shares and voting preferred shares.

PLDT Shares	2013	2014	2015	2016
COMMON[15] (per share)	₱52 ₱60 ₱63	₱54 ₱62 ₱69	₱26 ₱61 ₱65	₱57 ₱49
VOTING PREFERRED STOCK[16] (per share)	₱0.016/share (₱2,437,500/ 150,000,000)	₱0.016/share (₱2,437,500/ 150,000,000)	₱0.016/share (₱2,437,500/ 150,000,000)	₱0.016/share (₱2,437,500/ 150,000,000)
% DIVIDENDS OF VOTING PREFERRED VS. COMMON SHARES	0.04%	0.04%	0.03%	0.06%

Clearly, such disparity highlights the anomaly in the treatment of the total outstanding voting stock as a single class of shares. From 2013 to 2016, the declared dividends on the common shares ranged from ₱26 to ₱69 per share per annum with a par value of ₱5.00 per share, whereas the dividend on the 150,000,000 voting preferred shares amounted to ₱0.065[17] per annum with a par value of ₱1.00 per share.

In short, the voting preferred shares comprised 40.98% of all voting shares but received only 0.04%[18] of the dividends

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[14] Based on PLDT's dividend declaration from 2013 to 2016 <http://www.pldt.com/investor-relations/shareholder-information/dividend-info> (accessed on 12 March 2017).

[15] Declared on various dates.

[16] Quarterly.

[17] For 2013, 2014, and 2016.

[18] ₱0.065 (sum of the dividends of each voting preferred share) divided by ₱175.065 (sum of the dividends of each common share and voting preferred share).

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for 2013, 0.04%[19] **for 2014, 0.03%**[20] **for 2015, and 0.06%**[21] **for 2016, compared with the dividends received by the common shares for the same period.**

Clearly, the voting preferred shares are mere "mickey mouse" voting shares, created just to ostensibly comply with the 60 percent Filipino ownership requirement of the voting stock. In reality, the voting preferred shares have insignificant beneficial returns to whoever owns it.

Significantly, in the *Gamboa Decision,* the Court cited the disparity in the beneficial ownership between common shares and preferred shares of PLDT, to wit:

> Incidentally, the fact that PLDT common shares with a par value of ₱5.00 have a current stock market value of ₱2,328.00 per share,-while PLDT preferred shares with a par value of ₱10.00 per share have a current stock market value ranging from only ₱10.92 to ₱11.06 per share, is a glaring confirmation by the market that control and beneficial ownership of PLDT rest with the common shares, not with the preferred shares.[22]

It must be noted that as of 10 March 2017, the last traded price of PLDT's common shares with a par value of ₱5.00 is ₱1,544.00,[23] whereas the voting preferred shares with a par value of ₱1.00 are not listed or traded. This further confirms that control and beneficial ownership of PLDT rest with the common shares, not with the preferred shares, either voting or non-voting.

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[19] ₱0.065 (sum of the dividends of each voting preferred share) divided by ₱185.065 (sum of the dividends of each common share and voting preferred share).

[20] ₱0.049 (sum of the dividends of each voting preferred share) divided by ₱152.049 (sum of the dividends of each common share and voting preferred share).

[21] ₱0.065 (sum of the dividends of each voting preferred share) divided by ₱106.065 (sum of the dividends of each common share and voting preferred share).

[22] *Gamboa v. Teves, supra* note 1, at 64.

[23] As of 1:27 p.m. of 10 March 2017 <http://edge.pse.com.ph/companyPage/stockData.do?cmpy_id=6>.

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Moreover, as I have previously stated, SEC Memorandum Circular No. 8 can be considered valid only if (1) the stocks with voting rights and (2) the stocks without voting rights, which comprise the capital of a corporation operating a public utility, have **equal** par values. If the shares of stock have different par values, then applying SEC Memorandum Circular No. 8 would contravene the *Gamboa Decision* that the "**legal and beneficial ownership of 60 percent of the outstanding capital stock x x x rests in the hands of Filipino nationals in accordance with the constitutional mandate**." I illustrated the resulting anomaly in this wise:

