

REPUBLIC OF THE PHILIPPINES
COMMISSION ON HUMAN RIGHTS
QUEZON CITY

GREENPEACE SOUTHEAST
ASIA (PHILIPPINES), ET AL.,
Petitioners,

- versus -

CHEVRON (US), ET AL.,
Respondents.

CHR-NI-2016-0001
Petition requesting for
investigation of the
responsibility of the
Carbon Majors for
human rights
violations or threats of
violations resulting
from the impacts of
climate change

X-----X

ENTRY OF SPECIAL APPEARANCE

-with-

MOTION TO DISMISS

ENTRY OF SPECIAL APPEARANCE

1. The law firm of POBLADOR BAUTISTA & REYES respectfully enters its special appearance as counsel for **CEMEX S.A.B. de C.V.** ("CEMEX Mexico"). This special appearance is for the sole purpose of establishing that this Honorable Commission has no jurisdiction over this case and over the person of CEMEX Mexico, and securing a dismissal of the Petition on those grounds.

2. Pursuant to the special appearance, it is requested that copies of all submissions of Petitioners, and all orders and notices of this Honorable Commission intended for CEMEX Mexico, be sent to the undersigned counsel at its address indicated below.

MOTION TO DISMISS

CEMEX S.A.B. de CV., by counsel and on *ad cautelam* basis, respectfully states:

I. PREFACE

3. This submission, more than anything, is being filed out of courtesy and respect for the Honorable Commission. CEMEX Mexico has no intention of voluntarily appearing before this Honorable Commission, or submitting to its supposed jurisdiction, or even participating in these proceedings, and for the avoidance of doubt, it does not submit itself to the jurisdiction of this Honorable Commission.¹ At the outset, there are several major issues which plague the Petition:

- (a) The Petition states no law or authority for a Philippine government agency to exercise any form of jurisdiction over an entity based in another State, as there is no such authority.
- (b) This Honorable Commission's jurisdiction, as defined by the Supreme Court, does not encompass the subject matter of the Petition. Using the standard set forth in *Simon, Jr. v. CHR*,² the subject matter of the Petition – carbon emissions and climate change – does not fall under the scope of human rights within the jurisdiction of this Honorable Commission.
- (c) With all due respect, this Honorable Commission has no adjudicative or quasi-judicial powers³ – it is not empowered to receive evidence, make factual conclusions and apply the law thereto to the end that a controversy may be decided authoritatively and definitely.⁴ Thus, the result of these proceedings will not end any issue or controversy.

¹ The Supreme Court held that when the appearance of a defendant is precisely to object to the jurisdiction of the court over his person, it cannot be considered as appearance in court. (*French Oil Mill Machinery Co., Inc. v. Court of Appeals*, G.R. No. 126477, September 11, 1998; *HSBC v. Catalan*, G.R. No. 159590, October 18, 2004; *Steel Corporation of the Philippines v. MAPFRE Insular Insurance Corporation*, G.R. No. 201199, October 16, 2013.)

² G.R. No. 100150, 5 January 1994

³ *Export Processing Zone Authority v. Commission on Human Rights*, G.R. No. 101476, 14 April 1972; *Cariño v. Commission on Human Rights*, G.R. No. 96681, 2 December 1991; *Southern Cross Cement Corp. v. The Phil. Cement Manufacturers Corp.*, G.R. No. 158540, 8 July 2004; *Cudia v. Superintendent of the Philippine Military Academy*, G.R. No. 211362, 24 February 2015.

⁴ *Id.*

- (d) The element of causation is non-existent – the Petition essentially posits that certain alleged statistics (not even facts) on carbon emissions halfway around the world somehow violate Filipinos' rights to mental health, food, adequate housing, sanitation, etc.
- (e) Even the Petition struggles mightily to establish some semblance of authority by this Honorable Commission over the persons of respondents. No credible authority was ever cited.

4. CEMEX Mexico could have very well disregarded the Order dated 21 July 2016, as well as these proceedings, without having to face any legal consequences (after all, a Philippine commission can have no jurisdiction or coercive power over a corporation in Mexico). However, having received the Honorable Commission's 21 July 2016 Order, it now opts to secure a dismissal of the case against it based on the proper laws and rules of procedure, so as to preserve order and respect for the rule of law, in the hope that the Honorable Commission will reciprocate and respect the rights of CEMEX Mexico and ultimately dismiss the Petition against it.

II. GROUNDS FOR DISMISSAL/ DISCUSSION

A.

This Honorable Commission has no jurisdiction over the subject matter.

5. The Petition must be dismissed outright because its subject matter is not within the jurisdiction of this Honorable Commission. The Petition filed by *Greenpeace et al.* (the "Petitioners") with this Honorable Commission is based on an alleged violation of rights to health, food and housing caused indirectly by climate change:

The Carbon Majors should be held accountable for violations or threats of violations of Filipinos' rights (a) to life; (b) to the highest attainable standard of physical and mental health; (c) to food; (d) to water; (e) to sanitation; (f) to adequate housing; and (g) to self-determination resulting from the adverse impacts of climate change.⁵

6. Its subject matter does not fall within the "human rights" contemplated by the framers of the Constitution when they created the Commission on Human Rights ("CHR"). Section 18, Article XIII of the 1987 Constitution provides that the CHR has, among others, the power to "investigate, on its own or on complaint by any party, all forms of human rights violations **involving civil and political rights.**" In *Simon, Jr. v. CHR*,⁶ the Supreme Court limited the scope of "human rights" cognizable by the CHR, and declared that the Constitution "envisioned a Commission on Human Rights that would focus its attention to the *more severe cases of human rights violations*" involving civil and political rights, thus:

After thus laying down at the outset the above rule, we now proceed to the other kernel of this controversy and, it is, to determine the extent of CHR's investigative power.

