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REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF THE PHILIPPINES

EN BANC

[G.R. No. 176579. June 28, 2011]

WILSON P. GAMBOA, *petitioner, vs.* **FINANCE SECRETARY MARGARITO B. TEVES, FINANCE UNDERSECRETARY JOHN P. SEVILLA, AND COMMISSIONER RICARDO ABCEDE OF THE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT (PCGG) IN THEIR CAPACITIES AS CHAIR AND MEMBERS, RESPECTIVELY, OF THE PRIVATIZATION COUNCIL, CHAIRMAN ANTHONI SALIM OF FIRST PACIFIC CO., LTD. IN HIS CAPACITY AS DIRECTOR OF METRO PACIFIC ASSET HOLDINGS INC., CHAIRMAN MANUEL V. PANGILINAN OF PHILIPPINE LONG DISTANCE TELEPHONE COMPANY (PLDT) IN HIS CAPACITY AS MANAGING DIRECTOR OF FIRST PACIFIC CO., LTD., PRESIDENT NAPOLEON L. NAZARENO OF PHILIPPINE LONG DISTANCE TELEPHONE COMPANY, CHAIR FE BARIN OF THE SECURITIES EXCHANGE COMMISSION, and PRESIDENT FRANCIS LIM OF THE PHILIPPINE STOCK EXCHANGE,** *respondents.*

PABLITO V. SANIDAD and ARNO V. SANIDAD, *petitioners-in-intervention.*

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SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; PETITION FOR DECLARATORY RELIEF TREATED AS PETITION FOR *MANDAMUS*. — At the outset, petitioner is faced with a procedural barrier. Among the remedies petitioner seeks, only the petition for prohibition is within the original jurisdiction of this court, which however is not exclusive but is concurrent with the Regional Trial Court and the Court of Appeals. The actions for declaratory relief, injunction, and annulment of sale are not embraced within the original jurisdiction of the Supreme Court. On this ground alone, the petition could have been dismissed outright. While direct resort to this Court may be justified in a petition for prohibition, the Court shall nevertheless refrain from discussing the grounds in support of the petition for prohibition since on 28 February 2007, the questioned sale was consummated when MPAH paid IPC ₱25,217,556,000 and the government delivered the certificates for the 111,415 PTIC shares. However, since the threshold and purely legal issue on the definition of the term "capital" in Section 11, Article XII of the Constitution has far-reaching implications to the national economy, the Court treats the petition for declaratory relief as one for *mandamus*. x x x It is well-settled that this Court may treat a petition for declaratory relief as one for *mandamus* if the issue involved has far-reaching implications. As this Court held in *Salvacion:* The Court has no original and exclusive jurisdiction over a petition for declaratory relief. **However, exceptions to this rule have been recognized. Thus, where the petition has far-reaching implications and raises questions that should be resolved, it may be treated as one for *mandamus***.

2. POLITICAL LAW; JUDICIARY DEPARTMENT; JUDICIAL REVIEW; INSTANT PETITION RAISES A PURELY LEGAL ISSUE WHICH IS OF TRANSCENDENTAL IMPORTANCE TO THE NATIONAL ECONOMY AND MORE SIGNIFICANTLY FOR THE BENEFIT OF THE ENTIRE FILIPINO PEOPLE, TO ENSURE, IN THE WORDS OF THE CONSTITUTION, "A SELF-RELIANT AND INDEPENDENT NATIONAL ECONOMY EFFECTIVELY CONTROLLED BY FILIPINOS." — In the present case, petitioner seeks primarily the interpretation of the term "capital" in Section 11, Article XII of the Constitution. He prays that

this Court declare that the term "capital" refers to common shares only, and that such shares constitute "the sole basis in determining foreign equity in a public utility." Petitioner further asks this Court to declare any ruling inconsistent with such interpretation unconstitutional. The interpretation of the term "capital" in Section 11, Article XII of the Constitution has far-reaching implications to the national economy. In fact, a resolution of this issue will determine whether Filipinos are masters, or second class citizens, in their own country. What is at stake here is whether Filipinos or foreigners will have ***effective control*** of the national economy. Indeed, if ever there is a legal issue that has far-reaching implications to the entire nation, and to future generations of Filipinos, it is the threshold legal issue presented in this case. The Court first encountered the issue on the definition of the term "capital" in Section 11, Article XII of the Constitution in the case of *Fernandez v. Cojuangco,* docketed as G.R. No. 157360. That case involved the same public utility (PLDT) and substantially the same private respondents. Despite the importance and novelty of the constitutional issue raised therein and despite the fact that the petition involved a purely legal question, the Court declined to resolve the case on the merits, and instead denied the same for disregarding the hierarchy of courts. There, petitioner Fernandez assailed on a pure question of law the Regional Trial Court's Decision of 21 February 2003 *via* a petition for review under Rule 45. The Court's Resolution, denying the petition, became final on 21 December 2004. The instant petition therefore presents the Court with another opportunity to finally settle this **purely legal issue** which is of transcendental importance to the national economy and a fundamental requirement to a faithful adherence to our Constitution. The Court must forthwith seize such opportunity, not only for the benefit of the litigants, but more significantly for the benefit of the entire Filipino people, to ensure, in the words of the Constitution, "a self-reliant and independent national economy **effectively controlled** by Filipinos." Besides, in the light of vague and confusing positions taken by government agencies on this purely legal issue, present and future foreign investors in this country deserve, as a matter of basic fairness, a categorical ruling from this Court on the extent of their participation in the capital of public utilities and other nationalized businesses. Despite its far-reaching implications to the national economy,

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this purely legal issue has remained unresolved for over 75 years since the 1935 Constitution. There is no reason for this Court to evade this ever recurring fundamental issue and delay again defining the term "capital," which appears not only in Section 11, Article XII of the Constitution, but also in Section 2, Article XII on co-production and joint venture agreements for the development of our natural resources, in Section 7, Article XII on ownership of private lands, in Section 10, Article XII on the reservation of certain investments to Filipino citizens, in Section 4(2), Article XIV on the ownership of educational institutions, and in Section 11(2), Article XVI on the ownership of advertising companies.

3. ID.; ID.; ID.; A CITIZEN HAS *LOCUS STANDI* TO BRING A SUIT ON MATTERS OF TRANSCENDENTAL IMPORTANCE TO THE PUBLIC. — There is no dispute that petitioner is a stockholder of PLDT. As such, he has the right to question the subject sale, which he claims to violate the nationality requirement prescribed in Section 11, Article XII of the Constitution. If the sale indeed violates the Constitution, then there is a possibility that PLDT's franchise could be revoked, a dire consequence directly affecting petitioner's interest as a stockholder. More importantly, there is no question that the instant petition raises matters of transcendental importance to the public. The fundamental and threshold legal issue in this case, involving the national economy and the economic welfare of the Filipino people, far outweighs any perceived impediment in the legal personality of the petitioner to bring this action. In *Chavez v. PCGG*, the Court upheld the right of a citizen to bring a suit on matters of transcendental importance to the public, thus: In *Tañada v. Tuvera*, the Court asserted that **when the issue concerns a public right and the object of *mandamus* is to obtain the enforcement of a public duty, the people are regarded as the real parties in interest; and because it is sufficient that petitioner is a citizen and as such is interested in the execution of the laws, he need not show that he has any legal or special interest in the result of the action**. In the aforesaid case, the petitioners sought to enforce their right to be informed on matters of public concern, a right then recognized in Section 6, Article IV of the 1973 Constitution, in connection with the rule that laws in order to be valid and enforceable must be published in the Official Gazette or otherwise effectively promulgated. In ruling for

the petitioners' legal standing, the Court declared that the right they sought to be enforced 'is a public right recognized by no less than the fundamental law of the land.' *Legaspi v. Civil Service Commission*, while reiterating Tañada, further declared that '**when a *mandamus* proceeding involves the assertion of a public right, the requirement of personal interest is satisfied by the mere fact that petitioner is a citizen and, therefore, part of the general 'public' which possesses the right**.' Further, in *Albano v. Reyes*, we said that while expenditure of public funds may not have been involved under the questioned contract for the development, management and operation of the Manila International Container Terminal, '**public interest [was] definitely involved considering the important role [of the subject contract] . . . in the economic development of the country and the magnitude of the financial consideration involved**.' We concluded that, as a consequence, the disclosure provision in the Constitution would constitute sufficient authority for upholding the petitioner's standing. Clearly, since the instant petition, brought by a citizen, involves matters of transcendental public importance, the petitioner has the requisite *locus standi*.

4. ID.; 1987 CONSTITUTION; NATIONAL ECONOMY AND PATRIMONY; FILIPINIZATION OF PUBLIC UTILITIES PROVISION; AN EXPRESS RECOGNITION OF THE SENSITIVE AND VITAL POSITION OF PUBLIC UTILITIES BOTH IN THE NATIONAL ECONOMY AND FOR NATIONAL SECURITY. — Father Joaquin G. Bernas, S.J., a leading member of the 1986 Constitutional Commission, reminds us that the Filipinization provision in the 1987 Constitution is one of the products of the spirit of nationalism which gripped the 1935 Constitutional Convention. The 1987 Constitution "provides for the Filipinization of public utilities by requiring that any form of authorization for the operation of public utilities should be granted only 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.' **The provision is [an express] recognition of the sensitive and vital position of public utilities both in the national economy and for national security."** 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. This specific provision

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explicitly reserves to Filipino citizens control of public utilities, pursuant to an overriding economic goal of the 1987 Constitution: to "conserve and develop our patrimony" and ensure "a self-reliant and independent national economy ***effectively controlled*** by Filipinos." Any citizen or juridical entity desiring to operate a public utility must therefore meet the minimum nationality requirement prescribed in Section 11, Article XII of the Constitution. Hence, for a corporation to be granted authority to operate a public utility, at least 60 percent of its "capital" must be owned by Filipino citizens.

5. ID.; ID.; ID.; 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. — The term "capital" in Section 11, Article XII of the 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 comprising both common and non-voting preferred shares. The Corporation Code of the Philippines classifies shares as common or preferred. x x x 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 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.** 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.

6. ID.; ID.; ID.; MERE LEGAL TITLE IS INSUFFICIENT TO MEET THE 60 PERCENT FILIPINO OWNED "CAPITAL" REQUIRED IN THE CONSTITUTION. — Mere legal title is insufficient to meet the 60 percent Filipino-owned "capital" required in the Constitution. 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]."

7. ID.; ID.; ID.; A BROAD DEFINITION OF THE TERM "CAPITAL" AS THE TOTAL OUTSTANDING CAPITAL STOCK, UNJUSTIFIABLY DISREGARDS WHO OWNS THE ALL-IMPORTANT VOTING STOCK WHICH NECESSARILY EQUATES TO CONTROL OF THE PUBLIC UTILITY; A BROAD DEFINITION WILL ALSO RENDER ILLUSORY THE STATE POLICY OF AN INDEPENDENT NATIONAL ECONOMY EFFECTIVELY CONTROLLED BY FILIPINOS. — To construe broadly the term "capital" as the total outstanding capital stock, including both common and *non-voting* preferred 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." A broad definition unjustifiably disregards who owns the all-important voting stock, which necessarily equates to control of the public utility. We shall illustrate the glaring anomaly in giving a broad definition to the term "capital." Let us assume that a corporation has 100 common shares owned by foreigners and 1,000,000

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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. It also renders illusory the State policy of an independent national economy ***effectively controlled*** by Filipinos. The example given is not theoretical but can be found in the real world, ***and in fact exists in the present case***.

8. ID.; ID.; ID.; ONLY HOLDERS OF COMMON SHARES CAN VOTE IN THE ELECTION OF DIRECTORS, MEANING ONLY COMMON SHAREHOLDERS EXERCISE CONTROL OVER RESPONDENT PHILIPPINE LONG DISTANCE TELEPHONE COMPANY (PLDT). — Holders of PLDT preferred shares are explicitly denied of the right to vote in the election of directors. PLDT's Articles of Incorporation expressly state that "**the holders of Serial Preferred Stock shall not be entitled to vote at any meeting of the stockholders for the election of directors or for any other purpose** or otherwise participate in any action taken by the corporation or its stockholders, or to receive notice of any meeting of stockholders." On the other hand, holders of common shares are granted the exclusive right to vote in the election of directors. PLDT's Articles of Incorporation state that "each holder of Common Capital Stock shall have one vote in respect of each share of such stock held by him on all matters voted upon by the stockholders, and **the holders of Common Capital Stock shall have the exclusive right to vote for the election of directors and for all other purposes.**" In short, only holders

of common shares can vote in the election of directors, meaning only common shareholders exercise control over PLDT. Conversely, holders of preferred shares, who have no voting rights in the election of directors, do not have any control over PLDT. In fact, under PLDT's Articles of Incorporation, holders of common shares have voting rights for all purposes, while holders of preferred shares have no voting right for any purpose whatsoever. It must be stressed, and **respondents do not dispute**, that foreigners hold a majority of the common shares of PLDT. In fact, based on PLDT's 2010 General Information Sheet (GIS), which is a document required to be submitted annually to the Securities and Exchange Commission, foreigners hold 120,046,690 common shares of PLDT whereas Filipinos hold only 66,750,622 common shares. In other words, foreigners hold 64.27% of the total number of PLDT's common shares, while Filipinos hold only 35.73%. Since holding a majority of the common shares equates to control, it is clear that foreigners exercise control over PLDT. Such amount of control unmistakably exceeds the allowable 40 percent limit on foreign ownership of public utilities expressly mandated in Section 11, Article XII of the Constitution.

9. ID.; ID.; ID.; THE 2010 GENERAL INFORMATION SHEET UNDENIABLY SHOWS THAT BENEFICIAL INTEREST IN PLDT IS NOT WITH THE NON-VOTING PREFERRED SHARES BUT WITH THE COMMON SHARES, BLATANTLY VIOLATING THE CONSTITUTIONAL REQUIREMENT OF 60 PERCENT FILIPINO CONTROL AND BENEFICIAL OWNERSHIP IN A PUBLIC UTILITY. — The Dividend Declarations of PLDT for 2009, as submitted to the SEC, shows that per share the SIP preferred shares earn a pittance in dividends compared to the common shares. PLDT declared dividends for the common shares at ₱70.00 per share, while the declared dividends for the preferred shares amounted to a measly ₱1.00 per share. So the preferred shares not only cannot vote in the election of directors, they also have very little and obviously negligible dividend earning capacity compared to common shares. As shown in PLDT's 2010 GIS, as submitted to the SEC, the par value of PLDT common shares is ₱5.00 per share, whereas the par value of preferred shares is ₱10.00 per share. In other words, preferred shares have twice the par value of common shares but cannot elect directors and have only 1/70 of the dividends of common

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shares. Moreover, 99.44% of the preferred shares are owned by Filipinos while foreigners own only a minuscule 0.56% of the preferred shares. Worse, preferred shares constitute 77.85% of the authorized capital stock of PLDT while common shares constitute only 22.15%. This undeniably shows that beneficial interest in PLDT is not with the non-voting preferred shares but with the common shares, blatantly violating the constitutional requirement of 60 percent Filipino control and Filipino beneficial ownership in a public utility.

10. ID.; ID.; ID.; FILIPINOS HOLD LESS THAN 60 PERCENT OF THE VOTING STOCK, AND EARN LESS THAN 60 PERCENT OF THE DIVIDENDS OF PLDT DIRECTLY CONTRAVENING THE CONSTITUTIONAL MANDATE THAT THE LEGAL AND BENEFICIAL OWNERSHIP OF 60 PERCENT OF THE OUTSTANDING CAPITAL STOCK MUST REST IN THE HANDS OF FILIPINOS. — The legal and beneficial ownership of 60 percent of the outstanding capital stock must rest in the hands of Filipinos in accordance with the constitutional mandate. Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is constitutionally required for the State's grant of authority to operate a public utility. The undisputed fact that the PLDT preferred shares, 99.44% owned by Filipinos, are non-voting and earn only 1/70 of the dividends that PLDT common shares earn, grossly violates the constitutional requirement of 60 percent Filipino control and Filipino beneficial ownership of a public utility. **In short, Filipinos hold less than 60 percent of the voting stock, and earn less than 60 percent of the dividends, of PLDT.** This directly contravenes the express command in Section 11, Article XII of the Constitution that "[n]o franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to x x x corporations x x x organized under the laws of the Philippines, **at least sixty per centum of whose capital is owned by such citizens x x x.**" To repeat, (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.

11. ID.; ID.; ID.; CONSTRUING THE TERM "CAPITAL" IN SECTION 11, ARTICLE XII OF THE CONSTITUTION TO INCLUDE BOTH VOTING AND NON-VOTING SHARES WILL RESULT IN THE ABJECT SURRENDER OF OUR TELECOMMUNICATIONS INDUSTRY TO FOREIGNERS AMOUNTING TO A CLEAR ABDICATION OF THE STATE'S CONSTITUTIONAL DUTY TO LIMIT CONTROL OF PUBLIC UTILITIES TO FILIPINO CITIZENS. — Indisputably, construing the term "capital" in Section 11, Article XII of the Constitution to include both voting and non-voting shares will result in the abject surrender of our telecommunications industry to foreigners, amounting to a clear abdication of the State's constitutional duty to limit control of public utilities to Filipino citizens. Such an interpretation certainly runs counter to the constitutional provision reserving certain areas of investment to Filipino citizens, such as the exploitation of natural resources as well as the ownership of land, educational institutions and advertising businesses. The Court should never open to foreign control what the Constitution has expressly reserved to Filipinos for that would be a betrayal of the Constitution and of the national interest. The Court must perform its solemn duty to defend and uphold the intent and letter of the Constitution to ensure, in the words of the Constitution, "a self-reliant and independent national economy *effectively controlled* by Filipinos."

12. ID.; ID.; ID.; SECTION 11, ARTICLE XII OF THE CONSTITUTION IS SELF EXECUTING AND THERE IS NO NEED FOR LEGISLATION TO IMPLEMENT IT. — Section 11, Article XII of the Constitution, like other provisions of the Constitution expressly reserving to Filipinos *specific* areas of investment, such as the development of natural resources and ownership of land, educational institutions and advertising business, is ***self-executing***. There is no need for legislation to implement these self-executing provisions of the Constitution.

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x x x To treat Section 11, Article XII of the Constitution as not self-executing would mean that since the 1935 Constitution, or over the last 75 years, not one of the constitutional provisions expressly reserving specific areas of investments to corporations, at least 60 percent of the "capital" of which is owned by Filipinos, was enforceable. In short, the framers of the 1935, 1973 and 1987 Constitutions miserably failed to effectively reserve to Filipinos specific areas of investment, like the operation by corporations of public utilities, the exploitation by corporations of mineral resources, the ownership by corporations of real estate, and the ownership of educational institutions. All the legislatures that convened since 1935 also miserably failed to enact legislations to implement these vital constitutional provisions that determine who will effectively control the national economy, Filipinos or foreigners. This Court cannot allow such an absurd interpretation of the Constitution.

13. MERCANTILE LAW; SECURITIES AND EXCHANGE COMMISSION (SEC); CAN BE COMPELLED BY *MANDAMUS* TO PERFORM ITS STATUTORY DUTY WHEN IT UNLAWFULLY NEGLECTS TO PERFORM THE SAME. — This Court has held that the SEC "has both regulatory and adjudicative functions." Under its regulatory functions, the SEC can be compelled by *mandamus* to perform its statutory duty when it unlawfully neglects to perform the same. Under its adjudicative or quasi-judicial functions, the SEC can be also be compelled by *mandamus* to hear and decide a possible violation of any law it administers or enforces when it is mandated by law to investigate such violation.

14. ID.; ID.; THE SEC HAS THE POWER UNDER THE CORPORATION CODE TO REJECT OR DISAPPROVE THE ARTICLES OF INCORPORATION OF ANY CORPORATION WHERE THE REQUIRED PERCENTAGE OF OWNERSHIP OF THE CAPITAL STOCK TO BE OWNED BY CITIZENS OF THE PHILIPPINES HAS NOT BEEN COMPLIED WITH AS REQUIRED BY EXISTING LAWS OR THE CONSTITUTION. — Under Section 17(4) of the Corporation Code, the SEC has the regulatory function to reject or disapprove the Articles of Incorporation of any corporation where **"the required percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or**

the Constitution." Thus, the SEC is the government agency tasked with the statutory duty to enforce the nationality requirement prescribed in Section 11, Article XII of the Constitution on the ownership of public utilities. This Court, in a petition for declaratory relief that is treated as a petition for *mandamus* as in the present case, can direct the SEC to perform its statutory duty under the law, a duty that the SEC has apparently unlawfully neglected to do based on the 2010 GIS that respondent PLDT submitted to the SEC.

VELASCO, JR., *J., separate dissenting opinion*:

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; DECLARATORY RELIEF; NOT PROPER IN CASE AT BAR. — It is patently clear that petitions for declaratory relief, annulment of sale and injunction do not fall within the exclusive original jurisdiction of this Court. *First*, the court with the proper jurisdiction for declaratory relief is the Regional Trial Court (RTC). Sec. 1, Rule 63 of the Rules of Court stresses that an action for declaratory relief is within the **exclusive** original jurisdiction of the RTC, *viz*: Any person interested under a deed, will, contract or other written instrument, whose rights are affected by a statute, executive order or regulation, ordinance, or any other governmental regulation may, before breach or violation thereof, **bring an action in the appropriate Regional Trial Court** to determine any question of construction or validity arising, and for a declaration of his rights or duties, thereunder. An action for declaratory relief also requires the following: (1) a justiciable controversy between persons whose interests are adverse; (2) the party seeking the relief has a legal interest in the controversy; and (3) the issue is ripe for judicial determination. As previously discussed, petitioner lacks any real interest in this action; thus, no justiciable controversy between adverse interests exists. Further, the Rules of Court also requires that "[a]ll persons who have or claim any interest which would be affected by the declaration shall be made parties." The failure to implead all persons with a claim or interest in the subject matter of the petition for declaratory relief is a jurisdictional defect. What is more, an action for declaratory relief requires that it be filed before "the breach or violation of the statute, deed, contract, *etc*. to which it refers. Where the law or contract has already been contravened prior

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to the filing of an action for declaratory relief, the court can no longer assume jurisdiction over the action." Here, petitioner himself points out the fact that, using the common stockholding basis, the 40% maximum foreign ownership limit on PLDT was already violated long before the sale of the PTIC shares by the government. In addition, the sale itself has already been consummated. This only means that an action for declaratory relief is no longer proper.

2. ID.; ID.; *MANDAMUS*; PETITION IS PREMATURE IF THERE ARE ADMINISTRATIVE REMEDIES AVAILABLE TO PETITIONER. — A petition for *mandamus* is premature if there are administrative remedies available to petitioner. Under the doctrine of primary administrative jurisdiction, "courts cannot or will not determine a controversy where the issues for resolution demand the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact. x x x Along with this, the doctrine of exhaustion of administrative remedies also requires that where an administrative remedy is provided by statute relief must be sought by exhausting this remedy before the courts will act. In the instant case, the power and authority to determine compliance with the Constitution lies with the SEC. Under Section 17(4) of the Corporation Code, the SEC has the power to approve or reject the Articles of Incorporation of any corporation where "the required percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution." Similarly, under Section 5 of the Securities Regulation Code, the SEC is conferred with the power to suspend or revoke the franchise or certificate of registration of corporations upon any of the grounds provided by law. It bears stressing that the SEC also has the power to investigate violations of the Securities Regulation Code and its Amended Rules. With this, it is clear that petitioner failed to invoke the primary jurisdiction of the SEC with respect to this matter. Additionally, the petition contains numerous questions of fact which is not allowed in a petition for *mandamus*. Hence, based on the foregoing, a petition for *mandamus* is evidently improper. *Second*, since an action for annulment of sale is an ordinary civil action incapable of pecuniary estimation, it also falls within the exclusive original jurisdiction of the RTC.

