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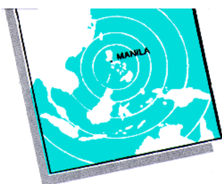

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January 18, 2022

HON. SHARON S. GARIN
Chairperson, Committee on Economic Affairs
Representative, AAMBIS-OWA Party List
House of Representatives
Quezon City, MM

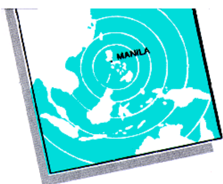
Dear Chairperson Garin:

The undersigned foreign chambers of commerce in the Phhilippines commend the current Congress for approving game-changing amendments to the 86-year old Public Service Act (PSA). While we appreciate the challenges from the surging pandemic and limited session days, we continue to strongly encourage the Congress to convene the bicam and seek to ratify the bill before beginning its campaign recess on February 5.

The PSA reform is one of the most important reforms for the Philippine economy in many decades and essential to restoring and eventually exceeding pre-pandemic rates of economic growth. Just this week the Wolld Bank revised its predictions downwards for global economic growth in 2022 and 2023, especially for developing economies such as the Philippines. Bouncing back is becoming a more and more elusive possiiblity. By ecouraging large new capital inflows from abroad into critical infrastructure, the reforms will support and enable faster modernization of vital infrastructure, including telecommunication/broadband and air, ground, and marine transportation services.

Eventually, Filipino consumers will enjoy the benefits of increased competition from more choices of service providers with better technology, pricing, and customer service.

To ensure the gains the Philippines should reap through this law, we encourage the bicameral committee to adopt the most liberal possible provisions between the two versions. There should be no reason for the Congress to protect influential special interests in a measure of such great implications for the Philippine economy.



In particular, we recommend:

1) Section 3(k). Retention of the definition of "*Public Utility Vehicles*" in the Senate version.

International freight carriers are not "vehicles for hire" and should be allowed to pick up and deliver to their customers in the Philippines, as they do in most of the world. Allowing this will encourage these global firms to invest more in international gateways, as they have at Clark, and increase the role of the Philippines as a regional air cargo hub, which in turn will attract new export manufacturing firms to locate in the country.

2) Section 3(m). Adoption of the definition of "*Telecommunications"* in the Senate version with amendment.

We recommend adoption of the House and Senate versions which exclude telecommunications from public utilities, as this important service no longer has the characteristics of a public utility. Moreover, listing telecommunications as a public utility under the present provisions of the PSA Amendments bill would reverse the effect of many years of deregulation that the industry has enjoyed under Republic Act 7925 (the Public Telecommunications Policy Act).

a. Exception for passive telecommunications infrastructure be amended to delete the word "tower" so that the provision shall now read as follows:

"Sec. 3 (m) *Telecommunications* … except passive telecommunications **[**tower**]** infrastructure and components, such as, but not limited to, poles, fiber ducts, dark fiber cables, and passive telecommunications tower infrastructure, as defined by the Department of Information and Communications Technology (DICT),…"

The provision of passive infrastructure *per se* does not involve the transmission and reception of voice or data, and therefore is not telecommunications. Different types of passive infrastructure can support telecommunications and ICT services, not *just* towers. Poles, ducts, and dark fiber are other examples of passive infrastructure. There is in fact a whole

sector engaged in the provision to telcos of passive infrastructure that is unregulated and not required to secure a franchise, since they do not provide telecommunications service to the public.

b. Exception for Value Added Services (VAS).

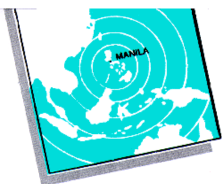
A key feature of the Public Telecommunications Policy Act of the Philippines (RA 7925) was the institution of a new category of service providers – the Value-Added Service (VAS) Providers – who would be allowed to render service without a Congressional franchise. Thus, VAS differ from Public Telecommunications Entities who render International Gateway, Cellular Mobile, Inter-exchange and Local Exchange Services under Secs. 7-10 of RA 7925 and for which franchises are required. Internet Service Providers (ISPs) are considered VAS and thus may render service without a franchise. This classification (made by the NTC in 2005) relied on the argument that the internet was not contemplated under RA 7925.

The definition of telecommunications under the House version, HB 78 Sec. 3 (g), is so broad as could arguably include internet. If so included, then ISPs that today are not required to secure a Congressional franchise would now be required to secure a Congressional franchise. This would erect a new and substantial barrier to the entry of competition in the market for internet services and would stifle the growth of community internet and further handicap the faster growth of the country's digital economy.

c. Adding a proviso on the exception for VAS.

