Republic of the Philippines
Supreme Court
Manila

EN BANC

JOSE M. ROY III,
Petitioner,

- versus -

CHAIRPERSON TERESITA HERBOSA, THE SECURITIES AND EXCHANGE COMMISSION, and PHILIPPINE LONG DISTANCE TELEPHONE COMPANY,
Respondents.

X----------X

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

X----------X

PHILIPPINE STOCK EXCHANGE, INC.,
Respondent-in-Intervention,

X----------X

SHAREHOLDERS' ASSOCIATION OF THE PHILIPPINES, INC.,
Respondent-in-Intervention.

x----------x

G.R. No. 207246

Present:

SERENO, *C.J.*,
CARPIO,
VELASCO, JR.,
LEONARDO-DE CASTRO,
BRION,
PERALTA,*
BERSAMIN,
DEL CASTILLO,
PEREZ,
MENDOZA,
REYES,
PERLAS-BERNABE,**
LEONEN,
JARDELEZA,*** and
CAGUIOA, *JJ.*

Promulgated:

November 22, 2016

DECISION

CAGUIOA, *J.*:

The petitions[1] before the Court are special civil actions for *certiorari* under Rule 65 of the Rules of Court seeking to annul Memorandum Circular

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* On official leave.

** No Part and On official leave.

*** No Part.

1 These are the Petition for Certiorari filed on June 10, 2013 (the "Petition") and Petition-in-Intervention (for Certiorari) filed on July 30, 2013 (the "Petition-in-Intervention"). They will be referred to collectively as the "petitions".

No. 8, Series of 2013 ("SEC-MC No. 8") issued by the Securities and Exchange Commission ("SEC") for allegedly being in violation of the Court's Decision[2] ("*Gamboa* Decision") and Resolution[3] ("*Gamboa* Resolution") in *Gamboa v. Finance Secretary Teves*, G.R. No. 176579, respectively promulgated on June 28, 2011, and October 9, 2012, which jurisprudentially established the proper interpretation of Section 11, Article XII of the Constitution.

The Antecedents

On June 28, 2011, the Court issued the *Gamboa* Decision, the dispositive portion of which reads:

> **WHEREFORE**, we *PARTLY GRANT* the petition and rule that the term "capital" in Section 11, Article XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares). Respondent Chairperson of the Securities and Exchange Commission is *DIRECTED* to apply this definition of the term "capital" 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.
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> **SO ORDERED**.[4]

Several motions for reconsideration were filed assailing the *Gamboa* Decision. They were denied in the *Gamboa* Resolution issued by the Court on October 9, 2012, *viz*:

> **WHEREFORE**, we **DENY** the motions for reconsideration **WITH FINALITY**. No further pleadings shall be entertained.
>
> **SO ORDERED**.[5]

The *Gamboa* Decision attained finality on October 18, 2012, and Entry of Judgment was thereafter issued on December 11, 2012.[6]

On November 6, 2012, the SEC posted a Notice in its website inviting the public to attend a public dialogue and to submit comments on the draft memorandum circular (attached thereto) on the guidelines to be followed in determining compliance with the Filipino ownership requirement in public utilities under Section 11, Article XII of the Constitution pursuant to the Court's directive in the *Gamboa* Decision.[7]

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2 *Gamboa v. Finance Secretary Teves*, 668 Phil. 1 (2011).
3 *Heirs of Wilson P. Gamboa v. Finance Sec. Teves*, 696 Phil. 276 (2012).
4 *Gamboa v. Finance Secretary Teves*, supra note 2, at 69-70.
5 *Heirs of Wilson P. Gamboa v. Finance Sec. Teves*, supra note 3, at 363.
6 *Rollo* (Vo. II), pp. 605-609.
7 Id. at 547.

On November 9, 2012, the SEC held the scheduled dialogue and more than 100 representatives from various organizations, government agencies, the academe and the private sector attended.[8]

On January 8, 2013, the SEC received a copy of the Entry of Judgment[9] from the Court certifying that on **October 18, 2012**, the *Gamboa* Decision had become **final and executory**.[10]

On March 25, 2013, the SEC posted another Notice in its website soliciting from the public comments and suggestions on the draft guidelines.[11]

On April 22, 2013, petitioner Atty. Jose M. Roy III ("Roy") submitted his written comments on the draft guidelines.[12]

On May 20, 2013, the SEC, through respondent Chairperson Teresita J. Herbosa, issued SEC-MC No. 8 entitled "*Guidelines on Compliance with the Filipino-Foreign Ownership Requirements Prescribed in the Constitution and/or Existing Laws by Corporations Engaged in Nationalized and Partly Nationalized Activities.*" It was published in the *Philippine Daily Inquirer* and the *Business Mirror* on May 22, 2013.[13] Section 2 of SEC-MC No. 8 provides:

> Section 2. All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.
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> Corporations covered by special laws which provide specific citizenship requirements shall comply with the provisions of said law.[14]

On June 10, 2013, petitioner Roy, as a lawyer and taxpayer, filed the Petition,[15] assailing the validity of SEC-MC No. 8 for not conforming to the letter and spirit of the *Gamboa* Decision and Resolution and for having been issued by the SEC with grave abuse of discretion. Petitioner Roy seeks to apply the 60-40 Filipino ownership requirement separately to each class of shares of a public utility corporation, whether common, preferred non-voting, preferred voting or any other class of shares. Petitioner Roy also questions the ruling of the SEC that respondent Philippine Long Distance Telephone Company ("PLDT") is compliant with the constitutional rule on

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8 Id. at 548.
9 Id. at 605-609.
10 Id. at 548.
11 Id.
12 *Rollo* (Vol. I), pp. 31-33.
13 *Rollo* (Vol. II), pp. 549, 587-288.
14 Id. at 588.
15 *Rollo* (Vol. I), pp. 3-206 (with annexes).

foreign ownership. He prays that the Court declare SEC-MC No. 8 unconstitutional and direct the SEC to issue new guidelines regarding the determination of compliance with Section 11, Article XII of the Constitution in accordance with *Gamboa*.

Wilson C. Gamboa, Jr.,[16] Daniel V. Cartagena, John Warren P. Gabinete, Antonio V. Pesina, Jr., Modesto Martin Y. Mamon III, and Gerardo C. Erebaren ("intervenors Gamboa, *et al.*") filed a Motion for Leave to File Petition-in-Intervention[17] on July 30, 2013, which the Court granted. The Petition-in-Intervention[18] filed by intervenors Gamboa, *et al.* mirrored the issues, arguments and prayer of petitioner Roy.

On September 5, 2013, respondent PLDT filed its Comment (on the Petition dated 10 June 2013).[19] PLDT posited that the Petition should be dismissed because it violates the doctrine of hierarchy of courts as there are no compelling reasons to invoke the Court's original jurisdiction; it is prematurely filed because petitioner Roy failed to exhaust administrative remedies before the SEC; the principal actions/remedies of *mandamus* and declaratory relief are not within the exclusive and/or original jurisdiction of the Court; the petition for *certiorari* is an inappropriate remedy since the SEC issued SEC-MC No. 8 in the exercise of its *quasi*-legislative power; it deprives the necessary and indispensable parties of their constitutional right to due process; and the SEC merely implemented the dispositive portion of the *Gamboa* Decision.

On September 20, 2013, respondents Chairperson Teresita Herbosa and SEC filed their Consolidated Comment.[20] They sought the dismissal of the petitions on the following grounds: (1) the petitioners do not possess *locus standi* to assail the constitutionality of SEC-MC No. 8; (2) a petition for *certiorari* under Rule 65 is not the appropriate and proper remedy to assail the validity and constitutionality of the SEC-MC No. 8; (3) the direct resort to the Court violates the doctrine of hierarchy of courts; (4) the SEC did not abuse its discretion; (5) on PLDT's compliance with the capital requirement as stated in the *Gamboa* ruling, the petitioners' challenge is premature considering that the SEC has not yet issued a definitive ruling thereon.

On October 22, 2013, PLDT filed its Comment (on the Petition-in-Intervention dated 16 July 2013).[21] PLDT adopted the position that intervenors Gamboa, *et al.* have no standing and are not the proper party to question the constitutionality of SEC-MC No. 8; they are in no position to assail SEC-MC No. 8 considering that they did not participate in the public consultations or give comments thereon; and their Petition-in-Intervention is

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16 Son of deceased petitioner Wilson P. Gamboa in *Gamboa*.
17 *Rollo* (Vol. I), pp. 222-230 (with annex).
18 Id. at 231-446 (with annexes).
19 Id. at 466-530.
20 *Rollo* (Vol. II), pp. 544-615 (with annexes).
21 Id. at 633-654.

a disguised motion for reconsideration of the *Gamboa* Decision and Resolution.

