IS THE GSIS-SSS SEED CAPITAL IN THE MAHARLIKA FUND A TAX?: A COMMENT ON HOUSE BILL NO. 6398, S. 2022*

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ABSTRACT

The Maharlika Investment Fund, a priority in the legislative agenda of President Ferdinand Marcos Jr., will soon become a reality as the House of Representatives and the Senate have passed respective bills providing for this. While the very concept of a sovereign wealth fund ("SWF") has faced various pushbacks and controversies since its inception, the most vocal dissent has stemmed from the proposed use of social security funds for the initial capitalization of the SWF—as contained in House Bill No. 6398, s. 2022, the first Maharlika Fund bill. Even if the most recent Maharlika proposal deletes the infusion of social security monies in the SWF, nothing prevents Congress from exercising its lawmaking prerogative to revive the capitalization funding from the Government Service Insurance System (GSIS) and Social Security System (SSS) through an amendatory law. This article explains why such a move is legally untenable from the lens of tax law and constitutional law principles. The paper recaps rudimentary jurisprudence on taxation. Proceeding from this review, the article then argues that any mandatory contribution of GSIS and SSS funds to the SWF by way of legislation constitutes a form of confiscatory taxation on capital. Hence, a statutorily obligated capital infusion from GSIS and SSS to the Maharlika Fund is an unconstitutional levy.

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* *Cite as* Jan Fredrick P. Cruz, *Is the GSIS-SSS Seed Capital in the Maharlika Fund a Tax?: A Comment on House Bill No. 6398, s. 2022*, 96 PHIL. L.J. 237, [page cited] (2023).

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I. INTRODUCTION

In 2022, the Philippines under the administration of President Ferdinand "Bongbong" Marcos Jr. expressed interest in joining at least 70 countries with at least one sovereign wealth fund as of 2021.[1] The proposal for the "Maharlika Wealth Fund" (later renamed "Maharlika Investment Fund") was first filed in the House of Representatives, through House Bill No. 6398, s. 2022.[2] A revised version—House Bill No. 6608, s. 2023—successfully crossed the third reading with 282 representatives as co-authors.[3] Months later, two counterpart bills were filed in the Senate by Senators Mark Villar[4] and Rafael "Raffy" Tulfo,[5] respectively, which were eventually consolidated. The Senate passed the consolidated Bill after a few deliberations, and the House adopted the same to fast-track its passage.[6]

President Marcos Jr. presented the Maharlika Fund at the World Economic Forum in Davos as a tool to meet his administration's objectives for infrastructure, energy development, agriculture, and e-governance.[7] The top economic bureaucrats and technocrats of the Marcos Jr. administration also support the creation of the sovereign wealth fund, citing high-value projects on the environment, maritime economy, and countryside development as some of the direct benefits of the sovereign wealth fund.[8]

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[1] Chad de Guzman, *The Philippines Just Passed a Bill to Create a Sovereign Wealth Fund. Here's Why It's Controversial,* TIME, Dec. 15, 2022, *at* https://time.com/6241736/philippines-sovereign-wealth-fund/.

[2] H. No 6608, 19th Cong., 1st Sess. (2022). An Act Establishing the Maharlika Investment Fund.

[3] *Maharlika Investment Fund bill approved, 90 percent of House members named co-authors*, PHIL. HOUSE OF REPRESENTATIVES WEBSITE, Dec. 16, 2022, *at* https://www.congress.gov.ph/press/details.php?pressid=12348.

[4] S. No. 1670, 19th Cong., 1st Sess. (2023). An Act Establishing the Maharlika Investment Fund, introduced by Mark Villar.

[5] S. No. 1814, 19th Cong., 1st Sess. (2023). An Act Establishing the Maharlika Investment Fund, introduced by Raffy Tulfo.

[6] *Senate's Maharlika Bill Adopted by House,* SENATE OF THE PHIL. WEBSITE, *at* https://legacy.senate.gov.ph/press_release/2023/0601_zubiri1.asp.

[7] GMA Integrated News, *Marcos in Davos: Maharlika fund to drive infra in energy, agriculture*, GMA NEWS ONLINE, Jan. 18, 2023, *at* https://www.gmanetwork.com/news/money/economy/857866/marcos-in-davos-maharlika-fund-to-drive-infra-in-energy-agriculture/story/.

[8] Benjamin E. Diokno, Amenah F. Pangandaman, Arsenio M. Balisacan & Felipe M. Medalla, Statement of Economic Managers on the Creation of the Maharlika Wealth Fund, Dec. 12, 2022, *at* https://www.dbm.gov.ph/index.php/secretary-s-corner/press-releases/list-of-press-releases/2514-statement-of-economic-managers-on-the-creation-of-the-maharlika-wealth-fund.

Controversy hounded the Marcos-backed sovereign wealth fund from the onset. Critics questioned the urgency of a new government institution investing billions of pesos at a time when the Philippines was reeling from anemic economic growth and the government faces ballooning debt.[9] Others raised the risk of corruption and cronyism.[10] Some groups called the Maharlika Fund an example of an unnecessary State intervention in the workings of a market-based economy.[11]

The initial proposal for the Maharlika Investment Fund includes seed capital from the funds of the Government Social Insurance System (GSIS) and Social Security System (SSS).[12] This aspect of the Maharlika Fund received public scrutiny, particularly from some legislators. "[N]*akakatakot yatang ipusta 'yung retirement fund, 'yung pension fund ng GSIS. Nakakatakot yata. 'Wag naman*," said Senator Imee Marcos.[13] "Retirement funds should be zero risk. Their values are depleting due to inflation and rising prices, and yet these will be placed elsewhere?" she remarked in a different forum.[14] Other senators raised similar sentiments.[15] Chief Presidential Legal Counsel Juan Ponce Enrile advised the President to study the matter carefully.[16]

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[9] Antonio T. Carpio, *Maharlika Investment Fund: A losing proposition,* RAPPLER, Dec. 16, 2022, *at* https://www.rappler.com/voices/thought-leaders/analysis-maharlika-investment-fund-losing-proposition/; Diwa C. Guinigundo, *Questions only the Maharlika Investment Fund has the answer to,* BUSINESSWORLD, Jan. 26, 2023, *at* https://www.bworldonline.com/opinion/2023/01/26/501149/questions-only-the-maharlika-investment-fund-has-the-answer-to/; Cielito F. Habito, *No Free Lunch: Drop the Maharlika fund,* PHIL. DAILY INQUIRER, Dec. 6, 2022, *at* https://opinion.inquirer.net/159331/drop-the-maharlika-fund.

[10] Action for Economic Reforms, *Statement on the Maharlika Wealth Fund* (Dec. 7, 2022), *at* https://aer.ph/statement-on-the-maharlika-wealth-fund/.

[11] Foundation for Economic Freedom, *The Proposed Sovereign Wealth Fund: A Statement of Concern* (Dec. 12, 2022), *at* https://drive.google.com/file/d/15vtJOcN5Ct-pmTs7Mjlem_lF2p2P63iI/view.

[12] H. No. 6398, 19th Cong., 1st Sess., § 9 (2022).

[13] Wilnard Bacelonia & Leonel Abasola, *Imee bucks Maharlika Wealth Fund,* PHIL. NEWS AGENCY, Dec. 2, 2022, *at* https://www.pna.gov.ph/articles/1189946.

[14] Xave Gregorio, *Imee Marcos wants tweaks to proposed Maharlika fund bill,* PHIL. STAR, Dec. 3, 2022, *at* https://www.philstar.com/headlines/2022/12/03/2228271/imee-marcos-wants-tweaks-proposed-maharlika-fund-bill.

[15] Hannah Torregoza, *Hontiveros, Marcos fear Maharlika wealth fund could stoke more acts of corruption,* MANILA BULLETIN, Dec. 3, 2022, *at* https://mb.com.ph/2022/12/02/hontiveros-marcos-fears-maharlika-wealth-fund-could-stoke-more-acts-of-corruption/; Dennis Gutierrez, *Cayetano: GSIS, SSS, other GOCC direct investment in infra dev't safer and better than Maharlika fund,* PHIL. DAILY INQUIRER, Dec. 16, 2022, *at* https://newsinfo.inquirer.net/1705919/cayetano-gsis-sss-other-gocc-direct-investment-in-infra-devt-safer-and-better-than-maharlika-fund.

[16] Azer Parrocha, *Enrile asks Marcos to 'carefully' review Maharlika Fund,* PHIL. NEWS AGENCY, Dec. 12, 2022, *at* https://www.pna.gov.ph/articles/1190614.

Economists, academics, and civil society groups have criticized the merits of the GSIS-SSS seed funding as well.[17] An online petition against the matter was started.[18] A few legal experts consider the GSIS-SSS capitalization as a form of taking private property without just compensation—a constitutional issue.[19] This outcry against the GSIS and SSS seed funding has prompted legislators to exclude GSIS and SSS as a source of capital for the sovereign wealth fund.[20]

This article probes the legal argument against the inclusion of GSIS-SSS funds in the initial capitalization for the Maharlika Investment Fund. While taking note of the eminent domain argument, we believe that a line of thought worth pursuing on the subject is that the GSIS-SSS seed money for the sovereign wealth fund is a form of unconstitutional tax. The main thesis of the article is that the mandatory capitalization of GSIS and SSS to the wealth fund is akin to a tax on capital. Hence, it is void for violating due process.

Despite the exclusion of GSIS and SSS funds in the current legislative proposal for the Maharlika Fund,[21] this paper still finds relevance. From an academic standpoint, the discussion contributes to discourse on the nature of taxation and eminent domain. The paper particularly explores the concepts of confiscatory taxes and condemnable properties. From a practical standpoint, nothing prevents Congress from reviving the GSIS-SSS capitalization of the sovereign wealth fund by way of legislative amendment to the eventual charter of the Maharlika Fund. History suggests a precedent for this.

In the 1940s, a sugar stabilization fund was collected from sugar millers, planters, and landowners by virtue of Commonwealth Act No. 567. Section 6 of the statute provided that the fund should "only" be used for

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[17] *See supra* notes 9–11.

[18] Julie M. Aurelio, *Critics roll out petition against Maharlika fund,* PHIL. DAILY INQUIRER, Dec. 3, 2022, *at* https://newsinfo.inquirer.net/1700769/critics-roll-out-petition-against-maharlika-fund.

[19] Jairo Bolledo, *Laws, SC rulings that say SSS, GSIS funds are private*, RAPPLER, Dec. 7, 2022, *at* https://www.rappler.com/nation/laws-supreme-court-rulings-sss-gsis-funds-private/.

[20] Delon Porcalla, *House Drops SSS, GSIS Funds from Maharlika*, ONENEWS PH, Dec. 7, 2022, *at* https://www.onenews.ph/articles/house-drops-sss-gsis-funds-from-maharlika.

