EN BANC

HEIRS OF WILSON P. GAMBOA,[*]
Petitioners,

- versus -

FINANCE SECRETARY MARGARITO B. TEVES, FINANCE UNDERSECRETARY JOHN P. SEVILLA, AND COMMISSIONER RICARDO ABCEDE OF THE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT (PCGG) IN THEIR CAPACITIES AS CHAIR AND MEMBERS, RESPECTIVELY, OF THE PRIVATIZATION COUNCIL, CHAIRMAN ANTHONI SALIM OF FIRST PACIFIC CO., LTD. IN HIS CAPACITY AS DIRECTOR OF METRO PACIFIC ASSET HOLDINGS INC., CHAIRMAN MANUEL V. PANGILINAN OF PHILIPPINE LONG DISTANCE TELEPHONE COMPANY (PLDT) IN HIS CAPACITY AS MANAGING DIRECTOR OF FIRST PACIFIC CO., LTD., PRESIDENT NAPOLEON L. NAZARENO OF PHILIPPINE LONG DISTANCE TELEPHONE COMPANY, CHAIR FE BARIN OF THE SECURITIES AND EXCHANGE COMMISSION, and PRESIDENT FRANCIS LIM OF THE PHILIPPINE STOCK EXCHANGE,
Respondents.

G.R. No. 176579

Present:

SERENO, *C.J*,
CARPIO,
VELASCO, JR.,
LEONARDO-DE CASTRO,
BRION,
PERALTA,
BERSAMIN,
DEL CASTILLO,
ABAD,
VILLARAMA, JR.,
PEREZ,
MENDOZA,
REYES, and
PERLAS-BERNABE, *JJ*.

[*] The Heirs of Wilson P. Gamboa substituted petitioner Wilson P. Gamboa per Resolution dated 17 April 2012 which noted the Manifestation of Lauro Gamboa dated 12 April 2012.

PABLITO V. SANIDAD and ARNO V. SANIDAD,
Petitioners-in-Intervention.

Promulgated:

OCTOBER 09, 2012

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RESOLUTION

CARPIO, *J.*:

This resolves the motions for reconsideration of the 28 June 2011 Decision filed by (1) the Philippine Stock Exchange's (PSE) President,[1] (2) Manuel V. Pangilinan (Pangilinan),[2] (3) Napoleon L. Nazareno (Nazareno),[3] and (4) the Securities and Exchange Commission (SEC)[4] (collectively, movants).

The Office of the Solicitor General (OSG) initially filed a motion for reconsideration on behalf of the SEC,[5] assailing the 28 June 2011 Decision. However, it subsequently filed a Consolidated Comment on behalf of the State,[6] declaring expressly that it agrees with the Court's definition of the term "capital" in Section 11, Article XII of the Constitution. During the Oral Arguments on 26 June 2012, the OSG reiterated its position consistent with the Court's 28 June 2011 Decision.

We deny the motions for reconsideration.

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1 *Rollo* (Vol. III), pp. 1431-1451. Dated 11 July 2011.
2 Id. at 1563-1613. Dated 14 July 2011.
3 Id. at 1454-1537. Dated 15 July 2011.
4 Id. at 1669-1680. Through its Office of the General Counsel and Commissioner Manuel Huberto B. Gaite. In its Manifestation and Omnibus Motion dated 29 July 2011, the SEC manifested that the position of the OSG on the meaning of the term "capital" does not reflect the view of the SEC. The SEC sought a partial reconsideration praying that the statement on SEC's unlawful neglect of its statutory duty be expunged and for clarification on the reckoning period of the imposition of any sanctions against PLDT.
5 Id. at 1614-1627. Dated 13 July 2011. On behalf of the SEC, by special appearance. The OSG prayed that the Court's decision "be cured of its procedural defect which however should not prevail over the substantive aspect of the Decision."
6 Id. at 2102-2124. Filed on 15 December 2011.

I.
Far-reaching implications of the legal issue justify treatment of petition for declaratory relief as one for mandamus.

As we emphatically stated in the 28 June 2011 Decision, the interpretation of the term "capital" in Section 11, Article XII of the Constitution has far-reaching implications to the national economy. In fact, a resolution of this issue will determine whether Filipinos are masters, or second-class citizens, in their own country. What is at stake here is whether Filipinos or foreigners will have ***effective control*** of the Philippine national economy. Indeed, if ever there is a legal issue that has far-reaching implications to the entire nation, and to future generations of Filipinos, it is the threshold legal issue presented in this case.