On May 7, 2014, Petitioner Roy and intervenors Gamboa, *et al.*[22] filed their Joint Consolidated Reply with Motion for Issuance of Temporary Restraining Order.[23]

On May 22, 2014, PLDT filed its Rejoinder [To Petitioner and Petitioners-in-Intervention's Joint Consolidated Reply dated 7 May 2014] and Opposition [To Petitioner and Petitioners-in-Intervention's Motion for Issuance of a Temporary Restraining Order dated 7 May 2014].[24]

On June 18, 2014, the Philippine Stock Exchange, Inc. ("PSE") filed its Motion to Intervene with Leave of Court[25] and its Comment-in-Intervention.[26] The PSE alleged that it has standing to intervene as the primary regulator of the stock exchange and will sustain direct injury should the petitions be granted. The PSE argued that in the *Gamboa* ruling, "capital" refers only to shares entitled to vote in the election of directors, and excludes those not so entitled; and the dispositive portion of the decision is the controlling factor that determines and settles the questions presented in the case. The PSE further argued that adopting a new interpretation of Section 11, Article XII of the Constitution violates the policy of conclusiveness of judgment, *stare decisis*, and the State's obligation to maintain a stable and predictable legal framework for foreign investors under international treaties; and adopting a new definition of "capital" will prove disastrous for the Philippine stock market. The Court granted the Motion to Intervene filed by PSE.[27]

PLDT filed its Consolidated Memorandum[28] on February 10, 2015.

On June 1, 2016, Shareholders' Association of the Philippines, Inc.[29] ("SHAREPHIL") filed an Omnibus Motion [1] For Leave to Intervene; and [2] To Admit Attached Comment-in-Intervention.[30] The Court granted the Omnibus Motion of SHAREPHIL.[31]

On June 30, 2016, petitioner Roy filed his Opposition and Reply to Interventions of Philippine Stock Exchange and Sharephil.[32] Intervenors

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22 Petitioner Roy and intervenors Gamboa, *et al.* will be collectively referred to as the "petitioners".
23 *Rollo* (Vol. II), pp. 723-762 (with annex).
24 Id. at 765-828.
25 Id. at 839-847.
26 Id. at 848-879.
27 Id. at 880.
28 Id. at 964-1077.
29 A non-stock and non-profit association composed of shareholders of Philippine companies, which aims to advocate changes in the legal and regulatory framework that will help improve the rights of minority shareholders and to promote and protect all types of shareholders' rights under existing laws, rules and regulations. Id. at 1081.
30 Id. at 1080-1114.
31 Resolution dated June 14, 2016, id. at 1115-1116.
32 Id. at 1117-1133.

Gamboa, *et al.* then filed on September 14, 2016, their Reply (to Interventions by Philippine Stock Exchange and Sharephil).[33]

The Issues

The twin issues of the Petition and the Petition-in-Intervention are: (1) whether the SEC gravely abused its discretion in issuing SEC-MC No. 8 in light of the *Gamboa* Decision and *Gamboa* Resolution, and (2) whether the SEC gravely abused its discretion in ruling that PLDT is compliant with the constitutional limitation on foreign ownership.

The Court's Ruling

At the outset, the Court disposes of the second issue for being without merit. In its Consolidated Comment dated September 13, 2013,[34] the SEC already clarified that it "has not yet issued a definitive ruling anent PLDT's compliance with the limitation on foreign ownership imposed under the Constitution and relevant laws [and i]n fact, a careful perusal of x x x SEC-MC No. 8 readily reveals that all existing covered corporations which are non-compliant with Section 2 thereof were given a period of one (1) year from the effectivity of the same within which to comply with said ownership requirement. x x x."[35] Thus, in the absence of a definitive ruling by the SEC on PLDT's compliance with the capital requirement pursuant to the *Gamboa* Decision and Resolution, any question relative to the inexistent ruling is premature.

Also, considering that the Court is not a trier of facts and is in no position to make a factual determination of PLDT's compliance with the constitutional provision under review, the Court can only resolve the first issue, which is a pure question of law. However, before the Court tackles the first issue, it has to rule on certain procedural challenges that have been raised.

The Procedural Issues

The Court may exercise its power of judicial review and take cognizance of a case when the following specific requisites are met: (1) there is an actual case or controversy calling for the exercise of judicial power; (2) the petitioner has standing to question the validity of the subject act or issuance, *i.e.*, he has a personal and substantial interest in the case that he has sustained, or will sustain, direct injury as a result of the enforcement of the act or issuance; (3) the question of constitutionality is raised at the earliest opportunity; and (4) the constitutional question is the very *lis mota* of the case.[36]

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33 Id. at 1134-1138.

34 Id. at 544-615 (with annex).

35 Id. at 580.

36 *Belgica v. Ochoa*, 721 Phil. 416, 518-519 (2013), citing *Joya v. Presidential Commission on Good Government (PCGG)*, 296-A Phil. 595, 602 (1993) and *Biraogo v. The Philippine Truth Commission of 2010*, 651 Phil. 374, 438 (2010); *Hon. General v. Hon. Urro*, 662 Phil. 132, 144 (2011), citing *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618, 632 (2000).

The first two requisites of judicial review are not met.

Petitioners' failure to sufficiently allege, much less establish, the existence of the first two requisites for the exercise of judicial review warrants the perfunctory dismissal of the petitions.

a. No actual controversy.

Regarding the first requisite, the Court in *Belgica v. Ochoa*[37] stressed anew that an actual case or controversy is one which involves a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished from a hypothetical or abstract difference or dispute since the courts will decline to pass upon constitutional issues through advisory opinions, bereft as they are of authority to resolve hypothetical or moot questions. Related to the requirement of an actual case or controversy is the requirement of "ripeness", and a question is ripe for adjudication when the act being challenged has a direct adverse effect on the individual challenging it.

Petitioners have failed to show that there is an actual case or controversy which is ripe for adjudication.

The Petition and the Petition-in-Intervention identically allege:

> 3. The standing interpretation of the SEC found in MC8 practically encourages circumvention of the 60-40 ownership rule by impliedly allowing the creation of several classes of voting shares with different degrees of beneficial ownership over the same, but at the same time, not imposing a 40% limit on foreign ownership of the higher yielding stocks.[38]
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> 4. For instance, a situation may arise where a corporation may issue several classes of shares of stock, one of which are common shares with rights to elect directors, another are preferred shares with rights to elect directors but with much lesser entitlement to dividends, and still another class of preferred shares with no rights to elect the directors and even less dividends. In this situation, the corporation may issue common shares to foreigners amounting to forty percent (40%) of the outstanding capital stock and issue preferred shares entitled to vote the directors of the corporation to Filipinos consisting of 60%[39] percent (sic) of the outstanding capital stock entitled to vote. Although it may appear that the 60-40 rule has been complied with, the beneficial ownership of the corporation remains with the foreign stockholder since the Filipino owners of the preferred shares have only a miniscule share in the dividends and profit of the corporation. Plainly, this situation runs contrary to the Constitution and the ruling of this x x x Court.[40]

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37 Id. at 519-520. Citations omitted.

38 ";" instead of "." in the Petition-in-Intervention.

39 "%" is omitted in the Petition-in-Intervention.

40 ";" instead of "." in the Petition-in-Intervention. Petition for Certiorari, *rollo* (Vol. I), p. 12; Petition-in-intervention, id. at 243.

Petitioners' hypothetical illustration as to how SEC-MC No. 8 "practically encourages circumvention of the 60-40 ownership rule" is evidently speculative and fraught with conjectures and assumptions. There is clearly wanting specific facts against which the veracity of the conclusions purportedly following from the speculations and assumptions can be validated. The lack of a specific factual milieu from which the petitions originated renders any pronouncement from the Court as a purely advisory opinion and not a decision binding on identified and definite parties and on a known set of facts.

Firstly, unlike in *Gamboa*, the identity of the public utility corporation, the capital of which is at issue, is unknown. Its outstanding capital stock and the actual composition thereof in terms of numbers, classes, preferences and features are all theoretical. The description "preferred shares with rights to elect directors but with much lesser entitlement to dividends, and still another class of preferred shares with no rights to elect the directors and even less dividends" is ambiguous. What are the specific dividend policies or entitlements of the purported preferred shares? How are the preferred shares' dividend policies different from those of the common shares? Why and how did the fictional public utility corporation issue those preferred shares intended to be owned by Filipinos? What are the actual features of the foreign-owned common shares which make them superior over those owned by Filipinos? How did it come to be that Filipino holders of preferred shares ended up with "only a miniscule share in the dividends and profit of the [hypothetical] corporation"? Any answer to any of these questions will, at best, be contingent, conjectural, indefinite or anticipatory.

Secondly, preferred shares usually have preference over the common shares in the payment of dividends. If most of the "preferred shares with rights to elect directors but with much lesser entitlement to dividends" and the other "class of preferred shares with no rights to elect the directors and even less dividends" are owned by Filipinos, they stand to receive their dividend entitlement ahead of the foreigners, who are common shareholders. For the common shareholders to have "bigger dividends" as compared to the dividends paid to the preferred shareholders, which are supposedly predominantly owned by Filipinos, there must still be unrestricted retained earnings of the fictional corporation left after payment of the dividends declared in favor of the preferred shareholders. The fictional illustration does not even intimate how this situation can be possible. No permutation of unrestricted retained earnings of the hypothetical corporation is shown that makes the present conclusion of the petitioners achievable. Also, no concrete meaning to the petitioners' claim of the Filipinos' "miniscule share in the dividends and profit of the [fictional] corporation" is demonstrated.