It can hardly be disputed that the phrase "human rights" is so generic a term that any attempt to define it, albeit not a few have tried, could at best be described as inconclusive. Let us observe. In a symposium on human rights in the Philippines, sponsored by the University of the Philippines in 1977, one of the questions that has been propounded is "(w)hat do you understand by "human rights?" The participants, representing different sectors of the society, have given the following varied answers:

Human rights are the basic rights which inhere in man by virtue of his humanity. They are the same in all parts of the world, whether the Philippines or England, Kenya or the Soviet Union, the United States or Japan, Kenya or Indonesia

Human rights include civil rights, such as the right to life, liberty, and property; freedom of speech, of the press, of religion, academic freedom, and the rights of the accused to due process of law; political rights, such as the right to elect public officials, to be elected to public office, and to form political associations and engage in politics; and social rights, such as the right to an education, employment, and social services.

Human rights are the entitlement that inhere in the individual person from the sheer fact of his humanity. . . . Because they are inherent, human rights are not granted

⁶ *Supra*: citations omitted.

by the State but can only be recognized and protected by it.

(*Human rights* include all) the civil, political, economic, social, and cultural rights defined in the Universal Declaration of Human Rights.

Human rights are rights that pertain to man simply because he is human. They are part of his natural birth, right, innate and inalienable.

The Universal Declaration of Human Rights, as well as, or more specifically, the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, suggests that the scope of human rights can be understood to include those that relate to an individual's social, economic, cultural, political and civil relations. It thus seems to closely identify the term to the universally accepted traits and attributes of an individual, along with what is generally considered to be his inherent and inalienable rights, encompassing almost all aspects of life.

Have these broad concepts been equally contemplated by the framers of our 1986 Constitutional Commission in adopting the specific provisions on human rights and in creating an independent commission to safeguard these rights? It may of value to look back at the country's experience under the martial law regime which may have, in fact, impelled the inclusions of those provisions in our fundamental law. Many voices have been heard. Among those voices, aptly represented perhaps of the sentiments expressed by others, comes from Mr. Justice J.B.L. Reyes, a respected jurist and an advocate of civil liberties, who, in his paper, entitled "Present State of Human Rights in the Philippines," observes:

But while the Constitution of 1935 and that of 1973 enshrined in their Bill of Rights most of the human rights expressed in the International Covenant, these rights became unavailable upon the proclamation of Martial Law on 21 September 1972. Arbitrary action then became the rule. Individuals by the thousands became subject to arrest upon suspicion, and were detained and held for indefinite periods, sometimes for years, without charges, until ordered released by the Commander-in-Chief or this representative. The right to petition for the redress of grievances became useless, since group actions were forbidden. So were strikes. Press and other mass media were subjected to censorship and short term

licensing. Martial law brought with it the suspension of the writ of habeas corpus, and judges lost independence and security of tenure, except members of the Supreme Court. They were required to submit letters of resignation and were dismissed upon the acceptance thereof. Torture to extort confessions were practiced as declared by international bodies like Amnesty International and the International Commission of Jurists.

Converging our attention to the records of the Constitutional Commission, we can see the following discussions during its 26 August 1986 deliberations:⁷

⁷ The deliberations of the Constitutional Commission, as quoted in *Simon, Jr. v. Commission on Human Rights*, is provided as follows:

"MR. GARCIA . . . , the primacy of its (CHR) task must be made clear in view of the importance of human rights and also because civil and political rights have been determined by many international covenants and human rights legislations in the Philippines, as well as the Constitution, specifically the Bill of Rights and subsequent legislation. Otherwise, **if we cover such a wide territory in area, we might diffuse its impact and the precise nature of its task, hence, its effectivity would also be curtailed.**

So, it is important to delineate the parameters of its tasks so that the commission can be most effective.

MR. BENGZON. That is precisely my difficulty because civil and political rights are very broad. The Article on the Bill of Rights covers civil and political rights. Every single right of an individual involves his civil right or his political right. So, where do we draw the line?

MR. GARCIA. Actually, these civil and political rights have been made clear in the language of human rights advocates, as well as in the Universal Declaration of Human Rights which addresses a number of articles on the right to life, the right against torture, the right to fair and public hearing, and so on. These are very specific rights that are considered enshrined in many international documents and legal instruments as constituting civil and political rights, and these are precisely what we want to defend here.

MR. BENGZON. So, would the commissioner say civil and political rights as defined in the Universal Declaration of Human Rights?

MR. GARCIA. Yes, and as I have mentioned, the International Covenant of Civil and Political Rights distinguished this right against torture.

MR. BENGZON. So as to distinguish this from the other rights that we have?

MR. GARCIA. Yes, because the other rights will encompass social and economic rights, and there are other violations of rights of citizens which can be addressed to the proper courts and authorities.

xxx xxx xxx

MR. BENGZON. **So, we will authorize the commission to define its functions**, and, therefore, in doing that the commission will be authorized to take under its wings cases which perhaps heretofore or at this moment are under the jurisdiction of the ordinary investigative and prosecutorial agencies of the government. **Am I correct?**

MR. GARCIA. **No. We have already mentioned earlier that we would like to define the specific parameters which cover civil and political rights** as covered by the international standards governing the behavior of governments regarding the particular political and civil rights of citizens, especially of political detainees or prisoners. **This particular aspect we have experienced during martial law which we would now like to safeguard.**

MR. BENGZON. Then, I go back to that question that I had. Therefore, what we are really trying to say is, perhaps, at the proper time we could specify all those rights stated in the Universal Declaration of Human Rights and defined as human rights. Those are the rights that we envision here?