Contrary to Pangilinan's narrow view, the serious economic consequences resulting in the interpretation of the term "capital" in Section 11, Article XII of the Constitution undoubtedly demand an immediate adjudication of this issue. **Simply put, the far-reaching implications of this issue justify the treatment of the petition as one for mandamus.**[7]

In *Luzon Stevedoring Corp. v. Anti-Dummy Board*,[8] the Court deemed it wise and expedient to resolve the case although the petition for declaratory relief could be outrightly dismissed for being procedurally defective. There, appellant admittedly had already committed a breach of the Public Service Act in relation to the Anti-Dummy Law since it had been employing non-American aliens long before the decision in a prior similar case. However, the main issue in *Luzon Stevedoring* was of transcendental importance, involving the exercise or enjoyment of rights, franchises, privileges, properties and businesses which only Filipinos and qualified corporations could exercise or enjoy under the Constitution and the statutes. Moreover, the same issue could be raised by appellant in an appropriate action. Thus,

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7 *Salvacion v. Central Bank of the Philippines*, 343 Phil. 539 (1997).
8 150-B Phil. 380 (1972).

in *Luzon Stevedoring* the Court deemed it necessary to finally dispose of the case for the guidance of all concerned, despite the apparent procedural flaw in the petition.

The circumstances surrounding the present case, such as the supposed procedural defect of the petition and the pivotal legal issue involved, resemble those in *Luzon Stevedoring.* Consequently, in the interest of substantial justice and faithful adherence to the Constitution, we opted to resolve this case for the guidance of the public and all concerned parties.

II.
No change of any long-standing rule;
thus, no redefinition of the term "capital."

Movants contend that the term "capital" in Section 11, Article XII of the Constitution has long been settled and defined to refer to the total outstanding shares of stock, whether voting or non-voting. In fact, movants claim that the SEC, which is the administrative agency tasked to enforce the 60-40 ownership requirement in favor of Filipino citizens in the Constitution and various statutes, has consistently adopted this particular definition in its numerous opinions. Movants point out that with the 28 June 2011 Decision, the Court in effect introduced a "new" definition or "midstream redefinition"[9] of the term "capital" in Section 11, Article XII of the Constitution.

This is egregious error.

For more than 75 years since the 1935 Constitution, the Court has ***not*** interpreted or defined the term "capital" found in various economic provisions of the 1935, 1973 and 1987 Constitutions. There has never been a judicial precedent interpreting the term "capital" in the 1935, 1973 and

[9] *Rollo* (Vol. III), p. 1583.

1987 Constitutions, until now. Hence, it is patently wrong and utterly baseless to claim that the Court in defining the term "capital" in its 28 June 2011 Decision modified, reversed, or set aside the purported long-standing definition of the term "capital," which supposedly refers to the total outstanding shares of stock, whether voting or non-voting. To repeat, until the present case there has never been a Court ruling categorically defining the term "capital" found in the various economic provisions of the 1935, 1973 and 1987 Philippine Constitutions.

The opinions of the SEC, as well as of the Department of Justice (DOJ), on the definition of the term "capital" as referring to both voting and non-voting shares (combined total of common and preferred shares) are, in the first place, conflicting and inconsistent. There is no basis whatsoever to the claim that the SEC and the DOJ have consistently and uniformly adopted a definition of the term "capital" contrary to the definition that this Court adopted in its 28 June 2011 Decision.

In DOJ Opinion No. 130, s. 1985,[10] dated 7 October 1985, the scope of the term "capital" in Section 9, Article XIV of the 1973 Constitution was raised, that is, whether the term "capital" includes "both preferred and common stocks." The issue was raised in relation to a stock-swap transaction between a Filipino and a Japanese corporation, both stockholders of a domestic corporation that owned lands in the Philippines. Then Minister of Justice Estelito P. Mendoza ruled that the resulting ownership structure of the corporation would be **unconstitutional** because 60% of the voting stock would be owned by Japanese while Filipinos would own only 40% of the voting stock, although when the non-voting stock is added, Filipinos would own 60% of the combined voting and non-voting stock. **This ownership structure is remarkably similar to the current ownership structure of PLDT**. Minister Mendoza ruled:

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[10] Addressed to Gov. Lilia Bautista of the Board of Investments.