[21] S. No. 2020, 19th Cong., 1st Sess., § 6(2) (2023). Maharlika Investment Fund Act of 2023.

four express purposes, albeit the President may initially disburse the fund in the specific situations enumerated in the proviso of the same section.[22] Several pieces of legislation in the next decades expanded the use of the stabilization fund and allocated part of the same to other agencies,[23] despite the original intent that the fund would be exclusively devoted to the objectives of Commonwealth Act No. 567, until President Ferdinand Marcos Sr. transferred the jurisdiction over the sugar stabilization fund to the Philippine Sugar Commission.[24]

The current charters of GSIS and SSS protect the pension funds by explicitly prohibiting their use for purposes other than the solvency and upkeep of the social security system.[25] Until House Bill No. 6398, the legislature has not seriously attempted to interfere with the investment strategies of the governing corporate boards of GSIS and SSS in light of the potential backlash from retirees and contributors. Given the discussion in the previous paragraph, however, it remains worth elaborating why such mandatory allocation of social security funds is legally tenuous.

The following outlines the flow of the discussion. Section II provides a brief background on what sovereign wealth funds are. It also traces the history of the quest to launch a sovereign wealth fund in the Philippines. Section III pushes the argument that the mandatory allocation of social security monies in the sovereign wealth fund is a form of taxation. This part includes a review of jurisprudence on tax definitions, as well as an operational test to determine whether a government exaction is a tax. Section IV explains why the GSIS and SSS mandatory remittance to the Maharlika Fund constitutes a confiscatory tax on capital. Section V revisits the expropriation argument against GSIS-SSS seed funding. Section VI concludes.

II. HISTORY OF PROPOSALS TO ESTABLISH A PHILIPPINE SOVEREIGN WEALTH FUND

A. Sovereign Wealth Funds in General

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[22] Com. Act No. 567 (1940), § 6.

[23] Rep. Act No. 582 (1951); Rep. Act No. 632 (1951); Rep. Act No. 1328 (1955); Rep. Act No. 3051 (1961).

[24] Pres. Dec. No. 388 (1974), §§ 7, 10.

[25] Pres. Dec. No. 1146 (1977), as amended by Rep. Act No. 8291 (1997), § 34; Rep. Act No. 11199 (2019), §§ 25–26.

Some advocates of the Maharlika Sovereign Wealth Fund in the House of Representatives dismiss criticisms against their bill by arguing that their proposal is substantially the same as the one filed by former Senator Paolo Benigno "Bam" Aquino IV.[26] This point necessitates a comparison and contrast of the various legislative bills to create a sovereign wealth fund in the Philippines. Such a recap of previous legislative proposals allows us to appreciate what makes the Maharlika Fund unique.

A sovereign wealth fund ("SWF") is a public-sector investment vehicle, the main objective of which is to maximize returns on behalf of the State[27] and to achieve other economic objectives of the government.[28] Sovereign wealth funds play a prominent role in international markets, as the assets held by these institutions are collectively estimated at 10 trillion US dollars.[29]

Broadly speaking, a financial investment refers to the use of investible funds for private gain.[30] The typical players in financial investments are private sector actors, as the motivation for the endeavor is to grow wealth. As such, the sovereign wealth fund as an investment mechanism is novel on two fronts. On one hand, the economic actor here is the State; it is the main investor of the resources under its custody. On the other hand, investible capital is utilized for social return and public purposes instead of private return.[31]

The investible capital of sovereign wealth funds is usually an economic surplus. Capitalization for the SWFs comes from a combination of the following: windfall profits of extractive industries and in the

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[26] Ellson Quismorio, *Arroyo sounds off on 'Maharlika' fund, says Bam Aquino filed similar bill in 2016*, MANILA BULLETIN, Dec. 5, 2022, *at* https://mb.com.ph/2022/12/05/arroyo-sounds-off-on-maharlika-fund-says-bam-aquino-filed-similar-bill-in-2016/; Vera Files, *VERA FILES FACT CHECK: Arroyo, Marcos claim that Bam Aquino proposed 'same' sovereign wealth fund needs context*, VERA FILES, Dec. 7, 2022, *at* https://verafiles.org/articles/vera-files-fact-check-arroyo-marcos-claim-that-bam-aquino-proposed-same-sovereign-wealth-fund-bill-needs-context.

[27] De Guzman, *supra* note 1.

[28] Diokno et al., *supra* note 8.

[29] De Guzman, *supra* note 1.

[30] *Investment*, MERRIAM WEBSTER, *at* https://www.merriam-webster.com/dictionary/investment (last accessed Apr. 28, 2023).

[31] Samuel Wills et al., *Sovereign Wealth Funds and Natural Resource Management in Africa*, 25 J. AFR. ECON. ii3, ii12–ii15 (2013).

exploitation of natural resources;[32] export earnings; budget surpluses;[33] excess currency foreign reserves;[34] income from privatization;[35] and revenue from certain taxes.

Whatever the source of capital, the investment mandate of a sovereign wealth fund can be broadly classified into three long-term objectives. The succeeding investment objectives of the SWF demonstrate how this government financial institution is distinct and separate from a country's central bank, national treasury, budget or finance departments, and State-owned banks.[36] The latter public institutions focus on monetary policy setting; custody of government financial resources; fiscal policy determination; and saving and lending platforms for preferred sectors, respectively. In contrast, a sovereign wealth fund usually aspires for any, some, or all of the following:

First, an SWF achieves the intergenerational transfer of wealth. This is especially true when the capitalization of the sovereign wealth fund is derived from earnings from natural resources. A natural resource depletes over time; an SWF enables future generations to partake in the economic gains from the exploitation of natural wealth though the operation of the extractive industry has long ceased.[37]

Second, the sovereign wealth fund offsets uncertainty over government revenue.[38] For example, the revenue stream of a petroleum State is highly volatile as global oil prices are susceptible to short-term fluctuations. The sovereign wealth fund may act as a holding company for excess or sudden revenues of the government, where the returns from SWF investment are released only when State income from volatile sources thins or an economic crisis disrupts tax collection.

Third, an SWF may be utilized to pursue long-run macroeconomic stability. On one hand, the sovereign wealth fund—by serving as a depositary of financial surplus—can address problems arising from a surge of capital

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[32] Shai Bernstein et al., *The Investment Strategies of Sovereign Wealth Funds*, 27 J. ON ECON. PERSPECTIVES 219 (2013).

[33] *Id. at* 221.

[34] Action for Economic Reforms, *supra* note 10.

[35] Bernstein et al., *supra* note 32, at 221.

[36] Carmel Abao et al., *What's Wrong with the Maharlika Wealth Fund* 1 (Ateneo School of Government and School of Social Sciences, Ateneo Policy Brief, 2023).

[37] Bernstein et al., *supra* note 32, at 222–23.

[38] *Id.* at 222.

inflows, such as high inflation or unsustainable currency appreciation.[39] On the other hand, the promise of higher returns through the SWF can help the State find sustainable funding for industrialization and other long-term development policies.[40]

B. Senator Bam Aquino's Bill

Senate Bill No. 1212, s. 2016, authored by Senator Paolo Benigno "Bam" Aquino IV, is the first introduction of the sovereign wealth fund in Philippine legislative history. This Bill pushes for the creation of an independent corporation attached to the Office of the President, to be called the "Philippine Investment Fund Corporation" ("PIFC").[41]

The primary purpose of this sovereign wealth fund is savings accumulation for present and future generations.[42] Its declared economic goals include broad-based development[43] and stability of public finances.[44] For these objectives, the Bill empowers the PIFC to invest in global financial markets and foreign assets.[45] The initial funding shall be taken from the national budget,[46] with initial foreign currency requirements to be provided by the Bangko Sentral ng Pilipinas (BSP).[47]

Corporate decisions are made by a Board of Directors[48] composed of the Chairperson, Vice Chairperson, five representatives of the private sector, and two representatives of major domestic business or financial associations.[49] All members of the Board must be Filipinos possessing desirable moral traits and substantial experience, while the Chairperson must have a minimum 10-year record in corporate governance and a minimum eight-year experience as a high-level executive in an international financial institution.[50]

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[39] *Id.* at 222–23.
[40] Abao et al., *supra* note 36.
[41] S. No. 1212, 17th Cong., 1st Sess., § 4 (2016).
[42] § 6.
[43] § 2.
[44] §§ 5–6(a).
[45] § 11.
[46] § 8.
[47] § 9(a).
[48] §§ 15–16.
[49] § 17.
[50] § 18.

C. Senator JV Ejercito's Bill

Although the version of Senator Joseph Victor "JV" Ejercito, Senate Bill No. 1764, s. 2018 speaks of a single wealth fund, the proposal actually creates three separate funds with distinct investment mandates, to be jointly managed by the PIFC. These funds, as distinguished by their investment objectives, are: (1) the Philippine Sovereign Wealth Fund ("PSF"),[51] for intergenerational transfer of wealth;[52] (2) the National Future Development Fund ("NFDF"),[53] to support national education, health, and housing needs; develop key economic sectors; and build the capacity of growth-oriented public and private institutions,[54] as well as promote entrepreneurship, enhance development in the field of science and technology, assist in infrastructure development, and attract foreign investments;[55] and (3) the Philippine Economic and Social Stabilization Fund ("PESSF");[56] to mitigate macroeconomic instability caused by fluctuations in exports and commodity prices; threats to national security; natural calamities; and budget deficits.[57]

The Ejercito bill outlines diverse funding sources for the three funds. Just like the Aquino proposal, the seed fund for the PSF shall be taken from the national budget[58] while the foreign currency requirements shall come from the BSP.[59] Public funding for NFDF and PESSF will originate from a share in the annual budget, government surplus, privatization revenue, and public-sector earnings in commodity export.[60] The NFDF shall get a minimum 50% share in the tax windfall from mineral and petroleum.[61] Meanwhile, the PESSF is entitled to receive foreign donations for climate change and natural calamities.[62]

Senator Ejercito enumerates the conditions and restrictions for the withdrawal of the fund proceeds,[63] an aspect of fund management that is absent in the Aquino bill. It makes the Ejercito version more effective in

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[51] S. No. 1764, 17th Cong., 2nd Sess., § 5 (2018).
[52] § 4, ¶ 1.
[53] § 5(b).
[54] § 12, 4(d)–(f).
[55] § 12.
[56] S. No. 1764, 17th Cong., 2nd Sess., § 5(c) (2018).
[57] § 14.
[58] § 15(a).
[59] § 9(a).
[60] § 16(a)–(b).
[61] § 16(c).
[62] § 16(d).
[63] §§ 17–18.

reducing the exposure of the sovereign wealth fund to politically motivated or populist reasons to distribute proceeds.[64]

The Ejercito proposal mirrors the Aquino version in other aspects, particularly in the investment strategy[65] and the responsibilities and composition of the Board of Directors,[66] except the Ejercito bill modifies the qualifications for Chairperson of the Board: he or she must be a natural-born citizen, at least 55 years old, with 5 years, 10 years, and 15 years of experience in corporate governance; executive work in a global financial institution; and exposure to global financial markets, respectively.[67]

D. The Maharlika Fund

The Maharlika Investments Fund traces its genesis in House Bill No. 6398, s. 2022.[68] The proposal is authored by several district representatives and a party-list representative. The idea of setting up a sovereign wealth fund in an economy still reeling from a pandemic and a government saddled by a historic level of debt is controversial enough, but a greater focus of criticism has been directed at the start-up capital of the Maharlika Fund.