> For example, assume that class "A" voting shares have a par value of ₱1.00, and class "B" non-voting preferred shares have a par value of ₱100.00. If 100 outstanding class "A" shares are all owned by Filipino citizens, and 80 outstanding class "B" shares are owned by foreigners and 20 class "B" shares are owned by Filipino citizens, the 60-40 percent ownership requirement in favor of Filipino citizens for voting shares, as well as for the total voting and non-voting shares, will be complied with. If dividends are declared equivalent to the par value per share for all classes of shares, only 20.8 percent of the dividends will go to Filipino citizens while 79.2 percent of the dividends will go to foreigners, an absurdity or anomaly that the framers of the Constitution certainly did not intend. Such absurdity or anomaly will also be contrary to the *Gamboa Decision* that the "**legal and beneficial ownership of 60 percent of the outstanding capital stock x x x rests in the hands of Filipino nationals in accordance with the constitutional mandate**." (Emphasis in the original)

PLDT's capital structure, as well as the disparity in the declared dividends between common and voting preferred shares, illustrates clearly the anomaly which will result in the interpretation by the SEC of the *Gamboa Decision* and *Resolution*. Applying the 60 percent Filipino ownership to the total voting stock and to the total outstanding stock, whether voting or non-voting, and not to each class of shares of PLDT clearly amounts to a blatant mockery of the Constitution.

Clarification of the Gamboa Decision and Resolution

While the Court did not explicitly state in the dispositive portion of the *Gamboa Decision* and *Resolution* that the minimum

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60 percent Filipino ownership must be uniformly applied to each class of shares, the body of the *Gamboa Resolution* categorically declared that "the 60-40 ownership requirement in favor of Filipino citizens must apply separately to each class of shares, whether common, preferred non-voting, preferred voting or any other class of shares."

Is the Court perpetually precluded from refining the dispositive portion of the *Gamboa Decision* and *Resolution* to harmonize with the Court's pronouncements in the body of the decision? Is the Court absolutely barred from clarifying the dispositive portion of the *Gamboa Decision* and *Resolution* and stating that the 60-40 Filipino ownership applies to each class of shares, as declared in the body of the *Gamboa Resolution*?

Definitely, no.

To avoid absurdity, and more importantly, to uphold the spirit and language of the Constitution, the Court is not only allowed, but is bound, to clarify, even rectify, any apparent conflict in its decisions. To grasp and delve into the true intent and meaning of a decision, no specific portion thereof should be resorted to – the decision must be considered in its entirety.[24] In *Reinsurance Company of the Orient, Inc. v. Court of Appeals,*[25] the Court stated:

> It is true that even a judgment which has become final and executory may be clarified under certain circumstances. The dispositive portion of the judgment may, for instance, contain an error clearly clerical in nature (perhaps best illustrated by an error in arithmetical computation) or an ambiguity arising from inadvertent omission, which error may be rectified or ambiguity clarified and the omission supplied by reference primarily to the body of the decision itself. Supplementary reference to the pleadings previously filed in the case may also be resorted to by way of corroboration of the existence of the error or of the ambiguity in the dispositive part of the judgment. x x x.

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[24] *Gulang v. Court of Appeals,* 360 Phil. 435, 450 (1998), citing *Valderrama v. NLRC,* 326 Phil. 477, 484 (1996).

[25] 275 Phil. 20, 34 (1991). Cited in *Gulang v. Court of Appeals, id*.

To refuse to clarify the dispositive portion of the *Gamboa Decision*, invoking conclusiveness of judgment and *obiter dictum*, among other things, is to shirk from this Court's sworn duty to uphold the Constitution. Consequently, the Court must reject the SEC's flimsy argument that the SEC's task is merely to implement the Court's directive as contained in the dispositive portion of the *Gamboa Decision*. Following such contention, the SEC deliberately ignores the crucial pronouncements of the Court in the body of the *Gamboa Decision* and *Resolution*.

Possible Economic Consequences

Agreeing with the Philippine Stock Exchange, the majority voiced fears of an economic disaster if the term "capital" would be "re-interpreted." The PSE claims that "[a]dopting a new definition of 'capital' will prove disastrous [to] the Philippine stock market." The majority opined that "a restrictive interpretation – or rather, re-interpretation, of 'capital' x x x directly affects the well-being of the country."

Suffice it to state that the possible economic repercussions resulting from the definition of the term "capital" in Section 11, Article XII of the Constitution can never justify a blatant violation of the Constitution. It is utterly dangerous to hold that possible economic repercussions justify junking the Constitution. The solution is to properly amend the Constitution, not to start violating it every time it becomes inconvenient to comply with the Constitution.