> x x x x
>
> Thus, the Filipino group still owns sixty (60%) of the entire subscribed capital stock (common and preferred) while the Japanese investors control sixty percent (60%) of the common (voting) shares.
>
> **It is your position that x x x since Section 9, Article XIV of the Constitution uses the word "capital," which is construed "to include both preferred and common shares" and "that where the law does not distinguish, the courts shall not distinguish."**
>
> x x x x
>
> In light of the foregoing jurisprudence, **it is my opinion that the stock-swap transaction in question may not be constitutionally upheld**. While it may be ordinary corporate practice to classify corporate shares into common voting shares and preferred non-voting shares, any arrangement which attempts to defeat the constitutional purpose should be eschewed. **Thus, the resultant equity arrangement which would place ownership of 60%**[11] **of the common (voting) shares in the Japanese group, while retaining 60% of the total percentage of common and preferred shares in Filipino hands would amount to circumvention of the principle of control by Philippine stockholders that is implicit in the 60% Philippine nationality requirement in the Constitution.** (Emphasis supplied)

In short, Minister Mendoza **categorically rejected** the theory that the term "capital" in Section 9, Article XIV of the 1973 Constitution includes "both preferred and common stocks" treated as the same class of shares regardless of differences in voting rights and privileges. Minister Mendoza stressed that the 60-40 ownership requirement in favor of Filipino citizens in the Constitution is not complied with unless the corporation "**satisfies the criterion of beneficial ownership**" and that in applying the same "**the primordial consideration is situs of control**."

On the other hand, in Opinion No. 23-10 dated 18 August 2010, addressed to Castillo Laman Tan Pantaleon & San Jose, then SEC General Counsel Vernette G. Umali-Paco applied the **Voting Control Test**, that is, using only the voting stock to determine whether a corporation is a Philippine national. The Opinion states:

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[11] A typographical error in DOJ Opinion No. 130 where it states 80%.

> Applying the foregoing, **particularly the Control Test**, MLRC is deemed as a Philippine national because: (1) sixty percent (60%) of its **outstanding capital stock *entitled to vote*** is owned by a Philippine national, the Trustee; and (2) at least sixty percent (60%) of the ERF will accrue to the benefit of Philippine nationals. **Still pursuant to the Control Test, MLRC's investment in 60% of BFDC's outstanding capital stock *entitled to vote* shall be deemed as of Philippine nationality, thereby qualifying BFDC to own private land**.
>
> Further, under, and for purposes of, the FIA, MLRC and BFDC are both Philippine nationals, considering that: (1) sixty percent (60%) of their respective **outstanding capital stock *entitled to vote*** is owned by a Philippine national (i.e., by the Trustee, in the case of MLRC; and by MLRC, in the case of BFDC); and (2) at least 60% of their respective board of directors are Filipino citizens. (Boldfacing and italicization supplied)

Clearly, these DOJ and SEC opinions are compatible with the Court's interpretation of the 60-40 ownership requirement in favor of Filipino citizens mandated by the Constitution for certain economic activities. At the same time, these opinions highlight the conflicting, contradictory, and inconsistent positions taken by the DOJ and the SEC on the definition of the term "capital" found in the economic provisions of the Constitution.

The opinions issued by SEC legal officers do not have the force and effect of SEC rules and regulations because only the SEC *en banc* can adopt rules and regulations. As expressly provided in Section 4.6 of the Securities Regulation Code,[12] the SEC cannot delegate to any of its individual Commissioner or staff the power to adopt any rule or regulation. Further, **under Section 5.1 of the same Code, it is *the SEC as a collegial body,* and not any of its legal officers, that is empowered to issue *opinions* and approve rules and regulations.** Thus:

> 4.6. The Commission may, for purposes of efficiency, delegate any of its functions to any department or office of the Commission, an individual Commissioner or staff member of the Commission **except** its review or appellate authority and **its power to adopt, alter and supplement any rule or regulation.**

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[12] Republic Act No. 8799.

