

COMPROMISING THE RULE OF LAW:

Case studies of Chinese ODA in the Philippines





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RULE OF LAW Defined

The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

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Rule of law

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Rule of law

supremacy of law equality before
the law accountability to the law fairness
separation of powers
participation legal certainty
avoidance of arbitrariness
transparency

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Duterte: China an 'important ingredient' in 'Build, Build, Build' program

By Ver Marcelo, CNN Philippines

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Philippines 'extra careful' with China loans - NEDA

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MANILA, Philippines- The government is "extra careful" not to fall into the Chinese debt trap, said Socioeconomic Planning Secretary Ernesto Pernia on Wednesday, June 27.

"Given the various experiences already felt by the other countries that have already dealt with China, we are more cautious," said Pernia, the director-general of the National Economic and Development Authority (NEDA).



Philippines 'extra careful' with China loans - NEDA

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Loans from Japan generally carry only 0.25% to 0.75% interest.

Pernia was previously quoted as saying that the government "needs more friends" like China to carry out ambitious infrastructure projects.

Duterte to use 'extraordinary powers' to see Kaliwa Dam project through

OCT 28, 2019 10:57 PM PHT

PIA RANADA

MANILA, Philippines – President Rodrigo Duterte said he would use all the powers of the presidency to bring an end to water shortages in Metro Manila, even if the solution may pose environmental damage.

Duterte to use 'extraordinary powers' to see Kaliwa Dam project through

OCT 28, 2019 10:57 PM PHT

PIA RANADA

But he said environmental violations is not enough of a reason to delay a project that could provide a new source of water.

"Just because your environment will be spoiled, that will not be a good answer," said Duterte.

Chico River Project

- Chico River Pump Irrigation Project (CRPIP)
- To provide ample and stable water supply to 8,700 ha of agricultural land through diversion and canal systems
- To increase productivity and benefit some 4,300 farmers in 21 barangays



Kaliwa Dam Project

- New Centennial Water Source-Kaliwa Dam Project (NCWS-KDP)
- To supply some 600 million liters of water/day and benefit some 17.5 million people or about 3.5 million households in Metro Manila and neighboring provinces of Rizal and Quezon



Kaliwa Dam Project

- To reduce the current 97% dependence on the Angat Dam



The CRPIP vis-à-vis the NCWS-KDP

Particulars	CRPIP	NCWS-KDP
Build, Build, Build program	Yes	Yes

The CRPIP vis-à-vis the NCWS-KDP

Particulars	CRPIP	NCWS-KDP
Environmental concerns	Environmental degradation, widespread flooding, disturbing the biodiversity in the area	
		Pre-mature issuance of Environmental Compliance Certificate (ECC)

The CRPIP vis-à-vis the NCWS-KDP

Particulars	CRPIP	NCWS-KDP
Selection of contractor	Contractor: China CAMC Engineering Co. Ltd (CAMCE) No transparency in selection Involved in anomalous project	Contractor: China Energy Engineering Corporation (CEEC) With audit findings – negotiated contract from the inception of the bidding process