At the end of the definition under Sec. 3 (m), add the proviso in bold so that the provision shall read as follows:

> "(m) Telecommunications refers to any process which enables a telecommunications entity to relay and receive voice, data, electronic messages, written or printed matter, fixed or moving pictures, words, music or visible or audible signals or any control signals of any design and for any purpose by wire, radio or other electromagnetic, spectral, optical or technological means, as defined by Section 3 (a) of Republic Act No. 7925, as amended, except passive telecommunications [tower] infrastructure and components, such as, but not limited to, poles, fiber ducts, dark



> fiber cables, and passive telecommunications tower infrastructure, as defined by the Department Of Information And Communications Technology (DICT), and value-added services, as defined in Section 3 (h) of RA 7925, as amended; **Provided, that, passive infrastructure shall continue to be under the jurisdiction of the DICT and value added services (VAS) shall continue to be de-regulated, and both passive infrastructure and VAS shall not be subject to any nationality requirements."**

There is a need to encourage competition, innovation, and flexibility in the provision of internet service. The propagation of ISPs especially in the countryside must be a priority in order to bridge the digital divide. Hence, internet as a VAS must remain deregulated and ease of market entry must be promoted. The availability and ubiquity of passive infrastructure are equally important in expanding internet connectivity. Thus, there should be no barriers to their installation except for safety regulations.

3) Section 4(D)(7). Deletion of expressways and tollways in the definition of "public utilities."

Section 4 of SB 2094 includes expressways and tollways among public utilities. To this proposed inclusion we respectfully express our reservation. We recommend that these vital logistic arteries be liberalized for foreign investment in the same way as railways and subways. It is quite an oddity to include expressways and tollways as a public utility. A closer look into those considered as public utilities reveals that, to a certain degree, they are engaged in the distribution/transmission, which expressways and tollways are not.

The Senate version classifies tollways as a public utility but not railroad and subways. This is illogical. Indonesia is reported by Nikkei to be seeking foreign investors for its 2,818 kilometer Trans-Sumatra Toll Road costing US$34 billion with 24 segments inviting foreign investors to construct, own, and operate different segments. The Philippines should do the same for new tollways on major islands.

Furthermore, a comparison of the kilometers of "controlled-access" roads on Wikipedia based on a 2021 CIA report revealed the Philippines

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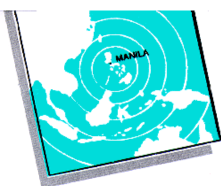

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substantially behind comparable and regional countries. A developing country such as Mexico has 17,524 kilometers while an advanced economy such as Japan has 8,795 kilometers. The Philippines with roughly comparable population and area had 626 kilometers. (see table 1 for comparative data).

Table 1. Total length of limited access roads and population, selected countries

Country	Length of limited access roads (km)	Population (per World Bank)
Philippines	**626**	**109.6 million**
Indonesia	2,756	273.5 million
Malaysia	2,001	32.4 million
Singapore	164	5.9 million
Thailand	535	69.8 million
Vietnam	1,276	97.3 million
China	161,000	1.4 billion
Japan	8,795	125.8 million
South Korea	4,767	51.8 million
Argentina	4,423	45.4 million
Mexico	17,524	128.9 million

The World Economic Forum also measures quality of road infrastructure in 141 countries. The Philippines ranked 88th in the 2019 rankings. (see table 2 for comparative data).

Table 2. WEF Global Competitiveness Report quality of road infrastructure rankings, 2019, selected countries

Country	WEF ranking
Philippines	**88**
Indonesia	60
Malaysia	19
Singapore	1
Thailand	55
Vietnam	103
China	45
Japan	5
South Korea	9
Argentina	92
Mexico	49

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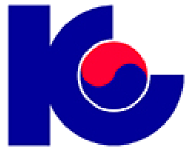

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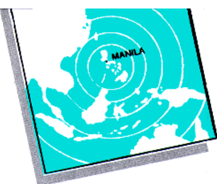

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4) To allow foreign ownership in the operation and management of airports and seaports we recommend an amendment to delete Section 6, Sec. 14 (3) of HB 78.