Thirdly, petitioners fail to allege or show how their hypothetical illustration will directly and adversely affect them. That is impossible since their relationship to the fictional corporation is a matter of guesswork.

From the foregoing, it is evident that the Court can only surmise or speculate on the situation or controversy that the petitioners contemplate to present for judicial determination. Petitioners are likewise conspicuously silent on the direct adverse impact to them of the implementation of SEC-MC No. 8. Thus, the petitions must fail because the Court is barred from rendering a decision based on assumptions, speculations, conjectures and hypothetical or fictional illustrations, more so in the present case which is not even ripe for decision.

b. No locus standi.

The personal and substantial interest that enables a party to have legal standing is one that is both **material**, an interest in issue and to be affected by the government action, as distinguished from mere interest in the issue involved, or a mere incidental interest, and **real**, which means a present substantial interest, as distinguished from a mere expectancy or a future, contingent, subordinate, or consequential interest.[41]

As to injury, the party must show that (1) he will personally suffer some actual or threatened injury because of the allegedly illegal conduct of the government; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable action.[42] If the asserted injury is more imagined than real, or is merely superficial and insubstantial, an excursion into constitutional adjudication by the courts is not warranted.[43]

Petitioners have no legal standing to question the constitutionality of SEC-MC No. 8.

To establish his standing, petitioner Roy merely claimed that he has standing to question SEC-MC No. 8 "as a concerned citizen, an officer of the Court and as a taxpayer" as well as "the senior law partner of his own law firm[, which] x x x is a subscriber of PLDT."[44] On the other hand, intervenors Gamboa, *et al.* allege, as basis of their *locus standi*, their "[b]eing lawyers and officers of the Court" and "citizens x x x and taxpayers."[45]

The Court has previously emphasized that the *locus standi* requisite is not met by the expedient invocation of one's citizenship or membership in the bar who has an interest in ensuring that laws and orders of the Philippine government are legally and validly issued as these supposed interests are too

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41 *Galicto v. Aquino III*, 683 Phil. 141, 170-171 (2012), citing *Miñoza v. Lopez*, 664 Phil. 115, 123 (2011).

42 Id. at 170, citing *Tolentino v. Commission on Elections*, 465 Phil. 385, 402 (2004).

43 Id. at 172. Citations omitted.

44 *Rollo* (Vol. I), p. 7.

45 Motion for Leave to file Petition-In-Intervention, id. at 224-225.

general, which are shared by other groups and by the whole citizenry.[46] Per their allegations, the personal interest invoked by petitioners as citizens and members of the bar in the validity or invalidity of SEC-MC No. 8 is at best equivocal, and totally insufficient.

Petitioners' status as taxpayers is also of no moment. As often reiterated by the Court, a taxpayer's suit is allowed only when the petitioner has demonstrated the direct correlation of the act complained of and the disbursement of public funds in contravention of law or the Constitution, or has shown that the case involves the exercise of the spending or taxing power of Congress.[47] SEC-MC No. 8 does not involve an additional expenditure of public funds and the taxing or spending power of Congress.

The allegation that petitioner Roy's law firm is a "subscriber of PLDT" is ambiguous. It is unclear whether his law firm is a "subscriber" of PLDT's shares of stock or of its various telecommunication services. Petitioner Roy has not identified the specific direct and substantial injury he or his law firm stands to suffer as "subscriber of PLDT" as a result of the issuance of SEC-MC No. 8 and its enforcement.

As correctly observed by respondent PLDT, "[w]hether or not the constitutionality of SEC MC No. 8 is upheld, the rights and privileges of all PLDT subscribers, as with all the rest of subscribers of other corporations, are necessarily and equally preserved and protected. Nothing is added [to] or removed from a PLDT subscriber in terms of the extent of his or her participation, relative to what he or she had originally enjoyed from the beginning. In the most practical sense, a PLDT subscriber loses or gains nothing in the event that SEC MC No. 8 is either sustained or struck down by [the Court]."[48]

More importantly, the issue regarding PLDT's compliance with Section 11, Article XII of the Constitution has been earlier ruled as premature and beyond the Court's jurisdiction. Thus, petitioner Roy's allegation that his law firm is a "subscriber of PLDT" is insufficient to clothe him with *locus standi*.

Petitioners' cursory incantation of "transcendental importance x x x of the rules on foreign ownership of corporations or entities vested with public interest"[49] does not automatically justify the brushing aside of the strict observance of the requisites for the Court's exercise of judicial review. An indiscriminate disregard of the requisites every time "transcendental or paramount importance or significance" is invoked would result in an

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46 *Galicto v. Aquino III*, supra note 41, at 172-173, citing *Integrated Bar of the Philippines v. Zamora*, supra note 36, at 633.

47 *Automotive Industry Workers Alliance v. Romulo*, 489 Phil. 710, 719 (2005). Citations omitted.

48 PLDT's Consolidated Memorandum, *rollo* (Vol. II), p. 992.

49 Petition for Certiorari, *rollo* (Vol. I), p.10, and Petition-in-intervention (For Certiorari), *rollo* (Vol. I), p. 240.

unacceptable corruption of the settled doctrine of *locus standi*, as every worthy cause is an interest shared by the general public.[50]

In the present case, the general and equivocal allegations of petitioners on their legal standing do not justify the relaxation of the *locus standi* rule. While the Court has taken an increasingly liberal approach to the rule of *locus standi*, evolving from the stringent requirements of personal injury to the broader transcendental importance doctrine, such liberality is not to be abused.[51]

The Rule on the Hierarchy of Courts has been violated.

The Court in *Bañez, Jr. v. Concepcion*[52] stressed that:

> The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of *certiorari*, prohibition and *mandamus* only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy. x x x
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> > x x x Where the issuance of an extraordinary writ is also within the competence of the Court of Appeals or a Regional Trial Court, it is in either of these courts that the specific action for the writ's procurement must be presented. This is and should continue to be the policy in this regard, a policy that courts and lawyers must strictly observe. x x x[53]

Petitioners' invocation of "transcendental importance" is hollow and does not merit the relaxation of the rule on hierarchy of courts. There being no special, important or compelling reason that justified the direct filing of the petitions in the Court in violation of the policy on hierarchy of courts, their outright dismissal on this ground is further warranted.[54]

The petitioners failed to implead indispensable parties.

The cogent submissions of the PSE in its Comment-in-Intervention dated June 16, 2014[55] and SHAREPHIL in its Omnibus Motion [1] For

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50 *Republic v. Roque*, 718 Phil. 294, 307 (2013), citing *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,* 646 Phil. 452, 478 (2010).

51 See *Galicto v. Aquino III*, supra note 41, at 170, citing *Lozano v. Nograles*, 607 Phil. 334, 344 (2009).

52 693 Phil. 399 (2012).

53 Id. at 412.

54 Id. at 414.

55 *Rollo* (Vol. II), pp. 848-879.

Leave to Intervene; and [2] To Admit Attached Comment-in-Intervention dated May 30, 2016[56] demonstrate how petitioners should have impleaded not only PLDT but all other corporations in nationalized and partly-nationalized industries — because the propriety of the SEC's enforcement of the Court's interpretation of "capital" through SEC-MC No. 8 affects them as well.

Under Section 3, Rule 7 of the Rules of Court, an indispensable party is a party-in-interest without whom there can be no final determination of an action. Indispensable parties are those with such a material and direct interest in the controversy that a final decree would necessarily affect their rights, so that the court cannot proceed without their presence.[57] The interests of such indispensable parties in the subject matter of the suit and the relief are so bound with those of the other parties that their legal presence as parties to the proceeding is an absolute necessity and a complete and efficient determination of the equities and rights of the parties is not possible if they are not joined.[58]

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

Not only are public utility corporations other than PLDT directly and materially affected by the outcome of the petitions, their shareholders also stand to suffer in case they will be forced to divest their shareholdings to ensure compliance with the said restrictive interpretation of the term "capital". As explained by SHAREPHIL, in five corporations alone, more than Php158 Billion worth of shares must be divested by foreign shareholders and absorbed by Filipino investors if petitioners' position is upheld.[59]

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

During the deliberations, Justice Velasco stressed on the foregoing procedural objections to the granting of the petitions; and Justice Bersamin added that the special civil action for *certiorari* and prohibition is not the

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56 Id. at 1080-1114.
57 See *Cua, Jr. v. Tan*, 622 Phil. 661, 720 (2009).
58 *De Galicia v. Mercado*, 519 Phil. 122, 127 (2006).
59 *Rollo* (Vol. II), p. 1107.

proper remedy to assail SEC-MC No. 8 because it was not issued under the adjudicatory or *quasi*-judicial functions of the SEC.

The Substantive Issue

The only substantive issue that the petitions assert is whether the SEC's issuance of SEC-MC No. 8 is tainted with grave abuse of discretion.

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

The ratio in the Gamboa Decision and Gamboa Resolution.