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3. ID.; CIVIL PROCEDURE; JOINDER OF CAUSES OF ACTION; SPECIFICALLY PROHIBITS THE JOINING OF SPECIAL CIVIL ACTIONS WITH ORDINARY CIVIL ACTIONS; VIOLATED IN CASE AT BAR. — It should be noted that the non-joinder of ordinary civil actions with special civil actions is elementary in remedial law. Sec. 5, Rule 2 of the Rules specifically prohibits the joining of special civil actions or actions governed by special rules with ordinary civil actions. In this case, petitioner violated this basic rule when he joined several special civil actions, prohibition and declaratory relief, and the ordinary civil actions for annulment and injunction.

4. POLITICAL LAW; JUDICIARY DEPARTMENT; JUDICIAL REVIEW; PETITIONER HAS NO LEGAL STANDING TO QUESTION THE SALE OF THE PHILIPPINE TELECOMMUNICATIONS INVESTMENT CORPORATION (PTIC) SHARES OF THE GOVERNMENT TO RESPONDENT FIRST PACIFIC CO., LTD. — Despite this, the *ponencia* decided to treat the petition for declaratory relief as one for *mandamus*, citing the rule that "where the petition has far-reaching implications and raises questions that should be resolved, it may be treated as one for *mandamus*." However, such rule is not absolute. In *Macasiano v. National Housing Authority*, the Court explicitly stated that the exercise of such discretion, whether to treat a petition for declaratory relief as one for *mandamus*, **presupposes that the petition is otherwise viable or meritorious**. As I shall discuss subsequently in the substantive portion of this opinion, the petition in this case is clearly not viable or meritorious. Moreover, one of the reasons pointed out by the Court in *Macasiano* when it refused to treat the petition for declaratory relief as one for *mandamus* was that the petitioner lacked the proper standing to file the petition. Thus, the petition was subsequently dismissed. This is exactly similar to the instant case. As previously explained, petitioner has no legal standing to bring the present petition before this Court. He failed to show any real interest in the case substantial enough to give him the required legal standing to question the sale of the PTIC shares of the government to First Pacific.

5. ID.; ID.; THE DOCTRINE OF HIERARCHY OF COURTS DICTATES THAT WHEN JURISDICTION IS SHARED CONCURRENTLY WITH DIFFERENT COURTS, THE PROPER SUIT SHOULD BE FIRST FILED WITH THE

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LOWER RANKING COURT AND FAILURE TO DO SO IS SUFFICIENT CAUSE FOR DISMISSAL OF PETITION. — Although this Court, the CA, and the RTC have "concurrent jurisdiction to issue writs of *certiorari*, **prohibition**, *mandamus*, *quo warranto, habeas corpus* and **injunction**, such concurrence does not give the petitioner unrestricted freedom of choice of court forum." The doctrine of hierarchy of courts dictates that when jurisdiction is shared concurrently with different courts, the proper suit should first be filed with the lower-ranking court. Failure to do so is sufficient cause for the dismissal of a petition. x x x In the instant case, petitioner should have filed the petition for injunction and prohibition with the trial courts. Petitioner failed to show any exceptional or compelling circumstance to justify the exception to the rule of hierarchy of courts. Thus, absent such justification, the rule must be upheld.

6. ID.; CONSTITUTIONAL LAW; BILL OF RIGHTS; DUE PROCESS; PETITIONER FAILED TO IMPLEAD ALL INDISPENSABLE PARTIES; WITHOUT THE INDISPENSABLE PARTIES, THE COURT IS WANTING IN AUTHORITY TO ACT OR RULE ON THE PRESENT PETITION. — Procedural due process requires that before any of the common shares in excess of the 40% maximum foreign ownership limit can be taken, all the shareholders have to be given notice and a trial should be held before their shares are taken. This means that petitioner should have impleaded all the foreign natural and juridical shareholders of PLDT so that they can be heard. The foreign shareholders are considered as an "indispensable party" or one who: has such an interest in the controversy or subject matter that a final adjudication cannot be made, in his absence, without injuring or affecting that interest[;] a party who has not only an interest in the subject matter of the controversy, but also has an interest of such nature that a final decree cannot be made without affecting his interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. It has also been considered that an indispensable party is a person in whose absence there cannot be a determination between the parties already before the court which is effective, complete, or equitable. Further, an indispensable party is one who must be included in an action before it may properly go forward. At the same time, the Rules

of Court explicitly requires the joinder of indispensable parties or "[p]arties in interest without whom no final determination can be had." This is mandatory. As held in *Pepsico, Inc. v. Emerald Pizza, Inc.*, their absence renders all actions of the court null and void x x x.

7. ID.; ID.; ID.; ID.; SINCE THE PRESENT PETITION PARTAKES OF A COLLATERAL ATTACK ON PHILIPPINE LONG DISTANCE TELEPHONE (PLDT) COMPANY'S FRANCHISE, DUE PROCESS REQUIRES THAT A PETITION FOR *QUO WARRANTO* BE FILED ATTACKING THE FRANCHISE ITSELF. — The present petition partakes of a collateral attack on PLDT's franchise as a public utility with petitioner pleading as ground PLDT's alleged breach of the 40% limit on foreign equity. Such is not allowed. As discussed in *PLDT v. National Telecommunications Commission*, a franchise is a property right that can only be questioned in a direct proceeding: x x x A franchise is a property right and cannot be revoked or forfeited without due process of law. The determination of the right to the exercise of a franchise, or whether the right to enjoy such privilege has been forfeited by non-user, is more properly the subject of the prerogative writ of *quo warranto*, the right to assert which, as a rule, belongs to the State "upon complaint or otherwise" x x x the reason being that the abuse of a franchise is a public wrong and not a private injury. A forfeiture of a franchise will have to be declared in a direct proceeding for the purpose brought by the State because a franchise is granted by law and its unlawful exercise is primarily a concern of Government. Hence, due process requires that for the revocation of franchise a petition for *quo warranto* be filed directly attacking the franchise itself. Evidently, the petition is patently flawed and the petitioner availed himself of the wrong remedies. These jurisdictional and procedural grounds, by themselves, are ample enough to warrant the dismissal of the petition. Granting *arguendo* that the petition is sufficient in substance and form, it will still suffer the same fate.

8. ID.; ID.; 1987 CONSTITUTION; NATIONAL ECONOMY AND PATRIMONY; FILIPINIZATION OF PUBLIC UTILITIES PROVISION; THE INTENT OF THE FRAMERS OF THE CONSTITUTION WAS NOT TO LIMIT THE APPLICATION OF THE WORD "CAPITAL"

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TO VOTING SHARES OR COMMON SHARES; BY USING THE WORD "CAPITAL," THE FRAMERS OF THE CONSTITUTION ADOPTED THE DEFINITON OR INTERPRETATION THAT INCLUDES ALL TYPES OF SHARES, WHETHER VOTING OR NON-VOTING. — Contrary to pronouncement of the *ponencia*, the intent of the framers of the Constitution was not to limit the application of the word "capital" to voting or common shares alone. In fact, the Records of the Constitutional Commission reveal that even though the UP Law Center proposed the phrase "voting stock or controlling interest," the framers of the Constitution did not adopt this but instead used the word "capital." x x x Undoubtedly, the framers of the Constitution decided to use the word "capital" in all provisions that talk about foreign participation and **intentionally** left out the phrase "voting stocks" or "controlling interest." *Cassus Omissus Pro Omisso Habendus Est* — a person, object or thing omitted must have been omitted intentionally. In this case, the intention of the framers of the Constitution is very clear — to omit the phrases "voting stock" and "controlling interest." Evidently, the framers of the Constitution were more comfortable with going back to the wording of the 1935 and 1973 Constitutions, which is to use the 60-40 percentage for the basis of the capital stock of the corporation. Additionally, the phrases "voting stock or controlling interest" were also initially used in Secs. 2 and 10, Article XII of the 1987 Constitution. These provisions involve the development of natural resources and certain investments. However, after much debate, they were also replaced with the word "capital" alone. All of these were very evident in the aforementioned deliberations. Much more significant is the fact that a comprehensive examination of the constitutional deliberations in their entirety will reveal that the framers of the Constitution themselves understood that the word capital includes both voting and non-voting shares and still decided to use "capital" alone. To emphasize, by using the word "capital," the framers of the Constitution adopted the definition or interpretation that includes **all** types of shares, whether voting or non-voting.

9. ID.; ID.; ID.; ID.; ID.; THE *PONENCIA* FAILED TO SEE THE FACT THAT THE FOREIGN INVESTMENTS ACT (FIA) SPECIFICALLY HAS THE PHRASE "ENTITLED TO VOTE" AFTER THE PHRASE "TOTAL OUTSTANDING

CAPITAL STOCK" WHICH CONNOTES THE INCLUSION OF ALL TYPES OF SHARES UNDER THE TERM "CAPITAL" AND NOT JUST THOSE THAT ARE ENTITLED TO VOTE. — The *ponencia* failed to see the fact that the FIA specifically has the phrase "entitled to vote" after the phrase "total outstanding capital stock." Logically, this means that interpreting the phrase "total outstanding capital stock" **alone** connotes the inclusion of all types of shares under the term "capital" and not just those that are entitled to vote. By adding the phrase "entitled to vote," the FIA sought to distinguish between the shares that can vote and those that cannot. Thus, it is very clear that even the FIA itself supports the definition of the term "capital" as including all types of shares. As a matter of fact, in the Senate deliberations of the FIA, Senator Angara pointed out that the word "capital," as used in the 1987 Constitution, includes all types of shares.

10. ID.; ID.; ID.; ID.; ID.; THE PHRASE "ENTITLED TO VOTE" SHOULD NOT BE INTERPRETED TO BE LIMITED TO COMMON SHARES ALONE OR THOSE SHARES ENTITLED TO VOTE IN THE ELECTION OF MEMBERS OF THE BOARD OF DIRECTORS; THE FOREIGN INVESTMENTS ACT SHOULD BE READ IN HARMONY WITH THE CONSTITUTION WHICH PROVIDES FOR A SINGLE REQUIREMENT FOR THE OPERATION OF A PUBLIC UTILITY THAT 60% OF THE CAPITAL MUST BE FILIPINO OWNED AND A MERE STATUTE CANNOT ADD ANOTHER REQUIREMENT. — It is a well-settled rule of statutory construction that a statute should be construed whenever possible in a manner that will avoid conflict with the Constitution. Where a statute is reasonably susceptible of two constructions, one constitutional and the other unconstitutional, the construction in favor of its constitutionality should be adopted. In this case, the FIA should be read in harmony with the Constitution. Since the Constitution only provides for a single requirement for the operation of a public utility under Sec. 11, *i.e.*, 60% capital must be Filipino-owned, a mere statute cannot add another requirement. Otherwise, such statute may be considered unconstitutional. Accordingly, the phrase "entitled to vote" should not be interpreted to be limited to common shares alone or those shares entitled to vote in the election of members of the Board of Directors. It should also include those deemed non-voting because they also

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have voting rights. Sec. 6 of the Corporation Code grants voting rights to holders of shares of a corporation on certain key fundamental corporate matters despite being classified as non-voting in the articles of incorporation. These are: 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. Clearly, the shares classified as non-voting are also entitled to vote under these circumstances. In fact, the FIA did not say "entitled to vote in the management affairs of the corporation" or "entitled to vote in the election of the members of the Board of Directors." Verily, where the law does not distinguish, neither should We. Hence, the proper interpretation of the phrase "entitled to vote" under the FIA should be that it applies to all shares, whether classified as voting or non-voting shares. Such construction is in fact in harmony with the fundamental law of the land. Stockholders, whether holding voting or non-voting stocks, have all the rights, powers and privileges of ownership over their stocks. This necessarily includes the right to vote because such is inherent in and incidental to the ownership of corporate stocks, and as such is a property right.

11. ID.; ID.; ID.; ID.; IN APPLYING THE CONTROL TEST, THE SECURITIES AND EXCHANGE COMMISSION (SEC) HAS CONSISTENTLY RULED THAT DETERMINATION OF THE NATIONALITY OF THE CORPORATION MUST BE BASED ON THE ENTIRE CAPITAL STOCK, WHICH INCLUDES BOTH VOTING AND NON-VOTING SHARES. — Control is another inherent right of ownership. The circumstances enumerated in Sec. 6 of the Corporation Code clearly evince this. It gives voting rights to the stocks deemed as non-voting as to ***fundamental* and *major* corporate changes**. Thus, the issue should not only dwell on the daily management affairs of the corporation but also on the equally important fundamental changes that may need to be voted on. On this, the "non-voting" shares also exercise control, together with the voting shares. Consequently, the fact that only holders

of common shares can elect a corporation's board of directors does not mean that only such holders exercise control over the corporation. Particularly, the control exercised by the board of directors over the corporation, by virtue of the corporate entity doctrine, is totally distinct from the corporation's stockholders and any power stockholders have over the corporation as owners. It is settled that when the activity or business of a corporation falls within any of the partly nationalized provisions of the Constitution or a special law, the "control test" must also be applied to determine the nationality of a corporation on the basis of the nationality of the stockholders who control its equity. The control test was laid down by the Department of Justice (DOJ) in its Opinion No. 18 dated January 19, 1989. It determines the nationality of a corporation with alien equity based on the percentage of capital owned by Filipino citizens. It reads: Shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as Philippine nationality, but if the percentage of Filipino ownership in the corporation or partnership is less than 60% only the number of shares corresponding to such percentage shall be counted as of Philippine nationality. In a catena of opinions, the SEC, "the government agency tasked with the statutory duty to enforce the nationality requirement prescribed in Section 11, Article XII of the Constitution on the ownership of public utilities," has consistently applied the control test. The FIA likewise adheres to the control test. This intent is evident in the May 21, 1991 deliberations of the Bicameral Conference Committee (Committees on Economic Affairs of the Senate and House of Representatives). x x x This intent is even more apparent in the Implementing Rules and Regulations (IRR) of the FIA. In defining a "Philippine national," **Section 1(b) of the IRR of the FIA categorically states that for the purposes of determining the nationality of a corporation the control test should be applied**. The cardinal rule in the interpretation of laws is to ascertain and give effect to the intention of the legislator. Therefore, the legislative intent to apply the control test in the determination of nationality must be given effect. Significantly, **in applying the control test, the SEC has consistently ruled that the determination of the nationality of the corporation must be based on the *entire***

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***outstanding capital stock*, which includes both voting and non-voting shares.**

12. ID.; ID.; ID.; ID.; ID.; THE SEC'S DEFINITION OF THE WORD "CAPITAL" HAS BEEN CONSISTENTLY APPLIED TO INCLUDE THE ENTIRE OUTSTANDING CAPITAL STOCK OF A CORPORATION, IRREGARDLESS OF WHETHER IT IS COMMON OR PREFERRED OR VOTING OR NON-VOTING. — Without a doubt, the SEC's definition of the word "capital" has been consistently applied to include the entire outstanding capital stock of a corporation, irregardless of whether it is common or preferred or voting or non-voting. This contemporaneous construction of the SEC is entitled to great respect and weight especially since it is consistent with the Constitutional Commission's intention to use the term "capital" as applying to all shares, whether common or preferred. It is well to reiterate the principle of contemporaneous construction and the reason why it is entitled to great respect, *viz*: x x x As far back as In re Allen, (2 Phil. 630) a 1903 decision, Justice McDonough, as *ponente*, cited this excerpt from the leading American case of Pennoyer v. McConnaughy, decided in 1891: **The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts,** is so firmly embedded in our jurisprudence that no authorities need be cited to support it.

13. ID.; ID.; ID.; ID.; ID.; IN NO INSTANCE CAN FOREIGNERS OBTAIN MAJORITY SEATS IN THE BOARD OF DIRECTORS; THE RIGHT OF FOREIGN INVESTORS TO ELECT THE MEMBERS OF THE BOARD OF DIRECTORS CANNOT EXCEED THE VOTING RIGHTS OF 40% OF THE COMMON SHARES, EVEN THOUGH THEIR OWNERSHIP OF COMMON SHARES EXCEED 40%.— First of all, it has been established that the word "capital" in the phrase "corporation or associations organized under the laws of the Philippines, at least sixty per centum of whose 'capital' is owned by such citizens" under Sec. 11, Art. XII of the 1987 Constitution means both common or preferred shares or voting or non-voting shares. This phrase is **qualified** by the last sentence of Sec. 11, which reads: x x x **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. The aforequoted constitutional provision is unequivocal — it limits the **participation** of the foreign investors in the governing body to their proportionate share in the capital of the corporation. Participation is "the act of taking part in something." Accordingly, it includes the right to elect or vote for in the election of the members of the Board of Directors. However, this right to participate in the election is restricted by the first sentence of Sec. 11 such that their right cannot exceed their proportionate share in the capital, *i.e.*, 40%. In other words, the right of foreign investors to elect the members of the Board of Directors cannot exceed the voting rights of the 40% of the common shares, even though their ownership of common shares may exceed 40%. Thus, since they can only vote up to 40% of the common shares of the corporation, they will never be in a position to elect majority of the members of the Board of Directors. Consequently, control over the membership of the Board of Directors will always be in the hands of Filipino stockholders although they actually own less than 50% of the common shares. Let Us apply the foregoing principles to the situation of PLDT. Granting without admitting that foreigners own 64.27% of PLDT's common shares and say they own 40% of the total number of common and preferred shares, still they can only vote up to 40% of the common shares of PLDT since their participation in the election of the Board of Directors (the governing body of the corporation) is limited by the 40% ownership of the capital under the first sentence of Sec. 11, Art. XII of the Constitution. The foreigners can only elect members of the Board of Directors based on their 40% ownership of the common shares and their directors will only constitute the minority. In no instance can the foreigners obtain the majority seats in the Board of Directors.

14. ID.; ID.; ID.; ID.; ID.; THE MAJORITY CONTROL OF THE FILIPINOS OVER PLDT IS, AT ALL TIMES, ASSURED, BY THE FACT THAT THE PROPORTIONATE SHARE OF THE FOREIGNERS IN THE CAPITAL IS EVEN LESS THAN 40%. — The 2010 General Information Sheet (GIS) of PLDT reveals that among the thirteen (13) members of the Board of Directors, only two (2) are foreigners.

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It also reveals that the foreign investors only own 13.71% of the capital of PLDT. Obviously, the nomination and election committee of PLDT uses the 40% cap on the foreign ownership of the capital which explains why the foreigners only have two (2) members in the Board of Directors. It is apparent that the 64.27% ownership by foreigners of the common shares cannot be used to elect the majority of the Board of Directors. The fact that the proportionate share of the foreigners in the capital (voting and non-voting shares or common and preferred shares) is even less than 40%, then they are only entitled to voting rights equivalent to the said proportionate share in the capital and in the process elect only a smaller number of directors. This is the reality in the instant case. Hence, the majority control of Filipinos over the management of PLDT is, at all times, assured.

15. ID.; ID.; ID.; ID.; ID.; APPLYING THE *PONENCIA'*S DEFINITION OF THE WORD "CAPITAL" WILL GIVE RISE TO A GREATER ANOMALY BECAUSE IT WILL RESULT IN THE FOREIGNER'S OBTAINING BENEFICIAL OWNERSHIP OF THE CORPORATION, WHICH IS CONTRARY TO THE PROVISIONS OF THE CONSTITUTION; WHEREAS INTERPRETING "CAPITAL" TO INCLUDE BOTH VOTING AND NON-VOTING SHARES WILL RESULT IN GIVING BOTH LEGAL AND BENEFICIAL OWNERSHIP OF THE CORPORATION TO FILIPINOS. — Applying the *ponencia*'s definition of the word "capital" will give rise to a greater anomaly because it will result in the foreigner's obtaining beneficial ownership over the corporation, which is contrary to the provisions of the Constitution; whereas interpreting "capital" to include both voting and non-voting shares will result in giving both legal and beneficial ownership of the corporation to the Filipinos. In the event that the word "capital" is construed as limited to common or voting shares only, it should not have any retroactive effect. Reliance in good faith on the opinions issued by the SEC, the regulating body charged with the duty to enforce the nationality required by the Constitution, should not prejudice any one, especially not the foreign investors. Giving such interpretation retroactive effect is tantamount to violation of due process and would impact negatively on the various foreign investments already present in the country. Accordingly, such construction should only be applied

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prospectively. In sum, the Constitution requires that 60% of the capital be owned by Filipinos. It further requires that the foreign ownership of capital be limited to 40%, as well as its participation in the governing body of the public utility corporation be limited to its proportionate share in the capital which cannot exceed 40% thereof. As a result, control over the Board of Directors and full beneficial ownership of 60% of the capital stock of the corporation are secured in the hands of the Filipinos.

ABAD, *J., dissenting opinion*:

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; ACTIONS FOR INJUNCTION, DECLARATORY RELIEF AND DECLARATION OF NULLITY OF SALE ARE NOT AMONG THE CASES THAT CAN BE INITIATED BEFORE THE SUPREME COURT; SAID ACTIONS BELONG TO OTHER TRIBUNALS. — Strictly speaking, Gamboa actions for injunction, declaratory relief, and declaration of nullity of sale are not among the cases that can be initiated before the Supreme Court. Those actions belong to some other tribunal. And, although the Court has original jurisdiction in prohibition cases, the Court shares this authority with the Court of Appeals and the Regional Trial Courts. But this concurrence of jurisdiction does not give the parties absolute and unrestrained freedom of choice on which court the remedy will be sought. They must observe the hierarchy of courts. As a rule, the Supreme Court will not entertain direct resort to it unless the remedy desired cannot be obtained in other tribunals. Only exceptional and compelling circumstances such as cases of national interest and of serious implications justify direct resort to the Supreme Court for the extraordinary remedy of writ of *certiorari*, prohibition, or *mandamus*. The majority of the Court of course suggests that although Gamboa entitles his actions as ones for injunction, declaratory relief, and declaration of nullity of sale, what controls the nature of such actions are the allegations of his petition. And a valid special civil action for *mandamus* can be made out of those allegations since respondent Secretary of Finance, his undersecretary, and respondent Chairman of the Securities and Exchange Commission are the officials who appear to have the duty in law to implement the foreign ownership restriction that the Constitution commands. To a

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certain extent, I agree with the position that the majority of my colleagues takes on this procedural issue. I believe that a case can be made for giving due course to Gamboa's action. Indeed, there are in his actions compelling reasons to relax the doctrine of hierarchy of courts. The need to address the important question of defining the constitutional limit on foreign ownership of public utilities under Section 11, Article XII of the 1987 Constitution, a bedrock policy adopted by the Filipino people, is certainly a matter of serious national interest. Such policy is intended to develop a self-reliant and independent national economy effectively controlled by Filipino entrepreneurs. Indeed, as the Court said in *Espina v. Zamora*, the provisions of Article XII of the 1987 Constitution lay down the ideals of economic nationalism. One of these is the Filipinization of public utilities under Section 11 which recognizes the very strategic position of public utilities both in the national economy and for national security. The participation of foreign capital is encouraged since the establishment and operation of public utilities may require the investment of substantial capital that Filipino citizens could possibly not afford. But at the same time, the Constitution wants to limit foreign involvement to prevent them from assuming control of public utilities which may be inimical to national interest.

2. POLITICAL LAW; CONSTITUTIONAL LAW; 1987 CONSTITUTION; NATIONAL ECONOMY AND PATRIMONY; FILIPINIZATION OF PUBLIC UTILITIES PROVISION; THE INTERPRETATION ADOPTED BY THE MAJORITY PLACES ON THE COURT THE AUTHORITY TO DEFINE AND INTERPRET THE MEANING OF "CAPITAL" WHICH AUTHORITY LIES WITH THE CONGRESS SINCE IT PARTAKES OF POLICY MAKING FOUNDED ON A GENERAL PRINCIPLE LAID DOWN BY THE FUNDAMENTAL LAW. — Gamboa contends that the constitutional limit on foreign ownership in public utilities should be based on the ownership of **common** or **voting shares** since it is through voting that stockholders are able to have control over a corporation. Preferred or non-voting shares should be excluded from the reckoning. But this interpretation, adopted by the majority, places on the Court the authority to define and interpret the meaning of "capital" in Section 11. I believe, however, that such authority should be for Congress to exercise since

it partakes of policy making founded on a general principle laid down by the fundamental law. The capital restriction written in the constitution lacks sufficient details for orderly and meaningful implementation. Indeed, in the twenty-four years that the provision has been in the Constitution, no concrete step has been taken by any government agency to see to its actual implementation given the absence of clear legislative guidance on how to go about it.

