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October 2017

STATEMENT REGARDING
CONSTITUTIONAL RESTRICTIONS ON FOREIGN EQUITY
AND RELATED PROVISIONS

SUBMITTED TO SUB-COMMITTEE 4 OF THE COMMITTEE ON CONSTITUIONAL AMENDMENTS OF THE HOUSE OF REPRESENTATIVES CHAIRED BY REPRESENTATIVE VICENT "CHING" VELOSO

For many years, the seven chambers of the Joint Foreign Chambers have supported reducing and removing the restrictions on foreign equity in the 1987 Philippine Constitution.

Most recently, we supported RBH No. 1 in the 16th Congress of Rep. Feliciano Belmonte, which proposed to insert the phrase *"unless otherwise provided by law"* into provisions that limit foreign ownership in advertising, educational institutions, land, mass media, natural resources, and public utilities. This proposal would use language similar to the provision in Article XII Section 14, which states *"The practice of all professions in the Philippines shall be limited to Filipino citizens, save in case prescribed by law."*

We welcome this opportunity to provide our position on these restrictions. In sum, our position is to remove all restrictions in order to open the Philippine economy more to foreign investors and foreign professionals. We no longer support the *"unless otherwise provided by law"* proposal because the current Administration and Congress are proposing major political and economic amendments to the Constitution.

In regards to future investment in the economy, this is an occasion to correct provisions that have contributed to diminished investment and reduced economic growth by reducing the competiveness of the Philippines vis-à-vis more open neighbors. Further, the Duterte Administration has expressed its policy intent in Point 3 of the Ten-point Socio-economic Agenda to improve competition and reduce restrictions on foreign investment. Senior government economic managers have emphasized their intent to liberalize these restrictions, through amendments to administrative issuances, restrictive laws, and constitutional provisions, in order to make the Foreign Investment Negative List (FINL) more positive.

General Reasons.

We have several reasons why we support the recommendation to remove all restrictions. The following are general reasons, followed by specific comments on each restriction.

1) **Inflexible.** Placing restrictions on foreign business activity in the Constitution denies the government flexibility to adjust to future changes in technology, to meet requirements of international treaties, and to take advantage of new opportunities that would benefit the economy. For these reasons, very few countries in the world place such restrictions in their constitutions. Many countries have some restrictions on foreign investment, but they are made in laws and executive issuances and thus easier to adjust to changing circumstances.

2) **Most restrictive.** The Philippines is one of the most restrictive countries in 11 sectors measured by the World Bank in its *"Investing Across Borders 2012*" report that surveyed 105 economies (see attached figure). Almost all of the restrictions measured in the report were by laws and executive orders.

3) **Outdated**. A number of restrictive provisions in the current Constitution date back to the 1935 Constitution or 1973 Constitution. They reflected the nationalistic spirit at the time and a protectionist policy to favor Philippine industry over foreign investors. Eighty-two and 44 years later, the global circumstances facing the country have greatly changed.

4) **Foreign Investment Act RA 7042, as amended by RA 8179 removed 60-40 rule.** Only four years after the 1987 Constitution was ratified, the Congress passed a law in 1991 that ended the restriction on foreign investment in domestic enterprises limiting a foreign investor to 40% ownership. While the Congress took action to liberalize the domestic economy to increase investment and job creation, however, Congress did not take any action to amend the foreign equity restrictions in the Constitution.

5) **Restrictions make it harder to create jobs when more are needed.** The country's population has grown from 14,700,000 in 1935 and 40,100,000 in 1973 to 105,000,000 in 2017. The country faces different challenges in the 21^{st} century and needs flexibility to respond effectively. Millions of new jobs need to be created in order to reduce unemployment, underemployment, and poverty.

6) **No longer an inward-looking economy.** There have been major economic changes since the 1987 Constitution was drafted. The Philippine economy is no longer inward-looking and protectionist as it was three decades ago. The Philippines has joined the WTO, the ASEAN Economic Community, and has free trade agreements with Japan, the European Free Trade Association, and, through ASEAN, with Australia, China, India, Japan, Korea, and New Zealand. Around 10% of the Philippine population lives and works abroad.

7) **Sacrifices by the Filipino diaspora.** Filipino laborers and professionals work in almost every country in the world, as well as on the high seas, as OFWs, immigrants, and seafarers. Their remittances reached $27 billion in 2016. A more open and competitive economy should create more domestic jobs, allowing more Filipinos to stay with their families.

8) **A less competitive economy**. Restrictions on foreign investment make the economy less competitive by imposing constraints to growth that result in lower investments, fewer jobs, poor infrastructure, and non-inclusive development. When there is less competition, the quality of goods and services goes down and prices go up, to the disadvantage of consumers.