MR. GARCIA. Yes. In fact, they are also enshrined in the Bill of Rights of our Constitution. They are integral parts of that.

MR. BENGZON. *Therefore, is the Gentleman saying that all the rights under the Bill of Rights covered by human rights?*

MR. GARCIA. *No, only those that pertain to civil and political rights.*

XXX XXX XXX

MR. RAMA. *In connection with the discussion on the scope of human rights, I would like to state that in the past regime, everytime we invoke the violation of human rights, the Marcos regime came out with the defense that, as a matter of fact, they had defended the rights of people to decent living, food, decent housing and a life consistent with human dignity.*

So, I think we should really limit the definition of human rights to political rights. Is that the sense of the committee, so as not to confuse the issue?

MR. SARMIENTO. *Yes, Madam President.*

MR. GARCIA. I would like to continue and respond also to repeated points raised by the previous speaker.

There are actually six areas where this Commission on Human Rights could act effectively: 1) protection of rights of political detainees; 2) treatment of prisoners and the prevention of tortures; 3) fair and public trials; 4) cases of disappearances; 5) salvagings and hamletting; and 6) other crimes committed against the religious.

XXX XXX XXX

The PRESIDENT. Commissioner Guingona is recognized.

MR. GUINGONA. Thank You Madam President.

I would like to start by saying that I agree with Commissioner Garcia that **we should, in order to make the proposed Commission more effective, delimit as much as possible, without prejudice to future expansion, the coverage of the concept and jurisdictional area of the term "human rights".** I was actually disturbed this morning when the reference was made **without qualification to the rights embodied in the universal Declaration of Human Rights,** although later on, this was qualified to refer to civil and political rights contained therein.

If I remember correctly, Madam President, Commissioner Garcia, after mentioning the Universal Declaration of Human Rights of 1948, mentioned or linked the concept of human right with other human rights specified in other convention which I do not remember. Am I correct?

MR. GARCIA. Is Commissioner Guingona referring to the Declaration of Torture of 1985?

MR. GUINGONA. I do not know, but the commissioner mentioned another.

MR. GARCIA. Madam President, the other one is the International Convention on Civil and Political Rights of which we are signatory.

MR. GUINGONA. I see. The only problem is that, although I have a copy of the Universal Declaration of Human Rights here, I do not have a copy of the other covenant mentioned. It is quite possible that there are rights specified in that other convention which may not be specified here. I was wondering whether it would be wise to link our concept of human rights to general terms like "convention," rather than specify the rights contained in the convention.

As far as the Universal Declaration of Human Rights is concerned, the Committee, before the period of amendments, could specify to us which of these articles in the Declaration will fall within the concept of civil and political rights, not for the purpose of including these in the proposed constitutional article, but to give the sense of the Commission as to what human rights would be included, without prejudice to expansion later on, if the need arises. For example, there was no definite reply to the question of Commissioner Regalado as to whether the right to marry would be considered a civil or a social right. It is not a civil right?

MR. GARCIA. *Madam President, I have to repeat the various specific civil and political rights that we felt must be envisioned initially by this provision — freedom from political detention and arrest prevention of torture, right to fair and public trials, as well as crimes involving disappearance, salvagings, hamlettings and collective violations. So, it is limited to political related crimes precisely to protect the civil and political rights of*

XXX

The final outcome, now written as Section 18, Article XIII, of the 1987 Constitution, is a provision empowering the Commission on Human Rights to "investigate, on its own or on complaint by any party, all forms of human rights violations *involving civil and political rights*" (Sec. 1).

The term "civil rights," has been defined as referring — (t)o those (rights) that belong to every citizen of the state or country, or, in wider sense, to all its inhabitants, and are not connected with the organization or administration of the government. They include the rights of property, marriage, equal protection of the laws, freedom of

a specific group of individuals, and therefore, we are not opening it up to all of the definite areas.

MR. GUINGONA. Correct. Therefore, just for the record, the Gentlemen is no longer linking his concept or the concept of the Committee on Human Rights with the so-called civil or political rights as contained in the Universal Declaration of Human Rights.

MR. GARCIA. When I mentioned earlier the Universal Declaration of Human Rights, I was referring to an international instrument.

MR. GUINGONA. I know.

MR. GARCIA. **But it does not mean that we will refer to each and every specific article therein, but only to those that pertain to the civil and politically related**, as we understand it in this Commission on Human Rights.

MR. GUINGONA. Madam President, I am not even clear as to the distinction between civil and social rights.

MR. GARCIA. There are two international covenants: the International Covenant and Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The second covenant contains all the different rights—the rights of labor to organize, the right to education, housing, shelter, et cetera.

MR. GUINGONA. So we are just limiting at the moment the sense of the committee to those that the Gentlemen has specified.

MR. GARCIA. Yes, to civil and political rights.

MR. GUINGONA. Thank you.

XXX XXX XXX

SR. TAN. Madam President, from the standpoint of the victims of human rights, I cannot stress more on how much we need a Commission on Human Rights. . . .

. . . human rights victims are usually penniless. They cannot pay and very few lawyers will accept clients who do not pay. And so, they are the ones more abused and oppressed. **Another reason is, the cases involved are very delicate — torture, salvaging, picking up without any warrant of arrest, massacre** — and the persons who are allegedly guilty are people in power like politicians, men in the military and big shots. Therefore, this Human Rights Commission must be independent.

I would like very much to emphasize how much we need this commission, especially for the little Filipino, the little individual who needs this kind of help and cannot get it. **And I think we should concentrate only on civil and political violations because if we open this to land, housing and health, we will have no place to go again and we will not receive any response. . . .**" (Emphasis supplied)

contract, etc. Or, as otherwise defined civil rights are rights appertaining to a person by virtue of his citizenship in a state or community. Such term may also refer, in its general sense, to rights capable of being enforced or redressed in a civil action.