To determine what the Court directed the SEC to do – *and therefore resolve whether what the SEC did amounted to grave abuse of discretion* – the Court resorts to the decretal portion of the *Gamboa* Decision, as this is the portion of the decision that a party relies upon to determine his or her rights and duties,[60] *viz*:

> **WHEREFORE**, we *PARTLY GRANT* the petition and rule that the term "capital" in Section 11, Article XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares). Respondent Chairperson of the Securities and Exchange Commission is *DIRECTED* to apply this definition of the term "capital" in determining the extent of allowable foreign ownership in respondent Philippine Long Distance Telephone Company, and if there is a violation of Section 11, Article XII of the Constitution, to impose the appropriate sanctions under the law.[61]

In turn, the *Gamboa* Resolution stated:

> In any event, the SEC has expressly manifested[62] that it will abide by the Court's decision and defer to the Court's definition of the term "capital" in Section 11, Article XII of the Constitution. Further, the SEC entered its special appearance in this case and argued during the Oral Arguments, indicating its submission to the Court's jurisdiction. It is clear, therefore, that there exists no legal impediment against the proper and immediate implementation of the Court's directive to the SEC.

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60 See *Suntay v. Cojuangco-Suntay*, 360 Phil. 932 (1998).

61 *Gamboa v. Finance Secretary Teves*, supra note 2.

62 In its Manifestation and Omnibus Motion dated July 29, 2011, the SEC stated: "x x x The Commission, however, would submit to whatever would be the final decision of this Honorable Court on the meaning of the term "capital"."

In its Memorandum, the SEC also stated: "In the event that this Honorable Court rules with finality on the meaning of "capital," the SEC will yield to the Court and follow its interpretation." (*Heirs of Wilson P. Gamboa v. Finance Sec. Teves*, supra note 3, at 356-357, footnote 54; emphasis omitted.)

x x x x

x x x **The dispositive portion of the Court's ruling is addressed not to PLDT but solely to the SEC, which is the administrative agency tasked to enforce the 60-40 ownership requirement in favor of Filipino citizens in Section 11, Article XII of the Constitution.**[63]

To recall, the sole issue in the *Gamboa* case was: "whether the term 'capital' in Section 11, Article XII of the Constitution refers to the total common shares only or to the total outstanding capital stock (combined total of common and non-voting preferred shares) of PLDT, a public utility."[64]

The Court directly answered the issue and **consistently** defined the term "capital" as follows:

> x x x 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.
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>
> 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.**[65]

The decretal portion of the *Gamboa* Decision follows the definition of the term "capital" in the body of the decision, to wit: "x x x we x x x rule that the term 'capital' in Section 11, Article XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares)."[66]

The Court adopted the foregoing definition of the term "capital" in Section 11, Article XII of the 1987 Constitution in furtherance of "the intent and letter of the Constitution that the 'State shall develop a self-reliant and independent national economy ***effectively controlled*** by Filipinos' [because a] broad definition unjustifiably disregards who owns the all-important voting stock, which necessarily equates to control of the public utility."[67] The Court, recognizing that the provision is an express recognition of the

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63 *Heirs of Wilson P. Gamboa v. Finance Sec. Teves*, id. at 356, 358.
64 *Gamboa v. Finance Secretary Teves*, supra note 2, at 35.
65 Id. at 51-53.
66 Id. at 69-70.
67 Id. at 58.

sensitive and vital position of public utilities both in the national economy and for national security, also pronounced that the evident purpose of the citizenship requirement is to prevent aliens from assuming control of public utilities, which may be inimical to the national interest.[68] Further, the Court noted that the foregoing 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; and, as revealed in the deliberations of the Constitutional Commission, "capital" refers to the voting stock or **controlling interest** of a corporation.[69]

In this regard, it would be *apropos* to state that since Filipinos own at least 60% of the outstanding shares of stock entitled to vote directors, which is what the Constitution precisely requires, then the Filipino stockholders **control** the corporation, *i.e.*, they dictate corporate actions and decisions, and they have all the rights of ownership including, but not limited to, offering certain preferred shares that may have greater economic interest to foreign investors – as the need for capital for corporate pursuits (such as expansion), may be good for the corporation that they own. Surely, these "true owners" will not allow any dilution of their ownership and control if such move will not be beneficial to them.

As owners of the corporation, the economic benefits will necessarily accrue to them. There is thus no logical reason why Filipino shareholders will allow foreigners to have greater economic benefits than them. It is illogical to speculate that they will create shares which have features that will give greater economic interests or benefits than they are holding and not benefit from such offering, or that they will allow foreigners to profit more than them from their own corporation – unless they are dummies. But, Commonwealth Act No. 108, the Anti-Dummy Law, is NOT in issue in these petitions. Notably, even if the shares of a particular public utility were owned 100% Filipino, that does not discount the possibility of a dummy situation from arising. Hence, even if the 60-40 ownership in favor of Filipinos rule is applied separately to each class of shares of a public utility corporation, as the petitioners insist, the rule can easily be side-stepped by a dummy relationship. In other words, even applying the 60-40 Filipino-foreign ownership rule to each class of shares will not assure the lofty purpose enunciated by petitioners.

The Court observed further in the *Gamboa* Decision that reinforcing this interpretation of the term "capital", as referring to interests or shares entitled to vote, is the definition of a Philippine national in the Foreign Investments Act of 1991 ("FIA"), which is explained in the Implementing Rules and Regulations of the FIA ("FIA-IRR"). The FIA-IRR provides:

> Compliance with the required Filipino ownership of a corporation shall be determined on the basis of outstanding capital stock whether fully

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68 Id. at 44.

69 Id. at 53-54.

> 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.[70]

Echoing the FIA-IRR, the Court stated in the *Gamboa* Decision that:

> 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]."
>
> x x x x
>
> 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. x x x[71]

Was the definition of the term "capital" in Section 11, Article XII of the 1987 Constitution declared for the first time by the Court in the *Gamboa* Decision modified in the *Gamboa* Resolution?

The Court is convinced that it was not. The *Gamboa* Resolution consists of 51 pages (excluding the dissenting opinions of Associate Justices Velasco and Abad). For the most part of the *Gamboa* Resolution, the Court, after reviewing SEC and DOJ[72] Opinions as well as the provisions of the FIA and its predecessor statutes,[73] reiterated that both the Voting Control Test and the Beneficial Ownership Test must be applied to determine whether a corporation is a "Philippine national"[74] and that a "Philippine national," as defined in the FIA and all its predecessor statutes, is "a Filipino citizen, or a **domestic corporation "at least sixty percent (60%) of the capital stock outstanding *and entitled to vote*,"** is owned by Filipino citizens. A domestic corporation is a "Philippine national" only if at least 60% of its ***voting stock*** is owned by Filipino citizens."[75] The Court also reiterated that, from the deliberations of the Constitutional Commission, it is evident that the term "capital" refers to **controlling interest** of a

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70 Id. at 55-57.
71 Id. at 57, 63.
72 Department of Justice.
73 Executive Order No. 226 or the *Omnibus Investments Code of 1987*; Presidential Decree No. 1789 or the *Omnibus Investments Code of 1981*, and Republic Act No. 5186 or the *Investment Incentives Act of 1967*.
74 *Heirs of Wilson P. Gamboa v. Finance Secretary Teves*, supra note 3, at 321.
75 Id. at 331.

corporation,[76] and the framers of the Constitution intended public utilities to be ***majority*** Filipino-owned and controlled.

The "***Final Word***" of the *Gamboa* Resolution put to rest the Court's interpretation of the term "capital", and this is quoted *verbatim*, to wit:

> ***XII.***
> ***Final Word***
>
> The Constitution expressly declares as State policy the development of an economy "***effectively controlled***" by Filipinos. Consistent with such State policy, the Constitution explicitly reserves the ownership and operation of public utilities to Philippine nationals, who are defined in the Foreign Investments Act of 1991 as Filipino citizens, or corporations or associations at least 60 percent of whose capital ***with voting rights*** belongs to Filipinos. The FIA's implementing rules explain that "[f]or 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 stocks, coupled with appropriate voting rights is essential.**" In effect, the FIA clarifies, reiterates and confirms the interpretation that the term "capital" in Section 11, Article XII of the 1987 Constitution refers to ***shares with voting rights, as well as with full beneficial ownership***. This is precisely because the right to vote in the election of directors, coupled with full beneficial ownership of stocks, translates to effective control of a corporation.[77]

Everything told, the Court, in both the *Gamboa* Decision and *Gamboa* Resolution, finally settled with the FIA's definition of "Philippine national" as expounded in the FIA-IRR in construing the term "capital" in Section 11, Article XII of the 1987 Constitution.

The assailed SEC-MC No. 8.

The relevant provision in the assailed SEC-MC No. 8 is Section 2, which provides:

> Section 2. All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.[78]

Section 2 of SEC-MC No. 8 clearly incorporates the Voting Control Test or the controlling interest requirement. **In fact, Section 2 goes beyond requiring a 60-40 ratio in favor of Filipino nationals in the voting stocks; it moreover requires the 60-40 percentage ownership in the total number of outstanding shares of stock, whether voting or not**. The SEC formulated SEC-MC No. 8 to adhere to the Court's unambiguous

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[76] Id. at 342.
[77] Id. at 361-362.
[78] *Rollo* (Vol. I), p. 35.

pronouncement that "[f]ull beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights is required."[79] Clearly, SEC-MC No. 8 cannot be said to have been issued with grave abuse of discretion.