Section 9 of the House Bill states that initial capitalization shall be obtained as follows: 125 billion pesos from the GSIS, 50 billion pesos from the SSS, 75 billion pesos from Landbank and the Development Bank of the Philippines, and 25 billion pesos from the national government.[69]

The inclusion of social security funds in the starting capital has earned such intense scrutiny and public criticism that the resulting version of the proposal which the House of Representatives passed in third reading—House Bill No. 6608, s. 2023—removed the GSIS and SSS contributions.[70] The initial capital is obtained from contributions of government banks. The subsequent capital infusion is sourced from the dividends of the central bank, gross revenue shares from government gaming operators, royalties and

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[64] Bernstein et al., *supra* note 32, at 224–30.

[65] S. No. 1764, 17th Cong., 2nd Sess., § 10 (2018).

[66] §§ 23–24, 26, 28.

[67] § 24.

[68] H. No. 6398, 19th Cong., 1st Sess. (2022).

[69] § 9.

[70] Delon Porcalla, *House Drops SSS, GSIS Funds from Maharlika*, ONENEWS PH, Dec. 7, 2022, *at* https://www.onenews.ph/articles/house-drops-sss-gsis-funds-from-maharlika; Dwight de Leon, *After backlash, House leaders spare GSIS, SSS from Maharlika fund*, RAPPLER, Dec. 7, 2022 at https://www.rappler.com/nation/house-leaders-exclude-gsis-sss-from-maharlika-wealth-fund/.

other incomes from extractive industries and privatization, and borrowings by the sovereign wealth fund.[71] Section 11 of House Bill No. 6608 categorically bans government social security institutions from investing in the Maharlika Fund.[72]

The counterparts of House Bill No. 6608 in the upper chamber of Congress were filed by Senator Mark Villar and Senator Raffy Tulfo. Senate Bill No. 1670, s. 2023 and Senate Bill No. 1814, s. 2023 are rough mirror images of the House version.[80] The Bills were consolidated by the joint efforts of the Senate Committees on Banks, Financial Institutions, and Currencies, Government Corporations and Public Enterprises, Ways and Means, and Finance.[81] The Senate approved the consolidated proposal—Senate Bill No. 2020, s. 2023—on the third reading with 19 affirmative votes, and the House of Representatives opted to adopt the same to forestall a bicameral conference.[82]

Senate Bill No. 2020 mirrors its House version as far as the exclusion of the social security system in the Maharlika Fund is concerned. The following are also prohibited from contributing in the wealth fund as per the Senate proposal: the Philippine Health Insurance Corporation, the Home Development Mutual Fund; the Overseas Workers Welfare Administration; and the Philippine Veterans Affairs Office Pension Fund.[83]

The stated objective of the Maharlika Fund is socio-economic development[84] and the allowable domestic and foreign investments to meet this objective range from low-risk to high-risk.[85]

To manage the fund, a government corporation called the "Maharlika Investment Corporation" is created.[86] Its corporate board is composed of nine individuals, chaired by the Secretary of the Department

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[71] H. No. 6608, 19th Cong., 1st Sess., § 11, ¶¶ 1–6 (2022).

[72] § 11, ¶ 8.

[80] S. No. 1670, 19th Cong., 1st Sess. (2023); S. No. 1814, 19th Cong., 1st Sess. (2023).

[81] S. No. 2020, 19th Cong., 1st Sess. (2023).

[82] Beatrice Pinlac, *How did senators vote and eventually approve Maharlika bill?*, PHIL. DAILY INQUIRER, May 31, 2023, *at* https://newsinfo.inquirer.net/1777397/how-did-senators-vote-and-eventually-approve-maharlika-bill; *supra* note 6.

[83] S. No. 2020, 19th Cong., 1st Sess., § 6(2) (2023).

[84] § 13.

[85] S. No. 2020, 19th Cong., 1st Sess., § 14–15. *See also* VERA Files Factsheet: The Maharlika Investment Fund explained, VERA FILES, *at* https://verafiles.org/articles/vera-files-fact-sheet-the-maharlika-investment-fund-explained.

[86] S. No. 2020, 19th Cong., 1st Sess., § 4.

of Finance.[87] The other members of the Board of Directors are the Chief Executive Officer, the Presidents of government banks, two regular directors, and three independent directors.[88]

Senate Bill No. 2020 does not have a specific provision on the allocation of the net proceeds, though it can be inferred from the section dealing with the powers of the Board of Directors that the proceeds shall be distributed in the form of dividends, subject to Republic Act No. 7656.[89]

E. Comparisons and Contrasts

The overview of the various plans to establish a Philippine sovereign wealth fund easily identifies the main contrast between the Maharlika Investment Fund and the proposals that preceded it. The Maharlika Fund includes many liabilities in its funding sources. These include the funds from GSIS and SSS (now removed) and deposits from government banks. The other bills mostly source the financial capital of the sovereign wealth fund from either assets or income of the government. The Maharlika Fund appears to deviate from the usual norm that investible funds should be economic or fiscal surpluses.

Another key difference is the allowable investments. The investment strategy of earlier bills is outward-oriented. Investments are made in foreign or international financial instruments. This setup prevents the sovereign wealth fund from seriously distorting local market forces.[90] Meanwhile, the Maharlika Fund is authorized to make a wide array of domestic investments. The upside of this is that the investible funds of the Maharlika Investment Corporation can be tapped for national industrialization. The pitfall is that the Maharlika Fund may become a platform for unrestrained government intervention in the economy and a deterrent to fair competition in the national market.[91] Some sectors gain undue advantage relative to others because State resources are diverted to the former through investments in the sovereign wealth fund. Moreover, inefficiency at the macroeconomic

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[87] § 20.

[88] § 20.

[89] § 21(j).

[90] Tao Sun and Heiko Hesse, *Sovereign wealth funds and financial stability*, VOXEU, Mar. 30, 2009, *at* https://cepr.org/voxeu/columns/sovereign-wealth-funds-and-financial-stability.

[91] Philipp Hildebrand, *The challenge of sovereign wealth funds*, VOXEU, Jan. 21, 2008, *at* https://cepr.org/voxeu/columns/challenge-sovereign-wealth-funds.

level may also arise should investments be directed at uncompetitive but politically favored local industries.

The Senate version of the Maharlika Fund does not contain a separate article or provision concerning the allocation of its net proceeds, as opposed to past proposals for the sovereign wealth fund. The absence of clear withdrawal rules or conditionalities on the use of net earnings begs the question of how the Fund intends to achieve its objectives, whether short-term or long-term. The only discernible limitation on the distribution of net profits is the qualification in the power of the Board of Directors to declare dividends that such should be "subject to the provisions of R.A. No. 7656."[92] However, Republic Act No. 7656 merely says that at least 50% of the net earnings of any government-owned or -controlled corporation shall be remitted to the National Government as income of the General Fund of the National Treasury.[93] Part of economic literature on sovereign wealth funds underscores well-designed withdrawal rules as integral to effective fund management.[94]

On the aspect of corporate governance, the past proposals for the sovereign wealth fund do not include a Cabinet official in the lineup for the Board of Directors. In one House version of the Maharlika Fund, however, the President will be the Chairperson of the Maharlika Investment Corporation.[96] In the latest iteration, the Secretary of the Department of Finance will chair the Board of Directors. There is reasonable doubt whether the state corporation can operate at arm's length from political influence in this structure. As Chairperson, the Finance Secretary holds a major role in the Board; he or she has the power to call special meetings and the authority to preside over meetings of the Board.[97] The Finance Secretary, as a presidential appointee who sits in the Cabinet, is the alter ego of the President.[98] As such, though the Maharlika Investment Corporation has a

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[92] S. No. 2020, 19th Cong., 1st Sess., §§ 21(j), 32 (2023).

[93] Rep. Act No. 7656 (1993), § 3.

[94] John Lipsky, Speech delivered at the Sovereign Fund: Responsibility with Our Future seminar, Santiago, Chile (Sept. 3, 2008), *available at* https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp090308.

[96] Lance Spencer Yu, *Marcos to chair PH wealth fund corporation under bill approved by House panel,* RAPPLER, Dec. 1, 2022, *at* https://www.rappler.com/business/marcos-chair-philippine-sovereign-wealth-fund-corporation-house-panel-approves-bill/.

[97] S. No. 2020, 19th Cong., 1st Sess., § 25 (2023).

[98] Spouses Constantino v. Cuisia, G.R. No. 106064, 472 SCRA 505, 533, Oct. 13, 2005.

legal personality distinct from the national government,[99] the President can actually exert indirect ascendancy over the Board of Directors through the Chairperson.

III. THE ELEMENTS OF TAXATION IN JURISPRUDENCE

The discussion so far highlights the valid concerns against the propriety of a Philippine sovereign wealth fund on the practical and policy level. To the credit of its proponents, the deletion of the GSIS and SSS funds in the start-up capital of the Maharlika Fund makes its establishment somewhat less concerning to social pensioners. Suppose, however, that legislators decide to revive the original inclusion of GSIS and SSS contributions in the seed money of the sovereign wealth fund. We argue that such inclusion partakes in the nature of a tax.

A. *Meralco v. El Auditor General*

The 1987 Constitution does not define what a tax is. This is because taxation is an "incident of sovereignty" and "is coextensive with that to which it is an incident."[100] It does not require a constitutional or statutory meaning for as long as the State exists, so too does its power to tax.

Despite that, the Supreme Court on certain occasions has been compelled to assign a definition to the term to distinguish tax from other assessments of the government. One of the first attempts to define the word "tax" in our jurisdiction is *Meralco v. El Auditor General*[101] ("*Meralco*"), which is concerned with the true nature of the regulatory fees imposed by the Public Service Commission on the petitioner-corporation.