Thus, we recommend an amendment of Sec. 4(d) of SB 2094 to add a proviso for airports and seaports so that the provision shall read as follows:

"(D) *PUBLIC UTILITY.* –

PUBLIC UTILITY REFERS TO A PUBLIC SERVICE THAT OPERATES, MANAGES OR CONTROLS FOR PUBLIC USE ANY OF THE FOLLOWING:

(1) DISTRIBUTION OR TRANSMISSION OF ELECTRICITY;

(2) PETROLEUM AND PETROLEUM PRODUCTS PIPELINE TRANSMISSION OR DISTRIBUTION SYSTEMS;

(3) WATER PIPELINE DISTRIBUTION SYSTEMS AND WASTEWATER PIPELINE SYSTEMS;

(4) AIRPORTS;

(5) SEAPORTS;

[(6)] (4) PUBLIC UTILITY VEHICLES; AND

[(7)] (5) EXPRESSWAYS AND TOLLWAYS

PROVIDED, THAT, FOREIGN OWNERSHIP IN THE OPERATION AND MANAGEMENT OF AIRPORTS AND SEAPORTS SHALL BE ALLOWED.

Xxx"

Operations and maintenance concessions should be allowed for fully foreign-owned companies. The world's best airport and seaport operators could bring world-class standards and technology to serve the Philippine public who travel by air and sea.

As we are well aware, the airport and seaport industries were among the most gravely effected by the COVID-19 pandemic. Airport and seaport operations were halted as countries had to order closure of international and local borders. These embattled industries require maximum effort and help from the government to build back, and here foreign investment can play a crucial role. However, to secure higher levels of foreign capital, the Philippine needs to liberalize this sector. Further, we agree that "the measure primarily intends to provide Filipino consumers with "more and better choices" and liberalising public services will "truly benefit" future generations."

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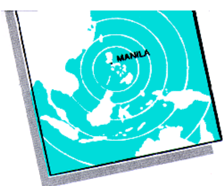

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5) Adopting the national security review and critical infrastructure provisions in the Senate version with amendment.

Section 15 of SB 2094 mandates the conduct of a national security review of foreign direct investment on covered transactions. However, what is a "covered transaction" is not clear. The definition of covered transaction is *"**any** **investment activity** such as merger, acquisition, or takeover that is proposed or pending after the effectivity of this law **which could** result in foreign control of a business or entity considered as critical infrastructure."* The definition in itself would cover any foreign investment regardless of size on the speculation that it "could" ultimately lead to foreign control of critical infrastructure, regardless of whether it actually does or even if the possibility is remote as opposed to being a clear and present danger.

Moreover, some vagueness in the wording of the law seems to indicate that the president may step into and interfere with a review of any transaction based solely on his own belief.

If the ultimate objective of this bill is to further open the economy in order to support government policies on substantially increasing FDI levels, it is similarly crucial that the law eliminates any uncertainty and perception of possible arbitrariness in the conduct of a national security review.

We understand that any country may have apprehensions or concerns pertaining to national security in allowing foreign investments in critical industries. It is easy to understand that leaders might be skeptical in sacrificing national security for economic growth. Hence, the undersigned respectfully endorse and support the adoption of the national security review and critical infrastructure provisions of the Senate version, but with clear criteria on when a transaction is subject to review and the boundaries to such a review.

Thus, we propose that the definition of "covered transaction" be amended to read as follows:

> "Sec. 3. (c) (c) *Covered transaction* refers to any investment activity such as merger, acquisition**[**, or takeover that is proposed or pending after the effectivity of this law which could result in foreign control of a business or entity considered as critical infrastructure **] where at least one party is an owner of critical**

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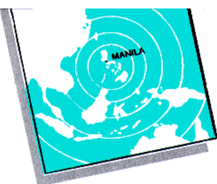

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infrastructure, wherein the value of the transaction exceeds one billion pesos (P1,000,000,000.00);

Section 15 shall then be <u>simplified to read</u> as follows:

> "SEC. 15. Review of Foreign Direct Investment in Covered Transactions. – **Parties to a Covered Transaction are prohibited from consummating their agreement until sixty (60) days after providing notification to the National Security Council and the Philippine Competition Commission in the form and containing the information specified in regulations to be jointly issued by the PCC and the NSC. The PCC and the NSC shall conduct a joint review of the Covered Transaction in accordance with rules to be promulgated and published by them within sixty (60) days from the issuance of this Act.**"

6) Retain the exclusion of independent pension funds, sovereign wealth funds, and multinational banks from the definition of state-owned enterprises in the Senate version

Section 16 of SB 2094 bans prospective investments of state-owned enterprises in critical infrastructure but excluding independent pension funds, sovereign wealth funds, and multinational banks from definition of state-owned enterprises. The undersigned note the existing presence in the Philippines of numerous pension and sovereign wealth funds from Asia, Europe, and North America that are valuable sources of funding for businesses and social programs in the country and are potentially significant sources of foreign investment for the future. Alternatively, investments from independent pension funds, sovereign wealth funds, and multinational banks may be prospectively capped at a 30% threshold, which would be consistent with the passive nature of their investment and with the tender offer rule.