> The Commission may review upon its own initiative or upon the petition of any interested party any action of any department or office, individual Commissioner, or staff member of the Commission.
>
> SEC. 5. *Powers and Functions of the Commission*.- 5.1. The Commission shall act with transparency and shall have the powers and functions provided by this Code, Presidential Decree No. 902-A, the Corporation Code, the Investment Houses Law, the Financing Company Act and other existing laws. Pursuant thereto the Commission shall have, among others, the following powers and functions:
>
> x x x x
>
> **(g) Prepare, approve, amend or repeal rules, regulations and orders, and issue *opinions* and provide guidance on and supervise compliance with such rules, regulations and orders;**
>
> x x x x (Emphasis supplied)

Thus, the act of the individual Commissioners or legal officers of the SEC in issuing opinions that have the effect of SEC rules or regulations is *ultra vires*. Under Sections 4.6 and 5.1(g) of the Code, only the SEC *en banc* can "issue opinions" that have the force and effect of rules or regulations. Section 4.6 of the Code bars the SEC *en banc* from delegating to any individual Commissioner or staff the power to adopt rules or regulations. **In short, any opinion of individual Commissioners or SEC legal officers does not constitute a rule or regulation of the SEC**.

The SEC admits during the Oral Arguments that only the SEC *en banc*, and not any of its individual commissioners or legal staff, is empowered to issue opinions which have the same binding effect as SEC rules and regulations, thus:

> JUSTICE CARPIO:
>
> So, under the law, it is the Commission En Banc that can issue an SEC Opinion, correct?
>
> COMMISSIONER GAITE:[13]
>
> That's correct, Your Honor.

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[13] General Counsel and Commissioner Manuel Huberto B. Gaite of the Securities and Exchange Commission.

JUSTICE CARPIO:
Can the Commission En Banc delegate this function to an SEC officer?

COMMISSIONER GAITE:
Yes, Your Honor, we have delegated it to the General Counsel.

JUSTICE CARPIO:
It can be delegated. What cannot be delegated by the Commission En Banc to a commissioner or an individual employee of the Commission?

COMMISSIONER GAITE:
Novel opinions that [have] to be decided by the En Banc …

JUSTICE CARPIO:
What cannot be delegated, among others, is the power to adopt or amend rules and regulations, correct?

COMMISSIONER GAITE:
That's correct, Your Honor.

JUSTICE CARPIO:
So, you combine the two (2), the SEC officer, if delegated that power, can issue an opinion but that opinion does not constitute a rule or regulation, correct?

COMMISSIONER GAITE:
Correct, Your Honor.

JUSTICE CARPIO:
So, all of these opinions that you mentioned they are not rules and regulations, correct?

COMMISSIONER GAITE:
They are not rules and regulations.

JUSTICE CARPIO:
If they are not rules and regulations, they apply only to that particular situation and will not constitute a precedent, correct?

COMMISSIONER GAITE:
Yes, Your Honor.[14] (Emphasis supplied)

Significantly, the SEC *en banc*, which is the collegial body statutorily empowered to issue rules and opinions on behalf of the SEC, has adopted even the Grandfather Rule in determining compliance with the 60-40 ownership requirement in favor of Filipino citizens mandated by the Constitution for certain economic activities. This prevailing SEC ruling,

[14] TSN (Oral Arguments), 26 June 2012, pp. 81-83. Emphasis supplied.

which the SEC correctly adopted to thwart any circumvention of the required Filipino "**ownership and control**," is laid down in the 25 March 2010 SEC *en banc* ruling in *Redmont Consolidated Mines, Corp. v. McArthur Mining, Inc., et al.*,[15] to wit:

> The avowed purpose of the Constitution is to place in the hands of Filipinos the exploitation of our natural resources. **Necessarily, therefore, the Rule interpreting the constitutional provision should not diminish that right through the legal fiction of corporate ownership and control**. But the constitutional provision, as interpreted and practiced via the 1967 SEC Rules, has favored foreigners contrary to the command of the Constitution. ***Hence, the Grandfather Rule must be applied to accurately determine the actual participation, both direct and indirect, of foreigners in a corporation engaged in a nationalized activity or business***.
>
> Compliance with the constitutional limitation(s) on engaging in nationalized activities must be determined by ascertaining if 60% of the investing corporation's outstanding capital stock is owned by "Filipino citizens", or as interpreted, by natural or individual Filipino citizens. If such investing corporation is in turn owned to some extent by another investing corporation, the same process must be observed. One must not stop until the citizenships of the individual or natural stockholders of layer after layer of investing corporations have been established, the very essence of the Grandfather Rule.
>
> **Lastly, it was the intent of the framers of the 1987 Constitution to adopt the Grandfather Rule.** In one of the discussions on what is now Article XII of the present Constitution, the framers made the following exchange:
>
> > MR. NOLLEDO. In Sections 3, 9 and 15, the Committee stated local or Filipino equity and foreign equity; namely, 60-40 in Section 3, 60-40 in Section 9, and 2/3-1/3 in Section 15.
> >
> > MR. VILLEGAS. That is right.
> >
> > MR. NOLLEDO. In teaching law, we are always faced with the question: 'Where do we base the equity requirement, is it on the authorized capital stock, on the subscribed capital stock, or on the paid-up capital stock of a corporation'? Will the Committee please enlighten me on this?
> >
> > MR. VILLEGAS. We have just had a long discussion with the members of the team from the UP Law Center who provided us a draft. The phrase that is contained here which we adopted from the UP draft is '60 percent of voting stock.'

