



The Intangible Costs of Building

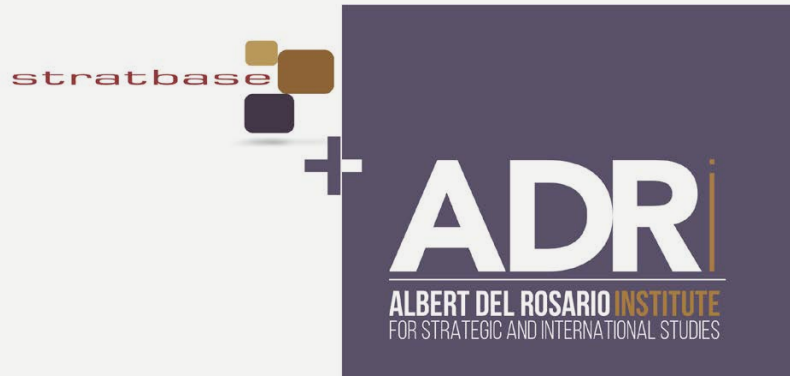
# The New Centennial Water Source-Kaliwa Dam Project

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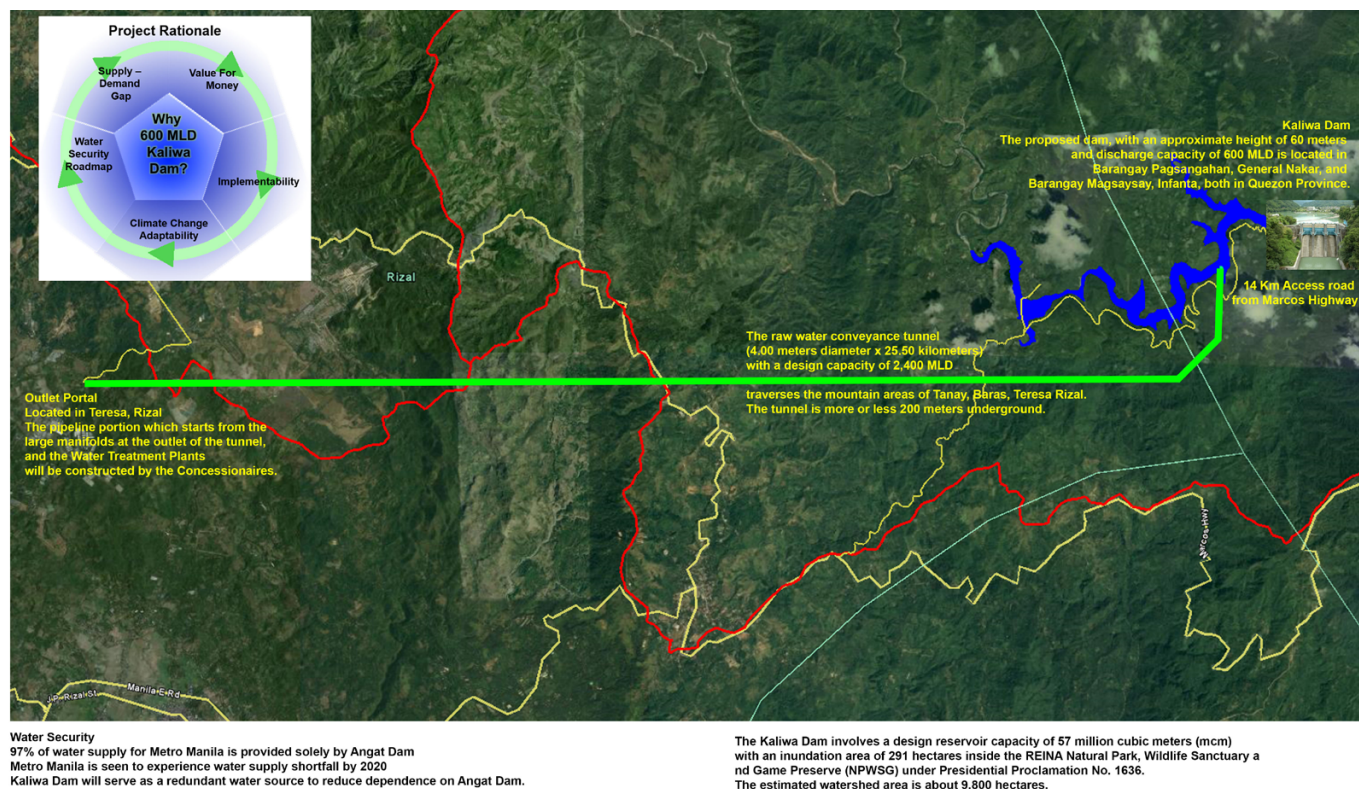


Image from <https://mwss.gov.ph/projects/new-centennial-water-source-kaliwa-dam-project>

## Introduction

The New Centennial Water Source-Kaliwa Dam Project (NCWS-KDP) is a banner project under the Philippine government's Build, Build, Build (BBB) program with funding from China, making it a key example illustrating Chinese infrastructure construction in the Philippines. The Kaliwa Dam project is central to the Philippines' participation in China's overseas "Belt and Road Initiative" (BRI) and part of the Duterte administration's closer relationship with Beijing. During Chinese President Xi Jinping's state visit to Manila in 2018, the two governments signed a bundle of 29 agreements, including both a Memorandum of Understanding on cooperation on the BRI (often viewed as the mark of "joining" the BRI)<sup>1</sup> and a loan agreement on the NCWS-KDP.<sup>2</sup> In mid-2019, China's official state-run press agency noted that "both countries have committed to further strengthen the synergies between the BRI and the 'Build, Build, Build' program"<sup>3</sup> and later quoted Duterte as saying "the Philippines is ready to join hands with China to deepen the synergy between the BRI and the Philippines' 'Build, Build, Build,' program."<sup>4</sup>

- David Sacks, "Countries in China's Belt and Road Initiative: Who's In and Who's Out," blog post, Council on Foreign Relations, March 24, 2021, <https://www.cfr.org/blog/countries-chinas-belt-and-road-initiative-whos-and-whos-out>; Katerina Francisco, "Fast Facts: China's Belt and Road Initiative," Rappler, November 20, 2018, <https://www.rappler.com/newsbreak/iq/china-belt-road-initiative>.
- Dharel Placido, "List: Philippines, China Sign 29 Deals in Xi Jinping Visit," ABS-CBN News, November 20, 2018, <https://news.abs-cbn.com/news/11/20/18/list-philippines-china-sign-29-deals-in-xi-jinping-visit>.
- Li Xin, ed., "Philippines' Arroyo Describes China's BRI as 'Broadest Platform for Collaboration,'" Xinhua, July 26, 2019, [http://www.xinhuanet.com/english/2019-07/26/c\\_138261109.htm](http://www.xinhuanet.com/english/2019-07/26/c_138261109.htm).
- Ming Mei, ed. "China, Philippines Pledge More Efforts to Further Strengthen Cooperation on BRI," Xinhua, September 17, 2019, [http://www.xinhuanet.com/english/2019-09/17/c\\_138397808.htm](http://www.xinhuanet.com/english/2019-09/17/c_138397808.htm).

The Kaliwa Dam project has been on and off the government's major infrastructure list since the 1970s. Its development stalled primarily because of environmental and socio-cultural issues relating to the planned construction. Discussions about the Kaliwa Dam resurfaced in March 2019 when parts of Metro Manila experienced significant water service interruptions lasting up to 19 hours per day. In August of the previous year, Reynaldo Velasco, then-administrator of the government regulatory agency Metropolitan Waterworks and Sewerage System (MWSS) and subsequently a member of the Board of Trustees,<sup>5</sup> had given assurances that the supply of potable water was expected to be adequate until 2022, saying “no shortage is imminent.”<sup>6</sup> It became clear this was not the case, and the government faced pressure to act and reactivated plans for infrastructure related to water security.

Access to clean drinking water and sanitation has remained elusive for many in rural areas all over the world. As a testament to its importance, the United Nations lists universal access to clean water and sanitation as one of the 17 Sustainable Development Goals. Water shortages, which some experts predict may become increasingly common, only worsen the situation. Loïc Fauchon, president of the World Water Council, attributes the scarcity of water to a growing human population vis-à-vis an unchanged water supply, and uneven population density contributes to challenges in access and resource use.<sup>7</sup> These global patterns are already appearing in the Philippines, increasing political pressure to undertake water infrastructure development projects such as the NCWS-KDP.

China's involvement in the project's funding has added fuel to the controversies; concerns over the process followed in approving the project and the loan along with specific provisions in the loan contract itself have led opponents to file a petition before the Supreme Court asking it to declare the loan agreement illegal and void. Despite this challenge and the consultations that the MWSS has been conducting in public, Velasco has asserted that the NCWS-KDP is a “done deal.”<sup>8</sup>

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**This paper is a governance case study of the NCWS-KDP under the Duterte administration. Specifically, it will look into project actors' adherence to established regulatory processes and in the process identify any gaps and assess their implications.**

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5 “After Being Replaced, Velasco Reappointed to MWSS Board,” CNN Philippines, July 31, 2019, <https://www.cnnphilippines.com/news/2019/7/31/Reynaldo-Velasco-MWSS-reappointed.html>.

6 Victor V. Saulon, “MWSS Says No Imminent Water Shortage,” *BusinessWorld*, August 31, 2018, <https://www.bworldonline.com/mwss-says-no-imminent-water-shortage/>.

7 Loïc Fauchon, “Exploring the Looming Water Crisis,” interview by Gitika Bhardwaj, Chatham House, November 28, 2019, <https://www.chathamhouse.org/expert/comment/exploring-looming-water-crisis>.

8 “China-funded Kaliwa Dam a Done Deal: MWSS,” ABS-CBN News, March 21, 2019, <https://news.abs-cbn.com/business/03/18/19/china-funded-kaliwa-dam-a-done-deal-mwss>.



## The Build, Build, Build Program

The BBB program is often called the “centerpiece” of the Duterte administration’s economic programs. Launched in April 2017, it is designed to usher in what President Duterte terms a “golden age of infrastructure.” It was initially slated to spend P8 to P9 trillion (about USD \$160 to USD \$180 billion) on thousands of small projects and a list of 75 high-impact “flagship” projects to improve the poor state of infrastructure in the Philippines and enable greater economic growth, investment flows, and employment generation.