Also quite often mentioned are the guarantees against involuntary servitude, religious persecution, unreasonable searches and seizures, and imprisonment for debt.

Political rights, on the other hand, are said to refer to the right to participate, directly or indirectly, in the establishment or administration of government, the right of suffrage, the right to hold public office, the right of petition and, in general, the rights appurtenant to citizenship *vis-a-vis* the management of government.

Recalling the deliberations of the Constitutional Commission, aforequoted, **it is readily apparent that the delegates envisioned a Commission on Human Rights that would focus its attention to the more severe cases of human rights violations. Delegate Garcia, for instance, mentioned such areas as the "(1) protection of rights of political detainees, (2) treatment of prisoners and the prevention of tortures, (3) fair and public trials, (4) cases of disappearances, (5) salvagings and hamletting, and (6) other crimes committed against the religious."** While the enumeration has not likely been meant to have any preclusive effect, more than just expressing a statement of priority, it is, nonetheless, significant for the tone it has set. In any event, the delegates did not apparently take comfort in peremptorily making a conclusive delineation of the CHR's scope of investigatorial jurisdiction. They have thus seen it fit to resolve, instead, that "Congress may provide for other cases of violations of human rights that should fall within the authority of the Commission, taking into account its recommendation."

In the particular case at hand, there is no cavil that what are sought to be demolished are the stalls, *sari-sari* stores and *carinderia*, as well as temporary shanties, erected by private respondents on a land which is planned to be developed into a "People's Park". More than that, the land adjoins the North EDSA of Quezon City which, this Court can take judicial notice of, is a busy national highway. The consequent danger to life and limb is not thus to be likewise simply ignored. It is indeed paradoxical that a right which is claimed to have been violated is one that cannot, in the first place, even be invoked, if

it is, in fact, extant. Be that as it may, **looking at the standards hereinabove discoursed *vis-a-vis* the circumstances obtaining in this instance, we are not prepared to conclude that the order for the demolition of the stalls, *sari-sari* stores and *carinderia* of the private respondents can fall within the compartment of "human rights violations involving civil and political rights" intended by the Constitution.**⁸

7. Section 1, Rule 2 of the Omnibus Rules of Procedure of the CHR also sets the tone for what forms of human rights violations fall under the jurisdiction of this Honorable Commission. First and foremost, the rights alleged to be violated must be either civil or political rights:

Pursuant to Sections 17 to 19, Article XIII of the 1987 Philippine Constitution, in relation to Executive Order No. 163, dated 5 May 1987, and relevant international human rights instruments, the Commission on Human Rights shall take cognizance of and investigate, on its own or on complaint by any party, all forms of human rights violations and abuses involving civil and political rights, to include but not limited to the following:

- a) right to life;
- b) right to liberty;
- c) right to security;
- d) right to respect for one's dignity;
- e) freedom from slavery and involuntary servitude;
- f) freedom from torture, cruel, inhuman or degrading treatment and punishment;
- g) right to protection from enforced disappearance;
- h) freedom from arbitrary interference with one's privacy, family, home, or correspondence;
- i) freedom from arbitrary arrest, detention or exile;
- j) freedom of movement and residence;
- k) freedom of thought, conscience and religion;
- l) freedom of the press, speech, opinion and expression;
- m) freedom from discrimination;
- n) right to marry and to found a family; and
- o) right to own property.

8. The allegations in the Petition pertain to supposed violations of human rights as a result of climate change, a phenomenon which CEMEX Mexico is allegedly one of those primarily responsible. According to the conclusion of the Petition:

⁸ Emphasis supplied.

In summary, what the Petitioners are saying is that the production of fossil fuels by the Carbon Majors has been found to be primarily responsible for large amounts of greenhouse gases. The concentration of said gases, especially carbon dioxide in the atmosphere, causes climate change. An estimated 25-30% of the carbon dioxide already emitted by these activities has been absorbed by the oceans and is contributing to ocean acidification.

The adverse impacts of climate change and ocean acidification have brought harm or pose the threat of harm to people, on top of or in addition to, damage resulting from natural disasters. These harms resulting from the impacts of climate change and ocean acidification affect the exercise and enjoyment of Filipinos' human rights to (a) to life; (b) to the highest attainable standard of physical and mental health; (c) to adequate food; (d) to water (e) to sanitation; (f) to adequate housing; (g) to self-determination; and (h) the human rights of marginalized and disadvantaged groups particularly vulnerable to the effects of climate change, including (1) women; (2) children; (3) persons with disabilities; (4) those living in extreme poverty; (5) indigenous peoples; (6) displaced persons; and, (7) workers; as well as the right of Filipinos to development.⁹

9. The only alleged violation of a human right in the Petition also found in the Omnibus Rules of Procedure is the alleged violation to the "right to life". But the invocation of the "right to life" should not be deemed a magic formula that would instantly make a case fall under the jurisdiction of the CHR. It is an overstretch of the imagination to argue that the alleged threat posed by climate change to the life of Petitioners is within the jurisdiction of this Honorable Commission, or is what was contemplated by both the framers of the Constitution and the Supreme Court.

10. The rights as described in the Petition are not even civil or political rights. The Petition alleges that there is deprivation of the "*highest attainable standard of physical and mental health*," "*food*," "*sanitation*" and "*adequate housing*". This is a far cry from the examples of human rights cited by the Supreme Court, such as "*treatment of prisoners*," "*prevention of tortures*," "*salvagings and hamlettings*" and "*crimes committed against the religious*." The Constitution is clear that the jurisdiction of the CHR is confined to forms of

⁹ Petition, p. 65.

human rights violations **involving civil and political rights**. No such rights are involved here.