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[15] SEC En Banc Case No. 09-09-177, 25 March 2010.

> MR. NOLLEDO. That must be based on the subscribed capital stock, because unless declared delinquent, unpaid capital stock shall be entitled to vote.
>
> MR. VILLEGAS. That is right.
>
> MR. NOLLEDO. Thank you. With respect to an investment by one corporation in another corporation, say, a corporation with 60-40 percent equity invests in another corporation which is permitted by the Corporation Code, does the Committee adopt the grandfather rule?
>
> MR. VILLEGAS. Yes, that is the understanding of the Committee.
>
> MR. NOLLEDO. Therefore, we need additional Filipino capital?
>
> MR. VILLEGAS. Yes. (Boldfacing and underscoring supplied; italicization in the original)

This SEC *en banc* ruling conforms to our 28 June 2011 Decision that the 60-40 ownership requirement in favor of Filipino citizens in the Constitution to engage in certain economic activities applies not only to voting control of the corporation, but **also to the beneficial ownership of the corporation**. Thus, in our 28 June 2011 Decision we stated:

> Mere legal title is insufficient to meet the 60 percent Filipino-owned "capital" required in the Constitution. **Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is required**. The legal and beneficial ownership of 60 percent of the outstanding capital stock must rest in the hands of Filipino nationals in accordance with the constitutional mandate. Otherwise, the corporation is "considered as non-Philippine national[s]." (Emphasis supplied)

Both the Voting Control Test and the Beneficial Ownership Test must be applied to determine whether a corporation is a "Philippine national."

The interpretation by legal officers of the SEC of the term "capital," embodied in various opinions which respondents relied upon, is merely preliminary and an opinion only of such officers. To repeat, any such opinion does not constitute an SEC rule or regulation. In fact, many of these opinions contain a disclaimer which expressly states: "x x x **the foregoing**

opinion is based solely on facts disclosed in your query and relevant only to the particular issue raised therein and **shall not be used in the nature of a standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances**."[16] Thus, the opinions clearly make a *caveat* that they do not constitute binding precedents on any one, not even on the SEC itself.

Likewise, the opinions of the SEC *en banc*, as well as of the DOJ, interpreting the law are neither conclusive nor controlling and thus, do not bind the Court. It is hornbook doctrine that any interpretation of the law that administrative or quasi-judicial agencies make is only preliminary, never conclusive on the Court. The power to make a final interpretation of the law, in this case the term "capital" in Section 11, Article XII of the 1987 Constitution, lies with this Court, not with any other government entity.

In his motion for reconsideration, the PSE President cites the cases of *National Telecommunications Commission v. Court of Appeals*[17] and *Philippine Long Distance Telephone Company v. National Telecommunications Commission*[18] in arguing that the Court has already

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16 SEC Opinion No. 49-04, Re: Corporations considered as Philippine Nationals, dated 22 December 2004, addressed to Romulo Mabanta Buenaventura Sayoc & De Los Angeles and signed by General Counsel Vernette G. Umali-Paco; SEC-OGC Opinion No. 03-08, dated 15 January 2008, addressed to Attys. Ruby Rose J. Yusi and Rudyard S. Arbolado and signed by General Counsel Vernette G. Umali-Paco; SEC-OGC Opinion No. 09-09, dated 28 April 2009, addressed to Villaraza Cruz Marcelo Angangco and signed by General Counsel Vernette G. Umali-Paco; SEC-OGC Opinion No. 08-10, dated 8 February 2010, addressed to Mr. Teodoro B. Quijano and signed by General Counsel Vernette G. Umali-Paco; SEC-OGC Opinion No. 23-10, dated 18 August 2010, addressed to Castillo Laman Tan Pantaleon and San Jose and signed by General Counsel Vernette G. Umali-Paco; SEC-OGC Opinion No. 18-07, dated 28 November 2007, addressed to Mr. Rafael C. Bueno, Jr. and signed by General Counsel Vernette G. Umali-Paco.