To repeat, the Constitution expressly mandates an economy effectively controlled by Filipinos. To sustain the glaringly anomalous and absurd situation which will result from the SEC's interpretation of the term "capital" contravenes the *Gamboa Decision* and *Resolution,* and worse, contradicts the Constitution.

The majority's decision now allows foreigners to control all nationalized industries, whether nationalized under the Constitution or existing statutes. Under these existing laws, foreign ownership is limited to less than a controlling interest. With the majority's decision, the mere expedient of creating "mickey mouse" voting preferred shares will turn over

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control of nationalized industries, particularly strategic industries like telecommunications and energy distribution, to foreigners. This is what the majority's decision is all about. This has, of course, far-reaching ramifications to the country's national economy, national security, and even the future of our country as a sovereign state.

ACCORDINGLY, I vote to **GRANT** the motion for reconsideration. The minimum 60 percent Filipino ownership requirement under Section 11, Article XII of the Constitution must be applied to each class of shares, which comprises "capital," as used in the Constitution, in determining whether a corporation can validly operate a public utility.

DISSENTING OPINION

LEONEN, *J.*:

I maintain my dissent.

The primordial interest served by the limitation of foreign participation and ownership in certain economic activities is the "conserv[ation] and develop[ment of] our *patrimony*."[1] By definition, this limitation is a matter of maintaining and rendering to the Filipino what belongs to the Filipino. This means that there is an effective control by Filipinos. It also means, as an act of preservation and development, that the Philippine economy stands to benefit from the fruits of capital. It is thus a question of national integrity:

> It should be emphatically stated that the provisions of our Constitution which limit to Filipinos the rights to develop the natural resources and to operate the public utilities of the Philippines is one of the bulwarks of our national integrity. The Filipino people decided to include it in our Constitution in order that it may have the stability and permanency that its importance requires. It is written in our Constitution so that it may neither be the subject of barter nor be impaired in the give and take of politics. *With our natural resources, our sources of power and energy, our public lands, and our public*

[1] CONST., Preamble.

utilities, the material basis of the nation's existence, in the hands of aliens over whom the Philippine Government does not have complete control, the Filipinos may soon find themselves deprived of their patrimony and living as it were, in a house that no longer belongs to them.[2] (Emphasis supplied)

The 1987 Constitution leaves room for the legislature to identify "certain areas of investment" where foreign equity participation may be limited to 40% or even lower.[3] This is in addition to the areas of natural resources[4] and public

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[2] Former President of the University of the Philippines, Hon. Vicente G. Sinco (Congressional Record, House of Representatives, Vol. 1, No. 26, 561), quoted in *Republic v. Quasha*, 150-B Phil. 140, 170 (1972) [Per *J*. Reyes, J.B.L., *En Banc*].

[3] CONST., Art. XII, Sec. 10 provides:

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

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

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

[4] CONST., Art. XII, Sec. 2, par. (1) 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.

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utilities[5] where foreign equity participation was already limited to a maximum of 40% by the 1935[6] and the 1973[7] Constitutions.

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[5] CONST., Art. XII, Sec. 11 provides:

Section 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

[6] CONST. (1935), Art. XII, Sec. 1 provides:

Section 1. All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces or potential energy, and other natural resources of the Philippines belong to the State, and 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. Natural resources, with the exception of public agricultural land, shall not be alienated, and no license, concession, or lease for the exploitation, development, or utilization of any of the natural resources shall be granted for a period exceeding twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases beneficial use may be the measure and the limit of the grant.

CONST. (1935), Art. XIII, Sec. 8 provides:

Section 8. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines, sixty per centum of the capital of which is owned by citizens of the Philippines, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. No franchise or right shall be granted to any individual, firm, or corporation, except under the condition that it shall be subject to amendment, alteration, or repeal by the National Assembly when the public interest so requires.

[7] CONST. (1973), Art. XIV, Sec. 5 provides:

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This is also in addition to other activities explicitly mentioned outside of Article XIV of the 1987 Constitution.[8]

Section 5. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of the capital of which is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal in by the National Assembly when the public interest so requires. The State shall encourage equity participation in public utilities by the general public.The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in the capital thereof.

Const. (1973), Art. XIV, Sec. 9 provides:

Section 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 of which is owned by such citizens. The National Assembly, in the national interest, may allow such citizens, corporations, or associations to enter into service contracts for financial, technical, management, or other forms of assistance with any foreign person or entity for the exploration, development, exploitation, or utilization of any of the natural resources. Existing valid and binding service contracts for financial, technical, management, or other forms of assistance are hereby recognized as such.