B.

The Honorable Commission has no jurisdiction over CEMEX Mexico.

B.1. Under the principle of territoriality in international law, the exercise of jurisdiction of the Philippines and its agents, including this Honorable Commission, is limited only to the confines of the Philippine territory.

11. Jurisdiction refers to the competence of States to prescribe rules of conduct, to enforce its legal processes, and to adjudicate controversies or claims.¹⁰ In international law, it is well-settled that the jurisdiction of a State is limited only to the confines of its physical boundaries. The territoriality principle was pronounced in the landmark case of *S.S. Lotus (France v. Turkey)*¹¹ resolved by the Permanent Court of International Justice ("PCIJ"), to wit:

The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed. **Now the first and foremost restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial;** it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. (Emphasis supplied)

¹⁰ State Jurisdiction by Dr. Walid Abdulrahim, Professor of Law. Accessed from <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/7-state-jurisdiction>, on 31 August 2016.

¹¹1927 P.C.I.J. (ser. A) No. 9.

12. This territoriality principle in relation to jurisdiction is acknowledged in the Philippines in the case of *Brownell v. Sun Life Assurance*.¹² *Brownell* instructs that no law may have extraterritorial effect on a foreign country and its subjects, unless the foreign country consents to the application of another country's laws:

There is no question that a foreign law may have extraterritorial effect in a country other than the country of origin, provided the latter, in which it is sought to be made operative, gives its consent thereto. This principle is supported by the unquestioned authority.

The jurisdiction of the nation within its territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power in which would impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. (Philippine Political Law by Sinco, pp. 27-28, citing Chief Justice Marshall's statement in the Exchange, 7 Cranch 116)

13. In this case, the Petition failed to allege and prove that Mexico, the country where CEMEX Mexico is established, organized and domiciled, has permitted this Honorable Commission to exercise extraterritorial jurisdiction on its subjects. There is also no allegation nor proof that CEMEX Mexico has voluntarily agreed to submit its person to the jurisdiction of this Honorable Commission. For the record, CEMEX Mexico does NOT recognize nor submit itself to the Commission's jurisdiction. As such, the Honorable Commission cannot exercise jurisdiction over CEMEX Mexico.

14. In short, there can be no proceeding as against CEMEX Mexico, a corporation existing and operating in a foreign state. It is settled that a state, or territory authorized to legislate for itself, may regulate the activities of foreign

¹² G.R. No. L-5731, 22 June 1954.

corporations *within* the state or such territory, but it cannot interfere with what foreign corporations may do *outside*.¹³

B.2. Corollarily, any attempt on the part of CHR to impose jurisdiction and authority over a foreign entity subject of another State creates State sovereignty issues and jeopardizes international relations with CEMEX Mexico's home state.

15. It is well-accepted that with respect to all persons, things, transactions or happenings *within* its territorial limits, a State exercises exclusive jurisdiction – legislative, executive (enforcement) and judicial.¹⁴ Everything found within the territorial domain of the state is under that State's jurisdiction. Nationals and aliens, including non-residents, are bound by its laws, and no process from a foreign government can take effect for or against them within the territory of the local state without its permission.¹⁵ Therefore, it is the sovereign State of Mexico that has exclusive jurisdiction over the acts and omissions of CEMEX Mexico, as the acts alleged to have been committed by CEMEX Mexico were committed within the territory of Mexico.

16. With due respect, any attempt on the part of CHR to impose its jurisdiction and authority over a corporation in Mexico would constitute an act of interference, if not usurpation, in relation to the sovereign state of Mexico. There is no allegation that Mexico has allowed the CHR to assume jurisdiction or investigate CEMEX Mexico. If not restrained, this may be interpreted to be a violation of Mexico's exclusive sovereignty and authority over its subjects and a transgression of international protocol. Under United Nations General Assembly Resolution No. 2625, "(n)o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."

¹³ Johnson, Dissenting Opinion, *La Compañía General de Tabacos de Filipina vs. Collector of Internal Revenue*, G.R. No. 27766, 6 December 1927

¹⁴ Salonga, Jovito R. and Pedro L. Yap (1992), "Public International Law" Fifth Edition, *Framell Printing Press*, p. 96

¹⁵ Cruz, Isagani A. (1998), "International Law", *Central Lawbook Publishing Co., Inc.*, p. 129

17. Again, in *Brownell*, the Supreme Court acknowledged the absolute and exclusive jurisdiction and sovereignty of a State within its own territory:

There is no question that a foreign law may have extraterritorial effect in a country other than the country of origin, provided the latter, in which it is sought to be made operative, gives its consent thereto. This principle is supported by the unquestioned authority.

The jurisdiction of the nation within its territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which would impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. (Philippine Political Law by Sinco, pp. 27-28, citing Chief Justice Marshall's statement in the Exchange, 7 Cranch 116)

In the course of his dissenting opinion in the case of *S. S. Lotus*, decided by the Permanent Court of International Justice, John Bassett Moore said:

"1. It is an admitted principle of International Law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied (*Schooner Exchange vs. McFadden* [1812], 7 Cranch 116, 136). The benefit of this principle equally enures to all independent and sovereign States, and is attended with a corresponding responsibility for what takes place within the national territory. (Digest of International Law, by Backworth, Vol. II, pp. 1-2)¹⁶ (Emphasis supplied)

¹⁶ *Brownell v. Sun Life Assurance*, G.R. No. L-5731, 22 June 1954.

18. Besides, the Philippines adheres to and honors due process as one of its primordial rights. The mere fact that a foreign entity is being made to answer in a forum found in a different continent, with there being no palpable ties between the entity and the *situs* of the forum, in itself constitutes a denial of basic due process.¹⁷

B.3. Even under Philippine law, the Honorable Commission cannot exercise jurisdiction over CEMEX Mexico because it is a foreign corporation NOT doing business in the Philippines.