3. ID.; ID.; ID.; ID.; THE CONSTITUTION FAILED TO PROVIDE FOR THE MEANING OF THE TERM "CAPITAL," CONSIDERING THAT THE SHARES OF STOCK OF A CORPORATION VARY IN KINDS. — It has been said that a constitution is a system of fundamental laws for the governance and administration of a nation. It prescribes the permanent framework of a system of government, assigns to the different departments their respective powers and duties, and establishes certain fixed principles on which the government is founded. But while some constitutional provisions are self-executing, others are not. A constitutional provision is self-executing if it fixes the nature and extent of the right conferred and the liability imposed such that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action. On the other hand, if the provision needs a supplementary or enabling legislation, it is merely a declaration of policy and principle which is not self-executing. Here, the Constitution simply states that no franchise for the operation of a public utility shall be granted to a corporation organized under Philippine laws unless at least sixty per centum of its capital is owned by Filipino citizens. Evidently, the Constitution fails to provide for the meaning of the term "capital," considering that the shares of stock of a corporation vary in kinds. The usual classification depends on how profits are to be distributed and which stockholders have the right to vote the members of the corporation's board of directors.

4. ID.; ID.; ID.; ID.; THE COURT SHOULD NOT LEAVE THE MATTER OF COMPLIANCE WITH THE CONSTITUTIONAL LIMIT ON FOREIGN OWNERSHIP IN PUBLIC UTILITIES, A MATTER OF TRANSCENDENTAL IMPORTANCE, TO JUDICIAL LEGISLATION ESPECIALLY SINCE ANY RULING THE COURT MAKES

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ON THE MATTER COULD HAVE DEEP ECONOMIC REPERCUSSIONS. — The Corporation Code does not offer much help, albeit it only confuses, since it uses the terms "capital," "capital stock," or "outstanding capital stock" interchangeably. "Capital" refers to the money, property, or means contributed by stockholders in the corporation and generally implies that the same have been contributed in payment for stock issued to the stockholders. "Capital stock" signifies the amount subscribed and paid-in in money, property or services. "Outstanding capital stock" means the total shares of stock issued to stockholders, whether or not fully or partially paid, except treasury shares. Meanwhile, the Foreign Investments Act of 1991 defines a "Philippine national" as, among others, a corporation organized under the laws of the Philippines of which at least 60% of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines. This gives the impression, as Justice Carpio noted, that the term "capital" refers only to controlling interest or shares entitled to vote. On the other hand, government agencies such as the Securities and Exchange Commission, institutions, and corporations (such as the Philippine National Oil Company-Energy Development Corporation) interpret the term "capital" to include both preferred and common shares. Under this confusing legislative signals, the Court should not leave the matter of compliance with the constitutional limit on foreign ownership in public utilities, a matter of transcendental importance, to judicial legislation especially since any ruling the Court makes on the matter could have deep economic repercussions. This is not a concern over which the Court has competence. The 1987 Constitution laid down the general framework for restricting foreign ownership of public utilities. It is apt for Congress to build up on this framework by defining the meaning of "capital," establishing rules for the implementation of the State policy, providing sanctions for its violation, and vesting in the appropriate agency the responsibility for carrying out the purposes of such policy. Parenthetically, there have been several occasions in the past where Congress provided supplementary or enabling legislation for constitutional provisions that are not self-executing. To name just some: the Comprehensive Agrarian Reform Law of 1988, the Indigenous Peoples Rights Act of 1997, the Local Government Code of 1991, the Anti-Graft and Corrupt Practices

Act, the Speedy Trial Act of 1998, the Overseas Absentee Voting Act of 2003, the Party-List System Act, the Paternity Leave Act of 1996, and the Solo Parents' Welfare Act of 2000.

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D E C I S I O N

CARPIO, *J.*:

The Case

This is an original petition for prohibition, injunction, declaratory relief and declaration of nullity of the sale of shares of stock of Philippine Telecommunications Investment Corporation (PTIC) by the government of the Republic of the Philippines to Metro Pacific Assets Holdings, Inc. (MPAH), an affiliate of First Pacific Company Limited (First Pacific).

The Antecedents

The facts, according to petitioner Wilson P. Gamboa, a stockholder of Philippine Long Distance Telephone Company (PLDT), are as follows:[1]

On 28 November 1928, the Philippine Legislature enacted Act No. 3436 which granted PLDT a franchise and the right to engage in telecommunications business. In 1969, General Telephone and Electronics Corporation (GTE), an American company and a major PLDT stockholder, sold 26 percent of the outstanding common shares of PLDT to PTIC. In 1977,

[1] *Rollo* (Vol. I), pp. 15-103, (Vol. II), pp. 762-768.

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Prime Holdings, Inc. (PHI) was incorporated by several persons, including Roland Gapud and Jose Campos, Jr. Subsequently, PHI became the owner of 111,415 shares of stock of PTIC by virtue of three Deeds of Assignment executed by PTIC stockholders Ramon Cojuangco and Luis Tirso Rivilla. In 1986, the 111,415 shares of stock of PTIC held by PHI were sequestered by the Presidential Commission on Good Government (PCGG). The 111,415 PTIC shares, which represent about 46.125 percent of the outstanding capital stock of PTIC, were later declared by this Court to be owned by the Republic of the Philippines.[2]

In 1999, First Pacific, a Bermuda-registered, Hong Kong-based investment firm, acquired the remaining 54 percent of the outstanding capital stock of PTIC. On 20 November 2006, the Inter-Agency Privatization Council (IPC) of the Philippine Government announced that it would sell the 111,415 PTIC shares, or 46.125 percent of the outstanding capital stock of PTIC, through a public bidding to be conducted on 4 December 2006. Subsequently, the public bidding was reset to 8 December 2006, and only two bidders, Parallax Venture Fund XXVII (Parallax) and Pan-Asia Presidio Capital, submitted their bids. Parallax won with a bid of ₱25.6 billion or US$510 million.

Thereafter, First Pacific announced that it would exercise its right of first refusal as a PTIC stockholder and buy the 111,415 PTIC shares by matching the bid price of Parallax. However, First Pacific failed to do so by the 1 February 2007 deadline set by IPC and instead, yielded its right to PTIC itself which was then given by IPC until 2 March 2007 to buy the PTIC shares. On 14 February 2007, First Pacific, through its subsidiary, MPAH, entered into a Conditional Sale and Purchase Agreement of the 111,415 PTIC shares, or 46.125 percent of the outstanding capital stock of PTIC, with the Philippine Government for the price of ₱25,217,556,000 or US$510,580,189. The sale was completed on 28 February 2007.

Since PTIC is a stockholder of PLDT, the sale by the Philippine Government of 46.125 percent of PTIC shares is actually an

[2] See *Cojuangco v. Sandiganbayan*, G.R. No. 183278, 24 April 2009, 586 SCRA 790.

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indirect sale of 12 million shares or about 6.3 percent of the outstanding common shares of PLDT. **With the sale, First Pacific's common shareholdings in PLDT increased from 30.7 percent to 37 percent, thereby increasing the common shareholdings of foreigners in PLDT to about 81.47 percent.** This violates Section 11, Article XII of the 1987 Philippine Constitution which limits foreign ownership of the capital of a public utility to not more than 40 percent.[3]

On the other hand, public respondents Finance Secretary Margarito B. Teves, Undersecretary John P. Sevilla, and PCGG Commissioner Ricardo Abcede allege the following relevant facts:

On 9 November 1967, PTIC was incorporated and had since engaged in the business of investment holdings. PTIC held 26,034,263 PLDT common shares, or 13.847 percent of the total PLDT outstanding common shares. PHI, on the other hand, was incorporated in 1977, and became the owner of 111,415 PTIC shares or 46.125 percent of the outstanding capital stock of PTIC by virtue of three Deeds of Assignment executed by Ramon Cojuangco and Luis Tirso Rivilla. In 1986, the 111,415 PTIC shares held by PHI were sequestered by the PCGG, and subsequently declared by this Court as part of the ill-gotten wealth of former President Ferdinand Marcos. The sequestered

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[3] Section 11, Article XII of the 1987 Constitution provides:

ARTICLE XII
NATIONAL ECONOMY AND PATRIMONY

x x x x x x x x x

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.

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PTIC shares were reconveyed to the Republic of the Philippines in accordance with this Court's decision[4] which became final and executory on 8 August 2006.

The Philippine Government decided to sell the 111,415 PTIC shares, which represent 6.4 percent of the outstanding common shares of stock of PLDT, and designated the Inter-Agency Privatization Council (IPC), composed of the Department of Finance and the PCGG, as the disposing entity. An invitation to bid was published in seven different newspapers from 13 to 24 November 2006. On 20 November 2006, a pre-bid conference was held, and the original deadline for bidding scheduled on 4 December 2006 was reset to 8 December 2006. The extension was published in nine different newspapers.

During the 8 December 2006 bidding, Parallax Capital Management LP emerged as the highest bidder with a bid of ₱25,217,556,000. The government notified First Pacific, the majority owner of PTIC shares, of the bidding results and gave First Pacific until 1 February 2007 to exercise its right of first refusal in accordance with PTIC's Articles of Incorporation. First Pacific announced its intention to match Parallax's bid.

On 31 January 2007, the House of Representatives (HR) Committee on Good Government conducted a public hearing on the particulars of the then impending sale of the 111,415 PTIC shares. Respondents Teves and Sevilla were among those who attended the public hearing. The HR Committee Report No. 2270 concluded that: (a) the auction of the government's 111,415 PTIC shares bore due diligence, transparency and conformity with existing legal procedures; and (b) **First Pacific's intended acquisition of the government's 111,415 PTIC shares resulting in First Pacific's 100% ownership of PTIC will not violate the 40 percent constitutional limit on foreign ownership of a public utility since PTIC holds only 13.847 percent of the total outstanding common shares of PLDT.**[5]

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[4] *Yuchengco v. Sandiganbayan*, G.R. No. 149802, 20 January 2006, 479 SCRA 1.

[5] *Rollo*, (Vol. II), p. 806.

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On 28 February 2007, First Pacific completed the acquisition of the 111,415 shares of stock of PTIC.

Respondent Manuel V. Pangilinan admits the following facts: (a) the IPC conducted a public bidding for the sale of 111,415 PTIC shares or 46 percent of the outstanding capital stock of PTIC (the remaining 54 percent of PTIC shares was already owned by First Pacific and its affiliates); (b) Parallax offered the highest bid amounting to ₱25,217,556,000; (c) pursuant to the right of first refusal in favor of PTIC and its shareholders granted in PTIC's Articles of Incorporation, MPAH, a First Pacific affiliate, exercised its right of first refusal by matching the highest bid offered for PTIC shares on 13 February 2007; and (d) on 28 February 2007, the sale was consummated when MPAH paid IPC ₱25,217,556,000 and the government delivered the certificates for the 111,415 PTIC shares. Respondent Pangilinan denies the other allegations of facts of petitioner.

On 28 February 2007, petitioner filed the instant petition for prohibition, injunction, declaratory relief, and declaration of nullity of sale of the 111,415 PTIC shares. Petitioner claims, among others, that the sale of the 111,415 PTIC shares would result in an increase in First Pacific's common shareholdings in PLDT from 30.7 percent to 37 percent, and this, combined with Japanese NTT DoCoMo's common shareholdings in PLDT, would result to a total foreign common shareholdings in PLDT of 51.56 percent which is over the 40 percent constitutional limit.[6] Petitioner asserts:

> If and when the sale is completed, First Pacific's equity in PLDT will go up from 30.7 percent to 37.0 percent of its common — or voting — stockholdings, x x x. Hence, the consummation of the sale will put the two largest foreign investors in PLDT — First Pacific and Japan's NTT DoCoMo, which is the world's largest wireless telecommunications firm, owning 51.56 percent of PLDT common equity. x x x With the completion of the sale, data culled from the official website of the New York Stock Exchange (www.nyse.com) showed that those foreign entities, which own at

[6] *Rollo* (Vol. I), p. 23.

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least five percent of common equity, will collectively own 81.47 percent of PLDT's common equity. x x x

x x x as the annual disclosure reports, also referred to as Form 20-K reports x x x which PLDT submitted to the New York Stock Exchange for the period 2003-2005, revealed that First Pacific and several other foreign entities breached the constitutional limit of 40 percent ownership as early as 2003. x x x[7]

Petitioner raises the following issues: (1) whether the consummation of the then impending sale of 111,415 PTIC shares to First Pacific violates the constitutional limit on foreign ownership of a public utility; (2) whether public respondents committed grave abuse of discretion in allowing the sale of the 111,415 PTIC shares to First Pacific; and (3) whether the sale of common shares to foreigners in excess of 40 percent of the entire subscribed common capital stock violates the constitutional limit on foreign ownership of a public utility.[8]

On 13 August 2007, Pablito V. Sanidad and Arno V. Sanidad filed a Motion for Leave to Intervene and Admit Attached Petition-in-Intervention. In the Resolution of 28 August 2007, the Court granted the motion and noted the Petition-in-Intervention.

Petitioners-in-intervention "join petitioner Wilson Gamboa x x x in seeking, among others, to enjoin and/or nullify the sale by respondents of the 111,415 PTIC shares to First Pacific or assignee." Petitioners-in-intervention claim that, as PLDT subscribers, they have a "stake in the outcome of the controversy x x x where the Philippine Government is completing the sale of government owned assets in [PLDT], unquestionably a public utility, in violation of the nationality restrictions of the Philippine Constitution."

The Issue

This Court is not a trier of facts. Factual questions such as those raised by petitioner,[9] which indisputably demand a thorough

[7] *Id.* at 23-24, 26.

[8] *Id.* at 41.

[9] *Id.*

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examination of the evidence of the parties, are generally beyond this Court's jurisdiction. Adhering to this well-settled principle, the Court shall confine the resolution of the instant controversy solely on the **threshold and purely legal issue** of 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.

The Ruling of the Court

The petition is partly meritorious.

Petition for declaratory relief treated as petition for mandamus

At the outset, petitioner is faced with a procedural barrier. Among the remedies petitioner seeks, only the petition for prohibition is within the original jurisdiction of this court, which however is not exclusive but is concurrent with the Regional Trial Court and the Court of Appeals. The actions for declaratory relief,[10] injunction, and annulment of sale are not embraced within the original jurisdiction of the Supreme Court. On this ground alone, the petition could have been dismissed outright.

While direct resort to this Court may be justified in a petition for prohibition,[11] the Court shall nevertheless refrain from

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[10] Governed by Rule 63 of the Rules of Court. Section 1, Rule 63 of the Rules of Court states:

RULE 63

Declaratory Relief and Similar Remedies

Section 1. *Who may file petition.* — Any person interested under a deed, will, contract or other written instrument, or whose rights are affected by a statute, executive order or regulation, ordinance, or any other governmental regulation may, before breach or violation thereof bring an action in the appropriate Regional Trial Court to determine any question of construction or validity arising, and for a declaration of his rights or duties, thereunder. (Bar Matter No. 803, 17 February 1998)

[11] Section 2, Rule 65 of the Rules of Court provides:

SEC. 2. Petition for prohibition. — When the proceedings of any tribunal, corporation, board, officer, or person, whether exercising judicial, quasi-judicial or ministerial functions, are without or in excess of its or his jurisdiction,

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discussing the grounds in support of the petition for prohibition since on 28 February 2007, the questioned sale was consummated when MPAH paid IPC ₱25,217,556,000 and the government delivered the certificates for the 111,415 PTIC shares.

However, since the threshold and purely legal issue on the definition of the term "capital" in Section 11, Article XII of the Constitution has far-reaching implications to the national economy, the Court treats the petition for declaratory relief as one for *mandamus*.[12]

In *Salvacion v. Central Bank of the Philippines*,[13] the Court treated the petition for declaratory relief as one for *mandamus* considering the grave injustice that would result in the interpretation of a banking law. In that case, which involved the crime of rape committed by a foreign tourist against a Filipino minor and the execution of the final judgment in the civil case for damages on the tourist's dollar deposit with a local bank,

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or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal or any other plain, speedy and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent to desist from further proceedings in the action or matter specified therein, or otherwise granting such incidental relief as law and justice may require.

x x x x x x x x x

[12] Section 3, Rule 65 of the Rules of Court states:

SEC. 3. Petition for *mandamus*. — When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law, the person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent, immediately or at some other time to be specified by the court, to do the act required to be done to protect the rights of the petitioner and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent.

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[13] 343 Phil. 539 (1997).

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the Court declared Section 113 of Central Bank Circular No. 960, exempting foreign currency deposits from attachment, garnishment or any other order or process of any court, inapplicable due to the peculiar circumstances of the case. The Court held that "injustice would result especially to a citizen aggrieved by a foreign guest like accused x x x" that would "negate Article 10 of the Civil Code which provides that 'in case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail.'" The Court therefore required respondents Central Bank of the Philippines, the local bank, and the accused to comply with the writ of execution issued in the civil case for damages and to release the dollar deposit of the accused to satisfy the judgment.

In *Alliance of Government Workers v. Minister of Labor*,[14] the Court similarly brushed aside the procedural infirmity of the petition for declaratory relief and treated the same as one for *mandamus*. In *Alliance*, the issue was whether the government unlawfully excluded petitioners, who were government employees, from the enjoyment of rights to which they were entitled under the law. Specifically, the question was: "Are the branches, agencies, subdivisions, and instrumentalities of the Government, including government owned or controlled corporations included among the four 'employers' under Presidential Decree No. 851 which are required to pay their employees x x x a thirteenth (13th) month pay x x x ?" The Constitutional principle involved therein affected all government employees, clearly justifying a relaxation of the technical rules of procedure, and certainly requiring the interpretation of the assailed presidential decree.

In short, it is well-settled that this Court may treat a petition for declaratory relief as one for *mandamus* if the issue involved has far-reaching implications. As this Court held in *Salvacion*:

The Court has no original and exclusive jurisdiction over a petition for declaratory relief. **However, exceptions to this rule have been recognized. Thus, where the petition has far-reaching implications**

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[14] 209 Phil. 1 (1983), citing *Nacionalista Party v. Angelo Bautista*, 85 Phil. 101, and *Aquino v. Commission on Elections*, 62 SCRA 275.

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and raises questions that should be resolved, it may be treated as one for *mandamus*.[15] (Emphasis supplied)

In the present case, petitioner seeks primarily the interpretation of the term "capital" in Section 11, Article XII of the Constitution. He prays that this Court declare that the term "capital" refers to common shares only, and that such shares constitute "the sole basis in determining foreign equity in a public utility." Petitioner further asks this Court to declare any ruling inconsistent with such interpretation unconstitutional.

The interpretation of the term "capital" in Section 11, Article XII of the Constitution has far-reaching implications to the national economy. In fact, a resolution of this issue will determine whether Filipinos are masters, or second class citizens, in their own country. What is at stake here is whether Filipinos or foreigners will have ***effective control*** of the national economy. Indeed, if ever there is a legal issue that has far-reaching implications to the entire nation, and to future generations of Filipinos, it is the threshold legal issue presented in this case.

The Court first encountered the issue on the definition of the term "capital" in Section 11, Article XII of the Constitution in the case of *Fernandez v. Cojuangco,* docketed as G.R. No. 157360.[16] That case involved the same public utility (PLDT) and substantially the same private respondents. Despite the importance and novelty of the constitutional issue raised therein and despite the fact that the petition involved a purely legal question, the Court declined to resolve the case on the merits, and instead denied the same for disregarding the hierarchy of courts.[17] There, petitioner Fernandez assailed on a pure question

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[15] *Supra* note 13.

[16] Adverted to in respondent Nazareno's Memorandum dated 27 September 2007. *Rollo*, p. 929. Nazareno stated: "In fact, in *Fernandez v. Cojuangco*, which raised markedly similar issues, the Honorable Court refused to entertain the Petition directly filed with it and dismissed the same for violating the principle of hierarchy of courts."

[17] In a Resolution dated 9 June 2003.

of law the Regional Trial Court's Decision of 21 February 2003 *via* a petition for review under Rule 45. The Court's Resolution, denying the petition, became final on 21 December 2004.

The instant petition therefore presents the Court with another opportunity to finally settle this **purely legal issue** which is of transcendental importance to the national economy and a fundamental requirement to a faithful adherence to our Constitution. The Court must forthwith seize such opportunity, not only for the benefit of the litigants, but more significantly for the benefit of the entire Filipino people, to ensure, in the words of the Constitution, "a self-reliant and independent national economy **effectively controlled** by Filipinos."[18] Besides, in the light of vague and confusing positions taken by government agencies on this purely legal issue, present and future foreign investors in this country deserve, as a matter of basic fairness, a categorical ruling from this Court on the extent of their participation in the capital of public utilities and other nationalized businesses.

Despite its far-reaching implications to the national economy, this purely legal issue has remained unresolved for over 75 years since the 1935 Constitution. There is no reason for this Court to evade this ever recurring fundamental issue and delay again defining the term "capital," which appears not only in Section 11, Article XII of the Constitution, but also in Section 2, Article XII on co-production and joint venture agreements for the development of our natural resources,[19] in Section 7, Article XII

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[18] Section 19, Article II, Constitution.

[19] 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

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on ownership of private lands,[20] in Section 10, Article XII on the reservation of certain investments to Filipino citizens,[21] in Section 4(2), Article XIV on the ownership of educational institutions,[22]

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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.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

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

[21] 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.

[22] Section 4(2), Article XIV of the 1987 Constitution provides: "**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.

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and in Section 11(2), Article XVI on the ownership of advertising companies.[23]

Petitioner has locus standi

There is no dispute that petitioner is a stockholder of PLDT. As such, he has the right to question the subject sale, which he claims to violate the nationality requirement prescribed in Section 11, Article XII of the Constitution. If the sale indeed violates the Constitution, then there is a possibility that PLDT's franchise could be revoked, a dire consequence directly affecting petitioner's interest as a stockholder.

More importantly, there is no question that the instant petition raises matters of transcendental importance to the public. The fundamental and threshold legal issue in this case, involving the national economy and the economic welfare of the Filipino people, far outweighs any perceived impediment in the legal personality of the petitioner to bring this action.

In *Chavez v. PCGG*,[24] the Court upheld the right of a citizen to bring a suit on matters of transcendental importance to the public, thus:

The control and administration of educational institutions shall be vested in citizens of the Philippines.

x x x x x x x x x"

[23] Section 11(2), Article XVI of the 1987 Constitution provides: "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.

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.

[24] G.R. No. 130716, 9 December 1998, 299 SCRA 744 cited in *Chavez v. Public Estates Authority*, 433 Phil. 506 (2002). See also *David v. Macapagal-Arroyo*, G.R. No. 171396, 3 May 2006, 489 SCRA 160; *Santiago v. Commission on Elections*, G.R. No. 127325, 19 March 1997, 270 SCRA 106; *Kilosbayan, Inc. v. Guingona, Jr.*, G.R. No. 113375, 5 May 1994, 232 SCRA 110 (1994).

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In *Tañada v. Tuvera*, the Court asserted that **when the issue concerns a public right and the object of *mandamus* is to obtain the enforcement of a public duty, the people are regarded as the real parties in interest; and because it is sufficient that petitioner is a citizen and as such is interested in the execution of the laws, he need not show that he has any legal or special interest in the result of the action**. In the aforesaid case, the petitioners sought to enforce their right to be informed on matters of public concern, a right then recognized in Section 6, Article IV of the 1973 Constitution, in connection with the rule that laws in order to be valid and enforceable must be published in the Official Gazette or otherwise effectively promulgated. In ruling for the petitioners' legal standing, the Court declared that the right they sought to be enforced 'is a public right recognized by no less than the fundamental law of the land.'

Legaspi v. Civil Service Commission, while reiterating Tañada, further declared that '**when a *mandamus* proceeding involves the assertion of a public right, the requirement of personal interest is satisfied by the mere fact that petitioner is a citizen and, therefore, part of the general 'public' which possesses the right**.'