The petitioner-corporation in that case was granted a franchise to operate a public utility. The franchise provided that the corporation should pay certain taxes on property and a tax expressed as a percentage of its gross earnings. The franchise then stated that the franchise-holder would be exempt from all other taxes. Because of this, the petitioner paid regulatory fees under protest to the Public Service Commission. The former then

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[99] The Maharlika Investment Corporation has a distinct legal personality as a government-owned or -controlled corporation (GOCC) with functions relating to public needs. *See* ADM. CODE (1987), Introductory Provisions, § 2(13).

[100] Commissioner of Internal Revenue (CIR) v. Solidbank Corp., G.R. No. 148191, 416 SCRA 436, 457, Nov. 25, 2003.

[101] [Hereinafter "*Meralco*"], 73 Phil. 128 (1941).

questioned the assessments, arguing before the Supreme Court that these fees were, in fact, taxes.[102]

In contrasting between *derechos* and *impuestos*, the Supreme Court ruled that *derechos* or "inspection fees" have regulation as the primary purpose, while *impuestos* or taxes are for revenue generation.[103] The exemption on the payment of taxes does not include the exemption to pay regulatory fees. As such, the Public Service Commission does not violate the terms and conditions of the franchise granted to the petitioner-corporation when the latter is required to pay "derechos."

This Court decision is notable for defining a tax. It is a "rate or sum of money assessed on the person or property of a citizen by the government for the use of the nation or state; burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes."[104] In this article, we will call this the "narrow" definition of a tax.

The above jurisprudential definition is consistent with the meaning of "tax" in contemporary English dictionaries, namely, "a charge usually of money imposed by authority on persons or property for public purposes"[105] and money that one has to "pay to the government so that it can pay for public services."[106] Thus, the "narrow" definition in *Meralco* and the modern ordinary meaning of the "tax" underline a continuity in hinting at three essential requisites of a tax: (1) it is a forced pecuniary contribution; (2) the government levies it; and (3) it is intended for public purpose.

The mandatory aspect of a tax stems from necessity. "Taxes are the lifeblood of the government, for without taxes, the government can neither exist nor endure."[107] In short, the so-called "lifeblood theory" justifies tax as an enforced contribution.

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[102] *Id.* at 130–32.

[103] *Id.* at 132–36.

[104] *Id.* at 133.

[105] *Tax*, MERRIAM WEBSTER, *at* https://www.merriam-webster.com/dictionary/tax (last accessed March 21, 2023).

[106] *Tax*, OXFORD LEARNER'S DICTIONARIES, *at* https://www.oxfordlearnersdictionaries.com/us/definition/english/tax_1#:~:text=%E2%80%8Bmoney%20that%20you%20have,paid%20on%20goods%20and%20services (last accessed Mar. 21, 2023).

[107] Nat'l Power Corp. (NAPOCOR) v. City of Cabanatuan, G.R. No. 149110, 401 SCRA 259, 269, Apr. 9, 2003.

In turn, to describe tax as an imposition from the government is an affirmation of the principle that of all the inherent powers of the State, "[n]o attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under"[108] the government.

Finally, the public purpose criterion separates taxation from mere "robbery for the State."[109]

B. *Republic v. COCOFED*

The Court in *Meralco* also says a tax is "an enforced contribution of money or other property assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state, on persons or property within its jurisdiction, for the purpose of defraying the public expenses."[110]

This definition is more expansive as it adds one more to the three elements just mentioned. A mandatory contribution, to be a tax, must also be "assessed in accordance with some reasonable rule of apportionment." Moreover, this "broad" definition later finds a restatement in *Republic v. COCOFED*[111] (*"COCOFED"*), where the Supreme Court also identifies three elements in determining whether the so-called "coco levy funds" are tax collections in nature.

During the martial law regime, President Ferdinand E. Marcos Sr. created the Coconut Consumer Stabilization Fund, colloquially known as "coco levy funds." The funds were used to purchase shares in the United Coconut Planters Bank (UCPB). After Marcos Sr. was ousted during the 1986 People Power Revolution, the new government of President Corazon Aquino constituted the Philippine Commission on Good Government (PCGG) to go after the ill-gotten wealth of the Marcoses and their cronies. This led to the sequestration of the UCPB shares bought with coco levy funds.[112]

A question was raised before the Supreme Court as to whether the government or the registered stockholders of the sequestered shares were

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[108] Churchill v. Concepcion, 34 Phil. 969, 974–75 (1916).

[109] Planters Products, Inc. v. Fertiphil Corp. [hereinafter *"Planters Products, Inc."*], 572 Phil. 270, 295 (2008).

[110] *Meralco*, 73 Phil. at 133.

[111] [Hereinafter *"COCOFED"*], G.R. No. 147062, 372 SCRA 462, Dec. 14, 2001.

[112] *Id.* at 467–71.

entitled to vote in the stockholders' meeting of UCPB. The Court used the opportunity to categorically declare the coco levy funds as taxes. Since the sequestered shares are purchased with public funds, the high tribunal declared that the government is entitled to exercise the right to vote in the stockholders' meeting.[113]

In addressing the legal issue, then Justice (later, Chief Justice) Panganiban writes for the majority of the Supreme Court *en banc* that:

> Indeed, coconut levy funds partake of the nature of taxes which, in general, are enforced proportional contributions from persons and properties, exacted by the State by virtue of its sovereignty for the support of government and for all public needs. *Based on this definition, a tax has three elements, namely: a) it is an enforced proportional contribution from persons and properties; b) it is imposed by the State by virtue of its sovereignty; and c) it is levied for the support of the government.*[114]

Using the tripartite criteria that it had just established, the majority of the Court concluded that the collection of coco levy funds is an act of taxation. First, the coco levy funds were imposed under threat of criminal liability. Second, the contributions were sanctioned by the decrees of President Marcos Sr. in his exercise of legislative powers. Third, the coco levy funds were for the protection of the coconut industry, which the Court deemed an important economic sector impressed with public interest.[115]

The *COCOFED* test is thereafter repeated in other decisions of the Court, to name a few: *COCOFED v. Republic*;[116] *Cojuangco v. Republic*;[117] and *Mandanas v. Ochoa.*[118]

We propose some qualifications for each of the elements of *COCOFED*'s three-criteria test.

The first element of "enforced proportional contribution" is actually composed of two criteria: (1) that a tax is "enforced" or obligatory, and (2) that the tax must be a "proportional" contribution. This mirrors the "broad" definition of tax in *Meralco*.

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[113] *Id.* at 472–82.
[114] *Id.* at 482. (Emphasis supplied.)
[115] *Id.* at 482–84.
[116] COCOFED v. Republic, G.R. No. 177857, 663 SCRA 514, Jan. 24, 2012.
[117] Cojuangco v. Republic, G.R. No. 180705, 686 SCRA 472, Nov. 27, 2012.
[118] Mandanas v. Ochoa, G.R. No. 199802, 869 SCRA 440, July 3, 2018.

Nonetheless, in the application of the first element in *COCOFED*, Chief Justice Panganiban classified coco levy funds as "enforced proportional contribution" because non-payment is met with penal sanctions. Despite the inclusion of "proportional" in phrasing the first element, Chief Justice Panganiban did not give this adjective any legal significance and he focused more on the "enforced" aspect.[119]

To state the matter differently, the first element as applied in *COCOFED* is in keeping with the "narrow" definition of tax in *Meralco* which does not include the "reasonable rule of apportionment" part. The "proportional" part in Chief Justice Panganiban's formulation may be dropped.

Furthermore, we raise reservations over making proportionality a legal parameter of taxation. A definition of tax must capture its barest and most essential aspects to give the courts justiciable standards. It is a different concern to list down the ways in which taxation should ideally be. The latter is a matter of wisdom and efficiency, not legality. The requirement for proportionality or the so-termed "reasonable rule of apportionment" in early jurisprudence looks like a prescriptive feature of sound taxation—no different from the equality principle of later case law, or the precept that as much as possible, everyone should contribute to public coffers[120]—and not a strict description of what taxes truly are. In fact, the Supreme Court in the past has ruled that a tax may be regressive or it may not be based on a person's ability to pay, but such tax is still constitutional and permissible.[121]

Next, the second element—"imposed by the State by virtue of its sovereignty"—seems to be satisfied by reference to legislation. This criterion is a reiteration of the rule of constitutional law that "the State's inherent power to tax is vested exclusively in the Legislature."[122] The case of coco levy funds is unique as a presidential issuance was invoked. Context matters, and with regard to coco levy funds, the President at that time exercised legislative powers.

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[119] *COCOFED*, 663 SCRA 462, 482–83, 488.

[120] Saint Wealth, Ltd. v. Bureau of Internal Revenue, G.R. No. 252965, Dec. 7, 2021.

[121] British American Tobacco v. Camacho, G.R. No. 163583, 585 SCRA 36, 50–52, Apr. 15, 2009.

[122] Purisima v. Lazatin, G.R. No. 210588, 811 SCRA 205, 237, Nov. 29, 2016.

Under the present constitutional order, the imposition of tax should be by statute as a general rule. The 1987 Constitution vests legislative power with Congress.[123] By way of an exception, local government units ("LGUs") can create new categories of taxes as the fundamental law authorizes LGUs to wield limited taxing powers.[124]

A final observation is with the third element of tax pertaining to "the support of the government." Chief Justice Panganiban appears to believe that this is substantially met when the objective of the contribution is public interest or public purpose, broadly understood.[125] He does not adopt a restrictive view that tax revenue should go to government operations only. Instructive at this juncture is the more liberal understanding of the "public purpose" threshold in case law:

> The term "public purpose" is not defined. It is an elastic concept that can be hammered to fit modern standards. Jurisprudence states that "public purpose" should be given a broad interpretation. It does not only pertain to those purposes which are traditionally viewed as essentially government functions, such as building roads and delivery of basic services, but *also includes those purposes designed to promote social justice*. Thus, public money may now be used for the relocation of illegal settlers, low-cost housing and urban or agrarian reform.[126]

C. *Commissioner of Internal Revenue v. Central Luzon Drug*

A third jurisprudential definition of tax is worth noting. In *Commissioner of Internal Revenue v. Central Luzon Drug*[127] ("*Central Luzon Drug*"), then Justice (later, Chief Justice) Artemio Panganiban, speaking for the Supreme Court, said that "[t]ax measures are but enforced contributions exacted *on pain of penal sanctions*."[128] The implication is that a tax is a mandatory levy whose evasion should be meted with criminal liability. Conversely, Central Luzon Drug seems to have an unintended suggestion that a government-dictated assessment whose non-payment is not punished as a crime is not a tax.

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[123] CONST. art. VI, § 1.

[124] Art. X, § 5.

[125] *COCOFED*, 372 SCRA 462, 484.