A simple illustration involving Company X with three kinds of shares of stock, easily shows how compliance with the requirements of SEC-MC No. 8 will necessarily result to full and faithful compliance with the *Gamboa* Decision as well as the *Gamboa* Resolution.

> The following is the composition of the outstanding capital stock of Company X:
>
> 100 common shares
> 100 Class A preferred shares (with right to elect directors)
> 100 Class B preferred shares (without right to elect directors)

SEC-MC No. 8	***GAMBOA* DECISION**
(1) 60% (required percentage of Filipino) applied to the total number of outstanding shares of stock entitled to vote in the election of directors	"shares of stock entitled to vote in the election of directors"[80] (60% of the voting rights)

If at least a total of 120 of common shares and Class A preferred shares (in any combination) are owned and controlled by Filipinos, Company X is compliant with the 60% of the voting rights in favor of Filipinos requirement of both SEC-MC No. 8 and the *Gamboa* Decision.

SEC-MC No. 8	***GAMBOA* DECISION/ RESOLUTION**
(2) 60% (required percentage of Filipino) applied to BOTH (a) the total number of outstanding shares of stock, entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.	"Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights"[81] or "Full beneficial ownership of the stocks, coupled with appropriate voting rights x x x shares with voting rights, as well as with full beneficial ownership"[82]

If at least a total of 180 shares of all the outstanding capital stock of Company X are owned and controlled by Filipinos, provided that among

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79 *Gamboa v. Finance Secretary Teves*, supra note 2, at 57.
80 Id. at 69-70.
81 Id. at 57.
82 *Heirs of Gamboa v. Finance Secretary Teves*, supra note 3, at 361.

those 180 shares a total of 120 of the common shares and Class A preferred shares (in any combination) are owned and controlled by Filipinos, then Company X is compliant with both requirements of voting rights and beneficial ownership under SEC-MC No. 8 and the *Gamboa* Decision and Resolution.

From the foregoing illustration, SEC-MC No. 8 simply implemented, and is fully in accordance with, the *Gamboa* Decision and Resolution.

While SEC-MC No. 8 does not expressly mention the Beneficial Ownership Test or full beneficial ownership of stocks requirement in the FIA, this will not, as it does not, render it invalid — meaning, it does not follow that the SEC will not apply this test in determining whether the shares claimed to be owned by Philippine nationals are Filipino, *i.e.*, are held by them by mere title or in full beneficial ownership. To be sure, the SEC takes its guiding lights also from the FIA and its implementing rules, the Securities Regulation Code (Republic Act No. 8799; "SRC") and its implementing rules.[83]

The full beneficial ownership test.

The minority justifies the application of the 60-40 Filipino-foreign ownership rule separately to each class of shares of a public utility corporation in this fashion:

> x x x The words "own and control," used to qualify the minimum Filipino participation in Section 11, Article XII of the Constitution, reflects the importance of Filipinos having both the ability to influence the corporation through voting rights and economic benefits. In other words, **full ownership up to 60% of a public utility** encompasses **both control** *and* **economic rights**, both of which must stay in Filipino hands. Filipinos, who own 60% of the **controlling interest**, must also own 60% of the **economic interest** in a public utility.
>
> x x x In mixed class or dual structured corporations, however, there is variance in the proportion of stockholders' controlling interest vis-à-vis their economic ownership rights. This resulting variation is recognized by the Implementing Rules and Regulations (*IRR*) of the Securities Regulation Code, which defined beneficial ownership as that may exist either through voting power **and/or** through investment returns. By using and/or in defining beneficial ownership, the **IRR**, in effect, recognizes a possible situation where voting power is not commensurate to investment power.

The definition of "beneficial owner" or "beneficial ownership" in the Implementing Rules and Regulations of the Securities Regulation Code ("SRC-IRR") is consistent with the concept of "full beneficial ownership" in the FIA-IRR.

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[83] For definition of "Beneficial owner or beneficial ownership" and "Control", please refer to Sections 3.1.2 and 3.1.8, respectively of the 2015 Implementing Rules and Regulations of the Securities Regulation Code.

As defined in the SRC-IRR, "**[b]eneficial owner** or **beneficial ownership** means any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares voting power (which includes the power to vote or direct the voting of such security) and/or investment returns or power (which includes the power to dispose of, or direct the disposition of such security) x x x."[84]

While it is correct to state that beneficial ownership is that which may exist either through voting power and/or investment returns, it does not follow, as espoused by the minority opinion, that the SRC-IRR, in effect, recognizes a possible situation where voting power is not commensurate to investment power. That is a wrong syllogism. The fallacy arises from a misunderstanding on what the definition is for. The "beneficial ownership" referred to in the definition, while it may ultimately and indirectly refer to the overall ownership of the corporation, more pertinently refers to the ownership of the share subject of the question: is it Filipino-owned or not?

As noted earlier, the FIA-IRR states:

> ***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.[85]

The emphasized portions in the foregoing provision is the equivalent of the so-called "beneficial ownership test". That is all.

The term "full beneficial ownership" found in the FIA-IRR is to be understood in the context of the entire paragraph defining the term "Philippine national". Mere legal title is not enough to meet the required Filipino equity, which means that it is not sufficient that a share is registered in the name of a Filipino citizen or national, *i.e.*, he should also have full beneficial ownership of the share. If the voting right of a share held in the name of a Filipino citizen or national is assigned or transferred to an alien, that share is not to be counted in the determination of the required Filipino equity. In the same vein, if the dividends and other fruits and accessions of the share do not accrue to a Filipino citizen or national, then that share is also to be excluded or not counted.

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[84] 2015 Implementing Rules and Regulations of the Securities Regulations Code, Sec. 3.1.2.

[85] Implementing Rules and Regulations of Republic Act No. 7042 (Foreign Investment Act of 1991) as Amended by Republic Act No. 8179, Sec. 1, b; underscoring and emphasis supplied.

In this regard, it is worth reiterating the Court's pronouncement in the *Gamboa* Decision, which is consistent with the FIA-IRR, *viz*:

> 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***. x x x
>
> x x x x
>
> 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***. x x x.[86]

And the "***Final Word***" of the *Gamboa* Resolution is in full accord with the foregoing pronouncement of the Court, to wit:

> ***XII.***
> ***Final Word***
>
> x x x The FIA's implementing rules explain that "[f]or 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.**"[87]

Given that beneficial ownership of the outstanding capital stock of the public utility corporation has to be determined for purposes of compliance with the 60% Filipino ownership requirement, the definition in the SRC-IRR can now be applied to resolve **only** the question of who is the beneficial owner or who has beneficial ownership of each "specific stock" of the said corporation. Thus, if a "specific stock" is owned by a Filipino in the books of the corporation, but the stock's voting power or disposing power belongs to a foreigner, then that "specific stock" will not be deemed as "beneficially owned" by a Filipino.

Stated inversely, if the Filipino has the "specific stock's" voting power (he can vote the stock or direct another to vote for him), or the Filipino has the investment power over the "specific stock" (he can dispose of the stock or direct another to dispose it for him), or he has both (he can vote and dispose of the "specific stock" or direct another to vote or dispose it for him), then such Filipino is the "beneficial owner" of that "specific stock" – and that "specific stock" is considered (or counted) as part of the 60% Filipino ownership of the corporation. In the end, all those "specific stocks" that are determined to be Filipino (per definition of "beneficial owner" or "beneficial ownership") will be added together and their sum must be equivalent to at least 60% of the total outstanding shares of stock entitled to

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[86] *Gamboa v. Finance Secretary Teves*, supra note 2, at 57, 63. Emphasis and underscoring supplied.
[87] *Heirs of Gamboa v. Finance Secretary Teves*, supra note 3, at 361.

vote in the election of directors and at least 60% of the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.

To reiterate, the "beneficial owner or beneficial ownership" definition in the SRC-IRR is understood only in determining the respective nationalities ***of the outstanding capital stock*** of a public utility corporation in order to determine its compliance with the percentage of Filipino ownership required by the Constitution.

The restrictive re-interpretation of "capital" as insisted by the petitioners is unwarranted.

Petitioners' insistence that the 60% Filipino equity requirement must be applied to each class of shares is simply beyond the literal text and contemplation of Section 11, Article XII of the 1987 Constitution, *viz*:

> Sec. 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* or 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.

As worded, ***effective control*** by Filipino citizens of a public utility is already assured in the provision. With respect to a stock corporation engaged in the business of a public utility, the constitutional provision mandates three safeguards: (1) 60% of its capital must be owned by Filipino citizens; (2) participation of foreign investors in its board of directors is limited to their proportionate share in its capital; and (3) all its executive and managing officers must be citizens of the Philippines.