Further, in *Albano v. Reyes*, we said that while expenditure of public funds may not have been involved under the questioned contract for the development, management and operation of the Manila International Container Terminal, '**public interest [was] definitely involved considering the important role [of the subject contract] . . . in the economic development of the country and the magnitude of the financial consideration involved**.' We concluded that, as a consequence, the disclosure provision in the Constitution would constitute sufficient authority for upholding the petitioner's standing. (Emphasis supplied)

Clearly, since the instant petition, brought by a citizen, involves matters of transcendental public importance, the petitioner has the requisite *locus standi*.

Definition of the Term "Capital" in Section 11, Article XII of the 1987 Constitution

Section 11, Article XII (National Economy and Patrimony) of the 1987 Constitution mandates the Filipinization of public utilities, to wit:

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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. (Emphasis supplied)

The above provision substantially reiterates Section 5, Article XIV of the 1973 Constitution, thus:

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 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. (Emphasis supplied)

The foregoing provision in the 1973 Constitution reproduced Section 8, Article XIV of the 1935 Constitution, *viz*:

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

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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 Congress when the public interest so requires. (Emphasis supplied)

Father Joaquin G. Bernas, S.J., a leading member of the 1986 Constitutional Commission, reminds us that the Filipinization provision in the 1987 Constitution is one of the products of the spirit of nationalism which gripped the 1935 Constitutional Convention.[25] The 1987 Constitution "provides for the Filipinization of public utilities by requiring that any form of authorization for the operation of public utilities should be granted only 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.' **The provision is [an express] recognition of the sensitive and vital position of public utilities both in the national economy and for national security**."[26] 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.[27] This specific provision explicitly reserves to Filipino citizens control of public utilities, pursuant to an overriding economic goal of the 1987 Constitution: to "conserve and develop our patrimony"[28] and ensure "a self-reliant and independent national economy ***effectively controlled*** by Filipinos."[29]

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[25] BERNAS, *THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES,* p. 452, citing *Smith, Bell and Co. v. Natividad*, 40 Phil. 136, 148 (1919); *Luzon Stevedoring Corporation v. Anti-Dummy Board*, 46 SCRA 474, 490 (1972).

[26] *Id.*

[27] DE LEON, HECTOR, *PHILIPPINE CONSTITUTIONAL LAW (PRINCIPLES AND CASES)*, Volume 2, 1999 Ed., p. 848.

[28] Preamble, 1987 Constitution; DE LEON, HECTOR, *PHILIPPINE CONSTITUTIONAL LAW (PRINCIPLES AND CASES)*, Volume 2, 1999 Ed., p. 788.

[29] Section 19, Article II, Constitution.

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Any citizen or juridical entity desiring to operate a public utility must therefore meet the minimum nationality requirement prescribed in Section 11, Article XII of the Constitution. Hence, for a corporation to be granted authority to operate a public utility, at least 60 percent of its "capital" must be owned by Filipino citizens.

The crux of the controversy is the definition of the term "**capital**." Does the term "capital" in Section 11, Article XII of the Constitution refer to common shares or to the total outstanding capital stock (combined total of common and non-voting preferred shares)?

Petitioner submits that the 40 percent foreign equity limitation in domestic public utilities refers only to common shares because such shares are entitled to vote and it is through voting that control over a corporation is exercised. Petitioner posits that the term "capital" in Section 11, Article XII of the Constitution refers to "the ownership of common capital stock subscribed and outstanding, which class of shares alone, under the corporate set-up of PLDT, can vote and elect members of the board of directors." It is undisputed that PLDT's non-voting preferred shares are held mostly by Filipino citizens.[30] This arose from Presidential Decree No. 217,[31] issued on 16 June 1973 by then President Ferdinand Marcos, requiring every applicant of a PLDT telephone line to subscribe to non-voting preferred shares to pay for the investment cost of installing the telephone line.[32]

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[30] http://www.pldt.com.ph/investor/shareholder/Documents/GIS_2010_%28as%20of_%207.2.10%29_final.pdf

[31] ESTABLISHING BASIC POLICIES FOR THE TELEPHONE INDUSTRY, AMENDING FOR THE PURPOSE THE PERTINENT PROVISIONS OF COMMONWEALTH ACT NO. 146, AS AMENDED, OTHERWISE KNOWN AS THE PUBLIC SERVICE ACT, AS AMENDED, AND ALL INCONSISTENT LEGISLATIVE AND MUNICIPAL FRANCHISE OF THE PHILIPPINE LONG DISTANCE TELEPHONE COMPANY UNDER ACT NO. 3436, AS AMENDED, AND ALL INCONSISTENT LEGISLATIVE AND MUNICIPAL FRANCHISES INCLUDING OTHER EXISTING LAWS.

[32] Upon approval by the National Telecommunications Commission, this mandatory requirement to subscribe to non-voting preferred shares was made optional starting 22 April 2003. See PLDT 20- F 2005 filing with the United States Securities and Exchange Commission at http://www.wikinvest.com/

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Petitioners-in-intervention basically reiterate petitioner's arguments and adopt petitioner's definition of the term "capital."[33] Petitioners-in-intervention allege that "the approximate foreign ownership of common capital stock of PLDT x x x already amounts to at least 63.54% of the total outstanding common stock," which means that foreigners exercise significant control over PLDT, patently violating the 40 percent foreign equity limitation in public utilities prescribed by the Constitution.

Respondents, on the other hand, do not offer any definition of the term "capital" in Section 11, Article XII of the Constitution. More importantly, private respondents Nazareno and Pangilinan of PLDT do not dispute that more than 40 percent of the common shares of PLDT are held by foreigners.

In particular, respondent Nazareno's Memorandum, consisting of 73 pages, harps mainly on the procedural infirmities of the petition and the supposed violation of the due process rights of the "affected foreign common shareholders." Respondent Nazareno does not deny petitioner's allegation of foreigners' dominating the common shareholdings of PLDT. Nazareno stressed mainly that the petition "**seeks to divest foreign common shareholders purportedly exceeding 40% of the total common shareholdings in PLDT of their ownership over their shares**." Thus, "the foreign natural and juridical PLDT shareholders must be impleaded in this suit so that they can be heard."[34] Essentially, Nazareno invokes denial of due process on behalf of the foreign common shareholders.

While Nazareno does not introduce any definition of the term "capital," he states that "**among the factual assertions that need to be established to counter petitioner's allegations is the uniform interpretation by government agencies (such as the SEC), institutions and corporations (such as the**

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stock/Philippine Long Distance Telephone Company (PHI)/ Filing/20-F/2—5/F2923101. See also *Philippine Consumers Foundation, Inc. v. NTC and PLDT*, G.R. No. 63318, 18 April 1984, on the origin and rationale of the SIP.

[33] *Rollo* (Vol. I), pp. 414-451.

[34] *Rollo* (Vol. II), p. 991.

Philippine National Oil Company-Energy Development Corporation or PNOC-EDC) of including both preferred shares and common shares in "controlling interest" in view of testing compliance with the 40% constitutional limitation on foreign ownership in public utilities."[35]

Similarly, respondent Manuel V. Pangilinan does not define the term "capital" in Section 11, Article XII of the Constitution. Neither does he refute petitioner's claim of foreigners holding more than 40 percent of PLDT's common shares. Instead, respondent Pangilinan focuses on the procedural flaws of the petition and the alleged violation of the due process rights of foreigners. Respondent Pangilinan emphasizes in his Memorandum (1) the absence of this Court's jurisdiction over the petition; (2) petitioner's lack of standing; (3) mootness of the petition; (4) non-availability of declaratory relief; and (5) the denial of due process rights. Moreover, respondent Pangilinan alleges that the issue should be whether "owners of shares in PLDT as well as owners of shares in companies holding shares in PLDT may be required to relinquish their shares in PLDT and in those companies without any law requiring them to surrender their shares and also without notice and trial."

Respondent Pangilinan further asserts that "**Section 11, [Article XII of the Constitution] imposes no nationality requirement on the shareholders of the utility company as a condition for keeping their shares in the utility company.**" According to him, "Section 11 does not authorize taking one person's property (the shareholder's stock in the utility company) on the basis of another party's alleged failure to satisfy a requirement that is a condition only for that other party's retention of another piece of property (the utility company being at least 60% Filipino-owned to keep its franchise)."[36]

The OSG, representing public respondents Secretary Margarito Teves, Undersecretary John P. Sevilla, Commissioner Ricardo Abcede, and Chairman Fe Barin, is likewise silent on the definition

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[35] *Id.* at 951.

[36] *Id.* at 838.

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of the term "capital." In its Memorandum[37] dated 24 September 2007, the OSG also limits its discussion on the supposed procedural defects of the petition, *i.e.* lack of standing, lack of jurisdiction, non-inclusion of interested parties, and lack of basis for injunction. The OSG does not present any definition or interpretation of the term "capital" in Section 11, Article XII of the Constitution. The OSG contends that "the petition actually partakes of a collateral attack on PLDT's franchise as a public utility," which in effect requires a "full-blown trial where all the parties in interest are given their day in court."[38]

Respondent Francisco Ed Lim, impleaded as President and Chief Executive Officer of the Philippine Stock Exchange (PSE), does not also define the term "capital" and seeks the dismissal of the petition on the following grounds: (1) failure to state a cause of action against Lim; (2) the PSE allegedly implemented its rules and required all listed companies, including PLDT, to make proper and timely disclosures; and (3) the reliefs prayed for in the petition would adversely impact the stock market.

In the earlier case of *Fernandez v. Cojuangco*, petitioner Fernandez who claimed to be a stockholder of record of PLDT, contended that the term "capital" in the 1987 Constitution refers to shares entitled to vote or the common shares. Fernandez explained thus:

> The forty percent (40%) foreign equity limitation in public utilities prescribed by the Constitution refers to ownership of shares of stock entitled to vote, *i.e.*, common shares, considering that it is through voting that control is being exercised. x x x
>
> Obviously, the intent of the framers of the Constitution in imposing limitations and restrictions on fully nationalized and partially nationalized activities is for Filipino nationals to be always in control of the corporation undertaking said activities. Otherwise, if the Trial Court's ruling upholding respondents' arguments were to be given credence, it would be possible for the ownership structure of a public utility corporation to be divided into one percent (1%) common

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[37] *Id.* at 898-923.

[38] *Rollo* (Vol. II), p. 913.

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stocks and ninety-nine percent (99%) preferred stocks. Following the Trial Court's ruling adopting respondents' arguments, the common shares can be owned entirely by foreigners thus creating an absurd situation wherein foreigners, who are supposed to be minority shareholders, control the public utility corporation.

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Thus, the 40% foreign ownership limitation should be interpreted to apply to both the beneficial ownership and the controlling interest.

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Clearly, therefore, the forty percent (40%) foreign equity limitation in public utilities prescribed by the Constitution refers to ownership of shares of stock entitled to vote, *i.e.*, common shares. Furthermore, ownership of record of shares will not suffice but it must be shown that the legal and beneficial ownership rests in the hands of Filipino citizens. Consequently, in the case of petitioner PLDT, since it is already admitted that the voting interests of foreigners which would gain entry to petitioner PLDT by the acquisition of SMART shares through the Questioned Transactions is equivalent to 82.99%, and the nominee arrangements between the foreign principals and the Filipino owners is likewise admitted, there is, therefore, a violation of Section 11, Article XII of the Constitution.

Parenthetically, the Opinions dated February 15, 1988 and April 14, 1987 cited by the Trial Court to support the proposition that the meaning of the word "capital" as used in Section 11, Article XII of the Constitution allegedly refers to the sum total of the shares subscribed and paid-in by the shareholder and it allegedly is immaterial how the stock is classified, whether as common or preferred, cannot stand in the face of a clear legislative policy as stated in the FIA which took effect in 1991 or way after said opinions were rendered, and as clarified by the above-quoted Amendments. In this regard, suffice it to state that as between the law and an opinion rendered by an administrative agency, the law indubitably prevails. Moreover, said Opinions are merely advisory and cannot prevail over the clear intent of the framers of the Constitution.

In the same vein, the SEC's construction of Section 11, Article XII of the Constitution is at best merely advisory for it is the courts that finally determine what a law means.[39]

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[39] *Rollo* (G.R. No. 157360), pp. 55-62.

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On the other hand, respondents therein, Antonio O. Cojuangco, Manuel V. Pangilinan, Carlos A. Arellano, Helen Y. Dee, Magdangal B. Elma, Mariles Cacho-Romulo, Fr. Bienvenido F. Nebres, Ray C. Espinosa, Napoleon L. Nazareno, Albert F. Del Rosario, and Orlando B. Vea, argued that the term "capital" in Section 11, Article XII of the Constitution includes preferred shares since the Constitution does not distinguish among classes of stock, thus:

16. The Constitution applies its foreign ownership limitation on the corporation's "capital," without distinction as to classes of shares. x x x

In this connection, the Corporation Code — which was already in force at the time the present (1987) Constitution was drafted — defined outstanding capital stock as follows:

> Section 137. Outstanding capital stock defined. — The term "outstanding capital stock," as used in this Code, means the total shares of stock issued under binding subscription agreements to subscribers or stockholders, whether or not fully or partially paid, except treasury shares.

Section 137 of the Corporation Code also does not distinguish between common and preferred shares, nor exclude either class of shares, in determining the outstanding capital stock (the "capital") of a corporation. Consequently, petitioner's suggestion to reckon PLDT's foreign equity only on the basis of PLDT's outstanding common shares is without legal basis. The language of the Constitution should be understood in the sense it has in common use.

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17. But even assuming that resort to the proceedings of the Constitutional Commission is necessary, there is nothing in the Record of the Constitutional Commission (Vol. III) — which petitioner misleadingly cited in the Petition x x x — which supports petitioner's view that only common shares should form the basis for computing a public utility's foreign equity.

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18. In addition, the SEC — the government agency primarily responsible for implementing the Corporation Code, and which also has the responsibility of ensuring compliance with the Constitution's

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foreign equity restrictions as regards nationalized activities x x x — has categorically ruled that both common and preferred shares are properly considered in determining outstanding capital stock and the nationality composition thereof.[40]

We agree with petitioner and petitioners-in-intervention. The term "capital" in Section 11, Article XII of the 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,[41] and not to the total outstanding capital stock comprising both common and non-voting preferred shares.

The Corporation Code of the Philippines[42] classifies shares as common or preferred, thus:

Sec. 6. *Classification of shares.* — The shares of stock of stock corporations may be divided into classes or series of shares, or both, any of which classes or series of shares may have such rights, privileges or restrictions as may be stated in the articles of incorporation: Provided, **That no share may be deprived of voting rights except those classified and issued as "preferred" or "redeemable" shares, unless otherwise provided in this Code**: Provided, further, That there shall always be a class or series of shares which have complete voting rights. Any or all of the shares or series of shares may have a par value or have no par value as may be provided for in the articles of incorporation: Provided, however, That banks, trust companies, insurance companies, public utilities, and building and loan associations shall not be permitted to issue no-par value shares of stock.

Preferred shares of stock issued by any corporation may be given preference in the distribution of the assets of the corporation in case of liquidation and in the distribution of dividends, or such other preferences as may be stated in the articles of incorporation which are not violative of the provisions of this Code: Provided, That preferred shares of stock may be issued only with a stated par value.

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[40] *Rollo* (G.R. No. 157360), pp. 1577-1583.

[41] In PLDT's case, the preferred stock is non-voting, except as specifically provided by law. (http://www.pldt.com.ph/investor/Documents/a2d211230ec3436eab66b41d3d107cfc4Q2004FSwithopinion.pdf)

[42] Batas Pambansa Blg. 68.

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The Board of Directors, where authorized in the articles of incorporation, may fix the terms and conditions of preferred shares of stock or any series thereof: Provided, That such terms and conditions shall be effective upon the filing of a certificate thereof with the Securities and Exchange Commission.

Shares of capital stock issued without par value shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereto: Provided; That shares without par value may not be issued for a consideration less than the value of five (₱5.00) pesos per share: Provided, further, That the entire consideration received by the corporation for its no-par value shares shall be treated as capital and shall not be available for distribution as dividends.

A corporation may, furthermore, classify its shares for the purpose of insuring compliance with constitutional or legal requirements.

Except as otherwise provided in the articles of incorporation and stated in the certificate of stock, each share shall be equal in all respects to every other share.

Where the articles of incorporation provide for non-voting shares in the cases allowed by this Code, the holders of such shares shall nevertheless be 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.

Except as provided in the immediately preceding paragraph, the vote necessary to approve a particular corporate act as provided in this Code shall be deemed to refer only to stocks with voting rights.

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Indisputably, one of the rights of a stockholder is the right to participate in the control or management of the corporation.[43] This is exercised through his vote in the election of directors because it is the board of directors that controls or manages the corporation.[44] 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.[45] In fact, under the Corporation Code only preferred or redeemable shares can be deprived of the right to vote.[46] 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.[47]

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.**

This interpretation is consistent with the intent of the framers of the Constitution to place in the hands of Filipino citizens the

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[43] As stated in the Corporation Code.

[44] See http://www.congress.gov.ph/download/researches/rrb_0303_5.pdf

[45] See http://www.congress.gov.ph/download/researches/rrb_0303_5.pdf

[46] Section 6, BP Blg. 68 or The Corporation Code.

[47] AGPALO, RUBEN E., C*OMMENTS ON THE CORPORATION CODE OF THE PHILIPPINES*, 2001 Second Edition, p. 36.

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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, to wit:

MR. NOLLEDO. In Sections 3, 9 and 15, the Committee stated local or Filipino equity and foreign equity; namely, 60-40 in Section 3, 60-40 in Section 9 and 2/3-1/3 in Section 15.

MR. VILLEGAS. That is right.

MR. NOLLEDO. In teaching law, we are always faced with this question: "Where do we base the equity requirement, is it on the authorized capital stock, on the subscribed capital stock, or on the paid-up capital stock of a corporation"? Will the Committee please enlighten me on this?

MR. VILLEGAS. We have just had a long discussion with the members of the team from the UP Law Center who provided us a draft. **The phrase that is contained here which we adopted from the UP draft is "60 percent of voting stock."**

MR. NOLLEDO. That must be based on the subscribed capital stock, because unless declared delinquent, unpaid capital stock shall be entitled to vote.

MR. VILLEGAS. That is right.

MR. NOLLEDO. Thank you.

With respect to an investment by one corporation in another corporation, say, a corporation with 60-40 percent equity invests in another corporation which is permitted by the Corporation Code, does the Committee adopt the grandfather rule?

MR. VILLEGAS. Yes, that is the understanding of the Committee.

MR. NOLLEDO. Therefore, we need additional Filipino capital?

MR. VILLEGAS. Yes.[48]

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MR. AZCUNA. May I be clarified as to that portion that was accepted by the Committee.

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[48] Record of the Constitutional Commission, Vol. III, pp. 255-256.

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MR. VILLEGAS. The portion accepted by the Committee is the deletion of the phrase "voting stock or controlling interest."

MR. AZCUNA. Hence, without the Davide amendment, the committee report would read: "corporations or associations at least sixty percent of whose CAPITAL is owned by such citizens."

MR. VILLEGAS. Yes.

MR. AZCUNA. So if the Davide amendment is lost, we are stuck with 60 percent of the capital to be owned by citizens.

MR. VILLEGAS. That is right.

MR. AZCUNA. But the control can be with the foreigners even if they are the minority. Let us say 40 percent of the capital is owned by them, but it is the voting capital, whereas, the Filipinos own the nonvoting shares. So we can have a situation where the corporation is controlled by foreigners despite being the minority because they have the voting capital. That is the anomaly that would result here.

MR. BENGZON. No, the reason we eliminated the word "stock" as stated in the 1973 and 1935 Constitutions is that according to Commissioner Rodrigo, there are associations that do not have stocks. That is why we say "CAPITAL."

MR. AZCUNA. We should not eliminate the phrase "controlling interest."

MR. BENGZON. In the case of stock corporations, it is assumed.[49] (Emphasis supplied)

Thus, 60 percent of the "capital" assumes, or should result in, "**controlling interest**" in the corporation. Reinforcing this interpretation of the term "capital," as referring to controlling interest or shares entitled to vote, is the definition of a "Philippine national" in the Foreign Investments Act of 1991,[50] to wit:

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[49] *Id.* at 360.

[50] Republic Act No. 7042 entitled "AN ACT TO PROMOTE FOREIGN INVESTMENTS, PRESCRIBE THE PROCEDURES FOR REGISTERING ENTERPRISES DOING BUSINESS IN THE PHILIPPINES AND FOR OTHER PURPOSES."

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SEC. 3. *Definitions.* — As used in this Act:

a. The term "*Philippine national"* shall mean a citizen of the Philippines; or a domestic partnership or association wholly owned by citizens of the Philippines; or **a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines**; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: *Provided,* That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation, shall be considered a "Philippine national." (Emphasis supplied)

In explaining the definition of a "Philippine national," the Implementing Rules and Regulations of the Foreign Investments Act of 1991 provide:

b. "*Philippine national*" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by the citizens of the Philippines; or **a corporation organized under the laws of the Philippines of which at least sixty percent [60%] of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines**; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent [60%] of the fund will accrue to the benefit of the Philippine nationals; *Provided,* that where a corporation its non-Filipino stockholders own stocks in a Securities and Exchange Commission [SEC] registered enterprise, at least sixty percent [60%] of the capital stock outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent [60%] of the members of the Board of Directors of each of both corporation

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must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national. The control test shall be applied for this purpose.

Compliance with the required Filipino ownership of a corporation shall be determined on the basis of outstanding capital stock whether fully paid or not, but only such stocks which are generally entitled to vote are considered.

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.

Individuals or juridical entities not meeting the aforementioned qualifications are considered as non-Philippine nationals. (Emphasis supplied)

Mere legal title is insufficient to meet the 60 percent Filipino-owned "capital" required in the Constitution. 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]."

Under Section 10, Article XII of the Constitution, Congress may "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." Thus, in numerous laws Congress has reserved certain areas of investments to Filipino citizens or to corporations at least sixty percent of the "**capital**" of which is owned by Filipino citizens. Some of these laws are: (1) Regulation of Award of Government Contracts or R.A. No. 5183; (2) Philippine Inventors Incentives Act or R.A. No. 3850; (3) Magna Carta for Micro, Small and Medium Enterprises or R.A. No. 6977; (4) Philippine Overseas Shipping Development

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Act or R.A. No. 7471; (5) Domestic Shipping Development Act of 2004 or R.A. No. 9295; (6) Philippine Technology Transfer Act of 2009 or R.A. No. 10055; and (7) Ship Mortgage Decree or P.D. No. 1521. Hence, the term "**capital**" in Section 11, Article XII of the Constitution is also used **in the same context in numerous laws** reserving certain areas of investments to Filipino citizens.

To construe broadly the term "capital" as the total outstanding capital stock, including both common and *non-voting* preferred 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." A broad definition unjustifiably disregards who owns the all-important voting stock, which necessarily equates to control of the public utility.

We shall illustrate the glaring anomaly in giving a broad definition to the term "capital." 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. It also renders illusory the State policy of an independent national economy ***effectively controlled*** by Filipinos.

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The example given is not theoretical but can be found in the real world, ***and in fact exists in the present case***.

Holders of PLDT preferred shares are explicitly denied of the right to vote in the election of directors. PLDT's Articles of Incorporation expressly state that "**the holders of Serial Preferred Stock shall not be entitled to vote at any meeting of the stockholders for the election of directors or for any other purpose** or otherwise participate in any action taken by the corporation or its stockholders, or to receive notice of any meeting of stockholders."[51]

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[51] *Rollo* (G.R. No. 157360), Vol. I, p. 348.