[126] *Planters Products, Inc.*, 572 Phil. 270, 296. (Emphasis supplied.)

[127] [Hereinafter "*Central Luzon Drug*"], G.R. No. 159647, 456 SCRA 414, Apr. 15, 2005.

[128] *Id.* at 445. (Emphasis supplied.)

Perhaps a better view is that criminal liability is simply the extension of the obligatory nature of taxation. Criminal prosecution deters tax evasion. It is not, however, essential in classifying a State-sanctioned payment as tax. The mandatory nature of taxation may also be satisfied, for example, if the tax statute authorizes the forfeiture of property of the tax evader so that the proceeds in an auction sale of the confiscated property are used to cover the tax liability of the errant taxpayer.[129]

D. Restatement of the Three-Criteria Test

Locating which of the three rulings provides the best snapshot of the legal nature of tax is critical as a jurisprudential definition is sometimes used by the Supreme Court in formulating justiciable standards. This is exactly what the Supreme Court demonstrates in *COCOFED*.

> We are of the opinion, however, that the best meaning of tax is given in the "narrow" definition in *Meralco*. The three elements suggested in *COCOFED* necessitate a restatement so that: (1) the first element better reflects the "narrow" definition in *Meralco*, which we believe is the best description of the essence of taxation; (2) the second element underscores the legislative origin of taxation; and (3) the third element mirrors the "elastic" concept of public purpose.

Hence, this paper contends that a government exaction is a tax when it is: (1) a forced contribution from persons and properties; (2) levied by the government in the exercise of legislative power; and (3) to raise revenue for a public purpose. The GSIS-SSS seed money in the Maharlika Investment Fund as envisioned by House Bill No. 6398, s. 2022 meets all three requirements.

First, there is a mandatory contribution of persons. House Bill No. 6398 says that GSIS and SSS "shall invest"[130] in the starting capital of the Maharlika Investment Corporation. The term "shall" in the House Bill denotes the obligatory character of the investment. Optional compliance is not granted to the GSIS and SSS corporate boards. Case law teaches us that "shall" assigns a "command," "compulsory" or "imperative" nature on a statutory provision.[131]

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[129] *See* Churchill v. Concepcion, 34 Phil. 969, 975 (1916).

[130] H. No. 6398, 19th Cong., 1st Sess., § 9, ¶ 1 (2022).

[131] Enriquez v. Enriquez, 505 Phil. 193–201 (2005).

Although the House Bill considers GSIS and SSS as founding investors,[132] case law uniformly holds that the real owners of the social insurance funds are their member-contributors.[133]

In *Roman Catholic Archbishop of Manila v. Social Security Commission*[134] ("*Archbishop of Manila*"), the office of the Archbishop of Manila claimed that the religious and charitable organizations which the former operated should be excluded from the coverage of the Social Security Law of 1954. Among other reasons, the office of the Archbishop alleged that the mandatory social security coverage on Church-run institutions would lead to a situation where public funds in the form of social security contributions would be used for the benefit or support of a priest employed by the archdiocese—a supposed violation of a constitutional prohibition.[135]

The Supreme Court instead says that social security contributions are funds "belonging to the members which are merely held in trust by the Government."[136] To put it succinctly, social insurance funds remain private money.

In *United Christian Missionary Society v. Social Security Commission*[137] ("*United Christian Missionary*"), the Social Security Commission imposed penalties on certain religious groups that failed to provide social security coverage for the American missionaries these Christian groups hired to perform religious work in the Philippines. The Christian organizations filed a petition for condonation before the Commission, which the latter denied by saying that it was not authorized by law to condone penalties.[138]

The Supreme Court agreed with the Commission, opining that the government as "mere trustee of the funds of the [Social Security] System *which actually belong to the members*" cannot perform acts like condonation of

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[132] H. No. 6398, 19th Cong., 1st Sess., § 3(c) (2022).

[133] Jairo Bolledo, *Laws, SC rulings that say SSS, GSIS funds are private*, RAPPLER, Dec. 7, 2022, *at* https://www.rappler.com/nation/laws-supreme-court-rulings-sss-gsis-funds-private/.

[134] Roman Cath. Archbishop of Manila v. Social Security Commission (SSC) [hereinafter "*Archbishop of Manila*"], 1 SCRA 10, Jan. 20, 1961.

[135] CONST. (1935), art. VI, § 13(3).

[136] *Archbishop of Manila*, 1 SCRA at 15–16.

[137] [Hereinafter "*United Christian Missionary*"], G.R. No. 26712, 30 SCRA 982, Dec. 27, 1969.

[138] *Id.* at 984–86.

penalties if these acts impair the property rights of the members and beneficiaries of the social insurance system.[139]

In *Social Security System v. Commission on Audit*[140] ("*SSS*"), the Commission on Audit disallowed a contract signing bonus granted to SSS officials and employees. The Supreme Court affirmed the Commission and concluded that the bonus is not reasonable compensation. The Court noted that social insurance funds are "workers' property" from which any diminution should be strictly scrutinized "in the interest of enhancing the welfare of *their true and ultimate beneficiaries*."[141]

The judicial pronouncement in *Archbishop in Manila*, *United Christian Missionary*, and *SSS* should apply to GSIS funds with the equal force since both SSS and GSIS are social security institutions entrusted with the contributions of their members.[142] The only substantial difference between the two is the nature of employment of their respective member-contributors.

It follows that when House Bill No. 6398 compels SSS and GSIS to invest in the sovereign wealth fund, in effect the SSS and GSIS members—the true owners of the social security funds according to jurisprudence—make involuntary or coerced contributions to the starting capital of the Maharlika Fund. The coercive and obligatory character of the contribution is reinforced by the absence of any provision in the legislative proposal outlining remedies for a member-contributor of GSIS or SSS to contest the allocation of his or her own money to the SWF.

The provision that legal ownership is retained by the investors according to their equity participation provides no comfort.[143] "Ownership is nothing without the inherent rights of possession, control, and enjoyment."[144] In the proposed sovereign wealth fund, the Maharlika Investment Corporation through the Board of Directors exercises control and *de jure* possession over the start-up capital because the Board itself

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[139] *Id.* at 988. (Emphasis supplied.)

[140] [Hereinafter "*SSS*"], G.R. No. 149240, 384 SCRA 548, July 11, 2002.

[141] *Id.* at 549–50. (Emphasis supplied.)

[142] Antonio T. Carpio, *On the Maharlika Wealth Fund*, RAPPLER, Dec. 7, 2022, at https://www.rappler.com/voices/thought-leaders/analysis-maharlika-wealth-fund/.

[143] H. No. 6398, 19th Cong., 1st Sess., § 5 (2022).

[144] Municipality of La Carlota v. Nat'l Waterworks and Sewerage Auth., G.R. No. 20232, 12 SCRA 164, 167, Sept. 30, 1964.

approves the investment guidelines for the use of the funds.[145] In the first House Bill, the Board can also decide how to distribute net profits and by how much.[146] The final House version does not fare any better. The net profits are distributed as cash assistance to indigent families and the remainder reverts to the government. Assuming that the starting capitalization from GSIS and SSS is revived, neither the original nor the revised concept of the Maharlika Investment Fund permits the GSIS and SSS members to fully, exclusively, and absolutely enjoy the fruits of their social security contributions.

Second, any enforced contribution from GSIS and SSS funds is a levy of the government in the exercise of legislative authority. The House proposal for the Maharlika Fund drops the capital infusion from social security institutions[147] while the Senate version explicitly precludes the use of GSIS and SSS funds.[148] All these do not forestall a future amendment to revive the GSIS-SSS capitalization in the charter of the Maharlika Investment Fund. Such amendatory act is simply an exercise of the plenary power of Congress to legislate. Should a future Congress decide to revise the Maharlika Fund charter and mandate GSIS and SSS to contribute to the seed capital of the Maharlika Fund, we contend that this should be deemed a legislative exaction.

Third, the public purpose criterion is met. There is no question that the "promotion of economic growth and social development"[149]—the avowed intent behind the sovereign wealth fund—is a public purpose. Prosperity and freedom from poverty are expressly declared by the Constitution as State policies.[150] The sovereign wealth fund pools various funding sources to have investible capital for its declared social and economic objectives.

IV. UNCONSTITUTIONALITY OF CONFISCATORY TAXES

A. Due Process Limits the Power of Taxation

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[145] H. No. 6398, 19th Cong., 1st Sess., §§ 11–13, 16 (2022).

[146] § 29.

[147] Delon Porcalla, *House Drops SSS, GSIS Funds from Maharlika,* ONENEWS PH, Dec. 7, 2022, *at* https://www.onenews.ph/articles/house-drops-sss-gsis-funds-from-maharlika.

[148] S. No. 2020, 19th Cong., 1st Sess., § 6(2) (2023).

[149] H. No. 6398, 19th Cong., 1st Sess., § 2 (2022).

[150] CONST. art. II, § 9.

The old view on taxation is that its exercise is the "highest attribute of sovereignty"[151] and the only boundaries of taxation are provided by the legislature. In other words, the government merely practices self-limitation in the exercise of its taxing power.[152] Congress is said to have plenary and unlimited discretion on the kind, purpose, rate, coverage, and situs of taxation.[153]

Eventually, jurisprudence acknowledges that the Constitution provides standards that constrain the State's taxing authority. One such limitation is due process.

The Bill of Rights begins with the declaration that "[n]o person shall be deprived of life, liberty, or property without due process of law[.]"[154] The often-invoked "due process clause" is usually understood as a reference to the proper implementation of the law. Due process entitles a person to the opportunity to be heard before the government condemns.[155] Simply, due process means notice and hearing.

To complete the protection of due process, the concept reaches the content or the substance of the law. Thus, a statute or ordinance must be enacted for a reasonable purpose and it should not be unduly oppressive on individuals.[156] As such, the law must also satisfy the demands of *substantive* due process.

Sison v. Ancheta[157] ("*Sison*") is a seminal Supreme Court ruling because it explicitly states that a tax law may be invalidated on due process grounds. This case stemmed from an amendment in the National Internal Revenue Code that imposed a higher tax rate on the net income of professionals and businesspeople and a lower tax rate on the gross income of salaried workers and fixed-income earners. The petitioner-taxpayer filed a petition for

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[151] Asiatic Petroleum Co. v. Llanes, 49 Phil. 466, 472 (1926).

[152] Tio v. Videogram Regulatory Board, G.R. No. 75697, 151 SCRA 208, 215, June 18, 1987.

[153] Chamber of Real Est. & Builders' Assoc'n, Inc. (CREBA) v. Romulo [hereinafter "*CREBA*"], G.R. No. 160756, 614 SCRA 605, 607, Mar. 9, 2010.