In SEC Opinion No. 32-03, dated 2 June 2003, addressed to National Telecommunications Commissioner Armi Jane R. Borje, SEC General Counsel Vernette G. Umali-Paco stated:

> In this light, it is imperative that we reiterate the policy of this Commission (SEC) in refraining from rendering opinions that might prejudice or affect the outcome of a case, which is subject to present litigation before the courts, or any other forum for that matter. The opinion, which may be rendered thereon, would not be binding upon any party who would in all probability, if the opinion happens to be adverse to his or its interest, take issue therewith and contest it before the proper venue. The Commission, therefore, has to refrain from giving categorical answers to your query.

17 370 Phil. 538 (1999).

18 G.R. No. 152685, 4 December 2007, 539 SCRA 365.

defined the term "capital" in Section 11, Article XII of the 1987 Constitution.[19]

The PSE President is grossly mistaken. In both cases of *National Telecommunications v. Court of Appeals*[20] and *Philippine Long Distance Telephone Company v. National Telecommunications Commission*,[21] the Court did not define the term "capital" as found in Section 11, Article XII of the 1987 Constitution. **In fact, these two cases never mentioned, discussed or cited Section 11, Article XII of the Constitution or any of its economic provisions**, **and thus cannot serve as precedent in the interpretation of Section 11, Article XII of the Constitution**. These two cases dealt solely with the determination of the correct regulatory fees under Section 40(e) and (f) of the Public Service Act, to wit:

> (e) For annual reimbursement of the expenses incurred by the Commission in the supervision of other public services and/or in the regulation or fixing of their rates, twenty centavos for each one hundred pesos or fraction thereof, of the **capital stock subscribed or paid**, or if no shares have been issued, of the capital invested, or of the property and equipment whichever is higher.
>
> (f) For the issue or increase of **capital stock**, twenty centavos for each one hundred pesos or fraction thereof, of the increased capital. (Emphasis supplied)

The Court's interpretation in these two cases of the terms "capital stock subscribed or paid," "capital stock" and "capital" does not pertain to, and cannot control, the definition of the term "capital" as used in Section 11, Article XII of the Constitution, or any of the economic provisions of the Constitution where the term "capital" is found. The definition of the term "capital" found in the Constitution must not be taken out of context. A careful reading of these two cases reveals that the terms "capital stock subscribed or paid," "capital stock" and "capital" were defined solely to

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19 *Rollo* (Vol. III), pp. 1392-1393.
20 Supra.
21 Supra.

determine the basis for computing the supervision and regulation fees under Section 40(e) and (f) of the Public Service Act.

III.
Filipinization of Public Utilities

The Preamble of the 1987 Constitution, as the prologue of the supreme law of the land, embodies the ideals that the Constitution intends to achieve.[22] The Preamble reads:

> We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society, and establish a Government that shall embody our ideals and aspirations, promote the common good, **conserve and develop our patrimony**, and secure to ourselves and our posterity, the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution. (Emphasis supplied)

Consistent with these ideals, Section 19, Article II of the 1987 Constitution declares as State policy the development of a national economy "***effectively controlled***" by Filipinos:

> Section 19. The State shall develop a self-reliant and independent national economy ***effectively controlled by Filipinos***.

Fortifying the State policy of a Filipino-controlled economy, the Constitution decrees:

> 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.

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[22] De Leon, Hector S., TEXTBOOK ON THE PHILIPPINE CONSTITUTION, 2005 Edition, pp. 32, 33.

> The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.[23]

Under Section 10, Article XII of the 1987 Constitution, Congress may "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." Thus, in numerous laws Congress has reserved certain areas of investments to Filipino citizens or to corporations at least sixty percent of the "**capital**" of which is owned by Filipino citizens. Some of these laws are: (1) Regulation of Award of Government Contracts or R.A. No. 5183; (2) Philippine Inventors Incentives Act or R.A. No. 3850; (3) Magna Carta for Micro, Small and Medium Enterprises or R.A. No. 6977; (4) Philippine Overseas Shipping Development Act or R.A. No. 7471; (5) Domestic Shipping Development Act of 2004 or R.A. No. 9295; (6) Philippine Technology Transfer Act of 2009 or R.A. No. 10055; and (7) Ship Mortgage Decree or P.D. No. 1521.