It must be noted that under PLDT's Articles of Incorporation, the PLDT Board of Directors is expressly authorized to determine, among others, with respect to each series of Serial Preferred Stock:

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(b) the dividend rate, if any, on the shares of such series (which, if and to the extent the Board of Directors, in its sole discretion, shall deem appropriate under the circumstances, shall be fixed considering the rate of return on similar securities at the time of issuance of such shares), the terms and conditions upon which and the periods with respect to which dividends shall be payable, whether and upon what conditions such dividends shall be cumulative and, if cumulative, the date or dates from which dividends shall accumulate;

(c) whether or not the shares of such series shall be redeemable, the limitations with respect to such redemption, the time or times when and the manner in which such shares shall be redeemable (including the manner of selecting shares of such series for redemption if less than all shares are to be redeemed) and the price or prices at which such shares shall be redeemable, which may not be less than (i) the par value thereof plus (ii) accrued and unpaid dividends thereon, nor more than (i) 110% of the par value thereof plus (ii) accrued and unpaid dividends thereon;

(d) whether or not the shares of such series shall be subject to the operation of a purchase, retirement or sinking fund, and, if so, whether and upon what conditions such purchase, retirement or sinking fund shall be cumulative or non-cumulative, the extent to which and the manner in which such fund shall be applied to the purchase or redemption of the shares of such series for retirement or to other corporate purposes and the terms and provisions relative to the operation thereof;

(e) the rights to which the holders of shares of such series shall be entitled upon the voluntary or involuntary liquidation, dissolution, distribution of assets or winding up of the corporation, which rights may vary depending on whether

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On the other hand, holders of common shares are granted the exclusive right to vote in the election of directors. PLDT's Articles of Incorporation[52] state that "each holder of Common Capital Stock shall have one vote in respect of each share of such stock held by him on all matters voted upon by the stockholders, and **the holders of Common Capital Stock shall have the exclusive right to vote for the election of directors and for all other purposes.**"[53]

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such liquidation, dissolution, distribution or winding up is voluntary or involuntary, and if voluntary, may vary at different dates, provided, however, that the amount which the holders of shares of such series shall be entitled to receive in the event of any voluntary or involuntary liquidation, dissolution, distribution of assets or winding up of the corporation;

Further, "the holders of Serial Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors out of funds legally available therefore, preferential cash dividends at the rate, under the terms and conditions, for the periods and on the dates fixed by the resolution or resolutions of the Board of Directors, x x x and no more, before any dividends on the Common Capital Stock (other than dividends payable in Common Capital Stock) shall be paid or set apart for payment with respect to the same dividend period. All shares of Preferred Stock of all series shall be of equal rank, preference and priority as to dividends irrespective of whether or not the rates of dividends to which the same shall be entitled shall be the same and, when the stated dividends are not paid in full, the shares of all series of Serial Preferred Stock shall share ratably in the payment of dividends including accumulations, if any, in accordance with the sums which would be payable on such shares if all dividends were declared and paid in full, provided, however, that any two or more series of Serial Preferred Stock may differ from each other as to the existence and extent of the right to cumulative dividends as aforesaid."

[52] *Rollo* (G.R. No. 157360), Vol. I, pp. 339-355. Adopted on 21 November 1995 and approved on 18 February 1997.

[53] The other rights, limitations and preferences of common capital stock are as follows:

1. After the requirements with respect to preferential dividends on the Serial Preferred Stock shall have been met and after the corporation shall have complied with all the requirements, if any, with respect to the setting aside of sums as purchase, retirement or sinking funds, then and not otherwise the holders of the Common Capital Stock shall be entitled to receive such dividends as may be declared from time to time by the Board of Directors out of funds legally available therefor.

2. After distribution in full of the preferential amounts to be distributed to the holders of Serial Preferred Stock in the event of the voluntary or involuntary

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In short, only holders of common shares can vote in the election of directors, meaning only common shareholders exercise control over PLDT. Conversely, holders of preferred shares, who have no voting rights in the election of directors, do not have any control over PLDT. In fact, under PLDT's Articles of Incorporation, holders of common shares have voting rights for all purposes, while holders of preferred shares have no voting right for any purpose whatsoever.

It must be stressed, and **respondents do not dispute**, that foreigners hold a majority of the common shares of PLDT. In fact, based on PLDT's 2010 General Information Sheet (GIS),[54] which is a document required to be submitted annually to the Securities and Exchange Commission,[55] foreigners hold 120,046,690 common shares of PLDT whereas Filipinos hold only 66,750,622 common shares.[56] In other words, foreigners hold 64.27% of the total number of PLDT's common shares, while Filipinos hold only 35.73%. Since holding a majority of the common shares equates to control, it is clear that foreigners exercise control over PLDT. Such amount of control unmistakably exceeds the allowable 40 percent limit on foreign ownership of public utilities expressly mandated in Section 11, Article XII of the Constitution.

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liquidation, dissolution, distribution of assets or winding up of the corporation, the holders of the Common Capital Stock shall be entitled to receive all the remaining assets of the corporation of whatever kind available for distribution to stockholders ratably in proportion to the number of shares of the Common Capital Stock held by them, respectively.

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4. The ownership of shares of Common Capital Stock shall not entitle the owner thereof to any right (other than such right, if any, as the Board of Directors in its discretion may from time to time grant) to subscribe for or to purchase or to have offered to him for subscription or purchase any shares of any class of preferred stock of the corporation.

[54] http://www.pldt.com.ph/investor/shareholder/Documents/GIS_2010_%28as%20of_%207.2.10%29_final.pdf

[55] http://www.sec.gov.ph/index.htm?GIS_Download

[56] http://www.pldt.com.ph/investor/shareholder/Documents/GIS_2010_%28as%20of_%207.2.10%29_final.pdf

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Moreover, the Dividend Declarations of PLDT for 2009,[57] as submitted to the SEC, shows that per share the SIP[58] preferred shares earn a pittance in dividends compared to the common shares. PLDT declared dividends for the common shares at ₱70.00 per share, while the declared dividends for the preferred shares amounted to a measly ₱1.00 per share.[59] So the preferred shares not only cannot vote in the election of directors, they also have very little and obviously negligible dividend earning capacity compared to common shares.

As shown in PLDT's 2010 GIS,[60] as submitted to the SEC, the par value of PLDT common shares is ₱5.00 per share, whereas the par value of preferred shares is ₱10.00 per share. In other words, preferred shares have twice the par value of common shares but cannot elect directors and have only 1/70 of the dividends of common shares. Moreover, 99.44% of the preferred shares are owned by Filipinos while foreigners own only a minuscule 0.56% of the preferred shares.[61] Worse, preferred shares constitute 77.85% of the authorized capital stock of PLDT

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[57] http://www.pldt.com.ph/investor/Documents/2009%20Dividend%20Declarations_Update %2012082009.pdf. See also http://www.pldt.com.ph/investor/Documents/disclosures_03-01- 2011.pdf

[58] Subscription Investment Plan. See PD No. 217.

[59] This is the result of the preferred shares being denominated 10% preferred, which means each preferred share will earn an annual dividend equal to 10% of its par value of ₱10, which amounts to ₱1. Once this dividend is paid to holders of preferred shares, the rest of the retained earnings can be paid as dividends to the holders of common shares. See http://www.pldt.com.ph/investor/Documents/2009%20Dividend%20Declarations_Update %2012082009.pdf

In 2011, PLDT declared dividends for the common shares at ₱78.00 per share. (http://www.pldt.com.ph/investor/Documents/disclosures_03-01-2011.pdf)

[60] http://www.pldt.com.ph/investor/shareholder/Documents/GIS_2010_(as%20of_%207.2.10)_final.pdf

[61] *Id.* Based on PLDT's 2010 GIS, the paid-up capital of PLDT (as of Record Date – 12 April 2010) consists of the following:

Filipino (preferred): 403,410,355
Foreigners (preferred): 2,287,207
Total: 405,697,562

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while common shares constitute only 22.15%.[62] This undeniably shows that beneficial interest in PLDT is not with the non-voting preferred shares but with the common shares, blatantly violating the constitutional requirement of 60 percent Filipino control and Filipino beneficial ownership in a public utility.

The legal and beneficial ownership of 60 percent of the outstanding capital stock must rest in the hands of Filipinos in accordance with the constitutional mandate. Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is constitutionally required for the State's grant of authority to operate a public utility. The undisputed fact that the PLDT preferred shares, 99.44% owned by Filipinos, are non-voting and earn only 1/70 of the dividends that PLDT common shares earn, grossly violates the constitutional requirement of 60 percent Filipino control and Filipino beneficial ownership of a public utility.

In short, Filipinos hold less than 60 percent of the voting stock, and earn less than 60 percent of the dividends, of PLDT. This directly contravenes the express command in Section 11, Article XII of the Constitution that "[n]o franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to x x x corporations x x x organized under the laws of the Philippines, **at least sixty per centum of whose capital is owned by such citizens x x x.**"

To repeat, (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

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[62] Based on par value, as stated in PLDT's 2010 GIS sbumitted to the SEC. See http://www.pldt.com.ph/investor/shareholder/Documents/GIS_2010_%28as%20of%207.2.10%29_final.pdf (accessed 23 May 2011).

Authorized capital stock of PLDT is broken down as follows:
Common shares: 234,000,000
Preferred shares: 822,500,000
Total: 1,056,000,000

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by Filipinos, have no voting rights; (4) preferred shares earn only 1/70 of the dividends that common shares earn;[63] (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,[64] 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,[65] is a glaring confirmation by the market that control and beneficial ownership of PLDT rest with the common shares, not with the preferred shares.

Indisputably, construing the term "capital" in Section 11, Article XII of the Constitution to include both voting and non-voting shares will result in the abject surrender of our telecommunications industry to foreigners, amounting to a clear abdication of the State's constitutional duty to limit control of public utilities to Filipino citizens. Such an interpretation certainly runs counter to the constitutional provision reserving certain areas of investment to Filipino citizens, such as the exploitation of natural resources as well as the ownership of land, educational institutions and advertising businesses. The Court should never open to foreign control what the Constitution has expressly reserved to Filipinos for that would be a betrayal of the Constitution and of the national interest. The Court must perform its solemn duty to defend and uphold the intent and letter of the Constitution to ensure, in the words of the Constitution, "a self-reliant and independent national economy *effectively controlled* by Filipinos."

Section 11, Article XII of the Constitution, like other provisions of the Constitution expressly reserving to Filipinos *specific* areas

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[63] For the year 2009.

[64] http://www.pse.com.ph/ (accessed 31 May 2011).

[65] http://www.pse.com.ph/html/Quotations/2011/stockQuotes_05272011.pdf\ (accessed 27 May 2011).

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of investment, such as the development of natural resources and ownership of land, educational institutions and advertising business, is ***self-executing***. There is no need for legislation to implement these self-executing provisions of the Constitution. The rationale why these constitutional provisions are self-executing was explained in *Manila Prince Hotel v. GSIS*,[66] thus:

> x x x Hence, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the constitution are self-executing. If the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic. That is why the prevailing view is, as it has always been, that —
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> > . . . in case of doubt, the Constitution should be considered self-executing rather than non-self-executing. . . . **Unless the contrary is clearly intended**, **the provisions of the Constitution should be considered self-executing, as a contrary rule would give the legislature discretion to determine when, or whether, they shall be effective**. These provisions would be subordinated to the will of the lawmaking body, which could make them entirely meaningless by simply refusing to pass the needed implementing statute. (Emphasis supplied)

In *Manila Prince Hotel*, even the Dissenting Opinion of then Associate Justice Reynato S. Puno, later Chief Justice, agreed that constitutional provisions are presumed to be self-executing. Justice Puno stated:

> Courts as a rule consider the provisions of the Constitution as self-executing, rather than as requiring future legislation for their enforcement. The reason is not difficult to discern. **For if they are not treated as self-executing, the mandate of the fundamental law ratified by the sovereign people can be easily ignored and nullified by Congress. Suffused with wisdom of the ages is the unyielding rule that legislative actions may give breath to constitutional rights but congressional inaction should not suffocate them**.

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[66] 335 Phil. 82 (1997).

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Thus, we have treated as self-executing the provisions in the Bill of Rights on arrests, searches and seizures, the rights of a person under custodial investigation, the rights of an accused, and the privilege against self-incrimination. It is recognized that legislation is unnecessary to enable courts to effectuate constitutional provisions guaranteeing the fundamental rights of life, liberty and the protection of property. The same treatment is accorded to constitutional provisions forbidding the taking or damaging of property for public use without just compensation. (Emphasis supplied)

Thus, in numerous cases,[67] this Court, even in the absence of implementing legislation, applied directly the provisions of the 1935, 1973 and 1987 Constitutions limiting land ownership to Filipinos. In *Soriano v. Ong Hoo*,[68] this Court ruled:

x x x As the Constitution is silent as to the effects or consequences of a sale by a citizen of his land to an alien, and as both the citizen and the alien have violated the law, none of them should have a recourse against the other, and it should only be the State that should be allowed to intervene and determine what is to be done with the property subject of the violation. We have said that what the State should do or could do in such matters is a matter of public policy, entirely beyond the scope of judicial authority. (*Dinglasan, et al. vs. Lee Bun Ting, et al.*, 6 G. R. No. L-5996, June 27, 1956.) **While the legislature has not definitely decided what policy should be followed in cases of violations against the constitutional prohibition, courts of justice cannot go beyond by declaring the disposition to be null and void as violative of the Constitution**. x x x (Emphasis supplied)

To treat Section 11, Article XII of the Constitution as not self-executing would mean that since the 1935 Constitution, or over the last 75 years, not one of the constitutional provisions expressly reserving specific areas of investments to corporations, at least 60 percent of the "capital" of which is owned by Filipinos, was enforceable. In short, the framers of the 1935, 1973 and 1987

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[67] *Krivenko v. Register of Deeds*, 79 Phil. 461 (1947); *Rellosa v. Gaw Chee Hun*, 93 Phil. 827 (1953); *Vasquez v. Li Seng Giap*, 96 Phil. 447 (1955); *Soriano v. Ong Hoo*, 103 Phil. 829 (1958); *Philippine Banking Corporation v. Lui She*, 128 Phil. 53 (1967); *Frenzel v. Catito*, 453 Phil. 885 (2003).

[68] *Id*.

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Constitutions miserably failed to effectively reserve to Filipinos specific areas of investment, like the operation by corporations of public utilities, the exploitation by corporations of mineral resources, the ownership by corporations of real estate, and the ownership of educational institutions. All the legislatures that convened since 1935 also miserably failed to enact legislations to implement these vital constitutional provisions that determine who will effectively control the national economy, Filipinos or foreigners. This Court cannot allow such an absurd interpretation of the Constitution.

This Court has held that the SEC "has both regulatory and adjudicative functions."[69] Under its regulatory functions, the SEC can be compelled by *mandamus* to perform its statutory duty when it unlawfully neglects to perform the same. Under its adjudicative or quasi-judicial functions, the SEC can be also be compelled by *mandamus* to hear and decide a possible violation

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[69] *Securities and Exchange Commission v. Court of Appeals, et al.*, 316 Phil. 903 (1995). The Court ruled in this case:

> The Securities and Exchange Commission ("SEC") **has both regulatory and adjudicative functions**.
>
> **Under its regulatory responsibilities, the SEC may pass upon applications for, or may suspend or revoke (after due notice and hearing), certificates of registration of corporations**, partnerships and associations (excluding cooperatives, homeowners' associations, and labor unions); compel legal and regulatory compliances; conduct inspections; and impose fines or other penalties for violations of the Revised Securities Act, as well as implementing rules and directives of the SEC, such as may be warranted.
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> Relative to its adjudicative authority, the SEC has original and exclusive jurisdiction to hear and decide controversies and cases involving —
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> a. Intra-corporate and partnership relations between or among the corporation, officers and stockholders and partners, including their elections or appointments;
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> **b. State and corporate affairs in relation to the legal existence of corporations, partnerships and associations or to their franchise; and**
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> c. Investors and corporate affairs particularly in respect of devices and schemes, such as fraudulent practices, employed by directors, officers, business associates, and/or other stockholders, partners, or members of registered firms; x x x
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> x x x x x x x x x
>
> (Emphasis supplied)

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of any law it administers or enforces when it is mandated by law to investigate such violation.

Under Section 17(4)[70] of the Corporation Code, the SEC has the regulatory function to reject or disapprove the Articles of Incorporation of any corporation where **"the required percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution."** Thus, the SEC is the government agency tasked with the statutory duty to enforce the nationality requirement prescribed in Section 11, Article XII of the Constitution on the ownership of public utilities. This Court, in a petition for declaratory relief that is treated as a petition for *mandamus* as in the present case, can direct the SEC to perform its statutory duty under the law, a duty that the SEC has apparently unlawfully neglected to do based on the 2010 GIS that respondent PLDT submitted to the SEC.

Under Section 5(m) of the Securities Regulation Code,[71] the SEC is vested with the "power and function" to "**suspend or revoke, after proper notice and hearing, the franchise or**

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[70] SEC. 17. *Grounds when articles of incorporation or amendment may be rejected or disapproved.* — The Securities and Exchange Commission may reject the articles of incorporation or disapprove any amendment thereto if the same is not in compliance with the requirements of this Code: Provided, **That the Commission shall give the incorporators a reasonable time within which to correct or modify the objectionable portions of the articles or amendment**. The following are grounds for such rejection or disapproval:

x x x x x x x x x

(4) **That the required percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution**. (Emphasis supplied)

[71] Republic Act No. 8799. Section 5 of R.A. No. 8799 provides:

Section 5. *Powers and Functions of the Commission.* — 5.1. The Commission shall act with transparency and shall have the powers and functions provided by this Code, Presidential Decree No. 902-A, the Corporation Code, the Investment Houses Law, the Financing Company Act and other existing laws. Pursuant thereto the Commission shall have, among others, the following powers and functions:

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certificate of registration of corporations, partnerships or associations, upon any of the grounds provided by law." The SEC is mandated under Section 5(d) of the same Code with the "power and function" to "**investigate x x x the activities of persons to ensure compliance**" with the laws and regulations that SEC administers or enforces. The GIS that all corporations are required to submit to SEC annually should put the SEC on guard against violations of the nationality requirement prescribed in the Constitution and existing laws. This Court can compel the SEC, in a petition for declaratory relief that is treated as a petition for *mandamus* as in the present case, to hear and decide a possible violation of Section 11, Article XII of the Constitution in view of the ownership structure of PLDT's voting shares, as admitted by respondents and as stated in PLDT's 2010 GIS that PLDT submitted to SEC.

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

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(a) Have jurisdiction and supervision over all corporations, partnerships or associations who are the grantees of primary franchises and/or a license or a permit issued by the Government;

x x x x x x x x x

(c) Approve, reject, suspend, revoke or require amendments to registration statements, and registration and licensing applications;

x x x x x x x x x

(f) Impose sanctions for the violation of laws and the rules, regulations and orders, issued pursuant thereto;

x x x x x x x x x

(i) Issue cease and desist orders to prevent fraud or injury to the investing public;

x x x x x x x x x

(m) Suspend, or revoke, after proper notice and hearing the franchise or certificate of registration of corporations, partnership or associations, upon any of the grounds provided by law; and

(n) Exercise such other powers as may be provided by law as well as those which may be implied from, or which are necessary or incidental to the carrying out of, the express powers granted the Commission to achieve the objectives and purposes of these laws.

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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.

SO ORDERED.

Leonardo-de Castro, Brion, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, Mendoza, and *Sereno, JJ.,* concur.

Corona, C.J., joins the dissent of Mr. Justice Velasco.

Velasco, Jr., J., dissents. See Dissenting Opinion.

Abad, J., see dissenting opinion.

SEPARATE DISSENTING OPINION

VELASCO, JR., *J.*:

With due respect, I dissent.

A summary of the pertinent facts is as follows:

Philippine Long Distance Telephone Company (PLDT), a Philippine-registered telecommunications firm, was granted an initial 50-year charter and the right to establish a telephone network by Act No. 3436 on November 28, 1928.[1]

In 1969, American-owned General Telephone and Electronics Corporation (GTE), a major shareholder of PLDT, sold 26% of PLDT's equity to Philippine Telecommunications Investment Corporation (PTIC).[2] PTIC was incorporated on November 9, 1967 and is engaged in the business of investment holdings. It

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[1] *Rollo,* p. 16.

[2] *Id.*

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held 26,034,263 of PLDT shares, or 13.847% of the total outstanding common stocks of PLDT.[3]

In 1977, Prime Holdings Inc. (PHI) was incorporated and 100% owned by the Conjuangco group. Subsequently, PHI became the owner of 111,415 shares or 46.125% of PTIC by virtue of three (3) Deeds of Assignment executed by Ramon Cojuangco and Luis Tirso Rivilla.[4]

On May 9, 1986, the 111,415 PTIC shares held by PHI were sequestered by the Presidential Commission on Good Government (PCGG) pursuant to Executive Order No. 1.[5] Later, this Court declared the said shares to be owned by the Republic of the Philippines.[6]

In 1999, First Pacific Company Limited (First Pacific), a Bermuda-registered, Hong Kong-based investment firm, acquired the remaining 54% equity of PTIC.[7]

Thereafter, the government decided to sell its 46.1% stake in PTIC (equivalent to 6.4% indirect stake in PLDT), designating the Privatization Council of the Philippine Government as the disposition entity. On December 8, 2006, a public bidding was held where Singapore-based Parallax Capital Management LP (Parallax) emerged as the highest bidder with an offer of PhP25,217,556,000.[8]

On January 31, 2007, the House of Representatives Committee on Good Government conducted a public hearing on the particulars of the impending sale. Finance Secretary Margarito Teves, Finance Undersecretary John Sevilla, PCGG Chairperson Camilo Sabio, Commissioners Narciso Nario and Nick Conti, Securities

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[3] *Id.* at 899.

[4] *Id.* at 900.

[5] *Id.*

[6] See *Cojuangco v. Sandiganbayan*, G.R. No. 183278, April 24, 2009, 586 SCRA 790.

[7] *Rollo*, p. 18.

[8] *Id.* at 900-901.

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and Exchange Commission (SEC) General Counsel Vernette Umali-Paco, Philippine Stock Exchange (PSE) Chairperson Jose Vitug and President Francisco Ed Lim, Development Bank of the Philippines (DBP) President Reynaldo David and Director Miguel Romero all attended the hearing.[9]

In Report No. 2270, the House Committee on Good Government concluded that: (1) the auction of the government's PTIC shares bore due diligence, transparency and conformity with existing legal procedures; and (2) First Pacific's intended acquisition of the government's PTIC shares resulting in its 100% ownership in PTIC will not violate the 40% constitutional limit on foreign ownership of a public utility since PTIC held only 13.847% of the total outstanding common stocks of PLDT.[10]

Subsequently, the government informed First Pacific of the results of the bidding and gave it until February 1, 2007 to exercise its right of first refusal as provided under PTIC's Articles of Incorporation. Consequently, First Pacific announced that it would match Parallax's bid.[11] However, First Pacific failed to raise the money for the purchase by the February 1, 2007 deadline and, instead, yielded the right to PTIC itself. The deadline was then reset to March 2, 2007.[12]

On February 14, 2007, First Pacific, through its subsidiary, Metro Pacific Assets Holdings Inc. (MPAH), entered into a Conditional Sale and Purchase Agreement with the government for the latter's 46.1% stake in PTIC at the price of PhP 25,217,556,000.[13] The acquisition was completed on February 28, 2007.

On the same date, Wilson Gamboa (Gamboa) filed the instant petition for prohibition, injunction, declaratory relief and

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[9] *Id.* at 902.

[10] *Id.* at 902-903.

[11] *Id.* at 902.

[12] *Id.* at 17.

[13] *Id.* at 903.

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declaration of nullity of sale of the 111,415 shares of PTIC. He argues that: (1) the consummation of the impending sale of 111,415 shares to First Pacific violates the constitutional limitation on foreign ownership of a public utility; (2) respondents committed grave abuse of discretion by allowing the sale of PTIC shares to First Pacific; (3) respondents have made a complete misrepresentation of the impending sale by saying that it does not breach the constitutional limitation on foreign ownership of a public utility; and (4) the sale of common shares to foreigners in excess of 40% of the entire subscribed common capital stock violates the 1987 Philippine Constitution.[14]

After a careful examination of the facts and law applicable to the case, I submit that the petition should be dismissed.

At the outset, it is strikingly clear that the petition suffers from several jurisdictional and procedural defects.

Petitioner Has No *Locus Standi*

Petitioner Gamboa claims that he filed the petition in his capacity as a "nominal shareholder of PLDT and as [a] taxpayer."[15] However, these claims do not clothe him with the requisite legal standing to bring this suit.