19. The Honorable Commission has no jurisdiction over CEMEX Mexico because the latter is a foreign corporation which is not doing business in the Philippines. Under Philippine law, jurisdiction over a foreign corporation may be acquired only if it is shown that the same is doing business, with or without a license, in the Philippines.¹⁸

20. An essential condition to be considered as doing business in the Philippines is the actual performance of specific commercial acts within the territory of the Philippines, for the plain reason that the Philippines has no jurisdiction over commercial acts performed in foreign territories.¹⁹

21. There is no allegation in the Petition that CEMEX Mexico is doing business in the Philippines. CEMEX Mexico is in fact NOT doing business in the Philippines. Accordingly, this Honorable Commission can never validly acquire jurisdiction over the person of CEMEX Mexico unless it voluntarily appears before it. There can be no proper service of summons to speak of in this case since it is not possible for governmental authorities in the Philippines to acquire jurisdiction over persons like CEMEX Mexico, who are not found in the Philippines and at the same time not doing business in the Philippines.

¹⁷ Salonga, Jovito R. (1995), "Private International Law", citing *Pennoyer v. Neff*, 95 U.S. 714, 733

¹⁸ *Pacific Micronesia Line, Inc. v. N. Baens Del Rosario*, G.R. No. L-7154, 23 October 1954; *Avon Insurance v. Court of Appeals*, G.R. No. 97642, 29 August 1997.

¹⁹ *B. Van Zuiden Bros., Ltd. vs. GTVL Manufacturing Industries*, G.R. No. 147905, 28 May 2007

B.4. Contrary to the contention of the Petitioners, the international principles and guidelines cited in the Petition do not warrant the exercise of extraterritorial jurisdiction by this Honorable Commission. These international principles and guidelines are not legally binding and enforceable.

22. In defending its position that the Honorable Commission may exercise extraterritorial jurisdiction, the Petitioners mainly cite international principles and guidelines, thus:

On the authority to exercise jurisdiction over investor-owned Carbon Majors to determine whether they have breached their responsibility to respect human rights, the Guiding Principles on Business and Human Rights (Guiding Principles) recognizes that corporations have a responsibility to respect human rights, which arises from a 'global standard of expected conduct applicable to all businesses in all situations.' The commentary under Principle 11 states:

'The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.'²⁰

xxx

States have obligations with respect to human rights, both within their territories and extraterritorially, based on international law. Specifically, states have extraterritorial obligations (ETOs) to respect, protect and fulfil human rights abroad. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights provide guidance and legal grounds for the effective implementation of ETOs. xxx

²⁰ Petition, pp. 14-15

There is also ample justification for any State to act on transboundary and global matters like climate change, where harmful activity is taking place in one country, and the negative impacts are being suffered in another. According to the 2011 OHCHR report on human rights and the environment, '[o]ne country's pollution can become another country's environmental and human rights problem, particularly where the polluting media, like air and water, are capable of easily crossing boundaries.' These issues are of particular importance in the environmental context, in the light of the number and intensity of transboundary and global environmental threats to the full enjoyment of human rights.²¹ (Underscoring supplied)

23. However, these so-called international principles and guidelines are not legally binding and enforceable in the Philippines. Under the 1987 Constitution, international law can become part of the sphere of domestic law, and therefore become legally enforceable, either by *transformation* or *incorporation*.

23.1. The *transformation* method requires that an international law be transformed into a domestic law through a constitutional mechanism such as local legislation.²² International treaties become part of domestic law through transformation.²³

23.2. The *incorporation* method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law.²⁴ The incorporation method applies only to "generally accepted principles of international law" or norms of general or customary international law which are binding on all states.²⁵

24. The Petition does not allege that any of the principles or guidelines it cited, which will supposedly justify the CHR's extraterritorial jurisdiction over foreign corporations like CEMEX Mexico, had been adopted by the Philippines, either by transformation or incorporation. They, in fact, have not.

²¹ Id., p. 17

²² Pharmaceutical and Health Care Association v. Health Secretary, G.R. No. 173034, 9 October 2007.

²³ Id.

²⁴ Id.

²⁵ Id.

25. Further, these international principles and guidelines likewise do not grant to the Honorable Commission jurisdiction over the subject matter. It is elementary that jurisdiction over a subject matter is conferred by law.²⁶ Besides citing international principles and guidelines, the Petition does not point to any law which confers CHR with jurisdiction over the subject matter.

B.5. Even assuming that the international guidelines and principles cited in the Petition are enforceable in the Philippines, the arguments raised by the Petitioners still negate the exercise of extraterritorial jurisdiction of this Honorable Commission over CEMEX Mexico. In fact, the Petition's arguments support the view that jurisdictions of States are limited within their territory.

26. Petitioners' contention that the Honorable Commission can exercise extraterritorial jurisdiction over CEMEX Mexico is belied by the text of the Petition itself. In general, the Petition made repetitive arguments that States may have obligations beyond its boundaries under international law. However, it is clearly *non-sequitur* to contend that such extraterritorial *obligations* also grant a State or its agency (such as the Honorable Commission) extraterritorial *jurisdiction* over a foreign subject. By no stretch of the imagination can extraterritorial obligation be equated to extraterritorial jurisdiction.