Given the scale of its ambitions, the BBB program was not without its critics. Many raised obvious and expected questions about the program’s financing, given its massive price tag.

Financial realities and the slower pace of project implementation appear to have prompted the administration to repeatedly revise the list of flagship projects included in the BBB program to favor proposals more likely to be realized in a politically-relevant timeframe.<sup>9</sup> In 2019, the list of flagship projects and the timeline were revised;<sup>10</sup> the budget was scaled down to P4.3 trillion (about USD \$86 billion) for a list of 100 smaller projects, with most to be completed beyond Duterte’s term of office.<sup>11</sup> In September 2020, the list was revised again to 104 flagship projects and the budget shrank slightly to P4.13 trillion;<sup>12</sup> a 2021 list of projects numbered 112.<sup>13</sup>

Official development assistance (ODA) funding predominates in the planned funding. At the outset, the administration’s economic managers eschewed the public-private partnership (PPP) model because they expected transactions to move faster under ODA arrangements. In a 2018 briefing, Socioeconomic Planning Secretary and head of the National Economic and Development Authority (NEDA) Ernesto M. Pernia admitted that ODA-financed projects had not moved as fast as planners expected because of bureaucratic approval processes in donor countries.<sup>14</sup> Despite this, Duterte has remained steadfast in seeking ODA financing for these infrastructure projects from China and has described China as “a very important ingredient” in the BBB program.<sup>15</sup> Based on prevailing public mistrust of China and past problems with Chinese-funded infrastructure abroad, many experts and interest groups have questioned the wisdom of the loan agreements underpinning these projects and criticized some of their more unusual provisions.

9 Ben O. de Vera, “Build, Build, Build’s ‘New Normal’: 13 Projects Added, 8 Removed,” *Inquirer:Net*, August 6, 2020, <https://business.inquirer.net/304612/build-build-builds-new-normal-8-projects-added-13-removed>.

10 Karen Lema, “Philippines to Revise ‘Build, Build, Build’ Plan to Make It More Achievable,” *Reuters*, October 25, 2019, <https://www.reuters.com/article/us-philippines-economy-infrastructure/philippines-to-revise-build-build-build-plan-to-make-it-more-achievable-idUSKBN1X419P>.

11 Kyle Aristophere T. Atienza, “‘Build, Build, Build’ Enters Legacy-building Stage,” *BusinessWorld Online*, May 11, 2021, <https://www.bworldonline.com/build-build-build-enters-legacy-building-stage/>.

12 Melissa Luz Lopez, “Build, Build, Build: Luzon Projects Dominate in New P4.13-T Flagship Infrastructure List,” *CNN Philippines*, September 22, 2020, <https://www.cnn.ph/business/2020/9/22/Build-Build-Build-new-list-104-projects.html>.

13 NEDA, “Revised List of Infrastructure Flagship Projects (IFPs) as of May 12, 2021,” June 2021, <https://www.neda.gov.ph/wp-content/uploads/2021/06/Revised-Infrastructure-Flagship-Projects-as-of-12-May-2021.pdf>.

14 Elijah Joseph C. Tubayan, “NEDA Bullish on Project Completion,” *BusinessWorld Online*, June 28, 2018, <https://www.bworldonline.com/neda-bullish-on-project-completion/>.

15 Ralph Villanueva, “Duterte: China Vital for ‘Build Build Build,’” *Manila Times*, April 10, 2018, <https://www.manilatimes.net/duterte-china-vital-for-build-build-build/391543/>.

## Historical Development Plans for the Kaliwa River Watershed

The history of proposals leading to the NCWS-KDP is full of starts, stops, and revisions. The Philippine government began drafting proposals to develop bulk water supply projects in the Kaliwa River watershed in the 1970s. The project was first conceptualized under then-President Ferdinand Marcos but was overtaken by events with his departure in February 1986. However, the MWSS Board of Trustees decided to temporarily defer the Laiban Dam Project in December 1989 to accommodate equally important water supply projects which were determined to be urgent at that time.”<sup>16</sup>

Technical studies about the construction of a dam in Laiban continued under the administration of President Fidel Ramos starting in 1992. By 2007, the administration of President Gloria Macapagal-Arroyo had secured a loan from China to fund the project. However, a political scandal involving a Chinese firm marred the administration and caused the project to be shelved.<sup>17</sup>

In 2009, San Miguel Corporation, a private company, submitted an unsolicited proposal for the construction of a massive Laiban Dam with a correspondingly large reservoir slated to flood some 28,000 hectares of forest.<sup>18</sup> The proposal was eventually set aside with growing public concerns that the project would increase water rates and displace indigenous people; MWSS subsequently terminated the joint-venture talks for the project.<sup>19</sup>

Some years later, the project was resuscitated as the New Centennial Water Source project (NCWS) with a proposal for two dams in the Kaliwa watershed: a main Laiban Dam and a regulating Kaliwa Low Dam.<sup>20</sup> Concerns about the duration and construction costs led officials to consider building them in stages under different financial schemes. Choosing this option, NEDA approved the implementation of the Kaliwa Low Dam as the first stage in 2014. The project was initially planned to be financed under a public-private partnership.<sup>21</sup> Subsequently, Duterte pursued the bigger, China-funded NCWS-KDP focused on the single Kaliwa Dam,<sup>22</sup> though MWSS has noted that the dam’s specifications allow for increased capacity designed to accommodate water from the construction of additional dams.<sup>23</sup>

16 Philippine Center for Investigative Journalism, “Laiban Dam Project Chronology of Events,” July 2009, <https://web.archive.org/web/20130820192441/http://pcij.org/resources/laiban-02-chronology.pdf>.

17 “In the Know: The New Centennial Water Source Project,” *Philippine Daily Inquirer*, March 14, 2019, <https://newsinfo.inquirer.net/1095558/in-the-know-the-new-centennial-water-source-project>.

18 Leilani Chavez, “A Philippine tribe that Defeated a Dam Prepares to Fight Its Reincarnation,” *Mongabay*, November 5, 2019, <https://news.mongabay.com/2019/11/a-philippine-tribe-that-defeated-a-dam-prepares-to-fight-its-reincarnation/>.

19 “In the Know,” *Philippine Daily Inquirer*.

20 Metropolitan Waterworks and Sewerage System, “In Pursuit of the Legacy: 2012 Annual Report,” <https://mwss.gov.ph/wp-content/uploads/MWSS-Annual-Report-2012-reduce.pdf>

21 Ralf Rivas, “Kaliwa Dam to Solve Metro Manila Water problems – Dominguez,” *Rappler*, March 13, 2019, <https://rappler.com/business/kaliwa-dam-solve-metro-manila-water-problems>

22 Metropolitan Waterworks and Sewerage System, “Frequently Asked Questions.”

23 Metropolitan Waterworks and Sewerage System, “New Water Source: Kaliwa Dam vs. Intake Weir” (Japanese proposal), <https://mwss.gov.ph/why-the-ncws-kaliwa-dam-instead-of-the-japanese-proposed-kaliwa-weir-project/>.

## Overview of the NCWS-KDP

According to the MWSS website, the NCWS-KDP is intended to supply some 600 million liters of water per day and benefit some 17.46 million people (or about 3.49 million households) in Metro Manila, Rizal, and Quezon by providing a redundant water source to reduce the current 97 percent dependence on the Angat Dam.<sup>24</sup> The MWSS further describes the project as follows:

This “climate resilient” project is envisioned to help Angat Dam, based on the comprehensive studies conducted by World Bank and JICA. This is also aligned with the Sustainable Development Goals (SDG) which is to have access to clean water supply. While it is true there are other sources of water, the cost of treatment is so high. This is already published in books—Kaliwa, Kanan and Agos rivers can help us achieve water security.<sup>25</sup>

Based on the webpage of the MWSS, specifically devoted to the NCWS-KDP (<https://mwss.gov.ph/projects/new-centennial-water-source-kaliwa-dam-project/new-centennial-water-source-kaliwa-dam-project/>), the project includes the following components:

- A concrete gravity dam along Kaliwa River
- A spillway at the right bank of Kaliwa Dam diversion
- Diversion tunnels
- Reservoir
- Bottom outlet structure (Low level outlet)
- A 2400-MLD capacity conveyance tunnel
- Intake structure
- Access roads
- Outlet structure

The dam is located in the municipalities of General Nakar and Infanta in Quezon Province and the municipality of Teresa in Rizal Province. The five-year project was scheduled for construction from 2019 to 2023 by China Energy Engineering Corporation Limited (CEEC). However, the MWSS website lists the implementation schedule as lasting from 2020 to 2025, with June 12, 2025 as the new completion date.

There is no official information giving the date construction began. Seemingly, this information is being withheld as it may prove incriminating to the government in relation to the legal requirement that the consultation process be completed before the project is initiated. The official date that comes closest to the commencement of construction is November 13, 2019, the date the Notice to Proceed was issued.

The MWSS webpage for the NCWS-KDP last updated with the project’s current status as of September 10, 2019 noted that at that time, “acquisition of lots required for the Tunnel Outlet Portal” was ongoing (land bank appraisal was completed and a report submitted in July 2019, negotiation with landowners was ongoing). Coordination with various provincial and government agency stakeholders was also listed as “ongoing,” as was coordination on resettlement, while three access roads were listed as completed

24 Metropolitan Waterworks and Sewerage System, “Frequently Asked Questions,” <https://mwss.gov.ph/projects/new-centennial-water-source-kaliwa-dam-project/frequently-asked-questions/>.

25 Metropolitan Waterworks and Sewerage System, “Frequently Asked Questions.”

or in progress (the access road to the Tunnel Outlet Portal in Teresa, Rizal, was completed, while the access road to the dam site was 35 percent complete and ongoing and the access road to Daraitan was 7 percent complete and ongoing).<sup>26</sup> An August 2020 report also mentions that “construction of the access road leading to the planned reservoir in General Nakar town in Quezon is underway” and quoted IP leaders’ estimates that as of May 2020, there were only a handful of kilometers left to construct to reach the main dam site.<sup>27</sup>

A June 2021 report quoted MWSS as announcing that tunnel excavation for the Kaliwa Dam would be ready to begin in December 2021, with the planned arrival of the tunnel boring machine to the Port of Manila slated for July 2021.<sup>28</sup>

Table I below shows the chronology of events related to the project under the Duterte administration.