[8] Const., Art. XIV, Sec. 4 (2) provides:

Section 4.

x x x x x x x x x

(2) Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions.

Const., Art. XVI, Sec. 11 provides:

SECTION 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.

(2) The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.

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The Constitution recognizes private enterprise and investments as indispensable to national progress and therefore encourages and provides incentives for them.[9] Yet the Constitution's propitious stance towards private enterprise and investment is tempered by the primacy of a "self-reliant and independent national economy."[10]

The imperative of conserving and developing our inheritance and integrity is not an empty exhortation. The specific mandate is established by Article II, Section 19 of the 1987 Constitution: "The State *shall* develop a self-reliant and independent national economy effectively controlled by Filipinos."

There is thus a positive duty imposed upon state organs. They are charged with the definite prestation of going about and ensuring such conservation and development. This is done through the *conscious* adoption of legal mechanisms that *adequately* effect such conservation and development.

The mechanisms we adopt in jurisprudence must work not only at a barefaced identification of Filipino and foreign stock ownership. They must go beyond surveying nominal compliance but discerningly – even astutely – account for and foreclose avenues for circumvention.

This begins with a conceptual understanding of capital and a functional comprehension of what it means to own

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Only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry. The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

[9] Const., Art. II, Sec. 20 provides:

Section 20. The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides in centives to needed investments.

[10] Const., Art. II, Sec. 19:

Section 19. The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.

capital. These must be thorough, with keen awareness that formal designations are not always representative of attendant rights, benefits, prerogatives, and other incidents. More than titular descriptions therefore, the mechanisms we adopt must scrutinize the many features of stock ownership, such as, its ultimate end of deriving commercial gains, the mutable as against the inviolable rights it entails, and its implications for participating in corporate affairs, the avenues for withholding participation, as well as the extent and quality of such participation depending on the nature of the affair. Our jurisprudential mechanisms must focus on beneficial, not merely titular, ownership. It cannot be true that a share of stock is held by a Filipino when it is only the title that he holds while the entire usufruct belongs to a foreigner.

Accordingly, the apparatus for reckoning foreign ownership must be willing go beyond what (i.e., the class of shares) corporate participants are holding but also at how they are holding it. When appropriate, there must be an unravelling of who ultimately derives the gains, as well as who benefits from and influences the manner of exercising the rights and prerogatives attendant to holding shares. Our mechanisms must rise beyond the naivety of assuming that nominal ownership translates to consummate and beneficial ownership.

The majority's position limiting the conception of "capital" vis-à-vis foreign equity participation in public utilities under Article XII, Section 11 of the 1987 Constitution only to shares of stock entitled to vote for directors in a corporation fails to adequately effect the Constitution's dictum. Rather than guarding our patrimony, it has opened the door for foreign control of corporations engaged in nationalized economic activities.[11]

In keeping with the primacy of our patrimony and the charge of a "self-reliant and independent national economy," capital

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[11] RIGOBERTO D. TIGLAO, *COLLOSAL DECEPTION: HOW FOREIGNERS CONTROL OUR TELECOMS SECTOR* (2016).

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must be construed in such a manner as to secure "the controlling interest in favor of Filipinos."[12]

To limit capital to so-called voting shares is to be shortsighted. It fails to account for the reality that every class of shares exercises a measure of control over a corporation. Even so-called non-voting shares vote and may be pivotal in the most crucial corporate actions. A cursory reading of the Corporation Code reveals this:

> No class of shares is ever truly bereft of a measure of control of a corporation. It is true, as Section 6 of the Corporation Code permits, that preferred and/or redeemable shares may be denied the right to vote extended to other classes of shares. For this reason, they are also often referred to as ["]non-voting shares.["] However, the absolutist connotation of the description "non-voting" is misleading. The same Section 6 provides that these "non-voting shares" are still "entitled to vote on the following matters:
>
> 1. Amendment of the articles of incorporation;
> 2. Adoption and amendment of by-laws;
> 3. Sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the corporate property;
> 4. Incurring, creating or increasing bonded indebtedness;
> 5. Increase or decrease of capital stock;
> 6. Merger or consolidation of the corporation with another corporation or other corporations;
> 7. Investment of corporate funds in another corporation or business in accordance with this Code; and
> 8. Dissolution of the corporation.