[154] CONST. art. III, § 1.

[155] Off. of the Ombudsman v. Conti, G.R. No. 221296, 818 SCRA 528, 539, Feb. 22, 2017.

[156] Ynot v. Intermediate App. Ct., G.R. No. 74457, 148 SCRA 659, 671, Mar. 20, 1987.

[157] [Hereinafter "*Sison*"], G.R. No. 59431, 130 SCRA 654, July 25, 1984.

declaratory relief to render the said amendment unconstitutional for being arbitrary, capricious, and oppressive.[158]

The Supreme Court upheld the constitutionality of the amendment to the tax code. The Court stated that the lower tax rate on the gross income of salaried individuals is due to the absence of overhead expenses in the practice of their profession. In contrast, the higher tax rates on the net income of the self-employed and persons engaged in business are tempered by allowable deductions.[159] There is nothing arbitrary in the said classification. As one concurring Justice added:

> While the tax rates for compensation income are lower than those for net income such circumstance does not necessarily result in lower tax payments for those receiving compensation income. In fact, the reverse will most likely be the case; those who file returns on the basis of net income will pay less taxes because they can claim all sorts of deductions justified or not.[160]

The petitioner claimed a violation of due process and equal protection in his suit. The Court responded:

> It is undoubted that the due process clause may be invoked where a taxing statute is so arbitrary that it finds no support in the Constitution. *An obvious example is where it can be shown to amount to the confiscation of property.* That would be a clear abuse of power. It then becomes the duty of this Court to say that such an arbitrary act amounted to the exercise of an authority not conferred. [...] It has also been held that where the assailed tax measure is beyond the jurisdiction of the state, or is not for a public purpose, or, in case of a retroactive statute is so harsh and unreasonable, it is subject to attack on due process grounds.[161]

Sison is significant for it holds arbitrary revenue measures as offensive to due process. The decision is equally important for hinting at what constitutes arbitrary taxation, namely, *when the law amounts to confiscation of property*; when the tax is outside the jurisdiction of the taxing authority; when the revenue is not intended for a public purpose; and when a retroactive application is harsh to the subjects of tax.

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[158] *Id.* at 657–58.
[159] *Id.* at 664–65.
[160] *Id.* at 665 (Abad Santos, *J.*, *concurring*).
[161] *Id.* at 661–62. (Emphasis supplied.)

Confiscation or taking of property per se is not unconstitutional. In fact, confiscation is inherent in expropriation or condemnation. However, when the State exercises its power of eminent domain, the taking of property is accompanied by the payment of just compensation.[162] Just compensation is intended to make whole the property owner for the loss of his or her private property.[163] There is no such requirement in the exercise of the State of its taxing powers.

Uncompensated taking may become valid when the government exercises police power over noxious property. In this situation, the confiscated property is illegal per se, a contraband, or a nuisance. The purpose of taking property in the exercise of police power is to put the property outside the commerce of men in the name of "public health, the public morals, the public safety, and the general welfare and prosperity" of the people.[164] To put it succinctly, the intent behind confiscation under police power is the destruction of harmful or unlawful property.[165]

In view of the above, so-called confiscatory taxes violate due process because a person is deprived of property but the taking does not promise just compensation (as in expropriation) and the object taken is not noxious property that necessitates destruction (as in the exercise of police power). What transpires is a coercive and uncompensated transfer of dominion over property from individual to State. This manner of confiscation through taxation is oppressive or capricious on the part of private persons and, hence, violative of due process principles.

B. A Tax on Capital is Unconstitutional Taking

Domestic case law does not shy away from the opportunity to declare a tax on capital unconstitutional. Capital is distinguished from income in two ways. The first distinction is based on measurement. Capital is a stock indicator; income, a flow measure. Capital is the level or amount of wealth at a given time while income is the stream of wealth within a specified duration or timeframe.[166] The second distinction is based on the role of the term in economic activity. Thus, capital is the fund or property exploited or invested for gain. In contrast, income is either the service of

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[162] CONST. art. III, § 9.

[163] Republic v. Spouses Bunsay, G.R. No. 205473, 927 SCRA 415, 430, Dec. 10, 2019.

[164] U.S. v. Gomez Jesus, 31 Phil. 218, 226 (1915).

[165] City of Manila v. Laguio, G.R. No. 118127, 455 SCRA 308, 343, Apr. 12, 2005.

[166] *CREBA*, 614 SCRA 605, 627.

capital[167] or the various names for the gains from such service, embracing payments, interests, and profits.[168] In a more poetic fashion, the eminent constitutionalist and jurist George A. Malcolm adopted foreign case law to define capital as the "tree" and income as the "fruits" of the tree.[169] Since jurisprudence simply says a tax on capital is a nullity because "capital is not income,"[170] further discussion is needed to elaborate on the unconstitutionality of taxes on capital.

Property rights refer to the attributes of ownership which the owner may exercise. This universe of rights under classical Roman Law is as follows: the right to possess (*jus possidendi*); the right to use and enjoy (*jus utendi*); the right to the fruits (*jus fruendi*); the right to accessories (*jus accessionis*); the right to consume the thing by its use (*jus abutendi*); the right to dispose or alienate (*jus disponendi*); and the right to vindicate or recover (*jus vindicandi*).[171]

Taxes in general should not drive the taxpayer into bankruptcy or insolvency.[172] Excessive or disproportionate income taxes are unconstitutional due to the serious impairment of an inherent and essential dominical right—the *jus fruendi* or the right to fruits—that amounts to confiscation. The Supreme Court declared:

> If local legislature was so extreme as to make it plain to the judicial mind that the power had been exercised for the *sole purpose of destroying rights* which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Philippine Government rests, *then it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of the power, but was the exercise of an authority not conferred.*[173]

If income taxes destructive of property rights are held as arbitrary, and, for that matter, unconstitutional exactions, a tax on capital is void by necessary implication. In the latter situation, deprivation is no longer limited to the exercise of dominion but now involves the very property from which

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[167] Madrigal v. Rafferty [hereinafter "*Madrigal*"], 38 Phil. 414, 418 (1918).

[168] CIR v. Fed'n of Golf Clubs of the Phils., G.R. No. 226449, 945 SCRA 382, 393, July 28, 2020.

[169] *Madrigal*, 38 Phil. at 418–19.

[170] *CREBA*, 614 SCRA at 628.

[171] Heirs of Cullado v. Gutierrez, G.R. No. 212938, 911 SCRA 557, 571, July 30, 2019.

[172] NAPOCOR v. Cabanatuan, G.R. No. 177332, 737 SCRA 305, 327, Oct. 1, 2014.

[173] *See* Churchill v. Concepcion, 34 Phil. 969, 976 (1916).

the dominical rights attach. A tax on capital, to use the phraseology in the earlier discussion, is equivalent to confiscation without due process.

We have previously made an argument that the GSIS-SSS seed fund to the Maharlika Investment Corporation is a form of tax. Is this a tax on capital? In our view, it is. Previous cases decided by the Supreme Court lead us to this belief.

Association of Non-Profit Clubs v. Bureau of Internal Revenue[174] ("*ANPC*") clarifies the income tax liability of recreational clubs. The Bureau of International Revenue (BIR) issued a Revenue Memorandum Circular that subjected all collections of recreational clubs to income tax and value-added tax because an amendment to the National Internal Revenue Code ("NIRC" or "Tax Code") deleted recreational clubs from the list of exempt entities. The petitioner-organization questioned the classification of membership fees, assessment dues, and the like as income subject to tax, to which the Supreme Court agreed.[175]

The Court focused on the nature of the monetary collections. In the case of membership fees, dues, and payments of similar nature, the Court mentioned that all these are incidental to club membership and are collected exclusively for the maintenance and operations of the clubs. In contrast, money received by the clubs through income-generating facilities and activities is "unencumbered fruits" that the clubs are free to use "for whatever purpose." The former is capital and a tax on it is unconstitutional; the latter is income properly subject to tax.[176]

The same reasoning arguably applies to the funds collected by GSIS and SSS. The current statute governing the GSIS provides:

> SECTION 34. Funds. — All contributions payable under Section 5 of this Act together with the earnings and accruals thereon shall constitute the GSIS Social Insurance Fund. The said Fund shall be used to finance the benefits administered by the GSIS under this Act. In addition, the GSIS shall administer the optional insurance fund for the insurance coverage described in Section 26 hereof, the employees' Compensation Insurance Fund created under P.D. 626, as amended, the General Insurance Fund created under Act No. 656, as amended, and such other special funds

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[174] [Hereinafter "*ANPC*"], G.R. No. 228539, 906 SCRA 331, June 26, 2019.
[175] *Id.* at 337–41.
[176] *Id.* at 348–50.

existing or that may be created for special groups or persons rendering services to the government. The GSIS shall maintain the required reserves to guarantee the fulfillment of its obligations under this Act.

The funds of the GSIS shall not be used for purposes other than what are provided for under this Act. Moreover, no portion of the funds of the GSIS or income thereof shall accrue to the General Fund of the national government and its political subdivisions, instrumentalities and other agencies including government-owned and controlled corporations except as may be allowed under this Act.[177]

The counterpart provisions of the SSS law are as follows:

SEC. 25. Deposit and Disbursements. – *All money paid to or collected by the SSS every year under this Act, and all accruals thereto, shall be deposited, administered and disbursed in the same manner and under the same conditions and requirements as provided by law for other public special funds*: Provided, That not more than twelve percent (12%) of the total yearly contributions plus three percent (3%) of other revenues shall be disbursed for administrative and operational expenses such as salaries and wages, supplies and materials, depreciation, and the maintenance of offices of the SSS: Provided, further, That if the expenses in any year are less than the maximum amount permissible, the difference shall not be availed of as additional expenses in the following years.

SEC. 26. Investment of Reserve Funds. – All revenues of the SSS that are not needed to meet the current administrative and operational expenses incidental to the carrying out of this Act shall be accumulated in a fund to be known as the "Reserve Fund". Such portions of the Reserve Fund as are not needed to meet the current benefit obligations thereof shall be known as the "Investment Reserve Fund" which the Commission shall manage and invest with the skill, care, prudence and diligence necessary to earn an annual income not less than the average rates of treasury bills or any other acceptable market yield indicator in any or in all of the following undertaking, under such rules and regulations as may be prescribed by the Commission: Provided, That investments shall satisfy the requirements of liquidity, safety/security and yield in order to ensure the actuarial solvency of the funds of the SSS:

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[177] Pres. Dec. No. 1146 (1977), as amended by Rep. Act No. 8291 (1997), § 34.