**Table I. NCWS-KDP chronology of events (Duterte administration)**

Date	Milestone
06 Jan 2017	Meeting of the National Economic Development Authority (NEDA), the Department of Finance (DOF), and MWSS to discuss projects for possible funding under the China Loan Package.
17 Jan 2017	MWSS submission of the NCWS-KDP to NEDA for funding under the China Loan Package.
27 Jun 2017	The NEDA Board approves the NCWS-KDP under Official Development Assistance (ODA) from China.
20 Nov 2018	MWSS Administrator Reynaldo Velasco and CEXIM Chairman Hu Xiaolian sign the NCWS-KDP loan agreement.
11 Dec 2018	MWSS issues Notice of Award to China Energy Engineering Corp. Limited.
11 Mar 2019	DOF Secretary said in a briefing that the process of bidding out and awarding the P18.724-billion dam in Quezon province “is well on its way.” <sup>29</sup>
19 Mar 2019	The DOF makes public the loan agreement between the MWSS and CEXIM.

26 “Projects: New Centennial Water Source – Kaliwa Dam Project,” MWSS, accessed June 28, 2021, <https://mwss.gov.ph/projects/new-centennial-water-source-kaliwa-dam-project/>.

27 “As Kaliwa Dam Project Continues, IP Leaders Urge Gov’t Prioritize Pandemic Response,” *Rappler*, August 11, 2020, <https://rappler.com/moveph/indigenous-people-leaders-urge-government-prioritize-coronavirus-pandemic-response>.

28 Madelaine B. Mirafior, “Kaliwa Dam Excavation to Start in December,” *Manilla Bulletin*, June 7, 2021, <https://mb.com.ph/2021/06/07/kaliwa-dam-excavation-to-start-in-december/>.

29 Joann Villanueva, “Dominguez Cites Fast-tracking of Kaliwa Dam Construction,” Philippine News Agency, March 14, 2019, <https://www.pna.gov.ph/articles/1064516>.



Date	Milestone
16 Jun 2019	The Commission on Audit (COA) releases an Audit Observation Memorandum to the MWSS.
20 Aug 2019	MWSS releases a statement addressing observations made by the COA. <sup>30</sup>
10 Sep 2019	MWSS reports construction progress in access roads (to Tunnel Outlet Portal in Teresa, Rizal; to the dam site; and to Daraitan). <sup>31</sup>
11 Oct 2019	The DENR Environmental Management Bureau issues a conditional Environmental Compliance Certificate to MWSS. <sup>32</sup>
28 Oct 2019	Duterte announces that he will use the extraordinary powers of the presidency to bring an end to water shortages in Metro Manila, even if the solution may cause environmental damage. <sup>33</sup>
03 Mar 2020	Presidential Spokesperson Salvador Panelo announces that the groundbreaking of the NCWS-KDP will take place in July or August 2020. <sup>34</sup>
09 Mar 2020	Duterte holds a press briefing to announce that he will “fight all the way” to pursue the construction of the Kaliwa Dam. <sup>35</sup>

**Other sources:** “Public Hearing on MWSS’ Application for Environmental Compliance Certificate (ECC) for the New Centennial Water Source – Kaliwa Dam Project,” Metropolitan Waterworks and Sewerage System, August 5, 2019, <https://mwss.gov.ph/public-hearing-on-mwss-application-for-environmental-compliance-certificate-ecc-for-the-new-centennial-water-source-kaliwa-dam-project/>; Metropolitan Waterworks and Sewerage System “New Water Source: Kaliwa Dam vs. Intake Weir” (Japanese proposal), <https://mwss.gov.ph/why-the-ncws-kaliwa-dam-instead-of-the-japanese-proposed-kaliwa-weir-project/>.

30 Metropolitan Waterworks and Sewerage System, “MWSS Statement on the COA Observations on the New Centennial Kaliwa Dam Project,” August 20, 2019, <https://mwss.gov.ph/mwss-statement-on-the-coa-observations-on-the-new-centennial-kaliwa-dam-project/>.

31 Metropolitan Waterworks and Sewerage System, “New Centennial Water Source – Kaliwa Dam Project,” <https://mwss.gov.ph/projects/new-centennial-water-source-kaliwa-dam-project/>.

32 Department of Environment and Natural Resources, “Environmental Compliance Certificate [for the New Centennial Water Source – Kaliwa Dam Project],” October 11, 2019, <https://eais.emb.gov.ph/internal/Secured/Uploads/ECC/5a59a9b6-0485-4350-b01c-3387db50862d.pdf>.

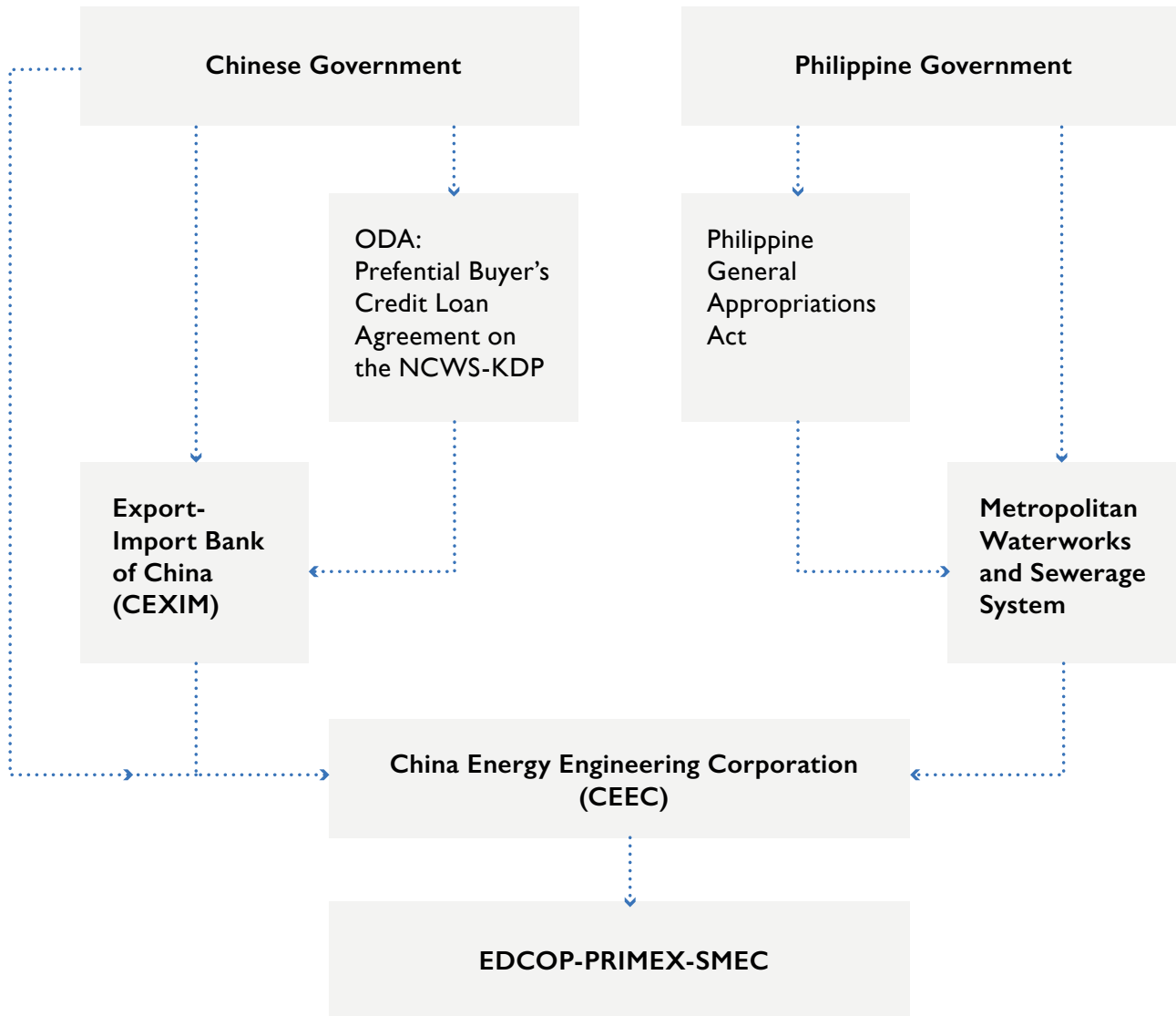
33 Pia Ranada, “Duterte to Use ‘Extraordinary Powers’ to See Kaliwa Dam Project Through,” *Rappler*, October 28, 2019, <https://rappler.com/nation/duterte-use-extraordinary-powers-for-kaliwa-dam>.

34 “Construction of China-funded Kaliwa Dam Eyed by July – Panelo,” CNN Philippines.

35 Azer Parrocha, “PRRD to Pursue Construction of Kaliwa Dam ‘All the Way,’” Philippine News Agency, March 10, 2020, <https://www.pna.gov.ph/articles/1096079>.

## Project Mapping

The following diagram maps the involved entities along with the project's structure to the extent identifiable:



The NCWS-KDP, which is estimated to cost P18.724 billion (about USD \$374.5 million), will be funded from a combination of an ODA loan from China and from the regular budget of the Philippine government. According to official statements, 85 percent of the project cost, or about P12.2 billion (about USD \$244 million), will be financed by the Export-Import Bank of China (CEXIM) under the Preferential Buyer's Credit Loan Agreement on the NCWS-KDP, with the remaining 15 percent to come from the Philippine government.<sup>36</sup> The project contractor is China Energy Engineering Corporation (CEEC).

36 "Preferential Buyer's Credit Loan Agreement on the New Centennial Water Source-Kaliwa Dam Project between Metropolitan Waterworks and Sewerage System as Borrower and the Export-Import Bank of China as Lender," Department of Finance of the Philippines, November 20, 2018, <https://www.dof.gov.ph/download/kaliwa-dam-project-loan-agreement/?wpdmdl=23115&refresh=60da078217cb41624901506>; JC Gotinga, "Kaliwa Dam Access Road Construction Broke the Law – Imee Marcos," Rappler, February 17, 2020, <https://www.rappler.com/nation/imee-marcos-says-kaliwa-dam-road-access-construction-broke-law>.