In the exhaustive review made by the Court in the *Gamboa* Resolution of the deliberations of the Constitutional Commission, the opinions of the framers of the 1987 Constitution, the opinions of the SEC and the DOJ as well as the provisions of the FIA, its implementing rules and its predecessor statutes, the intention to apply the voting control test and the beneficial ownership test was **not** mentioned in reference to "each class of shares." Even the *Gamboa* Decision was silent on this point.

To be sure, the application of the 60-40 Filipino-foreign ownership requirement separately to each class of shares, whether common, preferred non-voting, preferred voting or any other class of shares fails to understand and appreciate the nature and features of stocks as financial instruments.[88]

There are basically only two types of shares or stocks, i.e., common stock and preferred stock. However, the classes and variety of shares that a corporation may issue are dictated by the confluence of the corporation's financial position and needs, business opportunities, short-term and long-term targets, risks involved, to name a few; and they can be classified and re-classified from time to time. With respect to preferred shares, there are cumulative preferred shares, non-cumulative preferred shares, convertible preferred shares, participating preferred shares.

Because of the different features of preferred shares, it is required that the presentation and disclosure of these financial instruments in financial statements should be in accordance with the substance of the contractual arrangement and the definitions of a financial liability, a financial asset and an equity instrument.[89]

Under IAS[90] 32.16, a financial instrument is an equity instrument only if (a) the instrument includes no contractual obligation to deliver cash or another financial asset to another entity, and (b) if the instrument will or may be settled in the issuer's own equity instruments, it is either: (i) a non-derivative that includes no contractual obligation for the issuer to deliver a variable number of its own equity instruments; or (ii) a derivative that will be settled only by the issuer exchanging a fixed amount of cash or another financial asset for a fixed number of its own equity instruments.[91]

The following are illustrations of how preferred shares should be presented and disclosed:

> **Illustration – preference shares**
>
> If an entity issues preference (preferred) shares that pay a fixed rate of dividend and that have a mandatory redemption feature at a future date, the substance is that they are a contractual obligation to deliver cash and, therefore, should be recognized as a liability. [IAS 32.18(a)] In contrast, preference shares that do not have a fixed maturity, and where the issuer

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88 A financial instrument is a contract that gives rise to a financial asset of one entity and a financial liability or equity instrument of another entity. [IAS 32 — Financial Instruments: Presentation, Key definitions [IAS 32.11, available at <http://www.iasplus.com/en/standards/ias/ias32>, last accessed on November 28, 2016]. The common examples of financial instruments within the scope of International Auditing Standards (IAS) 39 are as follows: cash; demand and time deposit; commercial paper; accounts, notes, and loans receivable and payable; debt and equity securities which includes investments in subsidiaries, associates, and joint ventures; asset backed securities such as collateralised mortgage obligations, repurchase agreements, and securitised packages of receivables; and derivatives, including options, rights, warrants, futures contracts, forward contracts, and swaps. [IAS 39 — *Financial Instruments: Recognition and Measurement*, available at <http://www.iasplus.com/en/standards/ias/ias39>, last accessed on November 28, 2016].

89 IAS 32 *Financial Instruments: Presentation*, <http://www.ifrs.org/Documents/IAS32.pdf>, last accessed on November 28, 2016.

90 International Accounting Standards.

91 <http://www.iasplus.com/en/standards/ias/ias32>, last accessed on November 28, 2016.

> does not have a contractual obligation to make any payment are equity. In this example even though both instruments are legally termed preference shares they have different contractual terms and one is a financial liability while the other is equity.
>
> **Illustration – issuance of fixed monetary amount of equity instruments**
>
> A contractual right or obligation to receive or deliver a number of its own shares or other equity instruments that varies so that the fair value of the entity's own equity instruments to be received or delivered equals the fixed monetary amount of the contractual right or obligation is a financial liability. [IAS 32.20]
>
> **Illustration – one party has a choice over how an instrument is settled**
>
> When a derivative financial instrument gives one party a choice over how it is settled (for instance, the issuer or the holder can choose settlement net in cash or by exchanging shares for cash), it is a financial asset or a financial liability unless all of the settlement alternatives would result in it being an equity instrument. [IAS 32.26][92]

The fact that from an accounting standpoint, the substance or essence of the financial instrument is the key determinant whether it should be categorized as a financial liability or an equity instrument, there is no compelling reason why the same treatment may not be recognized from a legal perspective. Thus, to require Filipino shareholders to acquire preferred shares that are substantially debts, in order to meet the "restrictive" Filipino ownership requirement that petitioners espouse, may not bode well for the Philippine corporation and its Filipino shareholders.

Parenthetically, given the innumerable permutations that the types and classes of stocks may take, requiring the SEC and other government agencies to keep track of the ever-changing capital classes of corporations will be impracticable, if not downright impossible. And the law does not require the impossible. (*Lex non cogit ad impossibilia.*)[93]

That stock corporations are allowed to create shares of different classes with varying features is a flexibility that is granted, among others, for the corporation to attract and generate capital (funds) from both local and foreign capital markets. This access to capital – which a stock corporation may need for expansion, debt relief/repayment, working capital requirement and other corporate pursuits – will be greatly eroded with further unwarranted limitations that are not articulated in the Constitution. The intricacies and delicate balance between debt instruments (liabilities) and equity (capital) that stock corporations need to calibrate to fund their business requirements and achieve their financial targets are better left to the judgment of their boards and officers, whose bounden duty is to steer their companies to financial stability and profitability and who are ultimately answerable to their shareholders.

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92 Id.

93 *Biraogo v. The Philippine Truth Commission of 2010*, supra note 36, at 463.

Going back to the illustration above, the restrictive meaning of the term "capital" espoused by petitioners will definitely be complied with if 60% of each of the three classes of shares of Company X, consisting of 100 common shares, 100 Class A preferred shares (with right to elect directors) and 100 Class B preferred shares (without right to elect directors), is owned by Filipinos. **However**, what if the 60% Filipino ownership in each class of preferred shares, i.e., 60 Class A preferred shares and 60 Class B preferred shares, is not fully subscribed or achieved because there are not enough Filipino takers? Company X will be deprived of capital that would otherwise be accessible to it were it not for this unwarranted "restrictive" meaning of "capital".

The fact that all shares have the right to vote in 8 specific corporate actions as provided in Section 6 of the Corporation Code does not *per se* justify the favorable adoption of the restrictive re-interpretation of "capital" as the petitioners espouse. As observed in the *Gamboa* Decision, *viz*:

> The Corporation Code of the Philippines 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. 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.
> >
> > x x x x

> 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.

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 x x x.[94]

The *Gamboa* Decision held that preferred shares are to be factored in only if they are entitled to vote in the election of directors. If preferred shares have no voting rights, then they cannot elect members of the board of directors, which wields control of the corporation. As to the right of non-voting preferred shares to vote in the 8 instances enumerated in Section 6 of the Corporation Code, the *Gamboa* Decision considered them but, in the end, did not find them significant in resolving the issue of the proper interpretation of the word "capital" in Section 11, Article XII of the Constitution.

Therefore, to now insist in the present case that preferred shares be regarded differently from their unambiguous treatment in the *Gamboa* Decision is enough proof that the *Gamboa* Decision, which had attained finality more than 4 years ago, is being drastically changed or expanded.

In this regard, it should be noted that the 8 corporate matters enumerated in Section 6 of the Corporation Code require, at the outset, a favorable recommendation by the management to the board. As mandated by Section 11, Article XII of the Constitution, all the executive and managing officers of a public utility company must be Filipinos. Thus, the all-Filipino management team must first be convinced that any of the 8 corporate actions in Section 6 will be to the best interest of the company. Then, when the all-Filipino management team recommends this to the board, a majority of the board has to approve the recommendation — and, as required by the Constitution, foreign participation in the board cannot exceed 40% of the total number of board seats. Since the Filipino directors comprise the majority, they, if united, do not even need the vote of the foreign directors to approve the intended corporate act. After approval by the board, all the shareholders (with and without voting rights) will vote on the corporate action. The required vote in the shareholders' meeting is 2/3 of the outstanding capital stock.[95] Given the super majority vote requirement, foreign shareholders cannot dictate upon their Filipino counterpart.

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94 *Gamboa v. Finance Secretary Teves*, supra note 2, at 51-54. Underscoring supplied.

95 Sec. 16 (Amendment of Articles of Incorporation); Sec. 37 (Power to extend or shorten corporate term); Sec. 38 (Power to increase or decrease capital stock; create or increase bonded indebtedness); Sec. 40 (Sale or other dispositions of [all or substantially all] assets); Sec. 42 (Power to invest corporate funds in another corporation or business or for any other purpose); Sec. 48 (Amendments to by-laws); Sec. 77 (Stockholder's or member's approval [of plan of merger or consolidation]); Sec. 118 (Voluntary dissolution where no creditors are affected); and Sec. 119 (Voluntary dissolution where creditors are affected).

However, foreigners (if owning at least a third of the outstanding capital stock) must agree with Filipino shareholders for the corporate action to be approved. The 2/3 voting requirement applies to all corporations, given the significance of the 8 corporate actions contemplated in Section 6 of the Corporation Code.

In short, if the Filipino officers, directors and shareholders will not approve of the corporate act, the foreigners are helpless.