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[12] Dissenting Opinion of *J.* Leonen in *Roy v. Herbosa*, G.R. No. 207246, November 22, 2016 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246_leonen.pdf> 6 [Per *J.* Caguioa, *En Banc*], citing Dissenting Opinion of *J.* Mendoza in *Roy v. Herbosa*, G.R. No. 207246, November 22, 2016< http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246_mendoza.pdf> 21 [Per *J.* Caguioa, *En Banc*].

In the most crucial corporate actions – those that go into the very constitution of the corporation – even so-called non-voting shares may vote. Not only can they vote; they can be pivotal in deciding the most basic issues confronting a corporation. Certainly, the ability to decide a corporation's framework of governance (i.e., its articles of incorporation and by-laws), viability (through the encumbrance or disposition of all or substantially all of its assets, engagement in another enterprise, or subjection to indebtedness), or even its very existence (through its merger or consolidation with another corporate entity, or even through its outright dissolution) demonstrates not only a measure of control, but even possibly *overruling* control. "Non-voting" preferred and redeemable shares are hardly irrelevant in controlling a corporation.[13] (Emphasis in the original, citation omitted)

The constitutional imperative demands a consideration not just of nominal power and control or the identification of which shares are denominated as "voting" and "non-voting", but equally of beneficial ownership.

The implementing rules and regulations (amended 2004) of Republic Act No. 8799, the Securities Regulation Code (SRC), define "beneficial owner or beneficial ownership." It identifies the two (2) facets of beneficial ownership: first, having or sharing voting power; second, having or sharing investment returns or power:

Rule 3 – Definition of Terms Used in the Rules and Regulations

1. As used in the rules and regulations adopted by the Commission under the Code, unless the context otherwise requires:

A. *Beneficial owner* or beneficial ownership *means any person who, directly or indirectly*, through any contract, arrangement, understanding, relationship or otherwise, *has or shares voting power*, which includes the power to vote, or to direct the voting of such security; *and/or investment returns or power*, which includes the power to dispose of, or to direct the

[13] Dissenting Opinion of *J.* Leonen in *Roy v. Herbosa*, G.R. No. 207246, November 22, 2016 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246_leonen.pdf> 6–7 [Per *J.* Caguioa, *En Banc*].

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disposition of such security; provided, however, that a person shall be deemed to have an indirect beneficial ownership interest in any security which is:

i. held by members of his immediate family sharing the same household;

ii. held by a partnership in which he is a general partner;

iii. held by a corporation of which he is a controlling shareholder; or

iv. subject to any contract, arrangement or understanding which gives him voting power or investment power with respect to such securities; provided however, that the following persons or institutions shall not be deemed to be beneficial owners of securities held by them for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business, so long as such shares were acquired by such persons or institutions without the purpose or effect of changing or influencing control of the issuer:

   a. a broker dealer;

   b. an investment house registered under the Investment Houses Law;

   c. a bank authorized to operate as such by the Bangko Sentral ng Pilipinas;

   d. an insurance company subject to the supervision of the Office of the Insurance Commission;

   e. an investment company registered under the Investment Company Act;

   f. a pension plan subject to regulation and supervision by the Bureau of Internal Revenue and/or the Office of the Insurance Commission or relevant authority; and

   g. a group in which all of the members are persons specified above.

All securities of the same class beneficially owned by a person, regardless of the form such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person.

A person shall be deemed to be the beneficial owner of a security if that person has the right to acquire beneficial ownership, within thirty (30) days, including, but not limited to, any right to acquire, through the exercise of any option, warrant or right; through the conversion of any security; pursuant to the power to revoke a trust, discretionary account or similar arrangement; or pursuant to automatic termination of a trust, discretionary account or similar arrangement. (Emphasis supplied)

The concept of beneficial ownership uncovers that control is not entirely the end of participating in a stock corporation. As stock corporations are fundamentally business organizations, participating in their affairs by partaking in ownership is ultimately a matter of reaping gains from investments.

Consistent with the composite character of stock ownership and impelled by the need to equip state organs with the most efficacious means for conserving our heritage are the correlative mechanisms of the Control Test and the Grandfather Rule. These are the guideposts through which foreign participation in nationalized economic activities is reckoned. Together, the Control Test and the Grandfather Rule enable an adequate mechanism for state organs to examine whether a stock corporation is *effectively* controlled and *beneficially* owned by Filipinos.