Both CEXIM and CEEC are owned by the Chinese state. The Metropolitan Waterworks and Sewerage System, the counterpart of CEXIM in the loan agreement and the implementing agency of the project, is a national government agency of the Philippines.

Listed as consultants to CEEC are EDCOP, PRIMEX, and SMEC. EDCOP is the Engineering and Development Corporation of the Philippines, an engineering consultancy firm founded in 1955. PRIMEX is a real estate company founded in 1986. Lastly, SMEC is a consultancy services company headquartered in Australia.

## NCWS-KDP Issues and Controversies

Since damming the Kaliwa River was first proposed in the 1970s, two major inter-related concerns have plagued the project: the first is the displacement of indigenous peoples (IPs) in the affected area and the second is the environmental impact of the project. Under the Duterte administration, these issues remain as salient as ever. Moreover, using loan financing from China to fund the project has added another controversial dimension, and some have questioned the economic feasibility of the project and the reasons for its selection. The NCWS-KDP is frequently discussed in comparison with another controversial China-funded dam project—the Chico River Pump Irrigation Project (CRPIP)—with which it shares several similarities in environmental, social, and financing issues.

### Feasibility and viability of the project

NEDA's own assessment of the project in 2013 found that the standalone Kaliwa Dam would be barely viable based on its estimated economic internal rate of return (and that the integrated Laiban and Kaliwa Dam system would not be viable without water treatment plants). On the other hand, a 2012 World Bank assessment, which considered probable leakage rates as well as environmental assessment and watershed maintenance costs, singled out the Kaliwa Dam project as offering the lowest financial internal rate of return out of ten potential Metro Manila water projects.<sup>37</sup>

A 2021 scholarly assessment of the economic viability of the dam suggest it may become a “white elephant” project, economically burdensome to the host country.<sup>38</sup> In addition, critics argue that the Duterte administration ignored more sustainable and cost-effective options, such as a smaller-scale water supply project that a Japanese company had proposed to finance under a Build-Operate-Transfer model. Some analysis suggests that Duterte selected the Chinese-funded option to boost his own political standing, increase the pace of construction, and to be able to more easily reward local elites with the cooperation of the more-pliable Chinese partners.<sup>39</sup> In March 2019, the Japanese company that

37 CTI Engineering International Co., Ltd. in association with Woodfields Consultants, Inc., “Metro Manila Water Security Study: Final Report,” World Bank/Metropolitan Waterworks and Sewerage System/AusAID, July 2012, <https://documents1.worldbank.org/curated/en/966091468107676247/pdf/863820WP0P1251540Box385165B00PUBLIC0.pdf>.

38 Jerik Cruz and Hansley Juliano, “Assessing Duterte’s China Projects: Governance, White Elephants, and COVID-19 in the Build, Build, Build Program,” Asia Pacific Pathways to Progress Foundation, Inc., March 2021, <https://appfi.ph/images/2021/Assessing-Dutertes-China-Projects-V3.pdf>.

39 Alvin Camba, “How Duterte Strong-Armed Chinese Dam-Builders but Weakened Philippine Institutions,” Carnegie Endowment for International Peace, June 15, 2021, <https://carnegieendowment.org/2021/06/15/how-duterte-strong-armed-chinese-dam-builders-but-weakened-philippine-institutions-pub-84764>.

had first proposed an alternative Kaliwa Intake Weir project in 2009 indicated its continuing interest in the project.<sup>40</sup> The proposal consists of a 7-m-high, 16-km-long weir offering 550 million liters per day (50 million liters per day less than the planned Kaliwa Dam) and an adjoining water treatment plant. The lower barrier offers a more sustainable approach that would not inundate Daraitan Village and could be constructed more quickly than the larger NWCS-KDP. However, a 2019 MWSS comparison of the two options argued that the expansion potential of the Kaliwa Dam project would far exceed the proposed Kaliwa Intake Weir and that if supply needed to be increased, the weir option would incur additional costs to build another dam and separate conveyance tunnel.<sup>41</sup> MWSS also countered the Japanese firm's assertion that the construction of the weir and accompanying water treatment facilities would ultimately be far cheaper than the Chinese-funded Kaliwa Dam.<sup>42</sup>

## Environmental Concerns

Environmental regulation of infrastructure development in the Philippines is governed by the DENR Environmental Management Board. In 1978, Marcos issued Presidential Decree No. 1586,<sup>43</sup> followed by Presidential Proclamation No. 2146 in 1981,<sup>44</sup> establishing an environmental impact statement (EIS) system to facilitate the attainment and maintenance of a rational and orderly balance between socio-economic growth and environmental protection. Subsequently, Macapagal-Arroyo issued Administrative Order No. 42 in 2002 to rationalize the implementation of the EIS system.<sup>45</sup> Corollary to this, the Department of Environment and Natural Resources (DENR) released DENR Administrative Order No. 2003-30, the Implementing Rules and Regulations (IRR) for the Philippine Environmental Impact Statement.<sup>46</sup> Based on these, an Environmental Compliance Certificate (ECC) should be secured from the DENR Environmental Management Board for any project that has potential environmental risk or impact. Once issued, an ECC indicates a positive review and signifies that no significant negative impact on the environment is expected. It also means the project is in full compliance with the requirements of the Environmental Impact Statement (EIS) System.

40 Perfecto Raymundo, Jr., "Japanese Firm Renews Proposal on Kaliwa Dam Project," Philippine News Agency, March 18, 2019, <https://www.pna.gov.ph/articles/1064848>.

41 Metropolitan Waterworks and Sewerage System, "New Water Source: Kaliwa Dam vs. Intake Weir" (Japanese proposal).

42 Pia Ranada, "China-funded Kaliwa Dam Cheaper than Japanese Firm's Proposal – MWSS," Rappler, March 20, 2019, <https://www.rappler.com/business/mwss-says-china-funded-kaliwa-dam-cheaper-than-japanese-firm-proposal>; Carolyn Bonquin, "Japanese Firm Pushes for Alternative to China-funded Kaliwa Dam," CNN Philippines, March 18, 2019, <https://www.cnnphilippines.com/news/2019/3/18/Japan-Kaliwa-Dam-project-GUDC-China.html>.

43 Presidential Decree No. 1586, "Establishing an Environmental Impact Statement System Including Other Environmental Management Related Measures and for Other Purposes," Government of the Philippines, June 11, 1978, <http://extwprlegs1.fao.org/docs/pdf/phi19235.pdf>.

44 Proclamation No. 2146, "Proclaiming Certain Areas and Types of Projects As Environmentally Critical and Within the Scope of the Environmental Impact Statement System Established under Presidential Decree No. 1586," Government of the Philippines, December 14, 1981, <https://www.officialgazette.gov.ph/1981/12/14/proclamation-no-2146-s-1981/>.

45 Administrative Order No. 42, "Rationalizing the Implementation of the Philippine Environmental Impact Statement (EIS) System and Giving Authority, In Addition to the Secretary of Environment and Natural Resources, to the Director and Regional Directors of the Environmental Management Bureau to Grant or Deny the Issuance of Environmental Compliance Certificates," Government of the Philippines, November 2, 2002, <https://emb.gov.ph/wp-content/uploads/2016/06/AO-42.pdf>.

46 DENR Administrative Order No. 2003-30, "Implementing Rules and Regulation (IRR) for the Philippine Environmental Impact Statement (EIS) System," Government of the Philippines, 2003, <https://emb.gov.ph/wp-content/uploads/2016/06/DAO-2003-30.pdf>.

Several groups have expressed opposition to the NCWS-KDP. They are lobbying for the abandonment of the project, arguing that it will cause “long-term, irreversible environmental damage to the Sierra Madre and its biodiversity.”<sup>47</sup>

The Kaliwa River watershed is part of the Sierra Madre Biodiversity Corridor (SMBC). The dam is to be built within the Kaliwa River area declared as a forest reserve under Proclamation No. 573 issued in 1969. Furthermore, Proclamation No. 1636 issued in 1977 demarcated other areas to be affected by the construction as a national park, wildlife sanctuary, and a game preserve. The project’s location in protected and ecological important areas is the main driver of concerns about its impact on biodiversity. According to the 2018 report of the Haribon Foundation<sup>48</sup>—an organization founded in 1972 committed to “nature conservation through community empowerment and scientific excellence”<sup>49</sup>—the construction of the multi-billion-peso Kaliwa Dam Project will not only have devastating effects on people’s lives, but it will also ravage the homes of thousands of threatened wildlife species in the Sierra Madre mountain forests. The same report states that the dam area declared as a wildlife sanctuary is a “key habitat to 15 species of amphibians, 334 bird species, 1476 fish species, 963 invertebrate species, 81 mammal species, 50 plant species, and 60 reptile species,” according to the Integrated Biodiversity Assessment Tool curated by BirdLife International, the International Union for Conservation of Nature (IUCN), and the United Nations Environment Programme World Conservation Monitoring Centre. Of the species, a significant number are considered globally threatened by the IUCN, including the critically-endangered Philippine Eagle and the Hawksbill Turtle.

In addition, Claire Baffert, senior water policy officer at the World Wide Fund for Nature (also known as the World Wildlife Fund, or WWF), said that “the pressure dams put on biodiversity and water resources is absolutely incompatible with freshwater and nature protection” and that “dams are one of the primary drivers of recent declines in freshwater biodiversity.”<sup>50</sup> The WWF is an international non-governmental organization that works in the field of reducing human impact on the environment.

Despite this, on October 11, 2019, the Environmental Management Bureau (EMB), through its Director, Engr. Metodio U. Turrella, issued ECC No. ECC-CO-1907-0017, which would pave the way for the implementation of the NCWS-KDP. DENR Assistant Secretary Ricardo Calderon said that the ECC “went through thorough review and consultations.”<sup>51</sup> But, DJ Yap, Mariejo S. Ramos, and Melvin Gascon in their reporting quoted DENR Undersecretary Benny Antiporda as saying that “the ECC was issued because it was a priority project of the government and the agency had no recourse but to approve it.”<sup>52</sup>

For his part, DENR Secretary Roy Cimatu, in a statement released on October 22, 2019, announced that there will be strict monitoring of MWSS compliance with the ECC during construction of the NCWS-KDP.

47 “Construction of China-funded Kaliwa Dam Eyed by July – Panelo,” CNN Philippines.