> *No portion of the Investment Reserve Fund or income thereof shall accrue to the general fund of the National Government or to any of its agencies or instrumentalities, including government-owned or controlled corporations,* except as may be allowed under this Act[.][178]

These legal provisions emphasize that the collections of the GSIS and SSS are exclusively devoted to social security. They do not represent gain or profit of GSIS and SSS from any investment or commercial enterprise. The members of GSIS and SSS also contribute to the system without expectation of profit or yield. The contributions are remitted to GSIS and SSS only for the above-stated statutory purposes, with the implied intent of prolonging the actuarial life of the social security system. The GSIS and SSS funds are capital and not subject to tax.

Another interesting case is *BIR v. First E-Bank Tower Condominium Corp.*[179] ("*First E-Bank Tower*"). This time, the legal controversy was whether membership fees, assessment dues, and other charges imposed by a condominium corporation on its members and tenants should be subject to income tax, value-added tax, and withholding tax. On the income tax question, the Supreme Court applied *ANPC* to rule that collections by condominium corporations are capital and not subject to income tax.

But here, *the Court extensively discussed the nature of the entity collecting the fees.* A condominium corporation is a non-profit juridical person created to hold the legal title over the common areas of the condominium building on behalf of the unit owners and tenants for purposes of governance and management. The collections of a condominium corporation are necessary to maintain, improve, and properly administer the common areas of the building. The fees, dues, and charges by the corporation are not income subject to tax but are "the incidental consequence of a condominium corporation's responsibility to effectively oversee, maintain, or even improve the common areas of the condominium as well as its governance."[180]

As discussed in a previous section of this paper, the true owners of the SSS and GSIS funds are the contributors. The corporate bodies managing the funds are merely acting as trustees on behalf of the members of the systems. The remittances by the SSS and GSIS corporations are not

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[178] Rep. Act No. 11199 (2019), §§ 25–26.

[179] [Hereinafter "*First E-Bank Tower*"], G.R. No. 215801, 927 SCRA 577, Jan. 15, 2020.

[180] *Id.* at 618–23, 627.

acts of revenue generation but the exercise of the fiduciary responsibility of the State to safeguard the solvency of social security institutions. Viewed in this light, GSIS and SSS collections are capital not subject to tax.

Furthermore, the latest Supreme Court pronouncement also gives credence to the idea that regularity of receipt of money does not convert capital into taxable income. This is the implication of *Commissioner of Internal Revenue* ("CIR") *v. Shinko Electric Industries, Co., Ltd.*[181] ("*Shinko*"). In this case, the respondent was a representative office in the Philippines whose parent company was based in Japan. The representative office received regular remittances from the parent company for the former's operations. The BIR imposed deficiency income tax on these remittances, which was reversed by the Court of Tax Appeals and affirmed by the Supreme Court.[182]

The Supreme Court repeated jurisprudence on the difference between income and capital in *Shinko*.[183] However, the Court emphasized the aspect of gains or fruits from labor as a critical factor in determining whether money regularly received by an entity—as in the situation of remittances of the parent company to the respondent-representative office—should be treated as capital or income. The Court explained:

> In the case of Shinko, the amounts considered by the CIR as Shinko's income actually came from the subsidies remitted by its head office abroad, for Shinko's operations in the Philippines. Certainly, these remittances cannot be considered as income because they are not payment for the services rendered by Shinko. They cannot be regarded as a gain realized by Shinko or a flow of fruits from Shinko's labor. At the very least, *the remittances Shinko received as subsidy from its parent company can only be regarded as capital which is intended for the continued operation of a representative office in the Philippines, and from which no income tax may be collected or imposed.*[184]

The same observation operates for GSIS and SSS collections from their respective members. Although the monthly contributions suggest that GSIS and SSS receive payments on a habitual basis, this pattern of regularity does not convert the funds into income susceptible to taxation. The better

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[181] [Hereinafter "*Shinko*"], G.R. No. 226287, July 6, 2021.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 11. (Emphasis supplied.) This pinpoint citation refers to the copy of this decision uploaded to the Supreme Court Website.

characterization of the monthly payments is capital infusion to keep the GSIS and SSS afloat.

Thus, we can approach the unconstitutionality of the proposed GSIS and SSS remittances to the Maharlika Investment Fund in two ways. First, empirically speaking, there is undue deprivation of property in the proposal as GSIS and SSS seed funding reduces the pension life of GSIS and SSS but the member-contributors have no veto power over the matter. This is tantamount to "confiscation by legislative enactment" which is contrary to due process.[185] Second, applying the understanding that GSIS and SSS funds are in fact capital, the original intention of House Bill No. 6398 to contribute these funds to the Maharlika Investment Corporation by legislative fiat is equivalent to a form of tax on capital that has been consistently invalidated by the Supreme Court.

V. TAXATION OR EXPROPRIATION?

During the initial public discussion over the Maharlika Investment Fund, a legal argument against the capital infusion from GSIS and SSS has become an important talking point in mass media discourse. Some respected legal experts argue that GSIS and SSS funds should not cover the initial capitalization of the sovereign wealth fund for it amounts to taking of private property without just compensation.[186] This reasoning implicitly classifies Section 9 of House Bill No. 6398 as an invalid exercise of expropriation.

Expropriation, also called condemnation or eminent domain, is the taking of private property by the State for public use.[187] It is one of the traditionally inherent powers of the State, along with police power and taxation. To deter abuse of this attribute of sovereignty, the Constitution qualifies its exercise with two explicit conditions: private property must be

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[185] City of Manila v. Laguio, G.R. No. 118127, 455 SCRA 308, 330, Apr. 12, 2005.

[186] Antonio T. Carpio, *Maharlika Investment Fund: A losing proposition,* RAPPLER, Dec. 16, 2022, *at* https://www.rappler.com/voices/thought-leaders/analysis-maharlika-investment-fund-losing-proposition/; Jairo Bolledo, *Laws, SC rulings that say SSS, GSIS funds are private*, RAPPLER, Dec. 7, 2022, *at* https://www.rappler.com/nation/laws-supreme-court-rulings-sss-gsis-funds-private/.

[187] CONST. art. III, § 9.

taken for public use,[188] and the owner must be paid with just compensation.[189]

The expropriation argument of some notable critics of the Maharlika Fund appears compelling. The Constitution only says that the object of expropriation is "private property," without any qualification on what kind of private property is condemnable.[190] Money, the Civil Code reminds us, is property; it is movable, to be precise.[191] If the monies of GSIS and SSS members are used as financial capital for the Maharlika Investment Fund, then arguably property is taken by the government for public use.

There are equally persuasive reservations to this line of reasoning. Some possible objections from the expropriation argument stem from doubt as to whether money is actually condemnable property.

Jurisprudence is consistent in holding that just compensation is generally the fair market value of the private property taken. Compensation in expropriation cases should approximate the selling price the owner is willing to receive and the buyer is willing to pay in a voluntary exchange.[192] Recently, the "just" in just compensation extends to the time dimension, and not just to the amount, of the payment. Compensation should be prompt to be just.[193] Any delay in just compensation constitutes forbearance of money by the State, on which interest becomes due.[194]

Ideally, payment of just compensation should be simultaneous with or in advance of the taking of private property by the government.[195] From this framing, it is understandable if one questions money as a proper object of eminent domain since just compensation is usually money, too. The process of expropriation becomes absurd if the government must immediately pay money (as just compensation) to take money (as private property for public use).

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[188] Republic v. Castellvi, G.R. No. 20620, 58 SCRA 336, 352, Aug. 15, 1974.

[189] Republic v. Heirs of Borbon [hereinafter "*Heirs of Borbon*"], G.R. No. 165354, 745 SCRA 40, 55, Jan. 12, 2015.

[190] Southern Luzon Drug Corp. v. Dep't of Social Welfare & Dev't, G.R. No. 199669, 824 SCRA 164, 233, Apr. 25, 2017 (Carpio, *J.*, *dissenting*).

[191] CIVIL CODE, art. 426.

[192] Republic v. Unson, G.R. No. 215107, 785 SCRA 202, 218, Feb. 24, 2016.

[193] Apo Fruits v. Ct. of Appeals, G.R. No. 164195, 514 SCRA 537, 557–58, Feb. 6, 2007.

[194] Evergreen Mfg. v. Republic, G.R. No. 218628, 839 SCRA 200, 229, Sept. 6, 2017.

[195] *Heirs of Borbon*, 745 SCRA 40, 55.

Furthermore, a recent Supreme Court decision considers just compensation as "the money equivalent of said property,"[196] which favors the view that condemnable property is something other than money. American case law supports this.[197]

In *People v. Mayor of Brooklyn*[198] ("*Mayor of Brooklyn*"), the charter of Brooklyn, New York authorized the city council to impose an assessment on private property owners who would be benefitted by improvements on public streets, avenues, squares, sewers, and drainages.[199] Such assessment was imposed on land owners adjacent to Flushing Avenue, which was graded and paved by the authority of the city council. The landowners questioned the assessment. The trial court of the State of New York invalidated the assessment, ruling, among other reasons, that the assessment was money taken without just compensation.[200]

The high court of the State of New York reversed the lower court. It held that the assessment is a valid exercise of taxation. It also ruled that money could not be subject to expropriation, contrary to the opinion of the lower court.[201] The high court elaborated:

> The framers of the constitution could not have intended to delegate to municipal corporations the right of taking money under this power, because it is entirely unnecessary. Money can always be had by taxation; lands [cannot]; and therefore lands may be taken by right of eminent domain, but money may not.[202]

In *Burnett v. Mayor and Common Council of Sacramento*[203] ("*Burnett*"), the city council of Sacramento, California passed and the city mayor approved an ordinance imposing assessment for the grading or improvement of public streets and alleys.[204] Those subject to the assessment assailed the ordinance

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[196] Lloyds Industrial Richfield Corp. v. NAPOCOR, G.R. No. 190207, June 30, 2021, at 10. This pinpoint citation refers to the copy of this decision uploaded to the Supreme Court Website.

[197] Milton Colvin, *Property Which Cannot Be Reached By the Power of Eminent Domain for a Public Use or Purpose*, 78 U. PA. L. REV. 1 (1929).

[198] 4 N.Y. 419 (1851).

[199] *Id.* at 421.

[200] *Id.* at 422.

[201] *Id.* at 424.

[202] *Id.*

[203] 12 Cal. 76 (1859).