The Rules of Court specifically requires that "[e]very action must be prosecuted or defended in the name of the real party in interest."[16] A real party in interest is defined as the "party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit."

Petitioner has failed to allege any interest in the 111,415 PTIC shares nor in any of the previous purchase contracts he now seeks to annul. He is neither a shareholder of PTIC nor of First Pacific. Also, he has not alleged that he was an interested bidder in the government's auction sale of the PTIC shares. Finally, he has not shown how, as a nominal shareholder of

[14] *Id.* at 41.

[15] *Id.* at 15.

[16] Rule 3, Sec. 2.

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PLDT, he stands to benefit from the annulment of the sale of the 111,415 PTIC shares or of any of the sales of the PLDT common shares held by foreigners. In fine, petitioner has not shown any real interest substantial enough to give him the requisite *locus standi* to question the sale of the government's PTIC shares to First Pacific.

Likewise, petitioner's assertion that he has standing to bring the suit as a "taxpayer" must fail. In *Gonzales v. Narvasa*, We discussed that "a taxpayer is deemed to have the standing to raise a constitutional issue when it is established that **public funds have been disbursed in alleged contravention of the law or the Constitution**."[17] In this case, no public funds have been disbursed. In fact, the opposite has happened—there is an inflow of funds into the government coffers.

Evidently, petitioner Gamboa has no legal standing to bring the present petition before this Court.

This Court Has No Jurisdiction

Petitioner Gamboa filed four (4) different petitions before this Court — declaratory relief, annulment, prohibition and injunction. However, all of these actions are not within the exclusive and/or original jurisdiction of the Supreme Court.

Article VII of the 1987 Constitution, particularly Section 5(1), in relation to Sec. 5(5), enumerates the instances where this Court exercises original jurisdiction:

Article VIII

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

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

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[17] G.R. No. 140835, August 14, 2000, 337 SCRA 733, 741. (Emphasis supplied.)

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(5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

Accordingly, this Court promulgated the Rules of Court, Sec. 1, Rule 56 of which states:

RULE 56
Original Cases

Section 1. Original cases cognizable. — Only petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, *habeas corpus*, disciplinary proceedings against members of the judiciary and attorneys, and cases affecting ambassadors, other public ministers and consuls may be filed originally in the Supreme Court.

Based on the foregoing provisos, it is patently clear that petitions for declaratory relief, annulment of sale and injunction do not fall within the exclusive original jurisdiction of this Court.

First, the court with the proper jurisdiction for declaratory relief is the Regional Trial Court (RTC). Sec. 1, Rule 63 of the Rules of Court stresses that an action for declaratory relief is within the **exclusive** original jurisdiction of the RTC, *viz*:

Any person interested under a deed, will, contract or other written instrument, whose rights are affected by a statute, executive order or regulation, ordinance, or any other governmental regulation may, before breach or violation thereof, **bring an action in the appropriate Regional Trial Court** to determine any question of construction or validity arising, and for a declaration of his rights or duties, thereunder. (Emphasis supplied.)

An action for declaratory relief also requires the following: (1) a justiciable controversy between persons whose interests are adverse; (2) the party seeking the relief has a legal interest in

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the controversy; and (3) the issue is ripe for judicial determination.[18] As previously discussed, petitioner lacks any real interest in this action; thus, no justiciable controversy between adverse interests exists.

Further, the Rules of Court also requires that "[a]ll persons who have or claim any interest which would be affected by the declaration shall be made parties."[19] The failure to implead all persons with a claim or interest in the subject matter of the petition for declaratory relief is a jurisdictional defect. [20]

What is more, an action for declaratory relief requires that it be filed before "the breach or violation of the statute, deed, contract, *etc.* to which it refers. Where the law or contract has already been contravened prior to the filing of an action for declaratory relief, the court can no longer assume jurisdiction over the action."[21] Here, petitioner himself points out the fact that, using the common stockholding basis, the 40% maximum foreign ownership limit on PLDT was already violated long before the sale of the PTIC shares by the government.[22] In addition, the sale itself has already been consummated. This only means that an action for declaratory relief is no longer proper.

Despite this, the *ponencia* decided to treat the petition for declaratory relief as one for *mandamus*, citing the rule that "where the petition has far-reaching implications and raises questions that should be resolved, it may be treated as one for *mandamus*."[23] However, such rule is not absolute. In *Macasiano v. National Housing Authority*,[24] the Court explicitly stated

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[18] *Province of Camarines Sur v. Court of Appeals*, G.R. No. 175064, September 18, 2009, 600 SCRA 569, 585.

[19] Rule 63, Sec. 2.

[20] *Degala v. Reyes*, No. L-2402, November 29, 1950.

[21] *Tambunting, Jr. v. Sumabat*, G.R. No. 144101, September 16, 2005, 470 SCRA 92, 96.

[22] *Rollo*, pp. 11-12.

[23] *Ponencia*, p. 10.

[24] G.R. No. 107921, July 1, 1993, 224 SCRA 236, 243.

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that the exercise of such discretion, whether to treat a petition for declaratory relief as one for *mandamus*, **presupposes that the petition is otherwise viable or meritorious**. As I shall discuss subsequently in the substantive portion of this opinion, the petition in this case is clearly not viable or meritorious.

Moreover, one of the reasons pointed out by the Court in *Macasiano* when it refused to treat the petition for declaratory relief as one for *mandamus* was that the petitioner lacked the proper standing to file the petition. Thus, the petition was subsequently dismissed. This is exactly similar to the instant case. As previously explained, petitioner has no legal standing to bring the present petition before this Court. He failed to show any real interest in the case substantial enough to give him the required legal standing to question the sale of the PTIC shares of the government to First Pacific.

Further, a petition for *mandamus* is premature if there are administrative remedies available to petitioner.[25] Under the doctrine of primary administrative jurisdiction, "courts cannot or will not determine a controversy where the issues for resolution demand the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact. In other words, if a case is such that its determination requires the expertise, specialized training and knowledge of an administrative body, relief must first be obtained in an administrative proceeding before resort to the courts is had even if the matter may well be within their proper jurisdiction."[26] Along with this, the doctrine of exhaustion of administrative remedies also requires that where an administrative remedy is provided by statute relief must be sought by exhausting this remedy before the courts will act.[27]

In the instant case, the power and authority to determine compliance with the Constitution lies with the SEC. Under Section

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[25] *Perez v. City Mayor of Cabanatuan*, No. L-16786, October 31, 1961.

[26] *Ferrer, Jr. v. Roco, Jr.*, G.R. No. 174129, July 5, 2010.

[27] *Montes v. Civil Service Board of Appeals*, No. L-10759, May 20, 1957.

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17(4) of the Corporation Code, the SEC has the power to approve or reject the Articles of Incorporation of any corporation where "the required percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution." Similarly, under Section 5 of the Securities Regulation Code, the SEC is conferred with the power to suspend or revoke the franchise or certificate of registration of corporations upon any of the grounds provided by law.[28] It bears stressing that the SEC also has the

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[28] Republic Act No. 8799, Sec. 5 provides:

Section 5. Powers and Functions of the Commission. — 5.1. The commission shall act with transparency and shall have the powers and functions provided by this code, Presidential Decree No. 902-A, the Corporation Code, the Investment Houses law, the Financing Company Act and other existing laws. Pursuant thereto the Commission shall have, among others, the following powers and functions:

(a) Have jurisdiction and supervision over all corporations, partnership or associations who are the grantees of primary franchises and/or a license or a permit issued by the Government;

x x x x x x x x x

(c) Approve, reject, suspend, revoke or require amendments to registration statements, and registration and licensing applications;

(d) Regulate, investigate or supervise the activities of persons to ensure compliance;

x x x x x x x x x

(f) Impose sanctions for the violation of laws and rules, regulations and orders, and issued pursuant thereto;

(g) Prepare, approve, amend or repeal rules, regulations and orders, and issue opinions and provide guidance on and supervise compliance with such rules, regulation and orders;

x x x x x x x x x

(i) Issue cease and desist orders to prevent fraud or injury to the investing public;

x x x x x x x x x

(m) Suspend, or revoke, after proper notice and hearing the franchise or certificate of registration of corporations, partnership or associations, upon any of the grounds provided by law; and

(n) Exercise such other powers as may be provided by law as well as those which may be implied from, or which are necessary or incidental to

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power to investigate violations of the Securities Regulation Code and its Amended Rules. With this, it is clear that petitioner failed to invoke the primary jurisdiction of the SEC with respect to this matter.

Additionally, the petition contains numerous questions of fact which is not allowed in a petition for *mandamus*.[29] Hence, based on the foregoing, a petition for *mandamus* is evidently improper.

Second, since an action for annulment of sale is an ordinary civil action incapable of pecuniary estimation,[30] it also falls within the exclusive original jurisdiction of the RTC.[31]

Lastly, although this Court, the CA, and the RTC have "concurrent jurisdiction to issue writs of *certiorari*, **prohibition**, *mandamus, quo warranto, habeas corpus* and **injunction**, such concurrence does not give the petitioner unrestricted freedom of choice of court forum."[32] The doctrine of hierarchy of courts dictates that when jurisdiction is shared concurrently with different courts, the proper suit should first be filed with the lower-ranking court. Failure to do so is sufficient cause for the dismissal of a petition.[33]

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the carrying out of, the express powers granted the Commission to achieve the objectives and purposes of these laws.

[29] *National Power Corporation v. Province of Quezon and Municipality of Pagbilao*, G.R. No. 171586, January 25, 2010.

[30] See *Heirs of Juanita Padilla v. Magdua*, G.R. No. 176858, September 15, 2010, 630 SCRA 573, 586.

[31] Batas Pambansa Blg. 129, Sec. 19. *Jurisdiction in civil cases*. — Regional Trial Courts shall exercise exclusive original jurisdiction:

(1) In all civil actions in which the subject of the litigation is incapable of pecuniary estimation;

x x x x x x x x x

[32] *Chong v. Dela Cruz*, G.R. No. 184948, July 21, 2009, 593 SCRA 311, 314; citing *Talento v. Escalada*, G.R. No. 180884, June 27, 2008, 556 SCRA 491.

[33] See *Chamber of Real Estate and Builders Associations, Inc. (CREBA) v. Secretary of Agrarian Reform*, G.R. No. 183409, June 18, 2010, 621 SCRA 295.

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In *Santiago v. Vasquez*,[34] the Court took the opportunity to explain why the blatant disregard of the hierarchy of courts is frowned upon, to wit:

> x x x We discern in the proceedings in this case a propensity on the part of petitioner, and, for that matter, the same may be said of a number of litigants who initiate recourses before us, to disregard the hierarchy of courts in our judicial system by seeking relief directly from this Court despite the fact that the same is available in the lower courts in the exercise of their original or concurrent jurisdiction, or is even mandated by law to be sought therein. This practice must be stopped, not only because of the imposition upon the precious time of this Court but also because of the inevitable and resultant delay, intended or otherwise, in the adjudication of the case which often has to be remanded or referred to the lower court as the proper forum under the rules of procedure, or as better equipped to resolve the issues since this Court is not a trier of facts. We, therefore, reiterate the judicial policy that this Court will not entertain direct resort to it unless the redress desired cannot be obtained in the appropriate courts or where exceptional and compelling circumstances justify availment of a remedy within and calling for the exercise of our primary jurisdiction.

In the instant case, petitioner should have filed the petition for injunction and prohibition with the trial courts. Petitioner failed to show any exceptional or compelling circumstance to justify the exception to the rule of hierarchy of courts. Thus, absent such justification, the rule must be upheld.

In fact, in *Fernandez v. Cojuangco*,[35] which also involved a similar issue, questioning the issuance of PLDT's common shares to Smart and NTT's stockholders on the ground, among others, that such issuance of shares violated the 40% foreign ownership constitutional restriction for public utilities, this Court issued a Resolution dismissing the petition filed with it for disregarding the hierarchy of courts.

More importantly, the function of a writ of prohibition is to prevent the performance of an act which is yet to be done. It is

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[34] G.R. Nos. 99289-90, January 27, 1993, 217 SCRA 633, 651-652.

[35] G.R. No. 157360, June 9, 2003.

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not intended to provide a remedy for acts already performed.[36] The rationale behind this was discussed in *Cabanero v. Torres*,[37] citing *U.S. v. Hoffman*,[38] *viz*:

> The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggested to the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect to a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction.

As previously pointed out, the sale by the government of the PTIC shares had already been completed. Thus, the Petition for Prohibition has become moot. As a result, this Court has no obligation to entertain the petition.

Finally, it should be noted that the non-joinder of ordinary civil actions with special civil actions is elementary in remedial law. Sec. 5, Rule 2 of the Rules specifically prohibits the joining of special civil actions or actions governed by special rules with ordinary civil actions.[39] In this case, petitioner violated this basic rule when he joined several special civil actions, prohibition and declaratory relief, and the ordinary civil actions for annulment and injunction.

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[36] *Pimentel v. Ermita*, G.R. No. 164978, October 13, 2005, 472 SCRA 587, 593; *Tolentino v. Commission on Elections*, G.R. No. 148334, January 21, 2004, 420 SCRA 438, 451.

[37] 61 Phil. 523 (1935).

[38] 4 Wall., 158, 161; 18 Law. ed., 354.

[39] Rule 2, Sec. 5. *Joinder of causes of action.*

A party may in one pleading assert, in the alternative or otherwise, as many causes of action as he may have against an opposing party, subject to the following conditions:

x x x x x x x x x

(b) **The joinder shall not include special civil actions or actions governed by special rules;** (Emphasis supplied.)

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Violation of Due Process

It is a fundamental guarantee in the Constitution that "[n]o person shall be deprived of life, liberty or property without due process of law."[40] Due process has two aspects: substantive and procedural. Substantive due process is a prohibition of arbitrary laws, while procedural due process is a guarantee of procedural fairness.[41] Here, what petitioner asks of this Court is a finding of a violation of both substantive and procedural due process.

Sec. 11, Art. XII of the Constitution contemplates of two situations: *first*, where the applicant of a franchise is a natural person, he must be a Filipino citizen; and *second*, where the applicant is a juridical person, 60% of its **capital** must be owned by Filipino citizens. In the first scenario, only one person and one property is involved, *i.e.*, the Filipino citizen and his or her franchise. In the second, two different property holders and two different properties are involved, *i.e.*, the public utility company holding its franchise and the shareholders owning the capital of the utility company. However, in both situations, Sec. 11 imposes a qualification for the retention of property on just one property holder, the franchise holder, as a condition for keeping his or its franchise. It imposes no nationality qualification on the shareholders of the utility company as a condition for keeping their shares in the utility company. Thus, if a utility company or the franchise holder fails to maintain the nationality qualification, only its franchise should be revoked.

In *J.G. Summit Holdings, Inc. v. CA*,[42] this Court had the chance to rule on a similar set of facts. In that case, We refused to annul the sale of the government's shares despite the petitioner's claim that it would breach the maximum 40% foreign ownership limit found in the Constitution. According to the Court:

x x x **In fact, it can even be said that if the foreign shareholdings of a landholding corporation exceeds 40%, it is not the foreign**

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[40] Art. III, Sec. 1.

[41] J.G. Bernas, S.J., *THE 1987 PHILIPPINE CONSTITUTION: A COMPREHENSIVE REVIEWER* 27-28 (2006).

[42] G.R. No. 124293, January 31, 2005, 450 SCRA 169, 192.

stockholders' ownership of the shares which is adversely affected but the capacity of the corporation to own land — that is, the corporation becomes disqualified to own land. This finds support under the basic corporate law principle that the corporation and its stockholders are separate juridical entities. In this vein, the right of first refusal over shares pertains to the shareholders whereas the capacity to own land pertains to the corporation. Hence, the fact that PHILSECO owns land cannot deprive stockholders of their right of first refusal. **No law disqualifies a person from purchasing shares in a landholding corporation even if the latter will exceed the allowed foreign equity, what the law disqualifies is the corporation from owning land.** (Emphasis supplied.)

Certainly, the Court has differentiated the two property owners and their properties. Confusing the two would result in "an unreasonable curtailment of property rights without due process of law."[43]

Furthermore, procedural due process requires that before any of the common shares in excess of the 40% maximum foreign ownership limit can be taken, all the shareholders have to be given notice and a trial should be held before their shares are taken. This means that petitioner should have impleaded all the foreign natural and juridical shareholders of PLDT so that they can be heard. The foreign shareholders are considered as an "indispensable party" or one who:

has such an interest in the controversy or subject matter that a final adjudication cannot be made, in his absence, without injuring or affecting that interest[;] a party who has not only an interest in the subject matter of the controversy, but also has an interest of such nature that a final decree cannot be made without affecting his interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. It has also been considered that an indispensable party is a person in whose absence there cannot be a determination between the parties already before the court which is effective, complete, or

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[43] *La Bugal-B'laan Tribal Association Inc. v. DENR*, G.R. No. 127882, December 1, 2004, 445 SCRA 1.

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equitable. Further, an indispensable party is one who must be included in an action before it may properly go forward.[44]

At the same time, the Rules of Court explicitly requires the joinder of indispensable parties or "[p]arties in interest without whom no final determination can be had."[45] This is mandatory. As held in *Pepsico, Inc. v. Emerald Pizza, Inc.*,[46] their absence renders all actions of the court null and void, *viz*:

> x x x Their presence is necessary to vest the court with jurisdiction, which is "the authority to hear and determine a cause, the right to act in a case." Thus, without their presence to a suit or proceeding, judgment of a court cannot attain real finality. **The absence of an indispensable party renders all subsequent actions of the court null and void for want of authority to act, not only as to the absent parties but even as to those present.** (Emphasis supplied.)

In this case, petitioner failed to implead all the indispensable parties. Accordingly, in the absence of such indispensable parties, this Court is wanting in authority to act or rule on the present petition.

Ultimately, the present petition partakes of a collateral attack on PLDT's franchise as a public utility with petitioner pleading as ground PLDT's alleged breach of the 40% limit on foreign equity. Such is not allowed. As discussed in *PLDT v. National Telecommunications Commission*,[47] a franchise is a property right that can only be questioned in a direct proceeding:

> x x x A franchise is a property right and cannot be revoked or forfeited without due process of law. The determination of the right to the exercise of a franchise, or whether the right to enjoy such privilege has been forfeited by non-user, is more properly the subject of the prerogative writ of *quo warranto*, the right to assert which,

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[44] *Metropolitan Bank & Trust Company v. Alejo*, G.R. No. 141970, September 10, 2001, 364 SCRA 812, 820; citations omitted.

[45] Rule 3, Sec. 7.

[46] G.R. No. 153059, August 14, 2007, 530 SCRA 58.

[47] G.R. No. 84404, October 18, 1990, 190 SCRA 717, 729.

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as a rule, belongs to the State "upon complaint or otherwise" x x x the reason being that the abuse of a franchise is a public wrong and not a private injury. A forfeiture of a franchise will have to be declared in a direct proceeding for the purpose brought by the State because a franchise is granted by law and its unlawful exercise is primarily a concern of Government.

Hence, due process requires that for the revocation of franchise a petition for *quo warranto* be filed directly attacking the franchise itself.

Evidently, the petition is patently flawed and the petitioner availed himself of the wrong remedies. These jurisdictional and procedural grounds, by themselves, are ample enough to warrant the dismissal of the petition. Granting *arguendo* that the petition is sufficient in substance and form, it will still suffer the same fate.

The Proper Definition of "Capital"

Petitioner's main substantive issue revolves around the proper definition of the word "capital" found in Section 11, Article 12 of the Constitution. The said section reads:

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**. (Emphasis supplied.)

He argues that the framers of the Constitution intended the word "capital" to be limited to voting shares alone and not the total

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outstanding capital stock (combined total of voting and non-voting shares). Specifically, he contends that the term "capital" refers only to shares of stock that can vote in the election of the members of the Board of Directors. The question is, is this the proper definition?

The *ponencia* resolved this in the affirmative and held that the term "capital" only refers to voting shares since these are the shares that "have voting rights which translate to control,"[48] *i.e.*, the right to elect directors who ultimately control or manage the corporation. Generally, these are referred to as "common" shares. However, he clarified that if preferred shares also have the right to vote in the election of the members of the Board of Directors, then the term "capital" shall also include such preferred shares. Further, the *ponencia* maintains that "mere legal title is insufficient to meet the required Filipino equity," but that "full beneficial ownership of the stocks coupled with appropriate voting rights" is required.[49]

I beg to disagree with the *ponencia's* resolution of this issue for the following reasons:

First, contrary to pronouncement of the *ponencia*, the intent of the framers of the Constitution was not to limit the application of the word "capital" to voting or common shares alone. In fact, the Records of the Constitutional Commission reveal that even though the UP Law Center proposed the phrase "voting stock or controlling interest," the framers of the Constitution did not adopt this but instead used the word "capital," *viz*:

> MR. BENGZON. We would also like to indicate that perhaps the better term in order to avoid any conflict or misinterpretations would be the use of the phrase "capital stock."
>
> MR. NATIVIDAD. Capital stock?
>
> MR. SUAREZ. We will discuss that on the committee level because precisely, there were three criteria that were submitted. One of them is with reference to the authorized capital stock; the second would

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[48] *Ponencia*, p. 17.

[49] *Id.* at 20.

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be with respect to the voting rights; and the third would be with respect to the management. And so, again, we would like to inform the members that the Committee is still trying to polish this particular provision.[50]

x x x x x x x x x

MR. FOZ. Mr. Vice-President, in Sections 3 and 9,[51] the provision on equity is both 60 percent, but I notice that this is now different from the provision in the 1973 Constitution in that the basis for the equity provision is voting stock or controlling interest instead of the usual capital percentage as provided for in the 1973 Constitution. We would like to know what the difference would be between the previous and the proposed provisions regarding equity interest.

MR. VILLEGAS. Commissioner Suarez will answer that.

MR. SUAREZ. Thank you.

As a matter of fact, this particular portion is still being reviewed by this Committee. In Section 1, Article XIII of the 1935 Constitution, the wording is that the percentage should be based on the capital which is owned by such citizens. In the proposed draft, this phrase was proposed: "voting stock or controlling interest." This was a plan submitted by the UP Law Center.

Three days ago, we had an early morning breakfast conference with the members of the UP Law Center and precisely, we were seeking clarification regarding the difference. We would have three criteria to go by: One would be based on capital, which is capital stock of the corporation, authorized, subscribed or paid up, as employed under the 1935 and the 1973 Constitution. The idea behind the introduction of the phrase "voting stock or controlling interest" was precisely to avoid the perpetration of dummies, Filipino dummies of multinationals. It is theoretically possible that a situation may develop where these multinational interests would not really be only 40 percent but will extend beyond that in the matter of voting because they could enter into what is known as a voting trust or voting agreement with the rest of the stockholders and, therefore, notwithstanding the fact that on record their capital extent is only up to 40-percent interest in the corporation, actually, they would be

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[50] Records of the Constitutional Commission, Volume III, p. 269.

[51] Referring to Sections 2 and 10, Article XII of the 1987 Constitution.

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managing and controlling the entire company. That is why the UP Law Center members suggested that we utilize the words "voting interest" which would preclude multinational control in the matter of voting, independent of the capital structure of the corporation. And then they also added the phrase "controlling interest" which up to now they have not been able to successfully define the exact meaning of. x x x And as far as I am concerned, I am not speaking in behalf of the Committee, I would feel more comfortable if we go back to the wording of the 1935 and the 1973 Constitution, that is to say, the 60-40 percentage could be based on the capital stock of the corporation.

MR. FOZ. I understand that that was the same view of Dean Carale who does not agree with the other on this panel at the UP Law Center regarding the percentage of the ratio.

MR. Suarez. That is right. Dean Carale shares my sentiment about this matter.

MR. BENGZON. I also share the sentiment of Commissioner Suarez in that respect. So there are already two in the Committee who want to go back to the wording of the 1935 and the 1973 Constitution.[52]

x x x x x x x x x

MR. TREÑAS. Madam President, may I propose an amendment on line 14 of Section 3 by deleting therefrom "whose voting stock and controlling interest." And in lieu thereof, insert the CAPITAL so the line should read: "associations at least sixty percent of the CAPITAL is owned by such citizens.

MR. VILLEGAS. We accept the amendment.