Allowing stockholders holding preferred shares without voting rights to vote in the 8 corporate matters enumerated in Section 6 is an acknowledgment of their right of ownership. If the owners of preferred shares without right to vote/elect directors are not allowed to vote in any of those 8 corporate actions, then they will not be entitled to the appraisal right provided under Section 81[96] of the Corporation Code in the event that they dissent in the corporate act. As required in Section 82, the appraisal right can only be exercised by any stockholder who voted against the proposed action. Thus, without recognizing the right of every stockholder to vote in the 8 instances enumerated in Section 6, the stockholder cannot exercise his appraisal right in case he votes against the corporate action. In simple terms, the right to vote in the 8 instances enumerated in Section 6 is more in furtherance of the stockholder's right of ownership rather than as a mode of control.

As to financial interest, giving short-lived preferred or superior terms to certain classes or series of shares may be a welcome option to expand capital, without the Filipino shareholders putting up additional substantial capital and/or losing ownership and control of the company. For shareholders who are not keen on the creation of those shares, they may opt to avail themselves of their appraisal right. As acknowledged in the *Gamboa* Decision, preferred shareholders are merely investors in the company for income in the same manner as bondholders. Without a lucrative package, including an attractive return of investment, preferred shares will not be subscribed and the much-needed additional capital will be elusive. A too restrictive definition of "capital", one which was never contemplated in the *Gamboa* Decision, will surely have a dampening effect on the business milieu by eroding the flexibility inherent in the issuance of preferred shares with varying terms and conditions. Consequently, the rights and prerogatives of the owners of the corporation will be unwarrantedly stymied.

Moreover, the restrictive interpretation of the term "capital" would have a tremendous impact on the country as a whole – and to all Filipinos.

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[96] Sec. 81. ***Instances of appraisal right.*** – Any stockholder of a corporation shall have the right to dissent and demand payment of the fair value of his shares in the following instances:

1. In case any amendment to the articles of incorporation has the effect of changing or restricting the rights of any stockholder or class of shares, or of authorizing preferences in any respect superior to those of outstanding shares of any class, or of extending or shortening the term of corporate existence;
2. In case of sale, lease, exchange, transfer, mortgage, pledge or other disposition of all or substantially all of the corporate property and assets as provided in the Code; and
3. In case of merger or consolidation.

The PSE's Comment-in-Intervention dated June 16, 2014[97] warns that:

> 80. [R]edefining "capital" as used in Section 11, Article XII of the 1987 Constitution and adopting the supposed "Effective Control Test" will lead to disastrous consequences to the Philippine stock market.
>
> 81. Current data of the PSE show that, if the "Effective Control Test" were applied, the total value of shares that would be deemed in excess of the foreign-ownership limits based on stock prices as of 30 April 2014 is **One Hundred Fifty Nine Billion Six Hundred Thirty Eight Million Eight Hundred Forty Five Thousand Two Hundred Six Pesos and Eighty Nine Cents (Php159,638,845,206.89)**.
>
> 82. The aforementioned value of investments would have to be discharged by foreign holders, and consequently must be absorbed by Filipino investors. Needless to state, the lack of investments may lead to shutdown of the affected enterprises and to immeasurable consequences to the Philippine economy. [98]

In its Omnibus Motion [1] For Leave to Intervene; and [2] To Admit Attached Comment-in-Intervention dated May 30, 2016,[99] SHAREPHIL further warns that "[t]he restrictive re-interpretation of the term "capital" will result in massive forced divestment of foreign stockholdings in Philippine corporations."[100] SHAREPHIL explains:

> 4.51. On 16 October 2012, Deutsche Bank released a Market Research Study, which analyzed the implications of the ruling in *Gamboa*. The Market Research Study stated that:
>
> > "If this thinking is applied and becomes established precedent, it would significantly expand on the rules for determining nationality in partially nationalized industries. If that were to happen, not only will PLDT's move to issue the 150m voting prefs be inadequate to address the issue, a large number of listed companies with similar capital structures could also be affected."
>
> 4.52. In five (5) companies alone, One Hundred Fifty Eight Billion Pesos (PhP158,000,000,000.00) worth of shares will have to be sold by foreign shareholders in a forced divestment, if the *obiter* in *Gamboa* were to be implemented. Foreign shareholders of PLDT will have to divest One Hundred Three Billion Eight Hundred Sixty Million Pesos (PhP103,860,000,000.00) worth of shares.
>
> a. Foreign shareholders of Globe Telecom will *have* to divest Thirty Eight Billion Two Hundred Fifty Million Pesos (PhP38,250,000,000.00) worth of shares.

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97 *Rollo* (Vol. II), pp. 848-879.
98 Id. at 870. Emphasis supplied.
99 Id. at 1080-1114.
100 Id. 1105.

> b. Foreign shareholders of Ayala Land will have to divest Seventeen Billion Five Hundred Fifty Million Pesos (PhP17,550,000,000.00) worth of shares.
>
> c. Foreign shareholders of ICTSI will have to divest Six Billion Four Hundred Ninety Million Pesos (PhP6,490,000,000.00) worth of shares.
>
> d. Foreign shareholders of MWC will have to divest Seven Billion Seven Hundred Fourteen Million Pesos (PhP7,714,000,000.00) worth of shares.
>
> 4.53. Clearly, the local stock market which has an average value turn-over of Seven Billion Pesos cannot adequately absorb the influx of shares caused by the forced divestment. As a result, foreign stockholders will have to sell these shares at bargain prices just to comply with the *Obiter*.
>
> 4.54. These shares being part of the Philippine index, their forced divestment *vis-à-vis* the inability of the local stock market to absorb these shares will necessarily bring immense downward pressure on the index. A domino-effect implosion of the Philippine stock market and the Philippine economy, in general is not remote. x x x.[101]

Petitioners have failed to counter or refute these submissions of the PSE and SHAREPHIL. These unrefuted observations indicate to the Court that a restrictive interpretation – or rather, re-interpretation, of "capital", as already defined with finality in the *Gamboa* Decision and Resolution – directly affects the well-being of the country and cannot be labelled as "irrelevant and impertinent concerns x x x add[ing] burden [to] the Court."[102] These observations by the PSE[103] and SHAREPHIL,[104] unless refuted, must be considered by the Court to be valid and sound.

The Court in *Abacus Securities Corp. v. Ampil*[105] observed that: "[s]tock market transactions affect the general public and the national economy. The rise and fall of stock market indices reflect to a considerable degree the state of the economy. Trends in stock prices tend to herald changes in business conditions. Consequently, securities transactions are impressed with public interest x x x."[106] The importance of the stock market in the economy cannot simply be glossed over.

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101 Id. at 1106-1107.

102 Petitioner Roy's Opposition and Reply to Interventions of Philippine Stock Exchange and SHAREPHIL dated June 30, 2016, id. at 1128.

103 The PSE is an entity mandated to provide and maintain a convenient, economical, and suitable market for the exchange of stocks, to formulate and implement rules and regulations to ensure that the interests of all market participants are protected, and to provide an efficient and fair market for buyers and sellers alike. The PSE alleges that, in case the petitions are granted, it stands to be injured and there will be damaging consequences on the market, as it will force the reduction of foreign investment and restrict capital outflow. PSE's Comment-in-Intervention, p. 2, id. at 849.

104 SHAREPHIL, as an association forwarding the rights and welfare of shareholders, alleges that it aims to protect shareholders who have direct and substantial interest in this case and will no doubt be adversely affected by the restrictive re-interpretation of the *Gamboa* ruling forwarded by the petitioners. SHAREPHIL's Omnibus Motion [1] For Leave to Intervene; and [2] To Admit Attached Comment-in-Intervention, par. 5, p. 3, id. at 1082.

105 518 Phil. 478 (2006).

106 Id. at 482.

In view of the foregoing, the pronouncement of the Court in the *Gamboa* Resolution —the constitutional requirement to "apply uniformly and across the board to all classes of shares, regardless of nomenclature and category, comprising the capital of a corporation[107]– is clearly an *obiter dictum* that cannot override the Court's unequivocal definition of the term "capital" in both the *Gamboa* Decision and Resolution.

Nowhere in the discussion of the definition of the term "capital" in Section 11, Article XII of the 1987 Constitution in the *Gamboa* Decision did the Court mention the 60% Filipino equity requirement to be applied to each class of shares. The definition of "Philippine national" in the FIA and expounded in its IRR, which the Court adopted in its interpretation of the term "capital", does not support such application. In fact, even the ***Final Word*** of the *Gamboa* Resolution does not even intimate or suggest the need for a clarification or re-interpretation.

To revisit or even clarify the unequivocal definition of the term "capital" as referring "only to shares of stock entitled to vote in the election of directors" and apply the 60% Filipino ownership requirement to each class of share is effectively and unwarrantedly amending or changing the *Gamboa* Decision and Resolution. The *Gamboa* Decision and Resolution Doctrine did NOT make any definitive ruling that the 60% Filipino ownership requirement was intended to apply to each class of share.