My dissent to the majority's November 22, 2016 Decision,[14] as well as to the April 21, 2014 Decision[15] and January 28, 2015 Resolution[16] in *Narra Nickel and Development Corp. v. Redmont*

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[14] Dissenting Opinion of *J*. Leonen in *Roy v. Herbosa,* G.R. No. 207246, November 22, 2016,http:sc,jurisdiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/207246_leonen.pdf> [Per *J*. Caguioa, *En Banc*]

[15] Dissenting Opinion of *J*. Leonen in *Narra Nickel Mining & Development Corp. v. Redmont Consolidated Mines Corp*., 733 Phil. 365, 420–490 (2014) [Per *J*. Velasco, Third Division].

[16] Dissenting Opinion of *J*. Leonen in *Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp*., G.R. No. 195580, January 28, 2015, 748 SCRA 455, 492-510 [Per *J*. Velasco, Special Third Division Resolution].

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Consolidated Mines Corp., emphasized that the Control Test finds initial application and "must govern in reckoning foreign equity ownership in corporations engaged in nationalized economic activities."[17] Further, "the Grandfather Rule may be used as a supplement to the Control Test, that is, as a further check to ensure that control and beneficial ownership of a corporation is in fact lodged in Filipinos."[18]

The correlation between the Control Test and the Grandfather Rule – where the former finds initial application, and the latter supplements – is settled in jurisprudence, having been affirmed in the January 28, 2015 Resolution in *Narra Nickel*. The Court explained:

> [T]he Control Test can be, as it has been, applied jointly with the Grandfather Rule to determine the observance of foreign ownership restriction in nationalized economic activities. The Control Test and the Grandfather Rule are not, as it were, incompatible ownership-determinant methods that can only be applied alternative to each other. Rather, *these methods can, if appropriate, be used cumulatively in the determination of the ownership and control of corporations engaged in fully or partly nationalized activities*, as the mining operation involved in this case or the operation of public utilities as in Gamboa or Bayantel.
>
> The Grandfather Rule, standing alone, should not be used to determine the Filipino ownership and control in a corporation, as it could result in an otherwise foreign corporation rendered qualified to perform nationalized or partly nationalized activities. Hence, it is only when the Control Test is first complied with that the Grandfather Rule may be applied. Put in another manner, if the subject corporation's Filipino equity falls below the threshold 60%, the corporation is immediately considered foreign-owned, in which case, the need to resort to the Grandfather Rule disappears.

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[17] Dissenting Opinion of *J.* Leonen in *Narra Nickel Mining & Development Corp. v. Redmont Consolidated Mines Corp.*, 733 Phil. 365, 468 (2014) [Per *J.* Velasco, Third Division].

[18] *Id.* at 478.

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On the other hand, a corporation that complies with the 60-40 Filipino to foreign equity requirement can be considered a Filipino corporation if there is no doubt as to who has the "beneficial ownership" and "control" of the corporation. In that instance, there is no need for a dissection or further inquiry on the ownership of the corporate shareholders in both the investing and investee corporation or the application of the Grandfather Rule. As a corollary rule, even if the 60-40 Filipino to foreign equity ratio is apparently met by the subject or investee corporation, a resort to the Grandfather Rule is necessary if doubt exists as to the locus of the "beneficial ownership" and "control."[19] (Emphasis supplied)

Characterizing the Grandfather Rule as a "supplement" or as a "*further* check" is not understating its importance.

Precisely, the Grandfather Rule is intended to frustrate the use of ostensible equity ownership as an artifice for circumventing the constitutional imperatives of "conserv[ing] and develop[ing] our patrimony"[20] and "develop[ing] a self-reliant and independent national economy."[21]

We should be mindful of schemes used to frustrate the Constitution's ends. These include the use of dummies and corporate layering and cloaking devices. As early as 1936, we have adopted the Anti-Dummy Law.[22] It not only proscribes, but even penalizes concession to use one's name or citizenship to evade constitutional or legal requirements of citizenship for the exercise of a right, franchise or privilege,[23] the simulation of minimum capital stock,[24]

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[19] *Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp.*, G.R. No. 195580, January 28, 2015, 748 SCRA 455, 477-478 [Per *J.* Velasco, Special Third Division Resolution].

[20] CONST., preamble.

[21] CONST., Art. II, Sec. 19.

[22] Com. Act No. 108, as amended.