MR. TREÑAS. Thank you.

THE PRESIDENT. The amendment of Commissioner Treñas on line 14 has been accepted by the Committee.

Is there any objection? (*Silence*) The Chair hears none; the amendment is approved.[53]

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[52] Records of the Constitutional Commission, Volume III, pp. 326-327.

[53] *Id.* at 357.

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x x x x x x x x x

MR. VILLEGAS. Yes, Commissioner Davide has accepted the word "CAPITAL" in place of "voting stock or controlling interest." This is an amendment already accepted by the Committee.[54] **x x x**

x x x x x x x x x

MR. NOLLEDO. Thank you, Madam President.

I would like to propound some questions to the chairman and members of the committee. I have here a copy of the approved provisions on Article on the National Economy and Patrimony. On page 2, the first two lines are with respect to the Filipino and foreign equity and I said: "At least sixty percent of whose capital or controlling interest is owned by such citizen."

I notice that this provision was amended by Commissioner Davide by changing "voting stocks" to "CAPITAL," but I still notice that there appears the term "controlling interest" which seems to refer to associations other than corporations and it is merely 50 percent plus one percent which is less than 60 percent. Besides, the wordings may indicate that the 60 percent may be based not only on capital but also on controlling interest; it could mean 60 percent or 51 percent.

Before I propound the final question, I would like to make a comment in relation to Section 15 since they are related to each other. I notice that in Section 15, there still appears the phrase "voting stock or controlling interest." The term "voting stocks" as the basis of the Filipino equity means that if 60 percent of the voting stocks belong to Filipinos, foreigners may not own more than 40 percent of the capital as long as the 40 percent or the excess thereof will cover nonvoting stock. This is aside from the fact that under the Corporation Code, even nonvoting shares can vote on certain instances. Control over investments may cover aspects of management and participation in the fruits of production or exploitation.

So, I hope the committee will consider favorably my recommendation that instead of using "controlling interests," we just use "CAPITAL" uniformly in cases where foreign equity is permitted by law, because the purpose is really to help the Filipinos

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[54] *Id.* at 360.

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in the exploitation of natural resources and in the operation of public utilities. I know the committee, at its own instance, can make the amendment.

What does the committee say?

MR. VILLEGAS. We completely agree with the Commissioner's views. Actually, it was really an oversight. We did decide on the word "CAPITAL." I think it was the opinion of the majority that the phrase "controlling interest" is ambiguous.

So, we do accept the Commissioner's proposal to eliminate the phrase "or controlling interest" in all the provisions that talk about foreign participation. (Emphasis supplied.)

MR. NOLLEDO. Not only in Section 3, but also with respect to Section 15.

Thank you very much.[55]

Undoubtedly, the framers of the Constitution decided to use the word "capital" in all provisions that talk about foreign participation and **intentionally** left out the phrase "voting stocks" or "controlling interest." *Cassus Omissus Pro Omisso Habendus Est* — a person, object or thing omitted must have been omitted intentionally. In this case, the intention of the framers of the Constitution is very clear — to omit the phrases "voting stock" and "controlling interest."

Evidently, the framers of the Constitution were more comfortable with going back to the wording of the 1935 and 1973 Constitutions, which is to use the 60-40 percentage for the basis of the capital stock of the corporation. Additionally, the phrases "voting stock or controlling interest" were also initially used in Secs. 2[56]

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[55] *Id.* at 582.

[56] Section 2, Article XII, 1987 Constitution:

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

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and 10,[57] Article XII of the 1987 Constitution. These provisions involve the development of natural resources and certain investments. However, after much debate, they were also replaced with the word "capital" alone. All of these were very evident in the aforementioned deliberations.

Much more significant is the fact that a comprehensive examination of the constitutional deliberations in their entirety will reveal that the framers of the Constitution themselves understood that the word capital includes both voting and non-voting shares and still decided to use "capital" alone, to wit:

MR. AZCUNA. May I be clarified as to that portion that was accepted by the Committee.

MR. VILLEGAS. The portion accepted by the Committee is the deletion of the phrase "voting stock or controlling interest."

MR. AZCUNA. Hence, without the Davide amendment, the committee report would read: "corporations or associations at least sixty percent of whose CAPITAL is owned by such citizens."

MR. VILLEGAS. Yes.

MR. AZCUNA. So if the Davide amendment is lost, we are stuck with 60 percent of the capital to be owned by citizens?

MR. VILLEGAS. That is right.

x x x x x x x x x

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**. x x x (Emphasis supplied.)

[57] Section 10, Article XII, 1987 Constitution:

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. (Emphasis supplied.)

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MR. AZCUNA. Yes, but what I mean is that the control should be with the Filipinos.

MR. BENGZON. Yes, that is understood.

MR. AZCUNA. Yes, because if we just say "sixty percent of whose capital is owned by the Filipinos," the capital may be voting or non-voting.

MR. BENGZON. That is correct.[58]

x x x x x x x x x

MR. GARCIA. Thank you very much, Madam President.

I would like to propose the following amendment on Section 3, line 14 on page 2. I propose to change the word "sixty" to SEVENTY-FIVE. So, this will read: "or it may enter into co-production, joint venture, production sharing agreements with Filipino citizens or corporations or associations at least SEVENTY-FIVE percent of whose CAPITAL stock or controlling interest is owned by such citizens."

MR. VILLEGAS. This is just a correction. I think Commissioner Azcuna is not insisting on the retention of the phrase "controlling interest," so we will retain "CAPITAL" to go back really to the 1935 and 1973 formulations.[59] (Emphasis supplied.)

To emphasize, by using the word "capital," the framers of the Constitution adopted the definition or interpretation that includes **all** types of shares, whether voting or non-voting.

The fundamental principle in the construction of constitutional provisions is "to give the intent to the framers of the organic law and the people adopting it. The intention to which force is to be given is that which is embodied and expressed in the constitutional provisions themselves."[60] Generally, "in construing constitutional provisions which are ambiguous or of doubtful

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[58] Records of the Constitutional Commission, Volume III, p. 360.

[59] *Id.* at 364.

[60] *Sarmiento v. Mison*, G.R. No. 79974, December 17, 1987, 156 SCRA 549, 552 citing *Gold Creek Mining Corp. v. Rodriguez*, 66 Phil. 259, 264.

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meaning, the courts may consider the debates in the constitutional convention as throwing light on the intent of the framers of the Constitution. It is true that the intent of the convention is not controlling by itself, but as its proceeding was preliminary to the adoption by the people of the Constitution the understanding of the convention as to what was meant by the terms of the constitutional provision which was the subject of the deliberation, goes a long way toward explaining the understanding of the people when they ratified it."[61]

Second, the *ponencia* also points to the provisions of the Foreign Investments Act of 1991 (FIA),[62] as a reinforcement of the interpretation of the word "capital" as only referring to those shares entitled to vote. However, a careful examination of its provisions would reveal otherwise.

Section 3(a) of the FIA, as amended, defines the term "Philippine national" as:

SEC. 3. Definitions. — As used in this Act:

a. The term "Philippine national" shall mean a citizen of the Philippines; of a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which **at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines**; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%)

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[61] *Aquino, Jr. v. Enrile*, No. L-35546, September 17, 1974, 59 SCRA 183.

[62] Republic Act No. 7042 entitled "AN ACT TO PROMOTE FOREIGN INVESTMENTS, PRESCRIBE THE PROCEDURES FOR REGISTERING ENTERPRISES DOING BUSINESS IN THE PHILIPPINES AND FOR OTHER PURPOSES."

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of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation, shall be considered a "Philippine national." (Emphasis supplied.)

The *ponencia* failed to see the fact that the FIA specifically has the phrase "entitled to vote" after the phrase "total outstanding capital stock." Logically, this means that interpreting the phrase "total outstanding capital stock" **alone** connotes the inclusion of all types of shares under the term "capital" and not just those that are entitled to vote. By adding the phrase "entitled to vote," the FIA sought to distinguish between the shares that can vote and those that cannot. Thus, it is very clear that even the FIA itself supports the definition of the term "capital" as including all types of shares.

As a matter of fact, in the Senate deliberations of the FIA, Senator Angara pointed out that the word "capital," as used in the 1987 Constitution, includes all types of shares:

Senator Angara. x x x

Before I leave that point, Mr. President, as we know, **the constitutional test is capital. That means, equity investment, not control**. Would this control test then now become an additional requirement to the constitutional requirement?

Senator Paterno. Well, this is an amplification of the constitutional stipulation, Mr. President. It is a definition, by law, of what is contained in the Constitution.

Senator Angara. No, Mr. President, **because the Constitution requires 60 percent of capital. That means, whether voting or nonvoting, 60 percent of that must belong to Filipinos.** Whereas, under this proposed definition, it is only the voting shares that we require to be 60 percent owned.

Senator Paterno. Yes.

Senator Angara. So, my question is: Would this requirement of control be in addition to what the Constitution imposes?

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Senator Paterno. No, this would be the definition of what the Constitution requires. We are saying that it is the capital stock outstanding and entitled to vote. It is the definition of capital as maintained by the Constitution.

Senator Angara. On the contrary, I am saying that **the constitutional test is capital, which is distinguished from capital stock entitled to vote. Capital means equity which can be voting or nonvoting, common or preferred. That is the constitutional test**.[63] x x x (Emphasis supplied.)

Moreover, it is a well-settled rule of statutory construction that a statute should be construed whenever possible in a manner that will avoid conflict with the Constitution.[64] Where a statute is reasonably susceptible of two constructions, one constitutional and the other unconstitutional, the construction in favor of its constitutionality should be adopted.

In this case, the FIA should be read in harmony with the Constitution. Since the Constitution only provides for a single requirement for the operation of a public utility under Sec. 11, *i.e.*, 60% capital must be Filipino-owned, a mere statute cannot add another requirement. Otherwise, such statute may be considered unconstitutional.

Accordingly, the phrase "entitled to vote" should not be interpreted to be limited to common shares alone or those shares entitled to vote in the election of members of the Board of Directors. It should also include those deemed non-voting because they also have voting rights. Sec. 6 of the Corporation Code[65] grants voting rights to holders of shares of a corporation on certain key fundamental corporate matters despite being classified as non-voting in the articles of incorporation. These are:

1. Amendment of the articles of incorporation;

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[63] Transcript of the January 15, 1991, 4th Regular Session, 8th CRP, Bill on Second Reading, Senate, pp. 11-12.

[64] *Teehankee v. Rovias*, 75 Phil. 634 (1945).

[65] *Batas Pambansa Blg.* 68 entitled "THE CORPORATION CODE OF THE PHILIPPINES."

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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.

Clearly, the shares classified as non-voting are also entitled to vote under these circumstances.

In fact, the FIA did not say "entitled to vote in the management affairs of the corporation" or "entitled to vote in the election of the members of the Board of Directors." Verily, where the law does not distinguish, neither should We. Hence, the proper interpretation of the phrase "entitled to vote" under the FIA should be that it applies to all shares, whether classified as voting or non-voting shares. Such construction is in fact in harmony with the fundamental law of the land.

Stockholders, whether holding voting or non-voting stocks, have all the rights, powers and privileges of ownership over their stocks. This necessarily includes the right to vote because such is inherent in and incidental to the ownership of corporate stocks, and as such is a property right.[66]

Additionally, **control is another inherent right of ownership**.[67] The circumstances enumerated in Sec. 6 of the Corporation Code clearly evince this. It gives voting rights to the stocks deemed as non-voting as to ***fundamental*** **and** ***major*** **corporate changes**. Thus, the issue should not only dwell on the daily management

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[66] *Castillo v. Balinghasay*, G.R. No. 150976, October 18, 2004.

[67] *National Waterworks and Sewerage Authority*, No. L-21911, September 29, 1967.

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affairs of the corporation but also on the equally important fundamental changes that may need to be voted on. On this, the "non-voting" shares also exercise control, together with the voting shares.

Consequently, the fact that only holders of common shares can elect a corporation's board of directors does not mean that only such holders exercise control over the corporation. Particularly, the control exercised by the board of directors over the corporation, by virtue of the corporate entity doctrine, is totally distinct from the corporation's stockholders and any power stockholders have over the corporation as owners.

It is settled that when the activity or business of a corporation falls within any of the partly nationalized provisions of the Constitution or a special law, the "control test" must also be applied to determine the nationality of a corporation on the basis of the nationality of the stockholders who control its equity.

The control test was laid down by the Department of Justice (DOJ) in its Opinion No. 18 dated January 19, 1989. It determines the nationality of a corporation with alien equity based on the percentage of capital owned by Filipino citizens. It reads:

> Shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as Philippine nationality, but if the percentage of Filipino ownership in the corporation or partnership is less than 60% only the number of shares corresponding to such percentage shall be counted as of Philippine nationality.[68]

In a catena of opinions, the SEC, "the government agency tasked with the statutory duty to enforce the nationality requirement prescribed in Section 11, Article XII of the Constitution on the ownership of public utilities,"[69] has consistently applied the control test.[70]

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[68] Opinion No. 018, s. 1989, January 19, 1989, Department of Justice.

[69] *Ponencia*, pp. 30-31.

[70] SEC Opinion dated November 6, 1989 addressed to Attys. Barbara Anne C. Migollos and Peter Dunnely A. Barot; SEC Opinion dated December

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The FIA likewise adheres to the control test. This intent is evident in the May 21, 1991 deliberations of the Bicameral Conference Committee (Committees on Economic Affairs of the Senate and House of Representatives), to wit:

CHAIRMAN TEVES. x x x On definition of terms, Ronnie, would you like anything to say here on the definition of terms of Philippine national?

HON. RONALDO B. ZAMORA. I think we've — we have already agreed that we are adopting here the control test. Wasn't that the result of the —

CHAIRMAN PATERNO. No. I thought that at the last meeting, I have made it clear that the Senate was not able to make a decision for or against the grandfather rule and the control test, because we had gone into caucus and we had voted but later on the agreement was rebutted and so we had to go back to adopting the wording in the present law which is not clearly, by its language, a control test formulation.

HON. ANGARA. Well, I don't know. Maybe I was absent, Ting, when that happened but my recollection is that we went into caucus,

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14, 1989 addressed to Atty. Maurice C. Nubla; SEC Opinion dated January 2, 1990 addressed to Atty. Eduardo F. Hernandez; SEC Opinion dated May 30, 1990 addressed to Gold Fields Philippines Corporation; SEC Opinion dated September 21, 1990 addressed to Carag, Caballes, Jamora, Rodriguez & Somera Law Offices; SEC Opinion dated March 23, 1993 addressed to Mr. Francis F. How; SEC Opinion dated April 14, 1993 addressed to Director Angeles T. Wong of the Philippine Overseas Employment Administration; SEC Opinion dated November 23, 1993 addressed to Mssrs. Dominador Almeda and Renato S. Calma; SEC Opinion dated December 7, 1993 addressed to Roco Bunag Kapunan Migallos & Jardaleza; SEC Opinion No. 49-04 dated December 22, 2004 addressed to Atty. Priscilla B. Valer; SEC Opinion No. 17-07 dated September 27, 2007 addressed to Mr. Reynaldo G. David; SEC Opinion No. 18-07 dated November 28, 2007 addressed to Mr. Rafael C. Bueno, Jr.; SEC-OGC Opinion No. 20-07 dated November 28, 2007 addressed to Atty. Amado M. Santiago, Jr., SEC-OGC Opinion No. 21-07 dated November 28, 2007 addressed to Atty. Navato Jr.; SEC-OGC Opinion No. 03-08 dated January 15, 2008 addressed to Attys. Ruby Rose J. Yusi and Rudyard S. Arbolado; SEC-OGC Opinion No. 09-09 dated April 28, 2009 addressed to Villaraza Cruz Marcelo Angangco; SEC-OGC Opinion No. 08-10 dated February 8, 2010 addressed to Mr. Teodoro B. Quijano; SEC-OGC Opinion No. 23-10 dated August 18, 2010 addressed to Attys. Teodulo G. San Juan, Jr. and Erdelyn C. Go.

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we debated [the] pros and cons of the control versus the grandfather rule and by actual vote the control test bloc won. I don't know when subsequent rejection took place, but anyway even if the — we are adopting the present language of the law I think by interpretation, administrative interpretation, while there may be some differences at the beginning, the current interpretation of this is the control test. It amounts to the control test.

CHAIRMAN TEVES. That's what I understood, that we could manifest our decision on the control test formula even if we adopt the wordings here by the Senate version.

x x x x x x x x x

CHAIRMAN PATERNO. The most we can do is to say that we have explained — is to say that although the House Panel wanted to adopt language which would make clear that the control test is the guiding philosophy in the definition of [a] Philippine national, we explained to them the situation in the Senate and said that we would be — was asked them to adopt the present wording of the law cognizant of the fact that the present administrative interpretation is the control test interpretation. But, you know, we cannot go beyond that.[71]

MR. AZCUNA. May I be clarified as to that portion that was accepted by the Committee.

MR. VILLEGAS. The portion accepted by the Committee is the deletion of the phrase "voting stock or controlling interest."

This intent is even more apparent in the Implementing Rules and Regulations (IRR) of the FIA. In defining a "Philippine national," **Section 1(b) of the IRR of the FIA categorically states that for the purposes of determining the nationality of a corporation the control test should be applied**.[72]

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[71] Deliberations of the Bicameral Conference Committee, May 21, 1991, pp. 3-5.

[72] Section 1(b), Implementing Rules and Regulations of the Foreign Investments Act of 1991:

b. "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by the citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent [60%] of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension

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The cardinal rule in the interpretation of laws is to ascertain and give effect to the intention of the legislator.[73] Therefore, the legislative intent to apply the control test in the determination of nationality must be given effect.

Significantly, **in applying the control test, the SEC has consistently ruled that the determination of the nationality of the corporation must be based on the *entire outstanding capital stock*, which includes both voting and non-voting shares.** One such ruling can be found in an Opinion dated November 21, 1989 addressed to Atty. Reynaldo G. Geronimo, to wit:

> As to the basis of computation of the 60-40 percentage nationality requirement under existing laws (whether it should be based on the number of shares or the aggregate amount in pesos of the par value of the shares), the following definitions of corporate terms are worth mentioning.
>
> "The term capital stock signifies the aggregate of the shares actually subscribed." (11 Fletcher, Cyc. Corps. (1971 Rev. Vol.) Sec. 5082, citing *Goodnow v. American Writing Paper Co*., 73 NJ Eq. 692, 69 A 1014 aff'g 72 NJ Eq. 645, 66 A, 607).
>
> "Capital stock means the capital subscribed (the share capital)." (*Ibid*., emphasis supplied).
>
> "In its primary sense a share of stock is simply one of the proportionate integers or units, the sum of which constitutes the capital stock of corporation. (Fletcher, Sec. 5083).

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or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent [60%] of the fund will accrue to the benefit of the Philippine nationals; Provided, that where a corporation its non-Filipino stockholders own stocks in a Securities and Exchange Commission [SEC] registered enterprise, at least sixty percent [60%] of the capital stock outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent [60%] of the members of the Board of Directors of each of both corporation must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national. **The control test shall be applied for this purpose.** (Emphasis supplied.)

[73] *Roldan v. Villaroman*, No. L-46825, October 18, 1939.

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The equitable interest of the shareholder in the property of the corporation is represented by the term stock, and the extent of his interest is described by the term shares. The expression shares of stock when qualified by words indicating number and ownership expresses the extent of the owner's interest in the corporate property (*Ibid.*, Sec. 5083, emphasis supplied).

Likewise, in all provisions of the Corporation Code the stockholders' right to vote and receive dividends is always determined and based on the "outstanding capital stock," defined as follows:

"SECTION 137. Outstanding capital stock defined. — The term "outstanding capital stock" as used in this Code, means the total shares of stock issued to subscribers or stockholders, whether or not fully or partially paid (as long as there is a binding subscription agreement, except treasury shares."

The computation, therefore, should be based on the total outstanding capital stock, irrespective of the amount of the par value of the shares.

Again in SEC Opinion dated December 22, 2004 addressed to Atty. Priscilla B. Valer, the SEC reiterated the application of the control test to the total outstanding capital stock irrespective of the amount of the par value of shares, *viz*:

"Under the 'control concept,' the nationality of the corporation depends on the nationality of the controlling stockholders. In determining the nationality of a corporation under the 'control test,' the following ruling was adopted by the Commission:

x x x x x x x x x

Hence, we confirm your view that the test for compliance with the nationality requirement is based on the total outstanding capital stock irrespective of the amount of the par value of shares.[74] (Emphasis supplied.)

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[74] *See also* SEC Opinion No. 18-07 dated November 28, 2007 addressed to Mr. Rafael C. Bueno, Jr.; SEC-OGC Opinion No. 03-08 dated January 15, 2008 addressed to Attys. Ruby Rose J. Yusi and Rudyard S. Arbolado; and SEC-OGC Opinion No. 23-10 dated August 18, 2010 addressed to Attys. Teodulo G. San Juan, Jr. and Erdelyn C. Go.

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More importantly, the SEC defined "capital" as to include both voting and non-voting in the determination of the nationality of a corporation, to wit:

> In view of the foregoing, it is opined that the term "capital" denotes the sum total of the shares subscribed and paid by the shareholders, or secured to be paid, irrespective of their nomenclature to be issued by the corporation in the conduct of its operation. **Hence, non-voting preferred shares are considered in the computation of the 60-40% Filipino-alien equity requirement of certain economic activities under the Constitution**.[75] (Emphasis supplied.)

In fact, the issue in the present case was already answered by the SEC in its Opinion dated February 15, 1988. The opinion was issued as an answer to the query — "Would it be legal for foreigners to own more than 40% of the common shares but not more than 40% of the total outstanding capital stock which would include both common and non-voting preferred shares?" This is exactly the question in this case. The SEC ruled in the affirmative and stated:

> The pertinent provision of the Philippine Constitution under Article XII, Section 7, reads in part thus:
>
> "No franchise, certificate, or any 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 issue raised on your letter zeroes in on the meaning of the word "capital" as used in the above constitutional provision.**
>
> Anent thereto, please be informed that the term "capital" as applied to corporations, refers to the money, property or means contributed by stockholders as the form or basis for the business or enterprise for which the corporation was formed and generally implies that such money or property or means have been contributed in payment for stock issued to the contributors. (*United Grocers, Ltd. v. United States F. Supp*. 834, cited in 11 Fletcher, Cyc. Corp., 1986, rev. vol., Sec. 5080 at 18). As further ruled by the court, "capital of a

[75] SEC Opinion dated April 14, 1987.

corporation is the fund or other property, actually or potentially in its possession, derived or to be derived from the sale by it of shares of its stock or his exchange by it for property other than money. This fund includes not only money or other property received by the corporation for shares of stock but all balances of purchase money, or installments, due the corporation for shares of stock sold by it, and all unpaid subscriptions for shares." (*Williams v. Brownstein*, 1F. 2d 470, cited in 11 Fletcher, Cyc. Corp., 1058 rev. vol., Sec. 5080, p. 21).

The term "capital" is also used synonymously with the words "capital stock," as meaning the amount subscribed and paid-in and upon which the corporation is to conduct its operation. (11 Fletcher, Cyc. Corp. 1986, rev. vol., Sec. 5080 at 15). And, as held by the court in *Haggard v. Lexington Utilities Co.*, (260 Ky 251, 84 SW 2d 84, cited in 11 Fletcher, Cyc. Corp., 1958 rev. vol., Sec. 5079 at 17), **"The capital stock of a corporation is the amount paid-in by its stockholders in money, property or services with which it is to conduct its business, and it is immaterial how the stock is classified, whether as common or preferred."**

The Commission, in a previous opinion, ruled that the term 'capital' denotes the sum total of the shares subscribed and paid by the shareholders or served to be paid, irrespective of their nomenclature. (Letter to Supreme Technotronics Corporation, dated April 14, 1987).

Hence, your query is answered in the affirmative.[76] (Emphasis supplied.)