27. The Petition itself confirms that only the home state, or the State where a corporation is domiciled, may regulate or subject that corporation to control. For instance, on page 15 of the Petition, the Petitioners claim that the Guiding Principles "[s]tates should set our clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."²⁷ The Petition also avers that various international human rights bodies "have all confirmed that States must take necessary measures to prevent their

²⁶ Tumpag vs. Tumpag, G.R. No. 199133, 29 September 2014

²⁷ Underscoring supplied

corporations from interfering with the enjoyment of human rights both within their territory and in other countries and to take action, separately, and jointly through international cooperation, to realize human rights universally.”²⁸

28. Even assuming for argument’s sake that such Guiding Principles are obligatory and enforceable, the premise of these Principles is that States should try to regulate corporations *within* their territories to ensure that they respect human rights. However, there is no indication that these States should, or are even in a position to, regulate corporations *outside* their territories. In other words, the Guiding Principles cited by Petitioners do not support the proposition that a State agency like the CHR may regulate a foreign corporation in another State. Only the State of Mexico can regulate CEMEX Mexico.

29. Another illustration of Petitioners’ fallacious argument is the following paragraph on page 48 of the Petition:

With respect to civil and political rights, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) states that ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.’ The Human Rights Committee has interpreted this provision to impose both negative and positive obligations on Parties—in other words, States must refrain from violating rights as well as adopt laws or other measures to fulfil their legal obligations and provide remedies in case of violations. As such, a Party’s failure to “take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm” caused by private entities could give rise to violations of the ICCPR. (Underscoring supplied)

29.1. The arguments in this paragraph were cited in relation to the alleged transboundary effect of climate change. Curiously, however, the Petitioners cited Article 2 of the ICCPR, which speaks of the obligation of a “State Party” to ensure that all individuals *within its territory and subject to its jurisdiction* recognize the rights stipulated in the ICCPR. But nowhere in the ICCPR is a State/signatory (such as the Philippines) given the right to exercise extraterritorial jurisdiction over corporations which are *beyond* its territory and jurisdiction.

²⁸ Id., pp. 16-17. Underscoring supplied

30. Indeed, it appears from the body of the Petition and its Prayer that the Petitioners do not seek to impose liabilities on the respondent foreign corporations like CEMEX Mexico. Rather, Petitioners want to hold *the States* where the respondents are domiciled accountable, as exemplified by the following paragraph found on page 53:

Steps must be taken by the States where the Carbon Majors are incorporated, such as Australia, Canada, and the United States, and by the states where the harm is suffered, such as the Philippines, to ensure that the Carbon Majors refrain from the activities that are interfering with the rights of Filipinos. The States where the Carbon Majors are incorporated need to adequately regulate, while the states that are acutely vulnerable to the impacts of climate change need to monitor, assess, notify the Carbon Majors, and their states, of imminent or on-going human rights violations, and to take further action if deemed necessary. This petition presents an opportunity for the States where the Carbon Majors are incorporated to cooperate with the Philippines, a State profoundly affected by climate change, and specifically with the Honourable Commission in fully investigating this urgent matter. (Underscoring supplied)

31. That the Petitioners focus on the States where the respondent foreign corporations are, and not the respondent corporations themselves, is also evident from Item (6) of the *Prayer* of the Petition, to wit:

WHEREFORE, premises, considered, the Petitioners most respectfully pray that the Honourable Commission on Human Rights take the following actions:

.....

(6) Recommend that **governments**, including the Philippines and **other countries** where the investor-owned Carbon Majors are domiciled and/or operate, enhance, strengthen, or explore new ways to fulfill the international duty of cooperation to ensure the Carbon Majors take steps to address the human rights implications of climate change.

32. Petitioners also raised the “no-harm principle”, which they contend is “recognized in customary international law governing State responsibility for transboundary pollution.”²⁹ This contention does not justify extraterritorial jurisdiction of the Honorable Commission over CEMEX Mexico.

²⁹ Petition, p. 26.

33. *First*, similar to the other portions of the Petition mentioned earlier, this statement merely highlights the alleged duties of States in relation to other States. To repeat, the existence of international environmental obligations of States, such as Mexico, has no relation whatsoever to the grant of extraterritorial jurisdiction to this Honorable Commission over Mexican corporations such as CEMEX Mexico.

34. *Second*, contrary to the bare assertion of Petitioners, they have not proved that the “no-harm principle” has attained customary international law status that would warrant its enforceability in the Philippines and Mexico. In international law, a norm crystallizes into customary international law if these two elements are proved:³⁰

- a. State practice, which is characterized by a consistency, generality and substantial uniformity in the practice of States.
- b. Opinio Juris, which refers to the recognition that a certain practice is “obligatory”, and a belief that such practice is required by, or consistent with international law.

34.1. Petitioners failed to allege and prove that the “no-harm principle” is consistently practiced and observed by States, particularly by the Philippines and Mexico. Moreover, there is no recognition among the States that the “no-harm principle” has an “obligatory” character such that States like the Philippines and Mexico are duty-bound to prevent the alleged transboundary pollution.

35. *Third*, the invocation of the 1941 *Trail Smelter Case*, supposedly enunciating the “no-harm principle” in relation to transboundary pollution, is misplaced.³¹ The *Trail Smelter* dispute involves a private smelter company located in Canada. The smelter allegedly emitted toxic smoke which damaged the crops in its surrounding areas, even the lands across the Canada-United States border. The dispute culminated in an arbitration case before an arbitral tribunal which eventually ordered the payment of reparations to the affected farmers.

³⁰North Sea Continental Shelf Cases (Germany v. Denmark and The Netherlands), 1969, International Court of Justice.

³¹Id. n. 46

The doctrine pronounced in *Trail Smelter* is not applicable here.

35.1. For one, the physical circumstances are starkly different. In *Trail Smelter*, the total distance between the smelter company and the affected farmers was only thirty (30) kilometers.³² The only problem was that within that 30-kilometer distance was the US-Canada border. Due to this distance, the actual and observable damage caused by the Canadian smelter to the crops of the farmers in the US could be readily seen. Here, literally thousands of miles separate the Philippines from Mexico. There is thus no environmental damage, direct or otherwise, that can be directly attributed to CEMEX Mexico.