With respect to public utilities, the 1987 Constitution specifically ordains:

> 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. (Emphasis supplied)

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[23] Section 10, Article XII of the 1987 Constitution.

This provision, which mandates the Filipinization of public utilities, requires that any form of authorization for the operation of public utilities shall be granted only 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." "**The provision is [an express] recognition of the sensitive and vital position of public utilities both in the national economy and for national security."**[24]

The 1987 Constitution reserves the ownership and operation of public utilities exclusively to (1) Filipino citizens, or (2) corporations or associations at least 60 percent of whose "capital" is owned by Filipino citizens. Hence, in the case of individuals, only Filipino citizens can validly own and operate a public utility. In the case of corporations or associations, at least 60 percent of their "capital" must be owned by Filipino citizens. **In other words, under Section 11, Article XII of the 1987 Constitution, to own and operate a public utility a corporation's capital must at least be 60 percent owned by *Philippine nationals*.**

IV.
Definition of "Philippine National"

Pursuant to the express mandate of Section 11, Article XII of the 1987 Constitution, Congress enacted Republic Act No. 7042 or the *Foreign Investments Act of 1991* (FIA), as amended, which defined a "**Philippine national**" as follows:

> SEC. 3. Definitions. - As used in this Act:
>
> a. The term "*Philippine national"* shall mean a citizen of the Philippines; or a domestic partnership or association wholly owned by citizens of the Philippines; or **a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding *and entitled to vote* is owned and held by citizens of the Philippines**; or a corporation organized abroad and registered as doing

[24] Bernas, Joaquin G., S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY, 1996 Edition, p. 1044, citing *Smith, Bell and Co. v. Natividad*, 40 Phil. 136, 148 (1919); *Luzon Stevedoring Corporation v. Anti-Dummy Board*, 150-B Phil. 380, 403-404 (1972).

> business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: *Provided*, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation, shall be considered a "Philippine national." (Boldfacing, italicization and underscoring supplied)

Thus, the FIA clearly and unequivocally defines a "**Philippine national**" as a Philippine citizen, or a domestic corporation at least "**60% of the capital stock outstanding and *entitled to vote***" is owned by Philippine citizens.

The definition of a "Philippine national" in the FIA reiterated the meaning of such term as provided in its predecessor statute, Executive Order No. 226 or the *Omnibus Investments Code of 1987*,[25] which was issued by then President Corazon C. Aquino. Article 15 of this Code states:

> Article 15. "Philippine national" shall mean a citizen of the Philippines or a diplomatic partnership or association wholly-owned by citizens of the Philippines; or **a corporation organized under the laws of the Philippines of which at least sixty per cent (60%) of the capital stock outstanding *and entitled to vote* is owned and held by citizens of the Philippines**; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty per cent (60%) of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stock in a registered enterprise, at least sixty per cent (60%) of the capital stock outstanding and entitled to vote of both corporations must be owned and held by the citizens of the Philippines and at least sixty per cent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines in order that the corporation shall be considered a Philippine national. (Boldfacing, italicization and underscoring supplied)

Under Article 48(3)[26] of the Omnibus Investments Code of 1987, "no corporation x x x which is not a 'Philippine national' x x x shall do business

[25] Issued on 17 July 1987.

[26] Articles 44 to 56 of the Omnibus Investments Code of 1987 were later repealed by the Foreign Investments Act of 1991. See infra, p. 26.

x x x in the Philippines x x x without first securing from the Board of Investments a written certificate to the effect that such business or economic activity x x x would **not** conflict with the Constitution or laws of the Philippines."[27] Thus, a "non-Philippine national" cannot own and operate a reserved economic activity like a public utility. This means, of course, that only a "Philippine national" can own and operate a public utility.