7) <u>Delete</u> the foreign reciprocity provision.

Both the House and Senate versions include a foreign reciprocity provision. As a rule, we do not believe that reciprocity provisions are in the interest of the economic development of the Philippines as they may limit capital infusion from foreign firms of countries that restrict Philippine investment, when few or no Philippines firms are interested in investing in such countries. The

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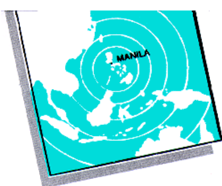

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reciprocity provision must not prevent important foreign investment from coming to the Philippines. When the Philippine economy needs more foreign capital, the law should not require that a Filipino firm be allowed the same in the country of the investor. No such rule applies to investors who are eagerly welcomed for business processing, exports of manufactured goods, or even high-value crops. The reciprocity provision should not be a barrier to needed investment.

Given the urgent need of the Philippines for foreign investments and stiff competition from other countries, we greatly hope that this provision will be reconsidered. However, in case the Bicameral Committee decides to proceed with this provision, we recommend adopting a desirable compromise by reinstating the broader definition of reciprocity i.e. “according rights of similar economic value in other economic sectors” under Section 7 of HB 78 (which was also in the original Senate Committee Report), then likewise adopting the proviso in the Senate Committee Report: “as may be determined by the Director-General of the National Economic and Development Authority” to grant NEDA the exclusive authority to determine whether the reciprocity requirement has been complied with.

8) Remove the ISO certification requirement for critical infrastructure.

Section 18 of SB 2094 requires ISO certification for critical infrastructure. We suggest that this be amended to read as follows:

> “SEC. 18. Information Security. – Public services in critical infrastructure shall obtain and maintain certifications **[**from an accredited certification body**]** attesting to compliance with relevant **[**ISO**]** **MINIMUM** standards on information security, as prescribed by the Department of Information and Communications Technology: Provided, That the maintenance of these certifications shall be a continuing qualification for retention of franchise or other authority to operate; provided further, that this section shall not apply to micro, small and medium enterprises under Republic Act No. 9501.”

We wish to point out that the ISO certification process is long and expensive, and smaller ISPs may not be able to mount the effort and expense required for an ISO certification. There are a number of globally accepted information security standards, not just the ISO family. It needs to be noted that ISO standards can be costly (and unnecessary) for small organizations,

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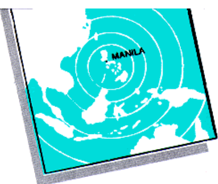
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such as local electric cooperatives or small provincial telcos. There are information security standards that provide a checklist and entails self-attestation rather than third-party certification. On the other hand, it would be better to leave to DICT the matter of defining what certifications will be required of particular industry players, since it is DICT that has the mandate under RA 10844 for cybersecurity.

The PSA amendments - along with the enacted Retail Trade amendments and pending amendments to the Foreign Investment Act – should result in a considerable improvement in the ranking of the Philippines by the Organization of Economic Cooperation and Development (OECD) for foreign investment restrictiveness, currently ranked as third most restive of 83 countries. This will improve the reputation of the Philippines as an economy that welcomes foreign investment, and annual FDI inflow levels should exceed $10 billion, above Malaysia and Thailand and may even begin to approach Vietnam.

We believe that including these proposed amendments is aligned with the Presidential certification and would bring the country's investment regime at par with its neighbors. Indeed, passing this legislation has come at the most opportune time as the country launches its post-pandemic recovery efforts.

With best regards,

FRANK THIEL
President
American Chamber of Commerce of the Philippines

DANIEL ALEXANDER
President
Australian-New Zealand Chamber of Commerce of the Philippines

JULIAN PAYNE
President
Canadian Chamber of Commerce of the Philippines

LARS WITTIG
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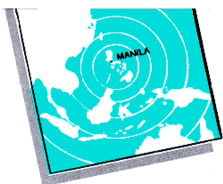

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