Specific comments

Our overall position is to remove all restrictions in order to open the Philippine economy more towards foreign investors and professionals.

The following discusses each restriction we favor repealing. Where we have knowledge that another group has submitted the same recommendation, we take note of its position. These include the 1999 Constitutional Correction for Development (CONCORD), the 2005 Consultative Commission (CONCOM), the 2017 Federalism Study Group of the PDP-Laban Federalism Institute (PDP-Laban), the 2017 Foundation for Economic Freedom amendments (FEF), and the 2016 Management Association of the Philippines (MAP) position paper.

Article II Section 19.

The Declaration of Principles article states that *"the State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."*

Recommendation: The JFC agrees with the recommendation of the CONCOM to repeal this section, also supported by the FEF and the MAP, among others.

Article XII Section 2 Paragraph 1.

"All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant."

Recommendation: The JFC agrees with the recommendation proposed by CONCOM, PDP-Laban, FEF, MAP, among others, to remove restrictions on co-production, joint venture, or production-sharing agreements for natural resources.

The JFC notes that the 1987 Constitution added language that allows the president "to enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils…" or FTAAs. However, this language does not apply to all of the enumerated categories of natural resources.

For example, it does not apply to "all forces of potential energy." This language resulted in the interpretation in the IRRs of RA 9153 the Renewable Energy Act of 1988, which stated that solar, tidal, and wind power projects were restricted to 40% foreign ownership. At the same time, power plants using coal, natural gas, and other foreign imported fuel stock are allowed up to 100% foreign ownership.

Article XII Section 2 Paragraph 2.

"The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens."

Recommendation: The JFC agrees with the recommendation of FEF, CONCOM and PDP-Laban, among others, to remove the restriction on marine wealth as it is considered to be anti-competitive language.

The Philippine government has numerous powers that allow it to regulate, protect, develop, and sustain the nation's marine wealth and should not be restricted from allowing foreign capital to operate in such areas it determines to be advantageous to the country. One example would be the exploration and possible development of the huge Benham Rise area east of Northern Luzon.

Article XII Section 7.

"Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain."

Recommendation: The JFC agrees with the recommendation to repeal this section, which has been interpreted to place restrictions on foreign ownership of land, as made by FEF, MAP, and PDP-Laban, among others.

We note that the CONCOM recommended the following amendment instead of the repeal of Section 7.

*"SEC. ~~7~~ **6**. Save in cases of hereditary succession, no private **AGRICULTURAL** lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain. **LANDS CLASSIFIED IN ACCORDANCE WITH LAW AS INDUSTRIAL, COMMERCIAL OR RESIDENTIAL MAY BE TRANSFERRED OR CONVEYED TO FOREIGN INDIVIDUALS OR CORPORATIONS WITH FOREIGN OWNERSHIP. PARLIAMENT SHALL DEFINE THE CONDITIONS FOR OWNERSHIP OF ALLOWABLE LANDS BY FOREIGN INDIVIDUALS AND BY CORPORATIONS WITH FOREIGN OWNERSHIP."***

Article XII Section 10.

"The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipino."

"In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos."

"The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities."

Recommendation: The JFC agrees with the recommendation to repeal the article as proposed by CONCORD and FEF, among others, as the language may inhibit competitiveness. At the same time, we note that PDP-Laban recommends retaining Paragraph 3 above.

Article XII Section 11.

"No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines."

Recommendation*:* The JFC agrees with the recommendation of CONCORD, CONCOM, FEF, PDP-Laban, and MAP, among others, to repeal this section and open up public utilities to more competition in line with the current proposal of HB 5828 on An Act Providing for the Definition of Public Utility Further Amending for the Purpose Commonwealth Act No. 146, Otherwise known as the "Public Service Act," as Amended
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The public will benefit from more competition in public utilities and public services. This issue has recently been considered extensively in the House of Representatives in its consideration and approval of HB 5828.

Further, under the 2008 ASEAN Economic Community Blueprint (Section A2-20) signed by former President Gloria Macapagal Arroyo, the Philippines committed to the principle:

"Free flow of trade in services is one of the important elements in realizing ASEAN Economic Community, where there will be substantially no restriction to ASEAN service suppliers in providing services and in establishing companies across national borders within the region, subject to domestic regulations. "

Article XII Section 12.

"The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive."

Recommendation: The JFC agrees with the recommendation to repeal this section made by CONCOM, FEF, and PDP-Laban, among others, as being anti-competitive.

Article XII Section 14.

"The practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law."