48 Haribon Foundation, “Kaliwa Dam Will Destroy Sierra Madre Biodiversity – Haribon Foundation,” November 20, 2018, <https://haribon.org.ph/kaliwa-dam-will-destroy-sierra-madre-biodiversity-haribon-foundation/>.

49 “Philippines – Haribon Foundation,” Birdlife International, <http://www.birdlife.org/asia/partners/philippines-haribon-foundation-0/>.

50 “Nearly 200 New Dams Planned in European Protected Areas, New Study Finds,” World Wide Fund for Nature, August 3, 2020, <https://www.wwf.eu/?uNewsID=394551>.

51 Gillian M. Cortez, “DENR Says Ready to Defend Kaliwa Dam ECC,” *BusinessWorld*, October 25, 2019, <https://www.bworldonline.com/denr-says-ready-to-defend-kaliwa-dam-ecc/>.

52 DJ Yap, Mariejo S. Ramos, and Melvin Gascon, “ECC for Kaliwa Dam Project Assailed,” *Inquirer:Net*, October 24, 2019, <https://newsinfo.inquirer.net/1181082/ecc-for-kaliwa-dam-project-assailed>.



The ECC imposed some 21 conditions and 4 restrictions on the project, including some that require satisfaction by MWSS before any activity can commence. Notable among these conditions is the necessary certification from the National Commission on Indigenous Peoples (NCIP) before project implementation.

But, as Tony La Viña observed, despite the damage to the environment that the project will bring, the ECC carries only one condition relating to biodiversity,<sup>53</sup> and that is

**to conduct and submit actual inventory and assessment of threatened species** that may be affected during clearing operations including maps showing the project location relative to the protected area boundaries and management zones, location of observed threatened species; land cover map indicating the various habitat types and location of management zones relative to the area for vegetation prior to the conduct of the Detailed Engineering Design (DED) (emphasis supplied).<sup>54</sup>

As if trying to put all environmental issues to rest, Duterte announced that he would use the extraordinary powers of the presidency to bring an end to water shortages in Metro Manila, even if the solution causes environmental damage.<sup>55</sup>

## Socio-cultural Considerations

Local indigenous peoples inhabiting the region are concerned about resettlement, the degradation of their environment, and the loss of their livelihoods. A significant issue with the indigenous peoples is the displacement of the Dumagat indigenous tribes residing in the area.<sup>56</sup> According to Marcelino Tena, president of Samahan ng mga Katutubong Agta-Dumagat-Remontado na Binabaka at Ipinagtatanggol ang Lupaing Ninuno (SAGIBIN-LN), some 10,000 members of the Dumagat-Remontado tribe will be displaced with the project.<sup>57</sup> The communities are in a precarious position: their culture and livelihoods are at risk, as their primary sources of income are farming and providing occasional guides to Sierra Madre hikers. The area is also the location of their sacred sites and burial grounds.

In addition, one of the more specific issues is the possibility of a big flood in case of structural damage to the dam caused by an earthquake. The project EIS prepared by MWSS acknowledged community fears of this outcome and noted that “based on consultations with key stakeholders, it was established that the main issue of the project is the threat posed by flooding in the event of dam breakage.”<sup>58</sup> It is possible that the increased weight of a dam and its reservoir can worsen seismic activity. In an article published in *National Geographic*, Sarah Gibbens asserts that “multiple earthquakes at 167 sites—and

53 Tony La Viña, “The Illegal and Immoral Kaliwa Dam ECC,” *Rappler*, October 31, 2019, <https://rappler.com/voices/thought-leaders/opinion-the-illegal-and-immoral-kaliwa-dam-ecc>.

54 Department of Environment and Natural Resources, “Environmental Compliance Certificate [for the New Centennial Water Source – Kaliwa Dam Project].”

55 Ranada, “Duterte to Use ‘Extraordinary Powers’ to See Kaliwa Dam Project Through.”

56 “Construction of China-funded Kaliwa Dam Eyed by July – Pabelo,” CNN Philippines.

57 Robert Vergara, “Dumagat Leader Laments Alleged Lack of Tribe Consent for Kaliwa Dam: ‘Binabaso nila kami,’” CNN Philippines, March 21, 2019, <https://cnnphilippines.com/news/2019/3/21/agta-dumagat-leader-laments-alleged-lack-of-proper-consent-for-kaliwa-dam-construction.html>.

58 Metropolitan Waterworks and Sewerage System, “Environmental Impact Statement for the New Centennial Water Resource-Kaliwa Dam Project,” July 2019, p. 272, [https://emb.gov.ph/wp-content/uploads/2019/08/Kaliwa-Dam\\_EIS.pdf](https://emb.gov.ph/wp-content/uploads/2019/08/Kaliwa-Dam_EIS.pdf).

by far the deadliest ones—were triggered by what the report calls water reservoir impoundment or dam building.”<sup>59</sup>

But the EIS seemed to have downplayed that possibility in the case of the Kaliwa Dam Project. It said:

The Kaliwa Dam Project is located in the Island of Luzon, Philippines, which is characterized by four (4) major earthquake generators, namely the Philippine Trench, the Philippine Fault Zone, the West Marikina Valley Fault, and Manila Trench. The nearest geological structure to the proposed dam site corresponds to the segment of the Philippine Fault, which is located 15 kilometers to the east.

Results of the feasibility study and previous works by the Mines and Geosciences Bureau and the Philippine Institute of Volcanology and Seismology indicate the presence of faults within the Kaliwa Dam Watershed. These studies, however, indicate that **there are no active faults within the immediate vicinity of the dam which can bring about ground rupture** (emphasis supplied). The nearest documented active fault to the dam site is the segment of the Philippine Fault Zone which is located 15 kilometers to the east in Infanta. Movement along this fault can bring about ground shaking which can affect the dam and other engineering structures of the project.<sup>60</sup>

Various groups, including several legislators, raised concerns that the government failed to consult the indigenous communities to be affected even as a “Notice to Proceed for the Detailed Design Phase” was issued to CEEC on November 13, 2019. This issue of the consultation process and the substantive requirements that make it valid has turned out to be even more controversial. Under Republic Act No. 8371 or the Indigenous Peoples’ Rights Act of 1997 (IPRA), the right of the indigenous cultural communities (ICCs) and indigenous peoples to self-determination is recognized. The law also provides mechanisms for the protection of their ancestral domains and the resources present therein. One of the means to achieve this is through the concept of a free and prior informed consent (FPIC), defined as the:

consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.<sup>61</sup>

Moreover, a certification pre-condition (CP) is necessary before a project can proceed, as stated in the law:

All departments and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. Such certification shall only be issued after a field-based investigation is conducted by the Ancestral Domains Office of the area concerned: Provided, That no certification shall be issued by the NCIP without the free and prior informed and written consent of ICCs/IPs concerned: Provided, further, That no department, government agency

59 Sarah Gibbens, “These 3 Big Earthquakes Were Likely Caused by Humans,” *National Geographic*, October 2, 2017, <https://www.nationalgeographic.com/news/2017/10/human-induced-earthquakes-fracking-mining-video-spd/>.

60 Metropolitan Waterworks and Sewerage System, “Environmental Impact Statement for the New Centennial Water Resource-Kaliwa Dam Project,” p. 272.

61 The Indigenous Peoples’ Rights Act of 1997, Republic Act No. 8371, Sec. 3g.

or government-owned or -controlled corporation may issue new concession, license, lease, or production-sharing agreement while there is a pending application for a CADT: Provided, finally, That the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process.<sup>62</sup>

In March 2019, Tena alleged that MWSS “did not follow the right process to secure the Free, Prior and Informed Consent (FPIC),” adding that the engineering design has not been shown to them. In contrast, then-MWSS administrator Velasco claimed that only about 46 families will be affected, that several consultations with those who will be affected have been made, and that the project design has yet to be finalized.<sup>63</sup>

The controversy has given birth to the “STOP Kaliwa Dam” (SKD) organization. Also known as Sectors and Peoples Totally Opposed to Kaliwa Dam, the organization claims representation from indigenous peoples, local communities, church leaders, academics, environmentalists, and social movements. The group has started a signature campaign from all over the Philippines to petition Duterte to stop the project.

By September 2019, the official MWSS website reported that three successful public hearings initiated by DENR-EMB and the MWSS had been conducted, as follows: at General Nakar, Quezon on August 23, 2019, at Teresa, Rizal on August 27, 2019; and at Infanta, Quezon on August 28, 2019.<sup>64</sup> In connection with the free, prior, and informed consent, the site has this to say:

With regard to MWSS’ compliance with Republic Act No. 8173 or the Indigenous People’s Rights Acts, the MWSS through the National Commission of Indigenous Peoples **has successfully completed the community assemblies on the six (6) clusters of IP communities in Quezon Province as part of the Free Prior and Informed Consent (FPIC) process** (emphasis supplied).<sup>65</sup>

However, according to Conde, five out of six cluster communities in General Nakar—one of the two municipalities in Quezon province where the NCWS-KDP will be located (the other one is Infanta)—voted overwhelmingly no, effectively rejecting the project.<sup>66</sup> The five clusters consist of those in Lumutan, Baybay, Pasanghan, Umiray, and Cablao.

Also, Aaron Pedrosa, attorney for the progressive political party Sanlakas, alleged that MWSS failed to provide proof of compliance with the procedural requirement of posting a public notice and a copy of the scoping report as proof that public scoping was conducted in the area as part of the environmental impact study.<sup>67</sup>

62 The Indigenous Peoples’ Rights Act of 1997, Republic Act No. 8371, Sec. 59.

63 Vergara, “Dumagat Leader Laments Alleged Lack of Tribe Consent for Kaliwa Dam: ‘Binabraso nila kami!’”

64 Metropolitan Waterworks and Sewerage System, “Three (3) Successful Public Hearings Conducted on the New Centennial Water Source-Kaliwa Dam Project,” September 2, 2019, <https://mwss.gov.ph/three-3-successful-public-hearings-conducted-on-the-new-centennial-water-source-kaliwa-dam-project/>.

65 Metropolitan Waterworks and Sewerage System, “Three (3) Successful Public Hearings Conducted on the New Centennial Water Source-Kaliwa Dam Project.”