In *Malayang Manggagawa ng Stayfast Phils., Inc. v. NLRC*,[108] the Court stated:

> Where a petition for *certiorari* under Rule 65 of the Rules of Court alleges grave abuse of discretion, the **petitioner should establish that the respondent court or tribunal acted in a capricious, whimsical, arbitrary or despotic manner in the exercise of its jurisdiction as to be equivalent to lack of jurisdiction**. This is so because "grave abuse of discretion" is well-defined and not an amorphous concept that may easily be manipulated to suit one's purpose. In this connection, *Yu v. Judge Reyes-Carpio*, is instructive:
>
> > The term "grave abuse of discretion" has a specific meaning. An act of a court or tribunal can only be considered as with grave abuse of discretion when such act is done in a "capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction." The abuse of discretion must be so patent and gross as to amount to an "evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility." Furthermore, the use of a petition for *certiorari* is restricted only to "truly extraordinary cases wherein the act of the lower court or quasi-judicial body is wholly void." From the foregoing definition, it is clear that the special civil

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107 *Heirs of Wilson P. Gamboa v. Finance Secretary Teves*, supra note 3, at 339.

108 716 Phil. 500, 515-516 (2013). Emphasis supplied; citations omitted.

> action of *certiorari* under Rule 65 can only strike an act down for having been done with grave abuse of discretion if the **petitioner could manifestly show that such act was patent and gross**. x x x.

The onus rests on petitioners to clearly and sufficiently establish that the SEC, in issuing SEC-MC No. 8, acted in a capricious, whimsical, arbitrary or despotic manner in the exercise of its jurisdiction as to be equivalent to lack of jurisdiction or that the SEC's abuse of discretion is so patent and gross as to amount to an evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law and the *Gamboa* Decision and Resolution. **Petitioners miserably failed in this respect.**

The clear and unequivocal definition of "capital" in Gamboa has attained finality.

It is an elementary principle in procedure that the resolution of the court in a given issue as embodied in the dispositive portion or *fallo* of a decision controls the settlement of rights of the parties and the questions, notwithstanding statement in the body of the decision which may be somewhat confusing, inasmuch as the dispositive part of a final decision is definite, clear and unequivocal and can be wholly given effect without need of interpretation or construction.[109]

As explained above, the *fallo* or decretal/dispositive portions of both the *Gamboa* Decision and Resolution are definite, clear and unequivocal. While there is a passage in the body of the *Gamboa* Resolution that might have appeared contrary to the *fallo* of the *Gamboa* Decision — capitalized upon by petitioners to espouse a restrictive re-interpretation of "capital" — the definiteness and clarity of the *fallo* of the *Gamboa* Decision must control over the obiter dictum in the *Gamboa* Resolution regarding the application of the 60-40 Filipino-foreign ownership requirement to "each class of shares, regardless of differences in voting rights, privileges and restrictions."

The final judgment as rendered is the judgment of the court irrespective of all seemingly contrary statements in the decision because at the root of the doctrine that the premises must yield to the conclusion is, side by side with the need of writing *finis* to litigations, the recognition of the truth that "the trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons."[110]

Petitioners cannot, after *Gamboa* has attained finality, seek a belated correction or reconsideration of the Court's unequivocal definition of the term "capital". At the core of the doctrine of finality of judgments is that public policy and sound practice demand that, at the risk of occasional

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[109] *Suntay v. Cojuangco-Suntay*, supra note 60, at 944-945 (1998).

[110] *Contreras and Gingco v. Felix and China Banking Corp.*, 78 Phil. 570, 577-578 (1947). Citations omitted.

errors, judgments of courts should become final at some definite date fixed by law and the very objects for which courts were instituted was to put an end to controversies.[111] Indeed, the definition of the term "capital" in the *fallo* of the *Gamboa* Decision has acquired finality.

Because the SEC acted pursuant to the Court's pronouncements in both the *Gamboa* Decision and *Gamboa* Resolution, then it could not have gravely abused its discretion. That portion found in the body of the *Gamboa* Resolution which the petitioners rely upon is nothing more than an *obiter dictum* and the SEC could not be expected to apply it as it was not — ***is not*** — a binding pronouncement of the Court.[112]

Furthermore, as opined by Justice Bersamin during the deliberations, the doctrine of immutability of judgment precludes the Court from re-examining the definition of "capital" under Section 11, Article XII of the Constitution. Under the doctrine of finality and immutability of judgment, a decision that has acquired finality becomes immutable and unalterable, and may no longer be modified in any respect, even if the modification is meant to correct erroneous conclusions of fact and law, and even if the modification is made by the court that rendered it or by the Highest Court of the land. Any act that violates the principle must be immediately stricken down.[113] The petitions have not succeeded in pointing to any exceptions to the doctrine of finality of judgments, under which the present case falls, to wit: (1) the correction of clerical errors; (2) the so-called *nunc pro tunc* entries which cause no prejudice to any party; (3) void judgments; and (4) whenever circumstances transpire after the finality of the decision rendering its execution unjust and inequitable.[114]

With the foregoing disquisition, the Court rules that SEC-MC No. 8 is ***not*** contrary to the Court's definition and interpretation of the term "capital". Accordingly, the petitions must be denied for failing to show grave abuse of discretion in the issuance of SEC-MC No. 8.

The petitions are second motions for Reconsideration, which are proscribed.

As Justice Bersamin further noted during the deliberations, the petitions are in reality second motions for reconsideration prohibited by the *Internal Rules of the Supreme Court*.[115] The parties, particularly intervenors

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111 Id. at 575.

112 See *Land Bank of the Philippines v. Suntay*, 678 Phil. 879, 913-914 (2011).

113 *FGU Insurance Corp. v. RTC of Makati City, Branch 66*, 659 Phil. 117, 123 (2011).

114 Id.

115 A.M. No. 10-4-20-SC, Rule 15, Sec. 3. *Second motion for reconsideration.* – The Court shall not entertain a second motion for reconsideration, and any exception to this rule can only be granted in the higher interest of justice by the Court *en banc* upon a vote of at least two-thirds of its actual membership. There is reconsideration "in the higher interest of justice" when the assailed decision is not only legally erroneous, but is likewise patently unjust and potentially capable of causing unwarranted and irremediable injury or damage to the parties. A second motion for reconsideration can only be entertained before the ruling sought to be reconsidered becomes final by operation of law or by the Court's declaration.

x x x x

Gamboa, *et al.*, could have filed a motion for clarification in *Gamboa* in order to fill in the perceived shortcoming occasioned by the non-inclusion in the dispositive portion of the *Gamboa* Resolution of what was discussed in the body.[116] The statement in the *fallo* of the *Gamboa* Resolution to the effect that "[n]o further pleadings shall be entertained" could not be a hindrance to a motion for clarification that sought an unadulterated inquiry arising upon an ambiguity in the decision.[117]

Closing

Ultimately, the key to nationalism is in the individual. Particularly for a public utility corporation or association, whether stock or non-stock, it starts with the Filipino shareholder or member who, together with other Filipino shareholders or members wielding 60% voting power, elects the Filipino director who, in turn, together with other Filipino directors comprising a majority of the board of directors or trustees, appoints and employs the all Filipino management team. This is what is envisioned by the Constitution to assure **effective control** by Filipinos. If the safeguards, which are already stringent, fail, i.e., a public utility corporation whose voting stocks are beneficially owned by Filipinos, the majority of its directors are Filipinos, and all its managing officers are Filipinos, is pro-alien (or worse, dummies), then that is not the fault or failure of the Constitution. It is the breakdown of nationalism in each of the Filipino shareholders, Filipino directors and Filipino officers of that corporation. No Constitution, no decision of the Court, no legislation, no matter how ultra-nationalistic they are, can guarantee nationalism.

WHEREFORE, premises considered, the Court **DENIES** the Petition and Petition-in-Intervention.

SO ORDERED.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

WE CONCUR:

See Concurring Opinion

MARIA LOURDES P. A. SERENO
Chief Justice

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[116] See *Spouses Mahusay v. B.E. San Diego, Inc.*, 666 Phil. 528, 536 (2011).
[117] See *Commissioner on Higher Education v. Mercado*, 519 Phil. 399, 406 (2006).

I do dissenting Opinion

ANTONIO T. CARPIO
Associate Justice

(Please see Concurring Opinion)

PRESBITERO J. VELASCO, JR.
Associate Justice

I join the dissent of Justice Carpio

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

I join J. Carpio's Dissent

ARTURO D. BRION
Associate Justice

On leave but left vote

DIOSDADO M. PERALTA
Associate Justice

With concurring opinion

LUCAS P. BERSAMIN
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

JOSE P. PEREZ
Associate Justice

See Dissenting Opinion

JOSE C. MENDOZA
Associate Justice

BIENVENIDO L. REYES
Associate Justice

I dissent. See separate opinion

(No Part and On official leave)
ESTELA M. PERLAS-BERNABE
Associate Justice

MARVIC M.V.F. LEONEN
Associate Justice

(No Part)
FRANCIS H. JARDELEZA
Associate Justice

CERTIFICATION

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

MARIA LOURDES P. A. SERENO
Chief Justice