

## Joint Foreign Chambers of the Philippines

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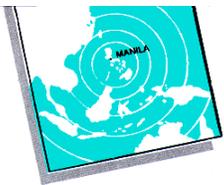
EUROPEAN



JAPANESE



KOREAN



PAMURI

### STATEMENT REGARDING CONSTITUTIONAL RESTRICTIONS ON FOREIGN EQUITY AND RELATED PROVISIONS IN REGARD TO HCR 1 and RBH 2

### SUBMITTED TO THE COMMITTEE ON CONSTITUTIONAL AMENDMENTS OF THE HOUSE OF REPRESENTATIVES

SEPTEMBER 25, 2019

The Joint Foreign Chambers is a business advocacy coalition comprised of seven members: the American, Australian-New Zealand, Canadian, European, Japanese, Korean chambers and the Philippine Association of Multinational Companies Regional Headquarters (PAMURI).

We thank the chairman for including us among those invited to comment on these two legislative measures. Our comments are limited only to the economic policy issues contained in House Concurrent Resolution 1 and Resolution of Both Houses 2, since these are relevant to our advocacies for investment climate policy reform.

Reforms to reduce or remove the restrictions on foreign equity in the 1987 Philippine Constitution have always been near the top of our priorities. Our motivation has been to permit more capital to flow into the Philippines to increase the rate of GDP growth and employment.

Both HCR 1 and RBH 2 propose modifying restrictions of the Economic Provisions in Articles XII, XIV, and XVI by the phrase “*unless otherwise provided by law.*”

In the 16<sup>th</sup> and 17<sup>th</sup> Congresses we were also invited to submit a position paper on these restrictions. In the 17<sup>th</sup> Congress we presented them at a subcommittee of this committee at a hearing focused on the Economic Provisions. In the 16<sup>th</sup> Congress we supported RBH 2 of Speaker Belmonte, which proposed to insert the phrase “*unless otherwise provided by law*” into the language in the Constitution limiting foreign ownership and foreign participation in corporate management. 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 cases prescribed by law.”*

We welcome this opportunity to provide our position on the restrictions. Briefly stated, we recommend that all but one of the restrictions be removed in order to open the Philippine economy to more foreign investors and foreign professionals.

We advocated this reform before the 17<sup>th</sup> Congress. At that time other groups that also took the same or very similar positions including the PDP-Laban Party Institute, the Foundation for Economic Freedom (FEF), the Makati Business Club (MBC), and the Management Association of the Philippines (MAP).

We have been encouraged by the policies of the Duterte Administration to increase the inflow of foreign investment into the country's economy. We see this enunciated in point 3 of the Ten Point Socio-Economic Agenda, the Philippine Development Plan, Memorandum Order 16, the 11<sup>th</sup> Foreign Investment Negative List, and the certification as urgent by President Duterte of amendments to the Foreign Investments Act, the Retail Trade Act, and the Public Services Act.

Also, senior government economic managers have emphasized their intent to open the economy more to foreign investment through revisions to administrative issuances, restrictive laws, and constitutional provisions, and thereby make the Foreign Investment Negative List (FINL) more positive.

### **General Reasons.**

We recommend removal of the restrictions at the earliest date. This can best be accomplished by deleting the restrictions without adding the phrase "unless otherwise provided by law."

Our reasons follow:

1) **To obtain the benefits of increased foreign investment as soon as possible.** If the policy objective is to encourage foreign investment, then the best way to do so is to remove the restrictions without conditions. If the restrictions are completely removed following their approval in a referendum, the government and Congress can be prepared with proposed draft laws to introduce bills and hold hearings to deliberate on what restrictions should be placed on any of the currently constitutionally restricted activities that are approved to be reformed by the voters. Many of the restrictions on foreign ownership listed in the FINL are based on laws.

2) **The restrictions are 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 benefit the economy. For such 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 can be adjusted much easier to changing circumstances without amending a constitution.

3) **One of the 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. The Organization for Economic Development has made a similar report in which the Philippines is the most restrictive of 67 countries (see attached).

4) **Restrictions are outdated.** A number of restrictive provisions in the current Constitution date back to the 1935 Constitution or 1973 Constitution. They reflect the nationalistic spirit at the time and the protectionist policy to favor Philippine industry over foreign investors. Eighty-four and 46 years later, the global circumstances facing the country have greatly changed.

5) **The Philippines is no longer an inward-looking economy.** There have been major economic changes since the 1973 and 1987 constitutions were drafted. The Philippine economy is no longer as inward-looking and protectionist as it was three decades ago. The Philippine economy is tied into the global economy. Around 10% of the Philippine population lives and works abroad. Substantial industries in business process outsourcing and electronics manufacturing have located in the country.

6) **The Philippines has increased its free trade agreements within ASEAN and Asia.** ASEAN has become a dynamic region of almost 650 million people and receives as much FDI now as China. The Philippines joined the WTO and the ASEAN Economic Community, and has free trade agreements not only with ASEAN but also with Japan, the European Free Trade Association, and - through ASEAN - with Australia, China, India, Japan, Korea, and New Zealand.

7) **New FTAs require treating foreign and domestic investors the same.** To remain competitive, the Philippines should negotiate FTAs with the European Union, the United States, and the Comprehensive and Progressive Trans-Pacific Partnership (CPTTP). These FTAs require the free movement of capital across borders.

8) **Foreign Investment Act RA 7042, as amended by RA 8179, removed the 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 market enterprises that limited a foreign investor to 40% ownership. While the Congress acted to liberalize the domestic economy in order to increase investment and job creation, Congress has yet to amend the foreign equity restrictions in the Constitution.

9) **Restrictions make it harder to create jobs.** The Philippine 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<sup>st</sup> century and needs flexibility to respond effectively. Millions of new jobs need to be created in to reduce unemployment, underemployment, and poverty.

10) **Removing restrictions increases competitiveness.** Restrictions on foreign investment make the economy less competitive by imposing constraints to growth that result in lower investments, fewer jobs, poorer infrastructure, and less 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.**

Article II “Declaration of Principles and State Policies” Section 19 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.

## **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 FTAAAs. 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 if it determines this to be advantageous to the country.

**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 Filipinos.*

*“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 goal 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.

The public will benefit from more competition in public utilities and public services. This issue was considered extensively in the House of Representatives in its consideration and approval of the PSA amendments in the 17<sup>th</sup> Congress.

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.

Forty-five laws on professions allow foreigners to practice, mostly with reciprocity. Only a Supreme Court rule on the practice of law limits the practice of a profession solely to Philippine nationals. 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 21<sup>st</sup> 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.”*

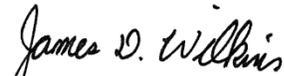
**Recommendation:** The JFC supports the repeal of this sub-section. We note that the CONCORD and CONCOM recommended repeal of the entire Section 11, as does the MAP, among others.

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.

This completes our comments on the aforementioned bills. We thank the committee for its consideration of our views.

Sincerely,



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**DANIEL ALEXANDER**

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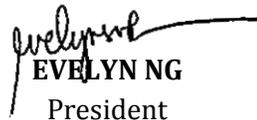
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Attachments:

1. World Bank Foreign Equity Ownership
2. OECD Restrictiveness