66 Mavic Conde, “Quezon Province’s IPs Reject Kaliwa Dam Project,” *Rappler*, September 8, 2019, <https://rappler.com/nation/quezon-province-indigenous-people-reject-kaliwa-dam-project>.

67 Conde, “Quezon Province’s IPs Reject Kaliwa Dam Project.”

These allegations and counter-allegations have given rise to serious legal questions relating to the issuance of the ECC in the absence of a valid consultation process.

MWSS Administrator Emmanuel Salamat did not deny the accusation of a pre-emptive ECC. He nonetheless defended the action and explained that the next step after the issuance of the ECC would be the signing of the loan effectivity of the project, which must precede the awarding of the project for design ahead of construction. Estimating that this process would take around six months to complete, Salamat stated that while waiting, “we will go with the process of securing the FPIC.”<sup>68</sup>

The Supreme Court, in the case of *Boracay Foundation Inc. v. The Province of Aklan* (2012) clarified the basic ECC requirements and laid the responsibility of implementing the Environmental Impact Assessment (EIA) process on the DENR, which must strictly comply with its procedures.<sup>69</sup> The Court also cited pertinent provisions of the Local Government Code of 1991, stating that it is the policy of the State to:

require all national agencies and offices to conduct periodic consultations with appropriate local government units, non-governmental and people’s organizations, and other concerned sectors of the community **before any project or program is implemented in their respective jurisdictions** (emphasis supplied).<sup>70</sup>

The local government units of Infanta in Quezon Province and Tanay in Rizal Province made clear that they will not issue an approval, endorsement, or any form of agreement concerning the construction of the NCWS-KDP.<sup>71</sup> However, Velasco, consistent with his earlier and other statements, announced that the project would proceed with or without permission from the local government unit of Infanta, Quezon.

Furthermore, the Local Government Code of 1991 states that:

It shall be the duty of every national agency or government-owned or -controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of cropland, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, non-governmental organizations, and other sectors concerned and explain the goals and objectives of the project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.<sup>72</sup>

68 Jonathan Mayuga, “A Damn Tough Balancing Act,” *Business Mirror*, November 2, 2019, <https://businessmirror.com.ph/2019/11/02/a-damn-tough-balancing-act/>.

69 *Boracay Foundation Inc. v. The Province of Aklan*, GR No. 196870, June 26, 2012, [https://lawphil.net/judjuris/juri2012/jun2012/gr\\_196870\\_2012.html](https://lawphil.net/judjuris/juri2012/jun2012/gr_196870_2012.html).

70 The Local Government Code, 1991, Book I, Title One, Chapter I, Section 2(c).

71 “Kaliwa Dam, tuloy kahit walang permit mula Infanta,” ABS-CBN News, November 8, 2018, <https://news.abs-cbn.com/video/news/11/08/18/kaliwa-dam-tuloy-kahit-walang-permit-mula-infanta>.

72 The Local Government Code of 1991, Republic Act No. 7160, Book I, Title One, Chapter I, Section 26.

In no uncertain terms, the law says:

**No project or program shall be implemented by government authorities unless the consultations mentioned in Section 2(c) and 26 hereof are complied with**, and prior approval of the sanggunian [local legislative body] concerned is obtained: Provided, that occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution (emphasis supplied).<sup>73</sup>

MWSS, on its website, clarified the issue on the consultations:

MWSS consultations with the Indigenous Peoples (IPs) of Quezon and Rizal have reached a positive outcome on December 9 and 17, 2019 when the IPs and Indigenous Cultural Communities (ICCs) of Rizal and Quezon Provinces, respectively adopted a resolution of consent (Resolusyon ng Pagpayag) to the project. This stage, which is one of the several stages in the Free Prior and Informed Consent (FPIC) process shows, that the IPs are able to conduct their own independent and collective discussions and decision-making in an environment where they did not feel intimidated, and where they had sufficient time to discuss in their culturally appropriate way, matters affecting their rights, livelihoods, knowledge, traditions, governance systems, natural resources. The IPs “Resolusyon” also means that MWSS adhered to the FPIC framework and that the rights of the IPs are being respected by making sure that they understood all of the implications of the project before they give their consent.<sup>74</sup>

The unresolved issue is whether the government—specifically the DENR—completely disregarded legal and procedural requirements in issuing the ECC for the Kaliwa Dam a few months after the Philippine government entered into a contract with China. The ultimate question is whether the ECC that has been issued is valid.

## Onerous Agreement Provisions

As the loan agreement for the NCWS-KDP is essentially the same as that of the Chico River Pump Irrigation Project, expectedly, the issues are the same. Several provisions in the Preferential Buyer's Credit Loan Agreement with CEXIM have been brought before the Supreme Court as lopsided in favor of China and onerous on the Philippines, raising the question of why the Philippine government agreed to them.

The specific issues are the loan terms, the confidentiality clause, the waiver of immunity, and the arbitration terms.

**Loan terms:** The terms—interest rate and tenor—of the loan agreement for the NCWS-KDP and the CRPIP, both funded from China, compared with other infrastructure projects funded from loans from other countries, are less favorable, with significantly higher rates and half the amount of time to maturity. Table 2 shows the details of other ODA projects vis-à-vis the NCWS-KDP.

73 The Local Government Code of 1991, Book I, Title One, Chapter 1, Section 27.

74 Metropolitan Waterworks and Sewerage System, “MWSS’ Clarifications on the Kaliwa Dam,” January 8, 2020, <https://mwss.gov.ph/mwss-clarifications-on-the-kaliwa-dam/>.



Table 2. Comparison of loan terms on other ODA projects

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	China	12.19	2.00	20
Panguil Bay Bridge	South Korea	7.38	0.15	40
New Cebu International Container Port	South Korea	9.96	0.15	40
Improvement of Sections along Pasig River from Delpan Bridge to Napindan Project	Japan	6.97	0.75	40
Cavite Industrial Area Flood Risk Management Project	Japan	9.89	0.3	30
Metro Manila Subway Phase I	Japan	356.97	0.1	40
North-South Commuter Railway Project	Japan	628.42	0.1	40

Source: Department of Finance; Ralf Rivas, "Duterte's Golden Age of Infrastructure Will Have to Be Completed by Next President."

Undeniably, the contracts entered into with China are a significant disadvantage based on interest rates. However, then Director-General Ernesto Pernia of the National Economic Development Authority (NEDA) defended the choice by saying, "we need more friends," referring to China.<sup>75</sup> He added that the Philippines "cannot get all the loans from the ODA of Japan. They have to give to other countries as well. Between 2% and 3% interest rate is still much better than commercial loans."<sup>76</sup> Pernia's statement on the need to secure loans from China as a matter of friendship strongly suggests that the administration favored China.

**Confidentiality clause:** The "confidentiality clause" present in the agreement is one of the issues covered in the petition before the Supreme Court. Under the loan agreement, the Philippines may not disclose any information regarding the project "without the prior written consent of China."<sup>77</sup> This is in violation of Section 21 of Article XII of the 1987 Constitution, which states, in part, that "information on foreign loans obtained or guaranteed by the Government shall be made available to the public."<sup>78</sup>

75 Ralf Rivas, "Philippines 'Extra Careful' with China Loans – NEDA," *Rappler*, June 27, 2018, <https://www.rappler.com/business/205903-philippine-government-extra-careful-china-loans-neda>.

76 "Japan Has Better Rates for Loans, But PH Needs China, Too to Speed up Infra Projects: Pernia," February 22, 2018, *Interaksyon*, <https://www.interaksyon.com/breaking-news/2018/02/22/120754/japan-has-better-rates-for-loans-but-ph-needs-china-too-to-speed-up-infra-projects-pernia/>.

77 Lian Buan, "After Chico River, Makabayaan Goes after Kaliwa Dam at Supreme Court," *Rappler*, May 9, 2019, <https://rappler.com/nation/makabayaan-goes-after-kaliwa-dam-supreme-court>.

78 The Philippine Constitution, Article XII National Economy and Patrimony, Section 21, 1987, <https://www.officialgazette.gov.ph/constitutions/the-1987-constitution-of-the-republic-of-the-philippines/the-1987-constitution-of-the-republic-of-the-philippines-article-xii/>.

The contested provision in Article 8.9 of the loan agreement reads:

The Borrower shall keep all the terms, conditions, and the standard of fees hereunder or in connection with this Agreement strictly confidential. Without the prior written consent of the Lender, the Borrower shall not disclose any information hereunder or in connection with this Agreement to any third party unless required by any applicable Philippine laws, regulations, and rules, or by order of any courts, tribunals, or agencies of competent jurisdiction, or relevant regulatory bodies.

In a press statement issued on January 6, 2020, DOF Undersecretary Mark Dennis Joven said: “such provisions are standard on all loan agreements entered into by the Philippines with other countries...as seen in our loan agreements with China, Japan, Korea, and France, even during past administrations.”<sup>79</sup>

Experts consider the presence of a standard confidentiality clause in such contracts an anomaly and arguably the most prominent and most corrosive element in dealing with China.<sup>80</sup> Public procurement documents, by international standards, should be easily accessible and in wide circulation to allow all interested parties to monitor outcomes, results, and performance.<sup>81</sup> Thus, unpublished documents paralyze civil monitoring and impede overall project transparency, even with assurances that copies can be made available upon proper request. Hála asserts that corrosive capital tends to thrive when information is scarce.<sup>82</sup> Therefore, addressing the lack of information and demanding transparency are two critical steps in undermining any form of corrosive capital.

To date, a copy of the contract between the MWSS and the CEEC is conspicuously unavailable on public sites.

**Waiver of immunity:** The Philippines asserts the principle of immunity that “the State may not be sued without its consent,” as embodied in Section 3, Article XVI of the 1987 Constitution.<sup>83</sup> However, express provisions in the loan agreement state that the Philippines waives this immunity. The loan agreement provides:

The signing of this Agreement by the Borrower constitutes, and the Borrower's performance of its obligations under this Agreement will constitute commercial acts. **Neither the Borrower nor any of its assets is entitled to any right of immunity on the grounds of sovereign or otherwise from arbitration, suit, execution, or any other legal process with respect to its obligations under this Agreement,** as the case may be, in any jurisdiction, except any other assets of the Borrower located within the territory of the Philippines to the extent that the Borrower is prohibited by the laws or public policies having force of law in the Republic of the Philippines, applicable and in effect at the signing date of this Agreement, from waiving such immunity

79 Beatrice M. Laforga, “DoF Rejects Claim of ‘Onerous’ Kaliwa Dam Loan,” *BusinessWorld*, January 7, 2020, <https://www.bworldonline.com/dof-rejects-claim-of-onerous-kaliwa-dam-loan/>.