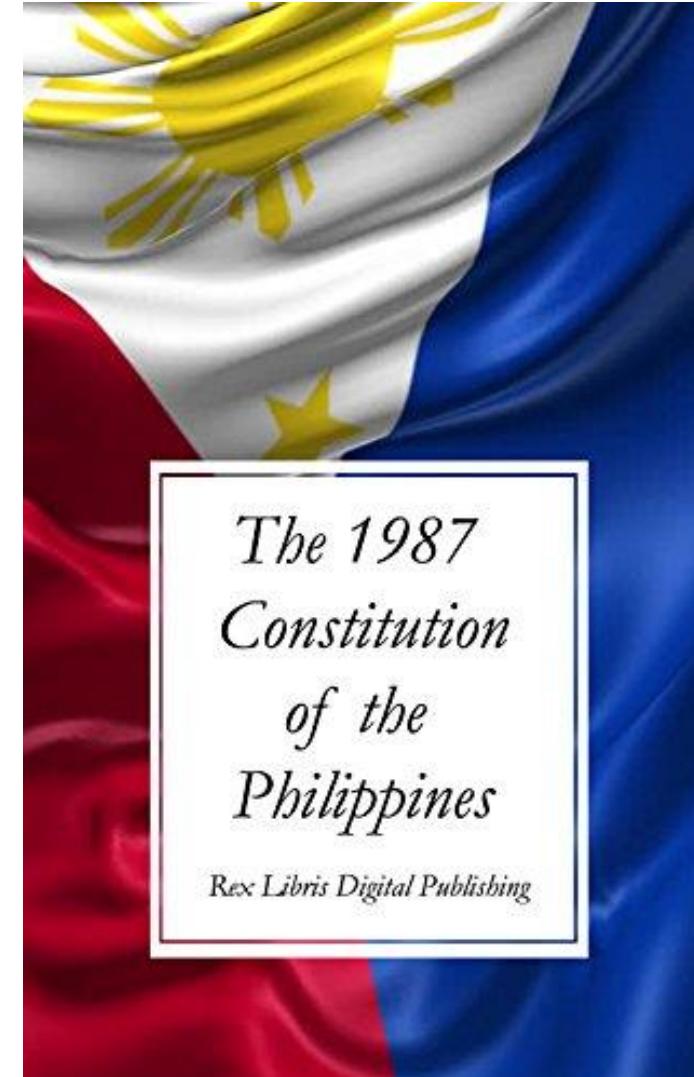
Comparative interest rates

Project	Funding Country	Total Cost (in Billion Peso)	Interest Rate (p.a.)	Tenor (in years)
Chico River Pump Irrigation Project	China	4.37	2.00	20
Kaliwa Dam Project	China	12.20	2.00	20

Sovereign immunity

Section 3, Article XVI of the Philippine Constitution

“The State may not be sued without its consent”



Sovereign immunity

Article 8.1 of the CRPIP loan agreement

*“The Borrower hereby **irrevocably waives any immunity** on the grounds of sovereign or otherwise for itself or its property in connection with any arbitration proceeding”*

Article 5.7 of the NCWS-KDP loan agreement

*“**Neither the Borrower** nor any of its assets **is entitled to any right of immunity** on the grounds of sovereign or otherwise from arbitration”*

Confidentiality

Section 21, Article XII of the Philippine Constitution

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

Confidentiality

Article 8.8 of the CRPIP loan agreement

*“The Borrower shall **keep all the terms, conditions, and the standard of fees** hereunder or in connection with this Agreement **strictly confidential.**”*

Article 8.9 of the NCWS-KDP loan agreement

*“The Borrower shall **keep all the terms, conditions, and the standard of fees** hereunder or in connection with this Agreement **strictly confidential.**”*

Arbitration

Article 8.5 of the CRPIP loan agreement

Arbitration will be before the China International Economic Trade Arbitration Commission (CIETAC) in accordance with CIETAC's arbitration rules

Article 8.5 of the NCWS-KDP loan agreement

Arbitration will be before the Hong Kong Arbitration Centre (HKIAC) in accordance with HKIAC's arbitration rules

Approval of the Monetary Board

Section 20, Article VII of the Philippine Constitution

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

- CRPIP loan agreement was signed on 10 Apr 2018, but was approved by the Monetary Board on 17 May 2018

Response of government

- The loan agreements have been vetted and above board
- The controversial provisions are standard for Chinese contracts
- Provision on waiver of immunity is irrelevant as the Philippines is a responsible borrower and will not default on its payments



Conclusions

- The loans from China for the CRPIP and the NCWS-KDP are disadvantageous to the Philippines, based on interest rates and other loan terms
- The agreements signed with China contain provisions inconsistent with the laws of the Philippines
- Despite audit reports and other serious allegations against the Chinese-funded infrastructure projects, the wheels of accountability do not seem to have been put into motion

Conclusions

- There is a severe lack of transparency about the agreements from the very start
- China leveraged the special friendship extended by the Philippine government

Conclusions

- Tenets of rule of law were disregarded
 - *Procedural and legal transparency*
 - *Participation in decision-making*
 - *Avoidance of arbitrariness*
 - *Independently adjudicated*
 - *Supremacy of the law*
 - *Accountability to the law*

Conclusions

- The adherence to the rule of law has been compromised in the two Chinese-funded infrastructure projects
- The funds for these projects may be described and termed as **corrosive investments**
- These come from authoritarian regimes and undermine democratic processes and institutions in the receiving countries



Conclusions

- These investments can actively exploit and amplify governance gaps, undermine democratic institutions, and make countries more susceptible to political and economic manipulation
- Without strong accountability, transparency, and oversight mechanisms, the adverse impacts of such sharp power can go unnoticed and unchallenged

Thank you!