[23] Com. Act No. 108, Sec. 1 provides:

Section1. In all cases in which any constitutional or legal provision requires Philippine or United States citizenship as a requisite for the exercise or enjoyment of a right, franchise or privilege, any citizen of the Philippines or the United States who allows his name or citizenship to be used for the purpose of evading such provision, and any alien or foreigner profiting thereby, shall be punished by imprisonment for not less than two nor

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and other acts deemed tantamount to the unlawful use, exploitation or enjoyment of a right, franchise, privilege, property or business, reserved to citizens.[25] In 1984, the Department of Justice, through

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more than ten years, and by a fine of not less than two thousand nor more than ten thousand pesos.

The fact that the citizen of the Philippines or of the United States charged with a violation of this Act had, at the time of the acquisition of his holdings in the corporations or associations referred to in section two of this Act, no real or personal property, credit or other assets the value of which shall at least be equivalent to said holdings, shall be admissible as circumstantial evidence of a violation of this Act.

[24] Com. Act No. 108, Sec. 2 provides:

Section 2. In all cases in which a constitutional or legal provision requires that, in order that a corporation or association may exercise or enjoy a right, franchise or privilege, not less than a certain per centum of its capital must be owned by citizens of the Philippines or the United States, or both, it shall be unlawful to falsely simulate the existence of such minimum of stock or capital as owned by such citizens of the Philippines or the United States or both, for the purpose of evading said provision.

The president or managers and directors or trustees of corporations or associations convicted of a violation of this section shall be punished by imprisonment for not less than two nor more than ten years, and by a fine of not less than two thousand nor more than ten thousand pesos.

[25] Com. Act No. 108, Sec. 2-A provides:

Section 2-A. Any person, corporation, or association[,] which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution, or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose

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its Opinion No. 165, referenced the Anti-Dummy Law and identified the following "significant indicators" or badges of "dummy status":

1. That the foreign investor provides practically all the funds for the joint investment undertaken by Filipino businessmen and their foreign partner.
2. That the foreign investors undertake to provide practically all the technological support for the joint venture.
3. That the foreign investors, while being minority stockholders, manage the company and prepare all economic viability studies.[26]

The Grandfather Rule enables the piercing of ostensible control vested by ownership of 60% of a corporation's capital when methods are employed to disable Filipinos from exercising control and reaping the economic benefits of an enterprise.[27] This – more assiduous – examination of who actually controls and benefits from holding such capital may very well be a jealous

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employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists or abets in the planning, consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, that the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act: and Provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.

[26] Sec. of Justice Op. No. 165, s. 1984.

[27] Dissenting Opinion of *J.* Leonen in *Narra Nickel Mining & Development Corp. v. Redmont Consolidated Mines Corp*., 733 Phil. 365, 478-479 (2014) [Per *J.* Velasco, Third Division].

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means of protecting our patrimony, but fending off the challenges to our national integrity demands it.

The application of the Grandfather Rule hinges on circumstances. It is an extraordinary mechanism the operation of which is impelled by a reasonable sense of doubt that even as 60% of a corporation's capital is ostensibly owned by Filipinos, a more scrupulous arrangement may underlie that compliance and that nominal Filipino owners have become parties to the besmirching of their own national integrity. As the 2015 Resolution in *Narra Nickel* explained, "'[D]doubt' refers to various indicia that the 'beneficial ownership' and 'control' of the corporation do not in fact reside in Filipino shareholders but in foreign stakeholders."[28] It is necessary then, that proper evidentiary bases sustain resort to the Grandfather Rule.

Adopting mechanisms that may be well-meaning, but ultimately inadequate, reduces state organs to unwitting collaborators in the despoiling and pillaging of the Filipino's patrimony. Rather than work for and in the national interest, they fall prey to regulatory capture; facilitating private over public, or worse, foreign over national, gain.

The majority's limitation of capital to so-called voting stocks entrenches an operational definition that can be a gateway to violating the Constitution's righteous protection of our heritage. It licentiously empowers foreign interests to overrun public utilities, which are enterprises whose primary objectives should be the common good and not commercial gain, to wrest control of rights to our natural resources, and to takeover other crucial areas of investment.

The majority's November 22, 2016 Decision may have set us along this course. We have the opportunity to reverse that position and truly do justice to the Filipino.

ACCORDINGLY, I vote to grant the Motion for Reconsideration.

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[28] *Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp.*, G.R. No. 195580, January 28, 2015, 748 SCRA 455, 478 [Per *J.* Velasco, Special Third Division Resolution].