80 Ralf Rivas, “Made in China: Loan Terms Shrouded in Secrecy,” *Rappler*, March 27, 2019, <https://rappler.com/newsbreak/in-depth/provisions-waivers-philippines-loan-agreements-with-china>.

81 OECD, “Methodology for Assessing Procurement Systems,” July 2016, <https://www.oecd.org/gov/public-procurement/Methodology-Assessment-Procurement-System-Revised-Draft-July-2016.pdf>.

82 Martin Hála, “A New Invisible Hand: Authoritarian Corrosive Capital and the Repurposing of Democracy,” National Endowment for Democracy, March 2020, [https://www.ned.org/wp-content/uploads/2020/03/New-Invisible-Hand-Authoritarian-Corrosive-Capital-Repurposing-Democracy-Hala.pdf?utm\\_source=forum-landing-page&utm\\_medium=site&utm\\_campaign=corrosive-capital](https://www.ned.org/wp-content/uploads/2020/03/New-Invisible-Hand-Authoritarian-Corrosive-Capital-Repurposing-Democracy-Hala.pdf?utm_source=forum-landing-page&utm_medium=site&utm_campaign=corrosive-capital).

83 The Philippine Constitution, Article XVI General Provisions, Section 3, 1987.

(emphasis supplied).<sup>84</sup>

Further, Article 8.I provides:

The Borrower hereby **irrevocably waives any immunity on the grounds of sovereignty** or otherwise for itself or its property in connection with any arbitration proceeding pursuant to Article 8.5 hereof or with the enforcement of any arbitral award thereto, except any other assets of the Borrower located within the territory of the Philippines to the extent that the Borrower is prohibited by the laws or public policies having force of law in the Republic of the Philippines, applicable and in effect at the signing date of this Agreement from waiving such immunity (emphasis supplied).<sup>85</sup>

The clause means that “in the event of a default or a dispute in the loan agreement that will be subject to an arbitration process, the patrimonial assets could be expended to satisfy the lender (China).”<sup>86</sup> Patrimonial assets are public properties that are not “intended for some public service or the development of the national wealth” as provided in Articles 420 and 421 of the Civil Code of the Philippines.

Of particular focus in this discussion of patrimonial assets is the gas-rich Reed Bank (Recto Bank), which, according to retired Supreme Court Senior Associate Justice Antonio Carpio, “could end up being the collateral.”<sup>87</sup> The Reed Bank is controversial because—despite China’s claim to it—the United Nations-backed Permanent Court of Arbitration in the Hague in the Netherlands ruled in July 2016 that the Philippines has sovereign rights. The government, responding to fears that China may take over properties of the Philippines, dismissed the issue, with Justice Secretary Menardo Guevarra calling it “jumping the gun.”<sup>88</sup>

These provisions in the loan agreement serve to fan the flames of controversy in light of the much-publicized debt traps that Sri Lanka, Djibouti, Maldives, and other countries have reportedly found themselves in with China where they had to give up their strategic national assets.

Like with the confidentiality clause, the DOF Undersecretary Bayani Agabin defended the sovereign immunity clause in the Philippine-China loan agreement as standard in all other contracts.<sup>89</sup> For the same issue relating to the China-funded CRPIP, then-Presidential Spokesperson Salvador Panelo said that the waiver of immunity “is not a possibility because we will never renege” on the payments and that it is a “useless” provision.<sup>90</sup>

84 “Preferential Buyer’s Credit Loan Agreement on The New Centennial Water Source-Kaliwa Dam Project,” Department of Finance, November 20, 2018, Article 5.7, <https://www.dof.gov.ph/download/kaliwa-dam-project-loan-agreement/?wpdmdl=23115&refresh=5f44f8ec9f3231598355692>.

85 “Preferential Buyer’s Credit Loan Agreement on The New Centennial Water Source-Kaliwa Dam Project,” Department of Finance, Article 8.I.

86 Louise Encabo, “Understanding the Problematic Chico River Pump Irrigation Project,” *The Defiant*, April 5, 2019, <https://thedefiant.net/understanding-the-problematic-chico-river-pump-irrigation-project/>.

87 Lian Buan, “Reed Bank Not Collateral to China Loan? Carpio Rebuts Duterte Gov’t,” *Rappler*, March 27, 2019, <https://rappler.com/nation/carpio-rebuts-duterte-government-reed-bank-collateral-chico-river-loan>.

88 Buan, “Reed Bank Not Collateral to China Loan? Carpio Rebuts Duterte Gov’t.”

89 Department of Finance, “Provisions in PHL-China Loan Accords Standard in All Other Agreements,” April 17, 2019, <https://www.dof.gov.ph/provisions-in-phl-china-loan-accords-standard-in-all-other-agreements/>.

90 Nestor Corrales, “Palace: ‘Onerous Provision in Chico River Project Loan Just ‘Standard,’” *Inquirer.Net*, March 25, 2019, <https://newsinfo.inquirer.net/1099459/palace-onerous-provision-in-chico-river-project-loan-just-standard>.

**Arbitration terms:** Another issue raised concerns the arbitration process itself. In their petition to the Supreme Court, opponents of the loan agreement included the concern that any potential arbitration would happen before the Hong Kong International Arbitration Centre (HKIAC) using their rules, which will then be final and binding. The loan agreement states:

Any dispute arising out of or in connection with this Agreement shall be resolved through friendly consultation. If no settlement can be reached through such consultation, each party shall have the right to submit such dispute to the Hong Kong Arbitration Centre (HKIAC) for arbitration. **The arbitration shall be conducted in accordance with HKIAC arbitration rules** in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties. The seat of arbitration shall be in Hong Kong. The arbitration shall be conducted in English. The Arbitral Tribunal shall consist of three (3) Arbitrators which shall be appointed pursuant to the arbitration rules of HKIAC (emphasis supplied).<sup>91</sup>

Joven defended the arbitration clause saying that “regardless of the venue of arbitration, the usual international arbitration rules apply.”<sup>92</sup> The government response to concerns about the arbitration provision more or less followed the same lines of argument as its response to other criticized provisions. Lambino again dismissed this issue, saying that the provision is standard and that it is “highly unlikely” that the two countries would reach that stage of arbitration, given that the Philippines is a “responsible borrower” and will not renege on its payments.<sup>93</sup>

In contrast, contracts for projects funded by Japan specify that the umpire “will not be a person of the same nationality as either of the parties to arbitration.”<sup>94</sup>

**Contractor choice:** Another issue raised regarding the project is the choice of project contractor—China Energy Engineering Corporation Limited (CEEC).

While the Government Procurement Reform Act (Republic Act No. 9184) dictates that competitive bidding is a basic government procurement principle<sup>95</sup> and the 1987 Constitution provides that preference be given to qualified Filipinos,<sup>96</sup> these regulations do not apply for the procurement of goods, infrastructure projects, or consulting services funded by foreign grants. According to the Government Procurement Policy Board (GPPB), an independent inter-agency body with responsibility to “formulate and amend public procurement policies, rules, and regulations,”<sup>97</sup> these activities are instead governed by Republic Act No. (RA) 8182, otherwise known as the Official Development Assistance Act of 1996, as amended by RA 8555, “unless the Government of the Philippines and the foreign grantor/foreign or international financing institution agree otherwise.”<sup>98</sup>

91 Preferential Buyer's Credit Loan Agreement on The New Centennial Water Source-Kaliwa Dam Project, Department of Finance, Article 8.5.

92 Lafora, “DoF Rejects Claim of ‘Onerous’ Kaliwa Dam Loan.”

93 Darryl John Esguerra, “DOF: PH, China Highly Unlikely to Reach Arbitration over Chico River Project Loan,” Inquirer:Net, March 7, 2019, <https://business.inquirer.net/267491/dof-ph-china-highly-unlikely-to-reach-arbitration-over-chico-river-project-loan>.

94 Ralf Rivas, “Duterte’s Golden Age of Infrastructure Will Have to Be Completed by Next President,” *Rappler*, November 13, 2019, <https://www.rappler.com/newsbreak/in-depth/244784-duterte-golden-age-infrastructure-projects-completed-next-president>.

95 The Government Procurement Reform Act, Republic Act No. 9184.

96 The Philippine Constitution, Article XII National Economy and Patrimony, Section 10, 1987.

97 “Applicability of RA 9184; Official Development Assistance (ODA),” Government Procurement Policy Board, October 7, 2015, [https://www.gppb.gov.ph/GPPBTSO\\_Non-Policy/1402](https://www.gppb.gov.ph/GPPBTSO_Non-Policy/1402).

98 “Applicability of RA 9184; Official Development Assistance (ODA),” Government Procurement Policy Board.

In his analysis, Matoto said that “all the ODA funders typically link their loans to the procurement of equipment and services from their respective countries,” such as in the case of CEXIM loans using China equipment and contracted services.<sup>99</sup>

Given this, the law still requires a competitive bidding process even among Chinese companies to allow the Philippines to select a qualified candidate. However, there have been suspected issues with ensuring truly competitive selection. In a similar case—that of the Chico River Pump Irrigation Project—the issue was the pre-selection of the contractor. However, DOF Assistant Secretary Lambino was quoted as saying that “on the procurement, China has provided a list of three contractors of good standing, and the implementing agency was allowed to vet and request a replacement if needed.”<sup>100</sup>

In the case of the NCWS-KDP, the issue was not so much having an identified contractor but more accusations that the bidding had been manipulated to appear competitive and to make CEEC look like the legitimate winning contractor when in fact the other contractors were not qualified.

Rappler’s Lian Buan reported that the Commission on Audit (COA), in its Audit Observation Memo, wrote:

**Only the China Energy Engineering Corporation Limited qualified which is questionable** considering that the two [other] bidders were disqualified in the 1st and 2nd stages of the procurement process due to the seemingly intentional purpose of the bidders not to comply with the TWG (technical working group) requirements (emphasis supplied).<sup>101</sup>

The two other firms that participated in the bidding process were Power Construction Corporation of China Limited (Power China) and Consortium of Guangdong Foreign Construction (Guangdong). In the Audit Observation Memorandum (AOM), COA explained that Guangdong failed the eligibility requirements of the Technical Working Group (TWG), the committee in the MWSS assigned to vet contractors, when the company had already met the MWSS pre-qualification requirements.