[204] *Id.* at 81.

as taking without just compensation, but the Supreme Court of California upheld the local law as a valid form of taxation.[205]

The Supreme Court of California said that money was outside the class of private properties subject to eminent domain. It ruled that expropriation could only be exercised "with reference to other property than money, for the property taken is to be the subject of compensation in money itself."[206]

In *Cary Library v. Bliss*[207] ("*Cary Library*"), financial donations were given to a town to open a library. A private corporation was organized to oversee this library.[208] A statute was later on passed to create a public corporation that would assume management over the library. The statute, invoking eminent domain, provided that the trustees of the library should turn over funds, books, and other library property to the public corporation.[209]

Some of the trustees questioned the statute, and the Massachusetts Supreme Judicial Court sided with the trustees. On the invocation of eminent domain, the Court states that expropriation is the taking of private property because of public necessity. Just compensation entails the immediate payment of money. Public necessity is absent in the forcible taking of library funds due to the situation that compensation is paid upon the surrender of library funds. In effect, money (i.e., the library funds) taken from the trustees is simultaneously returned through money in the form of just compensation. The State does not gain property for public use in the entire exchange.[210]

The common theme in these decisions of American state supreme courts is that the nature of private property subject to eminent domain must be something other than what is given as just compensation. The three cases are decided in 1851, 1859, and 1890 respectively. They represent prevailing jurisprudence in the American legal system when Spain ceded control of Philippine territory to the United States in 1898 and should apply to the interpretation of Section 63 of the Philippine Organic Act of 1902[211] and

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[205] *Id.* at 84–85.
[206] *Id.* at 83.
[207] 151 Mass. 364 (1890).
[208] *Id.* at 371–73.
[209] *Id.* at 373–74, 378.
[210] *Id.* at 378–80.
[211] Philippine Organic Act (1902), § 63.

Section 3(a) of the Jones Law,[212] which both deal with expropriation and just compensation.[213]

In the drafting of the Bill of Rights of the 1935 Constitution, the report of the Committee on the Bill of Rights of the 1934 Constitution Convention explained:

> The enumeration of individual rights in the present organic law (Acts of Congress of July 1, 1902, August 29, 1916) is considered ample, comprehensive and precise enough to safeguard the rights and immunities of Filipino citizens against abuses or encroachments of the Government, its powers or agents…
>
> Modifications or changes in phraseology have been avoided, wherever possible. *This is because the principles must remain couched in a language expressive of their historical background, nature, extent and limitations, as construed and expounded by the great statesmen and jurists that have vitalized them.*[214]

Article III, Section 2(1) of the 1935 Constitution provides: "Private property shall not be taken for public use without just compensation."[215] This is the exact wording of the second sentence of Section 3(a) of the Jones Law,[216] which in turn is substantially copied from the Fifth Amendment of the United States Constitution[217] and counterpart state constitutions. Following the intent of the framers of the 1935 Constitution, American case law enshrined in *Mayor of Brooklyn*, *Burnett*, and *Cary Library* should be persuasive, if not controlling, in the interpretation of the expropriation clause.

The same provision on eminent domain is repeated in the 1973[218] and 1986 Constitutions.[219] These verbatim reiterations may be understood as continuous intent of adopting the principle that money is not condemnable property.

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[212] Jones Law (1916), § 3(a).

[213] Philippine Organic Act (1902), § 63; Jones Law (1916), § 3(a).

[214] Republic v. Sandiganbayan, G.R. No. 104768, 407 SCRA 10, 97, July 21, 2003. (Emphasis in the original.)

[215] CONST. (1935), art. III, § 2(1).

[216] Jones Law (1916), § 3(a).

[217] U.S. CONST. amend. V.

[218] CONST. (1973), art. IV, § 2.

[219] CONST. art. III, § 9.

The concept of "forced sale" also favors the view that money could not be expropriated. The Philippine Supreme Court has consistently described eminent domain as akin to a forced sale.[220] The legal concept of forced sale is common law in origin[221] and no extant statute in the Philippines defines it. Yet, its existence is recognized in our jurisdiction by virtue of Articles 223, 232, 237, and 243 of the Civil Code and Articles 153 and 155 of the Family Code.

Forced sales differ from conventional sales because they happen by operation of law and absent the volition of the property owner. In common law jurisdictions, the substantial difference between forced sales and contracts of sale is the lack of a meeting of the minds between the transferor and transferee of the property, as the owner does not consent to the sale of the property.[222]

We believe the distinction between forced sales and conventional sales should not prevent the suppletory application of the Civil Code provisions on the nature of sales in construing forced sales.[223] The Civil Code provides that its Articles may supply the deficiency of a special law.[224] Additionally, Section 1488 of the Civil Code states that special laws govern expropriation.[225] This section is under the Title on Sales. The placing of this provision may be interpreted as legislative intent to have some aspects of contractual sales be applied to expropriation by either analogy or supplementation when special laws on condemnation are ambiguous.

Adhering to this logic, if the object of a conventional sale must be a determinate thing,[226] then the object of expropriation or other kinds of forced sale should also be a determinate thing. "A thing is determinate when it is particularly designated or physically segregated from all others of the same class."[227] A generic thing does not have individuality but is referred to

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[220] Republic v. Vda. de Ramos, G.R. No. 211576, Feb. 19, 2020, at 7. This pinpoint citation refers to the copy of this decision uploaded to the Supreme Court website.

[221] Hospicio de San Jose de Barili v. Dep't of Agrarian Reform (DAR), G.R. No. 140847, 470 SCRA 609, 618, Sept. 23, 2005.

[222] *Id.*

[223] For a contrary opinion, *see* Hospicio de San Jose de Barili v. DAR, G.R. No. 140847, 470 SCRA 609, 618, Sept. 23, 2005. "Yet a forced sale is clearly different from the sales described under Book V of the Civil Code which are conventional sales, as it does not arise from the consensual agreement of the vendor and vendee, but by compulsion of law."

[224] CIVIL CODE, art. 18.

[225] Art. 1488.

[226] Art. 1458.

[227] Art. 1460(1).

by its nature or the class of objects to which it belongs.[228] Money is a generic thing,[229] and as a consequence, it could not be an object of either expropriation or forced sale.

Finally, procedural law and jurisprudence suggest the exclusion of money as condemnable property. A condemnation proceeding has two phases: the determination of the validity of the taking, and the computation of just compensation.[230] In the second phase, a panel of disinterested commissioners is appointed by the court to make a recommendation on the just compensation to be paid. The appointment of the commissioners is reflected in the Code of Civil Procedure;[231] Rule 69 of the Rules of Court of 1940;[232] and Rule 67 of the Rules of Court of 1964,[233] 1997,[234] and 2019.[235]

Ultimately, the fixing of just compensation is a judicial function.[236] The report of the commissioners is tentative and provisional. Nevertheless, the Supreme Court has held that the commissioners are "necessary," "indispensable," and "mandatory."[237] There is a school of thought in jurisprudence that subscribes to the principle that the determination of just compensation with the aid of these commissioners is not just a matter of procedure but is a substantial right.[238]

The indispensability of the commissioners in fixing just compensation only makes sense if the fair market value of the property is unknown during the time of the government's taking. Money is not such property because the value of money, at any given time, is its nominal worth. The appointment of commissioners to ascertain just compensation is an irrelevant exercise in a hypothetical expropriation of money. The inference we get is that procedural law in our jurisdiction is crafted with the exclusion of money as condemnable property in mind.

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[228] De Leon v. Soriano, 87 Phil. 193, 195–96 (1950).

[229] Cordova v. Reyes, Daway, Lim, Bernardo, Lindo, Rosales Law Offices, G.R. No. 146555, 526 SCRA 300, 307, July 3, 2007.

[230] Republic v. Legaspi, G.R. No. 177611, 670 SCRA 110, 120–21, Apr. 18, 2012.

[231] CODE OF CIVIL PROCEDURE (1901), §§ 243–46.

[232] RULES OF COURT (1940), Rule 69, §§ 6–9.

[233] RULES OF COURT (1964), Rule 67, §§ 5–8.

[234] RULES OF COURT (1997), Rule 67, §§ 5–8.

[235] RULES OF COURT (2019), Rule 67, §§ 5–8.

[236] Land Bank of the Phil. v. Omengan, G.R. No. 196412, 831 SCRA 294, 305, July 19, 2017.

[237] Republic v. Ropa Dev. Corp., G.R. No. 227614, Jan. 11, 2021, at 1. This pinpoint citation refers to the copy of this decision uploaded to the Supreme Court Website.

[238] Cruz v. Intermediate App. Ct., G.R. No. 72806, 169 SCRA 9, 16, Jan. 9, 1989.

VI. CONCLUSION

The article attempts to understand the proposed Maharlika Investment Fund better by contrasting it with earlier proposals to create a sovereign wealth fund. In drawing comparisons, more attention is given to the kind of investible funds, investment strategy, and corporate governance. We can identify some unique features of the Maharlika Fund. Some of the initial capitalizations are in the nature of government liabilities. Investments in domestic financial markets and financial instruments are permitted. The corporate board is chaired by an alter ego of the President. These novelties make the latest push for a sovereign wealth fund markedly different from the previous ones.

Then, we look at the legal controversy surrounding the obligatory capital infusion of GSIS and SSS funds in the SWF as reflected in House Bill No. 6398, s. 2022. This article sees the mandatory remittance of GSIS and SSS to the Maharlika Fund as a form of tax. By reviewing jurisprudence, we suggest three elements of what makes a pecuniary obligation a tax: (1) forced monetary contribution; (2) imposition by legislation; and (3) public purpose as the objective for raising revenue. All three criteria are arguably met by the proposed seed funding from GSIS and SSS.

Unfortunately, we are also of the view that this form of tax is unconstitutional. GSIS and SSS funds may be classified as capital under tax jurisprudence for these are monies ultimately owned by member-contributors and pensioners which are only held by government institutions in a fiduciary capacity and are pooled for a special purpose (i.e., the fiscal upkeep of the national social security system). The mandatory GSIS-SSS initial capitalization on the sovereign wealth fund is a tax on capital, which case law describes as a confiscatory form of taxation. A tax on capital is null and void for violation of due process.

The article revisits the more popular legal argument against the GSIS-SSS seed money to the Maharlika Fund: that it constitutes the taking of private property without just compensation. We explore the possible objections to this claim of uncompensated expropriation by showing different arguments as to why money is not considered property subject to the State's power of eminent domain. Overall, the discourse on the possible attacks on the expropriation view necessitates a new anchor to ground the objection against the GSIS-SSS seed funding to the SWF. This new ground is the tax perspective earlier discussed.

House Bill No. 6608, s. 2023 and Senate Bill No. 2020, s. 2023—the final versions of the Maharlika Investment Fund in the respective chambers of Congress—remove the GSIS-SSS initial capitalization for the SWF. This is a temporary reprieve from anxiety among the contributors, members, and pensioners of GSIS and SSS. A future Congress may take advantage of an unvigilant public to amend the charter of the Maharlika Fund and revive the proposal for capital infusion from the social security system. In light of the paper's discussion, this course of action is respectfully submitted as not only politically unacceptable but constitutionally infirm as well.

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