Recommendation*:* The JFC recommends the repeal of this language also supported by FEF, MAP and PDP-Laban and FEF, among others.

Nearly 100% of the over 40 laws on professions allow foreigners to practice, mostly with reciprocity. Only two laws do not, and a Supreme Court rule limits the practice of law to Philippine nationals. Thus Section 14 has become redundant and unnecessary.

The Philippines has entered into Mutual Recognition Agreements for several professions with its ASEAN partners. Filipinos practice professions around the world, subject to local regulation. The same should be followed by the Philippines in regard to foreigners practicing in the Philippines.

A fast-growing economy such as the Philippines needs increasing numbers of professionals from abroad to share their technology and skills. This is especially true in the Creative Industry sector, which has very high potential for future growth and job creation.

Article XIV Section 4 Paragraph 2.

"Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or associations at least sixty per centum of the capital of which is owned by such citizens. "

"The control and administration of educational institutions shall be invested in citizens of the Philippines."

Recommendation: The JFC supports repeal of this provision, a recommendation also made by FEF and MAP, among others.

Achieving the goal of becoming a high middle-income economy requires Filipinos to be better educated in skills needed for the global economy of the future. This is even more important with the growing challenge of disruptive technologies to traditional jobs.

In order to maximize the quality of education in the country, foreign ownership of educational institutions and their control of the same should be allowed. Singapore is a model that the Philippines can learn from. Yale University established an undergraduate liberal arts college school at the National University of Singapore in 2011. Likewise, INSEAD, ranked the number one MBA school in the world by Financial Times, has operated a joint French-Singaporean campus in Singapore since 2000.

Article XVI Section 11 Paragraph 1.

"The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives and associations, wholly owned and managed by such citizens."

Recommendation: The JFC supports the repeal of this section. We note that CONCORD and CONCOM recommended repeal of the entire Section 11, as does MAP, among others.

Technology in the media sector has advanced so rapidly that this restriction, first introduced in the 1973 Constitution, makes little sense in the 21st Century. Within ASEAN, only the Philippines places limits on foreign ownership of media by a constitutional restriction.

Some other ASEAN countries have restrictions on media, but by law or administrative order, i.e. Thailand (35% allowed), Singapore (31% allowed). Indonesia and Vietnam allow zero while Malaysia is 100% open. (See attached figure).

Article XVI Section 11 (2).

"The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of general welfare."

"Only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry."

"The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all executive and managing officers of such entities must be citizens of the Philippines."

Recommendation: The JFC supports the repeal of this sub-section. We note that the CONCORD and CONCOM recommended repeal of the entire Section 11, as does the MAP, among others.

Advertising is a vibrant industry in the Philippines and has high potential to become an important advertising hub in the Asia-Pacific region given the creative talents of Filipinos. However, this potential is constrained by the limit on foreign ownership.

The JFC is a coalition of the American, Australian-New Zealand, Canadian, European, Japanese, Korean chambers and PAMURI. We represent over 3,000 member companies engaged in over $100 billion worth of trade and some $30 billion worth of investments in the Philippines. The JFC supports and promotes open international trade, increased foreign investment, and improved conditions for business to benefit both the Philippines and the countries the JFC members represent.

Best regards,

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Attachment:

1. Foreign equity ownership indices by industry group, ASEAN-6 (2012), World Bank

Foreign equity ownership indices by industry group, ASEAN-6, 2012

Economy	ECONOMY AVERAGE	Agriculture and Forestry	Mining and Oil & Gas	Manufacturing	Electricity	Waste management and water supply	Transportation	Tourism	Media	Telecom	Financial Services	Accounting	Education
Cambodia	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Indonesia	73%	98%	98%	98%	95%	100%	49%	100%	0%	57%	86%	100%	0%
Japan	92%	100%	100%	100%	100%	100%	72%	100%	60%	100%	100%	100%	100%
Korea	82%	100%	100%	100%	80%	100%	92%	100%	40%	49%	100%	100%	0%
Malaysia	79%	50%	60%	100%	39%	100%	83%	100%	100%	100%	70%	100%	100%
Philippines	50%	40%	40%	100%	40%	40%	50%	100%	0%	40%	87%	0%	40%
Singapore	92%	100%	100%	100%	100%	100%	83%	100%	31%	100%	100%	100%	100%
Thailand	68%	49%	75%	100%	100%	75%	49%	49%	35%	49%	75%	49%	100%
Vietnam	66%	76%	76%	100%	60%	76%	49%	100%	0%	53%	83%	100%	100%

Source: World Bank Investing Across Borders, Investing Across Sectors 2012

Note: 100% = full foreign ownership allowed; the 2012 study included 105 economies