This opinion was reiterated in another Opinion dated July 16, 1996 addressed to Mr. Mitsuhiro Otsuki:

Relative to the second issue, "In the absence of special provisions the holders of preferred stock in a corporation are in precisely the same position, both with respect to the corporation itself and with respect to the creditors of the corporation, as the holders of common stock, except only that they are entitled to receive dividends on their shares, to the extent guaranteed or agreed upon, before any dividends can be paid to the holders of common stock. x x x. **Accordingly, as a general rule, they are considered in the**

[76] SEC Opinion dated February 15, 1988.

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computation of the 60-40% Filipino-alien equity percentage requirement, unless the law covering the type of business to be undertaken provides otherwise. (Emphasis supplied.)

In Opinion No. 32-03 dated June 2, 2003 addressed to Commissioner Armi Jane R. Borje, the SEC likewise held that the word "capital" as used in Sec. 11, Art. XII of the 1987 Constitution refers to the entire outstanding capital stock, regardless of its share classification, *viz*:

Please note that Article XII, Section 11 of the Philippine 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 . . ."

The legal capacity of the corporation to acquire franchise, certificate, or authority for the operation of a public utility is regulated by the aforequoted Constitutional provision, which requires that at least sixty per centum (60%) of the capital of such corporation be owned by citizens of the Philippines. **However, such provision does not qualify whether the required ownership of "capital" shall be that of the voting or non-voting, common or preferred. Hence, it should be interpreted to refer to the sum total of the outstanding capital stock, irrespective of the nomenclature or classification as common, preferred, voting or non-voting**. (Emphasis supplied.)

In the same way, the SEC has also adopted the same interpretation of the word "capital" to various laws or statutes imposing a minimum on Filipino ownership. In an Opinion dated November 11, 1988 addressed to Mr. Nito Doria, which involved Executive Order No. 226, otherwise known as the Omnibus Investments Code of 1987, the SEC stated:

For permitted and permissible investments, the maximum percentage of control allowable to foreign investors is found in Sections 46 and 47 of the Omnibus Investments Code of 1987, copy enclosed. In relation thereto, "Outstanding capital stock" refers to the total shares issued to subscribers or stockholders, whether or not fully or partially paid, except treasury shares. (Section 137, Corporation

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Code of the Philippines), and it is immaterial how the stock is classified, whether as common or preferred, (SEC Opinions, dated June 13, 1988, April 14, 1987, and February 15, 1988).

Again, in an Opinion dated October 16, 1981 addressed to Atty. Jose A. Bañez which involved Republic Act No. 1180, otherwise known as the Retail Trade Nationalization Law, the SEC opined that the issuance of preferred shares to a foreigner will disqualify the corporation from engaging in retail trade, because the law provides that "no association, partnership, or corporation the capital of which is not wholly owned by citizens of the Philippines, shall engage directly or indirectly in the retail business."[77] The SEC held:

Your client will lose its character of being one hundred percent (100%) Filipino-owned if said Japanese entity is allowed to subscribe to its preferred shares. The issuance of shares to an alien will reduce the ownership of Filipino citizens to less than the required percentage based on the outstanding capital stock of the corporation, regardless of the fact that said shares are non-voting and non-convertible.

Please be advised that under the Retail Trade Nationalization Law (R.A. 1180), "No association, partnership, or corporation the capital of which is not wholly owned by citizens of the Philippines, shall engage directly or indirectly in the retail business."

Notably, the foregoing Opinion was rendered before the promulgation of the 1987 Constitution. Thus, it must be assumed that the framers of the Constitution were aware of the administrative interpretation of the word "capital" and that they also adhered to the same interpretation when they re-adopted it in the 1987 Constitution from the 1935 and 1973 Constitutions. As held in *Laxamana v. Baltazar*, "[w]here a statute has received a contemporaneous and practical interpretation and the statute as interpreted is re-enacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. The rule here is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially

[77] Republic Act No. 1180, Sec. 1.

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when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment."[78]

Without a doubt, the SEC's definition of the word "capital" has been consistently applied to include the entire outstanding capital stock of a corporation, irregardless of whether it is common or preferred or voting or non-voting.

This contemporaneous construction of the SEC is entitled to great respect and weight especially since it is consistent with the Constitutional Commission's intention to use the term "capital" as applying to all shares, whether common or preferred. It is well to reiterate the principle of contemporaneous construction and the reason why it is entitled to great respect, *viz*:

> x x x As far back as In re Allen, (2 Phil. 630) a 1903 decision, Justice McDonough, as *ponente*, cited this excerpt from the leading American case of *Pennoyer v. McConnaughy*, decided in 1891: "**The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts,** is so firmly embedded in our jurisprudence that no authorities need be cited to support it. (*Ibid.*, 640. *Pennoyer v. McConnaughly* is cited in 140 US 1. The excerpt is on p. 23 thereof. *Cf. Government v. Municipality of Binalonan*, 32 Phil. 634 [1915]) There was a paraphrase by Justice Malcolm of such a pronouncement in *Molina v. Rafferty*, (37 Phil. 545) a 1918 decision:" Courts will and should respect the contemporaneous construction placed upon a statute by the executive officers whose duty it is to enforce it, and unless such interpretation is clearly erroneous will ordinarily be controlled thereby. (*Ibid.*, 555) Since then, such a doctrine has been reiterated in numerous decisions.[79] (Emphasis supplied.)

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[78] G.R. No. L-5955, September 19, 1952.

[79] *Philippine Global Communications, Inc. v. Relova*, No. 60548, November 10, 1986; citing *Philippine Association of Free Labor Unions [PAFLU] v. Bureau of Labor Relations*, August 21, 1976, 72 SCRA 396, 402.

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Similarly, the Corporation Code defines "outstanding capital stock" as the "total shares of stock issued."[80] It does not distinguish between common and preferred shares. It includes all types of shares.

Since foreigners hold 64.27% of to the total number of PLDT's common shares which are entitled to select the Board of Directors, the *ponencia* claims foreigners will elect the majority of the Board of Director in PLDT and, hence, have control over the company.

This is incorrect.

First of all, it has been established that the word "capital" in the phrase "corporation or associations organized under the laws of the Philippines, at least sixty per centum of whose 'capital' is owned by such citizens" under Sec. 11, Art. XII of the 1987 Constitution means both common or preferred shares or voting or non-voting shares. This phrase is **qualified** by the last sentence of Sec. 11, which reads:

x x x **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. (Emphasis supplied.)

The aforequoted constitutional provision is unequivocal — it limits the **participation** of the foreign investors in the governing body to their proportionate share in the capital of the corporation. Participation is "the act of taking part in something."[81] Accordingly, it includes the right to elect or vote for in the election of the members of the Board of Directors. However, this right to participate in the election is restricted by the first sentence of Sec. 11 such that their right cannot exceed their proportionate share in the capital, *i.e.*, 40%. In other words, the right of foreign investors to elect the members of the Board of Directors cannot exceed the voting rights of the 40% of the common

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[80] Sec. 137.

[81] *BLACK'S LAW DICTIONARY* (9th ed. 2009).

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shares, even though their ownership of common shares may exceed 40%. Thus, since they can only vote up to 40% of the common shares of the corporation, they will never be in a position to elect majority of the members of the Board of Directors. Consequently, control over the membership of the Board of Directors will always be in the hands of Filipino stockholders although they actually own less than 50% of the common shares.

Let Us apply the foregoing principles to the situation of PLDT. Granting without admitting that foreigners own 64.27% of PLDT's common shares and say they own 40% of the total number of common and preferred shares, still they can only vote up to 40% of the common shares of PLDT since their participation in the election of the Board of Directors (the governing body of the corporation) is limited by the 40% ownership of the capital under the first sentence of Sec. 11, Art. XII of the Constitution. The foreigners can only elect members of the Board of Directors based on their 40% ownership of the common shares and their directors will only constitute the minority. In no instance can the foreigners obtain the majority seats in the Board of Directors.

Further, the 2010 General Information Sheet (GIS) of PLDT reveals that among the thirteen (13) members of the Board of Directors, only two (2) are foreigners. It also reveals that the foreign investors only own 13.71% of the capital of PLDT.[82]

Obviously, the nomination and election committee of PLDT uses the 40% cap on the foreign ownership of the capital which explains why the foreigners only have two (2) members in the Board of Directors. It is apparent that the 64.27% ownership by foreigners of the common shares cannot be used to elect the majority of the Board of Directors. The fact that the proportionate share of the foreigners in the capital (voting and non-voting shares or common and preferred shares) is even less than 40%, then they are only entitled to voting rights equivalent to the said proportionate share in the capital and in the process elect

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[82] <http://www.pldt.com.ph/investor/shareholder/Documents/GIS_2010_(as%20of%207.2.10)_final.pdf> (last visited June 23, 2011).

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only a smaller number of directors. This is the reality in the instant case. Hence, the majority control of Filipinos over the management of PLDT is, at all times, assured.

This intent to limit the participation of the foreign investors in the governing body of the corporation was solidified in Commonwealth Act No. 108, otherwise known as the *Anti-Dummy Law*. Sec. 2-A of the aforementioned law, as amended, provides in part:

> x x x Provided, finally, that the election of aliens as members of the Board of Directors of governing body of corporations or associations engaging in partially nationalized activity shall be allowed in proportion to their allowable participation or share in the capital of such entities.

The view that the definition of the word "capital" is limited to common or voting shares alone would certainly have the effect of removing the 60-40% nationality requirement on the non-voting shares. This would then give rise to a situation wherein foreign interest would not really be limited to only 40% but may even extend beyond that because foreigners could also own the entire 100% of the preferred or non-voting shares. As a result, Filipinos will no longer have effective ownership of the corporate assets which may include lands. This is because the actual Filipino equity constitutes only a minority of the entire outstanding capital stock. Therefore, the company would then be technically owned by foreigners since the actual ownership of at least 60% of the entire outstanding capital stock would be left to the hands of the foreigners. Allowing this to happen would violate and circumvent the purpose for which the provision in the Constitution was created.[83]

This situation was the subject matter of the Opinion dated December 27, 1995 addressed to Mr. George Lavidia where the SEC opined that for the computation of the required minimum 60% Filipino ownership in a land owning corporation, both voting and preferred non-voting shares must be included, to wit:

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[83] *See* SEC Opinion dated December 27, 1995 addressed to Mr. George Lavidia.

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The [law] does not qualify whether the required ownership of "capital stock" are voting or non-voting. Hence, it should be interpreted to mean the sum total of the capital stock subscribed, irrespective of their nomenclature and whether or not they are voting or non-voting. The use of the phrase "capital stock belongs" connotes that in order to comply with the Filipino nationality requirement for land ownership, it is necessary that the criterion of "beneficial ownership" should be met, not merely the control of the corporation.

To construe the 60-40% equity requirement is merely based on the voting shares, disregarding the preferred non-voting shares, not on the total outstanding subscribed capital stock, would give rise to a situation where the actual foreign interest would not really be only 40% but may extend beyond that because they could also own even the entire preferred non-voting shares. In this situation, Filipinos may have the control in the operation of the corporation by way of voting rights, but have no effective ownership of the corporate assets which include lands, because the actual Filipino equity constitutes only a minority of the entire outstanding capital stock. Therefore, in essence, the company, although controlled by Filipinos, is beneficially owned by foreigners since the actual ownership of at least 60% of the entire outstanding capital stocks would be in the hands of foreigners. Allowing this situation would open the floodgates to circumvention of the intent of the law to make the Filipinos the principal beneficiaries in the ownership of Philippine alienable lands.

x x x x x x x x x

Thus, for purpose of "land ownership," non-voting preferred shares should be included in the computation of the statutory 60-40% Filipino-alien equity requirement. To rule otherwise would result in the emergence of foreign beneficial ownership of land, thereby defeating the purpose of the law. On the other hand, to view the equity ratio as determined on the basis of the entire outstanding capital stock would be to uphold the unequivocal purpose of the above-cited law of ensuring Filipino rightful domination of land ownership. (Emphasis supplied.)

Clearly, applying the *ponencia*'s definition of the word "capital" will give rise to a greater anomaly because it will

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result in the foreigner's obtaining beneficial ownership over the corporation, which is contrary to the provisions of the Constitution; whereas interpreting "capital" to include both voting and non-voting shares will result in giving both legal and beneficial ownership of the corporation to the Filipinos.

In the event that the word "capital" is construed as limited to common or voting shares only, it should not have any retroactive effect. Reliance in good faith on the opinions issued by the SEC, the regulating body in charged with the duty to enforce the nationality required by the Constitution, should not prejudice any one, especially not the foreign investors. Giving such interpretation retroactive effect is tantamount to violation of due process and would impact negatively on the various foreign investments already present in the country. Accordingly, such construction should only be applied prospectively.

In sum, the Constitution requires that 60% of the capital be owned by Filipinos. It further requires that the foreign ownership of capital be limited to 40%, as well as its participation in the governing body of the public utility corporation be limited to its proportionate share in the capital which cannot exceed 40% thereof. As a result, control over the Board of Directors and full beneficial ownership of 60% of the capital stock of the corporation are secured in the hands of the Filipinos.

I, therefore, vote to **DISMISS** the petition.

DISSENTING OPINION

ABAD, *J.*:

In 1928, the legislature enacted Act 3436, granting Philippine Long Distance Telephone Company (PLDT) a franchise to provide telecommunications services across the country. Forty years later in 1969, General Telephone and Electronics Corporation, an American company and major PLDT stockholder, sold 26% of PLDT's equity to the Philippine Telecommunications Investment Corporation (PTIC).

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Subsequently, PTIC assigned 46% of its equity or 111,415 shares of stock to Prime Holdings, Inc. In 1986, the Presidential Commission on Good Government sequestered these shares. Eventually, the Court declared these as properties of the Republic of the Philippines.

In 1999, First Pacific, a Bermuda-registered and Hongkong-based investment firm, acquired the remaining 54% of PTIC's equity in PLDT.

In 2006, the government's Inter-agency Privatization Council offered to auction the 46% PTIC equity in PLDT that the Court adjudged to the Republic. Parallax Venture Fund XXVII won with a bid of ₱25.2 billion or US$510 million. First Pacific announced that it would exercise its right of first refusal and buy those shares by matching Parallax's bid. In 2007, First Pacific, through its subsidiary, Metro Pacific Assets Holdings, Inc., entered into a Conditional Sale and Purchase Agreement with the national government involving the 46% PTIC equity for ₱25.2 billion or US$510 million.

In this petition for prohibition, injunction, declaratory relief, and declaration of nullity of sale, petitioner Wilson P. Gamboa, a PLDT stockholder, seeks to annul the sale of the 46% PTIC equity or 111,415 shares of stock to Metro Pacific on the ground that it violates Section 11, Article XII of the 1987 Constitution which limits foreign ownership of a public utility company to 40% of its capital. Gamboa claims that since PTIC is a PLDT stockholder, the sale of the 46% of its equity is actually an indirect sale of 6.3% PLDT equity or 12 million shares of stock. This would increase First Pacific's equity in PLDT from 30.7% to 37%, and concomitantly increase the common shareholdings of foreigners in PLDT to about 64.27%.

The action presents two primordial issues:

1. Whether or not the Court can hear and decide Gamboa's petition for prohibition, injunction, declaratory relief, and declaration of nullity of sale; and

2. Whether or not Metro Pacific's acquisition of 46% of PTIC's equity violates the constitutional limit on foreign ownership of

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the capital of PLDT, a public utility company, provided under Section 11, Article XII of the 1987 Constitution.

One. The objection to the idea of the Court hearing and deciding Gamboa's action seems to have some basis in the rules. Under Section 1, Rule 56 of the Rules of Court, only the following cases may be filed originally in the Supreme Court:

> Sec. 1. Original cases cognizable. — Only petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, *habeas corpus*, disciplinary proceedings against members of the judiciary and attorneys, and cases affecting ambassadors, other public ministers and consuls may be filed originally in the Supreme Court.

Strictly speaking, Gamboa's actions for injunction, declaratory relief, and declaration of nullity of sale are not among the cases that can be initiated before the Supreme Court. Those actions belong to some other tribunal.

And, although the Court has original jurisdiction in prohibition cases, the Court shares this authority with the Court of Appeals and the Regional Trial Courts. But this concurrence of jurisdiction does not give the parties absolute and unrestrained freedom of choice on which court the remedy will be sought. They must observe the hierarchy of courts.[1] As a rule, the Supreme Court will not entertain direct resort to it unless the remedy desired cannot be obtained in other tribunals. Only exceptional and compelling circumstances such as cases of national interest and of serious implications justify direct resort to the Supreme Court for the extraordinary remedy of writ of *certiorari*, prohibition, or *mandamus*.[2]

The majority of the Court of course suggests that although Gamboa entitles his actions as ones for injunction, declaratory relief, and declaration of nullity of sale, what controls the nature

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[1] *Fortich v. Corona*, G.R. No. 131457, April 24, 1998, 289 SCRA 624, 645.

[2] *Springfield Development Corporation, Inc. v. Presiding Judge, RTC, Misamis Oriental, Br. 40, Cagayan de Oro City*, G.R. No. 142628, February 6, 2007, 514 SCRA 326, 342-343; *Fortich v. Corona*, *id.*

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of such actions are the allegations of his petition. And a valid special civil action for *mandamus* can be made out of those allegations since respondent Secretary of Finance, his undersecretary, and respondent Chairman of the Securities and Exchange Commission are the officials who appear to have the duty in law to implement the foreign ownership restriction that the Constitution commands.[3]

To a certain extent, I agree with the position that the majority of my colleagues takes on this procedural issue. I believe that a case can be made for giving due course to Gamboa's action. Indeed, there are in his actions compelling reasons to relax the doctrine of hierarchy of courts. The need to address the important question of defining the constitutional limit on foreign ownership of public utilities under Section 11, Article XII of the 1987 Constitution, a bedrock policy adopted by the Filipino people, is certainly a matter of serious national interest. Such policy is intended to develop a self-reliant and independent national economy effectively controlled by Filipino entrepreneurs.

Indeed, as the Court said in *Espina v. Zamora*,[4] the provisions of Article XII of the 1987 Constitution lay down the ideals of economic nationalism. One of these is the Filipinization of public utilities under Section 11 which recognizes the very strategic position of public utilities both in the national economy and for national security.[5] The participation of foreign capital is encouraged since the establishment and operation of public utilities may require the investment of substantial capital that Filipino citizens could possibly not afford. But at the same time, the Constitution wants to limit foreign involvement to prevent them

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[3] Decision, p. 10.

[4] G.R. No. 143855, September 21, 2010.

[5] BERNAS, JOAQUIN G., *FOREIGN RELATIONS IN CONSTITUTIONAL LAW*, 1995 Ed., p. 87 citing *Smith, Bell and Co. v. Natividad*, 40 Phil. 136, 148 (1919); *Luzon Stevedoring Corporation v. Anti-Dummy Board*, 46 SCRA 474, 490 (1972); DE LEON, HECTOR S., *PHILIPPINE CONSTITUTIONAL LAW (Principles and Cases)*, 2004 Ed., Vol. 2, p. 940.

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from assuming control of public utilities which may be inimical to national interest.[6]

Two. Still, the question is whether it is for the Court to decide in this case the shape and substance of what the Constitution meant when it restricted the size of foreign ownership of the capital of public utility corporations provided for in Section 11, Article XII of the 1987 Constitution which reads:

> 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; x x x.

Gamboa contends that the constitutional limit on foreign ownership in public utilities should be based on the ownership of **common** or **voting shares** since it is through voting that stockholders are able to have control over a corporation. Preferred or non-voting shares should be excluded from the reckoning.

But this interpretation, adopted by the majority, places on the Court the authority to define and interpret the meaning of "capital" in Section 11. I believe, however, that such authority should be for Congress to exercise since it partakes of policy making founded on a general principle laid down by the fundamental law. The capital restriction written in the constitution lacks sufficient details for orderly and meaningful implementation. Indeed, in the twenty-four years that the provision has been in the Constitution, no concrete step has been taken by any government agency to see to its actual implementation given the absence of clear legislative guidance on how to go about it.

It has been said that a constitution is a system of fundamental laws for the governance and administration of a nation. It prescribes the permanent framework of a system of government, assigns to the different departments their respective powers and duties, and establishes certain fixed principles on which the

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[6] DE LEON, HECTOR S., *PHILIPPINE CONSTITUTIONAL LAW (Principles and Cases)*, 2004 Ed., Vol. 2, p. 946.

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government is founded.[7] But while some constitutional provisions are self-executing, others are not.

A constitutional provision is self-executing if it fixes the nature and extent of the right conferred and the liability imposed such that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action. On the other hand, if the provision needs a supplementary or enabling legislation, it is merely a declaration of policy and principle which is not self-executing.[8]

Here, the Constitution simply states that no franchise for the operation of a public utility shall be granted to a corporation organized under Philippine laws unless at least sixty per centum of its capital is owned by Filipino citizens.

Evidently, the Constitution fails to provide for the meaning of the term "capital," considering that the shares of stock of a corporation vary in kinds. The usual classification depends on how profits are to be distributed and which stockholders have the right to vote the members of the corporation's board of directors.

The Corporation Code does not offer much help, albeit it only confuses, since it uses the terms "capital," "capital stock," or "outstanding capital stock" interchangeably. "Capital" refers to the money, property, or means contributed by stockholders in the corporation and generally implies that the same have been contributed in payment for stock issued to the stockholders.[9] "Capital stock" signifies the amount subscribed and paid-in in money, property or services.[10] "Outstanding capital stock" means

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[7] *Manila Prince Hotel v. Government Service Insurance System*, G.R. No. 122156, February 3, 1997, 267 SCRA 408, 430.

[8] *Id.* at 431.

[9] Agpalo, Ruben E., *COMMENTS ON THE CORPORATION CODE OF THE PHILIPPINES*, 2001 Ed., p. 50.

[10] *Id.* at 51.

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the total shares of stock issued to stockholders, whether or not fully or partially paid, except treasury shares.[11]

Meanwhile, the Foreign Investments Act of 1991 defines a "Philippine national" as, among others, a corporation organized under the laws of the Philippines of which at least 60% of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines.[12] This gives the impression, as Justice Carpio noted, that the term "capital" refers only to controlling interest or shares entitled to vote.[13]

On the other hand, government agencies such as the Securities and Exchange Commission, institutions, and corporations (such as the Philippine National Oil Company-Energy Development Corporation) interpret the term "capital" to include both preferred and common shares.[14]

Under this confusing legislative signals, the Court should not leave the matter of compliance with the constitutional limit

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[11] Section 137. The Corporation Code.

[12] Sec. 3. Definitions. — As used in this Act:

a. The term "Philippine national" shall mean a citizen of the Philippines; of a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation, shall be considered a "Philippine national." (As amended by Republic Act 8179)

[13] Decision, pp. 25-26.

[14] *Id.* at 17.

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on foreign ownership in public utilities, a matter of transcendental importance, to judicial legislation especially since any ruling the Court makes on the matter could have deep economic repercussions. This is not a concern over which the Court has competence. The 1987 Constitution laid down the general framework for restricting foreign ownership of public utilities. It is apt for Congress to build up on this framework by defining the meaning of "capital," establishing rules for the implementation of the State policy, providing sanctions for its violation, and vesting in the appropriate agency the responsibility for carrying out the purposes of such policy.

Parenthetically, there have been several occasions in the past where Congress provided supplementary or enabling legislation for constitutional provisions that are not self-executing. To name just some: the Comprehensive Agrarian Reform Law of 1988,[15] the Indigenous Peoples Rights Act of 1997,[16] the Local Government Code of 1991,[17] the Anti-Graft and Corrupt Practices Act,[18] the Speedy Trial Act of 1998,[19] the Overseas Absentee Voting Act of 2003,[20] the Party-List System Act,[21] the Paternity Leave Act of 1996,[22] and the Solo Parents' Welfare Act of 2000.[23]

Based on the foregoing, I vote to **DENY** the petition on the ground that the constitutional limit on foreign ownership in public utilities under Section 11, Article XII of the 1987 Constitution is not a self-executing provision and requires an implementing legislation for its enforcement.

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[15] Section 21, Article II.

[16] Section 22, Article II.

[17] Section 25, Article II.

[18] Section 27, Article II.

[19] Section 16, Article III.

[20] Section 2, Article V.

[21] Section 5, Article VI.

[22] Section 3, Article XIII.

[23] *Id.*