For its part, Power China was disqualified for submitting a bid higher than the approved budget. But, the COA, as quoted in the same report, observed that:

**this raises doubt on the bid of the Power Construction Corporation of China Limited** since the **nominated bidders were already informed in the bid documents and in the Invitation to Bid** for the project of the amount of the Approved Budget for the Contract (ABC) and that ‘Bids received in excess of the ABC shall be automatically rejected at bid opening requirements’ (emphasis supplied).<sup>102</sup>

99 Bing Matoto, “Chico River Loan – An Analysis,” Tribune.Net, April 17, 2019, <https://tribune.net.ph/index.php/2019/04/17/chico-river-loan-an-analysis/>.

100 Joyce Rocamora, “\$62-M China-PH Irrigation Project Screened before Approval: DOF,” Philippine News Agency, March 2, 2019, <https://www.pna.gov.ph/articles/1063392>.

101 Commission on Audit, “Audit Observation Memorandum Issued to the Metropolitan Waterworks and Sewerage System,” June 10, 2019.

102 Commission on Audit, “Audit Observation Memorandum Issued to the Metropolitan Waterworks and Sewerage System.”



The COA added:

In summary, it can be deduced that the **two bidders/contractors were included merely to comply with the ‘at least three bidders requirement’** as stated under the procurement law. Likewise, the procurement of the project is with the **semblance of competitive bidding** when in reality, **it is a negotiated contract from the inception of the bidding process** (emphasis supplied).<sup>103</sup>

The COA also took exception to the failure to meet rules on submission deadlines. The MWSS submitted the project documents 135 days after the execution of the contract instead of the standard 5 days.<sup>104</sup>

In response to the COA observations, then-Presidential Spokesperson Salvador Panelo said that “if the bidding is proven to be rigged, it will be up to President Rodrigo Duterte to allow or suspend the contract.”<sup>105</sup>

## Conclusion

The Duterte administration appears determined to implement the New Centennial Water Source-Kaliwa Dam Project despite opposition to the project. Where those who came before him—including strongman Marcos—did not devote significant political capital to the approval and completion of the project, Duterte has personally committed to the project, promising to “fight all the way” using “the extraordinary powers of the presidency.”<sup>106</sup>

The issues involved with the NCWS-KDP may be separated into two categories: project and political. Project issues stem from the nature of the project, regardless of the administration. Political issues, on the other hand, grow out of decisions made by the political leadership.

The main project issues have largely remained the same over time: namely, environmental and biodiversity concerns and the socio-cultural impact on indigenous peoples. These environment and socio-cultural issues existed prior to this administration; in pushing for the project, the current administration invariably reminds the public that the project was approved by NEDA in 2014, two years before Duterte’s term started. The persistence of these issues raises questions about the incumbent president’s extraordinary resolve to force the issue. Ostensibly, the reason is to stave off an impending water crisis for Metro Manila, which reared its head in early 2019, resulting in widespread water service interruptions, as if trying to warn residents of what is coming if the dam project does not materialize.

<sup>103</sup> Commission on Audit, “Audit Observation Memorandum Issued to the Metropolitan Waterworks and Sewerage System.”

<sup>104</sup> Lian Buan, “Kaliwa Dam Bidding Looks Rigged for China Energy – COA,” *Rappler*, August 19, 2019, <https://rappler.com/nation/coa-memo-kaliwa-dam-bidding-china-energy>.

<sup>105</sup> “MWSS Downplays COA Questions on Kaliwa Dam Bidding,” ABS-CBN News, August 20, 2019, <https://news.abs-cbn.com/business/08/20/19/mwss-downplays-coa-questions-on-kaliwa-dam-bidding#:~:text=Presidential%20Spokesperson%20Salvador%20Panelo%20has,to%20be%20completed%20until%202023>.

<sup>106</sup> Ranada, “Duterte to Use ‘Extraordinary Powers’ to See Kaliwa Dam Project Through”; Parrocha, “PRRD to Pursue Construction of Kaliwa Dam ‘All the Way.’”

However, experts say there are environment-friendly alternatives to the Kaliwa Dam that would also address the looming water crisis. One option is the proposal by a Japanese firm to construct a cheaper weir—a 7-meter-high wall as compared to China's 60-meter-high dam. This option could have easily eliminated the opposition to the project while achieving the same objective. Yet, the government readily opted for the Chinese-funded Kaliwa Dam, even to the extent of violating laws, rules, and procedures. This suggests that there are other reasons behind Duterte's strong advocacy for this project.

In terms of international development best practices, there appears to be a marked improvement in the contractor-selection process for the NCWS-KDP as the identity of the competing companies was made known. Nonetheless, there are still serious doubts about compliance with the internationally-accepted process of competitive bidding. The Commission on Audit's official memorandum stating that the bidding process appeared rigged to favor the eventual winning contractor—China Energy Engineering Co. Ltd. This allegation—coming as it did from state auditors—speaks volumes of the low level of adherence to the rule of law.

Other attempts to disregard or circumvent statutory and regulatory requirements also deserve attention, as in the case of the pre-requisite consultation process. The affected indigenous peoples are fighting the same issues now as in the 1970s; what needs closer inspection is how the government has become instrumental in defeating the very objectives that it is tasked to uphold under the law. Given strong signals from Duterte, officials tasked with ensuring the commencement and completion of the NCWS-KDP are placed in untenable situations that pressure them to cut corners and perform token compliance with the rules or be replaced.

In the latest iteration of the NCWS-KDP development project, concerns raised by the affected indigenous peoples have mostly concerned violations of the consultation process. More substantive issues have yet to be discussed thoroughly. With construction on some parts of the project already proceeding, it may be challenging to correct the defects in the consultation process.

This tension between the pressure officials face to comply with the president's priorities and their obligations to follow the law has been evident in the case of the issuance of the ECC. As if walking on a tightrope, the ECC was issued—allowing the project to proceed—but with several conditions and restrictions that could be interpreted as hedging against potential legal questions. The statements released by the officials who are potentially at legal risk sound guarded and veiled with disclaimers.

Expectedly, Duterte sounds extremely frustrated about challenges to the Kaliwa Dam Project.<sup>107</sup> In statements, he threatened the use of all the powers of the presidency to end the water shortage, even if the solution causes environmental damage. Given his propensity to seek military solutions to problems, this pronouncement puts the rule of law at risk.<sup>108</sup>

The last of the political issues concerning the NCWS-KDP is transparency and accountability. The level of transparency accorded by the government to the public is, at best, perfunctory. Pursuing information about the Kaliwa Dam Project—or even the China-funded CRPIP—most often led to dead-ends or conflicting information.

<sup>107</sup> Ranada, "Duterte to Use 'Extraordinary Powers' to See Kaliwa Dam Project Through"; Parrocha, "PRRD to Pursue Construction of Kaliwa Dam 'All the Way'."

<sup>108</sup> Parrocha, "PRRD to Pursue Construction of Kaliwa Dam 'All the Way'."

When it comes to accountability, there is an eerie silence. Good governance dictates an investigation of any allegation of impropriety. While in some instances, Duterte has allowed investigations in an attempt to appease the public, more often than not, he has pledged to personally “force the issue” and address challenges in court later.<sup>109</sup> This blanket assumption of responsibility reduces the risks of legal liability for other actors with the project, which may win their loyalty to his personality-driven leadership: following Duterte’s personal commitment to the project, officials associated with the project have more issued direct statements of support. Risks to Duterte himself may be limited, given the president’s immunity from legal action while in office, his advanced age, and his deteriorating medical condition, any legal action about the questionable projects is likely to fizzle out.

When the government decided to pursue the NCWS-KDP, the country was in stable and much better economic and financial shape, with its access to funds in the international market practically guaranteed. As such, many creditor countries were available to provide Official Development Assistance. This therefore raises the question of why the Philippines would adopt a beggar-cannot-be-chooser stance and take on a deal with less favorable terms (considering the interest rates and the so-called onerous provisions). At the same time, there may be cause for concern about Duterte’s desperation to implement the project.

Based on the available information about Duterte’s words and actions, there may be valid reasons that suggest that the water crisis is merely a pretense and that a plausible explanation for the selection of the Chinese deal is the political ties that bind Duterte and Xi Jinping.

In the case of the Kaliwa Dam, China’s ODA has not served any good purpose for the Philippines. On the contrary, it has only served to weaken even more the institutions already made fragile by Duterte’s style of leadership. China’s opportunism using financial resources was made possible by a poor governance structure with a leader who does not hold the rule of law in high regard.

Whether the Kaliwa Dam is good for the Philippines or not is a question that would need another study. What is certain though is that, under the ODA agreement with China, the project has left intangible costs.

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<sup>109</sup> Parrocha, “PRRD to Pursue Construction of Kaliwa Dam ‘All the Way’.”



### **What is BRI Monitor?**

BRI Monitor is a collaborative effort by five civil society organizations in Southeast Asia and the Pacific: the Institute for Democracy and Economic Affairs (IDEAS) of Malaysia, Stratbase Albert Del Rosario Institute (ADRI) of the Philippines, Sandhi Governance Institute (SGI) of Myanmar, the Institute of National Affairs (INA) of Papua New Guinea and the Future Forum of Cambodia to promote transparency and accountability in major infrastructure projects funded through the Belt and Road Initiative (BRI) in the region.

These organizations have studied the regulatory environments governing these large infrastructure projects in respective countries, including public procurement, official development assistance, public private partnership (PPP), and more, to identify regulatory gaps. They have each researched a set of case studies to identify implementation gaps and governance gaps. Each case study assesses the level of transparency based on almost 40 data points, from basic project information to the tendering process to project completion. Last but not least, each organization maps out the structure of the projects in question in order to identify domestic and international entities involved in the project and to understand the degree of public financial exposure resulting from each project.

This website is intended to be a platform for the publication of our research outputs and as a knowledge repository. We also hope that the website can be used as a platform for knowledge sharing and a tool to advocate better governance of major infrastructure projects in the region.

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