35.2. Moreover, the doctrine therein which allowed one State to recover environmental damages from another State has not been codified as an international law convention. This may be due in part to the fact that *Trail Smelter* involves a special set of facts as mentioned above. Besides, *Trail Smelter* is an international arbitration proceeding between two states, the United States and Canada. While private citizens (the farmers, and a private foreign corporation) were directly involved, their interests were ultimately represented by their respective States in an international arbitration proceeding. Hence, *Trail Smelter* cannot be invoked as a precedent herein.

III. EPILOGUE

31. All told, CEMEX Mexico reiterates that the present Petition should be immediately dismissed for, among other things, lack of jurisdiction over the subject matter and over the person of CEMEX Mexico. It bears stressing that in praying for the prompt and immediate dismissal of the instant Petition, CEMEX Mexico does not belittle the cause of the Petitioners. On the contrary, CEMEX Mexico recognizes the importance of environmental protection and the need to address climate change, not only in the Philippines, but globally as well.

³²The Trail Smelter Case Reexamined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter type of Dispute by Martijn van de Kerkhof (2011). Utrecht Journal of International and European Law

32. For all the reasons above discussed, CEMEX Mexico does not, however, recognize this Honorable Commission as the body and the forum which can assess the adequacy of its efforts to promote environmental protection and address climate change.

RELIEF

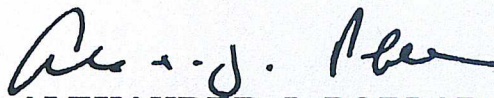
WHEREFORE, on an *ad cautelam* basis and without submitting to the jurisdiction of this Honorable Commission, CEMEX S.A.B. DE C.V., though the special appearance of counsel, hereby makes it of record that this Honorable Commission has no jurisdiction over the subject matter of the Petition and over the person of CEMEX S.A.B. DE C.V.. The Petition therefore should be immediately dismissed insofar as CEMEX S.A.B. DE C.V. is concerned.

Makati City for Quezon City, 14 September 2016.

POBLADOR BAUTISTA & REYES

Counsel for CEMEX S.A.B. de C.V.
5th Floor, SEDCCO I Building
120 Rada corner Legaspi Streets
Legaspi Village, Makati City
Tel. No. 893-7623; Fax No. 893-7622
E-mail: central@pbrlaw.com.ph

By:



ALEXANDER J. POBLADOR

PTR No. 5329701/8 January 2016/Makati City

Lifetime IBP No. 00066/Makati City

OR No. 345214/1 March 1993

Roll of Attorneys No. 29440

MCLE Compliance No. V-0009389/22 July 2015



ANTONIO J. HERNANDEZ

PTR No. 5329710/8 January 2016/Makati City

Lifetime IBP No. 04283/Quezon City

OR No. 574352, 8 January 2003

Roll of Attorneys No. 39240

MCLE Compliance No. V-0011428/2 November 2015

Cielo Marjorie A. Goño
CIELO/MARJORIE A. GOÑO

PTR No. 5709740/4 July 2016/ Makati City
 IBP No. 1041809/31 May 2016/ Oriental Mindoro
 Roll of Attorneys No. 66386
 Newly Admitted,³³ M.C.L.E. Governing Board
 Order 1 s.2008, July 4, 2008

Mica Maurinne M. Adao
MICA MAURINNE M. ADAO

PTR No.5709737/4 July 2016/Makati City
 IBP No.1041441/26 May 2016/Laguna
 Roll of Attorneys No. 66136
 Newly Admitted,³⁴ MCLE Governing Board Order
 No.1, s. of 2008, July 4, 2008

Copy Furnished:

GREENPEACE SOUTHEAST ASIA (PHILIPPINES)

Room 201, JGS Building, No. 30 Scout. Tuason
 Brgy. Laging Handa, Quezon City

As Petitioner and Legal Representative of the other Petitioners

1. Philippine Rural Reconstruction Movement (PRRM)
2. DAKILA (Philippine Collective for Modern Heroism)
3. Sentro ng mga Nagkakaisa at Progresibong
Manggagawa
4. Mother Earth Foundation
5. Ecowaste Coalition
6. Nagkakaisang Ugnayan ng Mga Magsasaka at
Manggagawa sa Niyugan
7. Philippine Human Rights Information Center
8. Asia Pacific Movement On Debt And Development
9. Nuclear Free Bataan Movement
10. Ayos Bicol
11. Philippine Alliance of Human Rights Advocates
12. 350.org East Asia
13. Philippine Movement for Climate Justice
14. Von Hernandez
15. Fr. Edwin Gariguez
16. Naderev "Yeb" Saño

³³ Admitted to the Philippine Bar in 2016.

³⁴ Admitted to the Philippine Bar in 2016.

17. Lidy Nacpil
18. Amado Guerrero "AG" Saño
19. John Charles Edward "Carlos" Pamintuan Celdran
20. Angel Aquino
21. Juan Manuel "Kokoi" Baldo
22. Tarcila M. Lerum
23. Roy N. Basto
24. Elma Reyes
25. Benjamin Acheron
26. Richard C. Lopez
27. Laidy L. Remando
28. Constanca Lopez
29. Lerissa Libao
30. Gloria O. Cadiz
31. Veronica V. Cabe

EXPLANATION

This *Entry of Special Appearance with Motion to Dismiss* was served by registered mail, instead of the preferred mode of personal service, due to the temporary lack of messengerial power of the undersigned.


CIELO MARJORIE A. GOÑO