In turn, the definition of a "Philippine national" under Article 15 of the Omnibus Investments Code of 1987 was a reiteration of the meaning of such term as provided in Article 14 of the *Omnibus Investments Code of 1981*,[28] to wit:

> Article 14. "Philippine national" shall mean a citizen of the Philippines; or a domestic partnership or association wholly owned by citizens of the Philippines; or **a corporation organized under the laws of the Philippines of which at least sixty per cent (60%) of the capital stock outstanding *and entitled to vote* is owned and held by citizens of the Philippines;** or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty per cent (60%) of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stock in a registered enterprise, at least sixty per cent (60%) of the capital stock outstanding and entitled to vote of both corporations must be owned and held by the citizens of the Philippines and at least sixty per cent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines in order that the corporation shall be considered a Philippine national. (Boldfacing, italicization and underscoring supplied)

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[27] Article 48. *Authority to Do Business*. No alien, and no firm association, partnership, corporation or any other form of business organization formed, organized, chartered or existing under any laws other than those of the Philippines, or which is not a Philippine national, or more than forty per cent (40%) of the outstanding capital of which is owned or controlled by aliens shall do business or engage in any economic activity in the Philippines or be registered, licensed, or permitted by the Securities and Exchange Commission or by any other bureau, office, agency, political subdivision or instrumentality of the government, to do business, or engage in any economic activity in the Philippines without first securing a written certificate from the Board of Investments to the effect:

x x x x

(3) That such business or economic activity by the applicant would not conflict with the Constitution or laws of the Philippines;

x x x x

[28] Presidential Decree No. 1789.

Under Article 69(3) of the Omnibus Investments Code of 1981, "no corporation x x x which is not a 'Philippine national' x x x shall do business x x x in the Philippines x x x without first securing a written certificate from the Board of Investments to the effect that such business or economic activity x x x would **not** conflict with the Constitution or laws of the Philippines."[29] Thus, a "non-Philippine national" cannot own and operate a reserved economic activity like a public utility. Again, this means that only a "Philippine national" can own and operate a public utility.

Prior to the Omnibus Investments Code of 1981, Republic Act No. 5186[30] or the *Investment Incentives Act*, which took effect on 16 September 1967, contained a similar definition of a "Philippine national," to wit:

> (f) "Philippine National" shall mean a citizen of the Philippines; or a partnership or association wholly owned by citizens of the Philippines; or **a corporation organized under the laws of the Philippines of which at least sixty per cent of the capital stock outstanding *and entitled to vote* is owned and held by citizens of the Philippines**; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine National and at least sixty per cent of the fund will accrue to the benefit of Philippine Nationals: Provided, That where a corporation and its non-Filipino stockholders own stock in a registered enterprise, at least sixty per cent of the capital stock outstanding and entitled to vote of both corporations must be owned and held by the citizens of the Philippines and at least sixty per cent of the members of the Board of Directors of both corporations must be citizens of the Philippines in order that the corporation shall be considered a Philippine National. (Boldfacing, italicization and underscoring supplied)

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29 Article 69. *Authority to Do Business.* No alien, and no firm, association, partnership, corporation or any other form of business organization formed, organized, chartered or existing under any laws other than those of the Philippines, or which is not a Philippine national, or more than thirty (30%) per cent of the outstanding capital of which is owned or controlled by aliens shall do business or engage in any economic activity in the Philippines, or be registered, licensed, or permitted by the Securities and Exchange Commission or by any other bureau, office, agency, political subdivision or instrumentality of the government, to do business, or engage in any economic activity in the Philippines, without first securing a written certificate from the Board of Investments to the effect:

x x x x

(3) That such business or economic activity by the applicant would not conflict with the Constitution or laws of the Philippines;

x x x x

30 An Act Prescribing Incentives And Guarantees To Investments In The Philippines, Creating A Board Of Investments, Appropriating The Necessary Funds Therefor And For Other Purposes.

Under Section 3 of Republic Act No. 5455 or the *Foreign Business Regulations Act*, which took effect on 30 September 1968, if the investment in a domestic enterprise by non-Philippine nationals exceeds 30% of its outstanding capital stock, such enterprise must obtain prior approval from the Board of Investments before accepting such investment. Such approval shall **not** be granted if the investment "would conflict with existing constitutional provisions and laws regulating the degree of required ownership by Philippine nationals in the enterprise."[31] A "non-Philippine national" cannot own and operate a reserved economic activity like a public utility. Again, this means that only a "Philippine national" can own and operate a public utility.

The FIA, ***like all its predecessor statutes***, clearly defines a "**Philippine national**" as a Filipino citizen, or a **domestic corporation "at least sixty percent (60%) of the capital stock outstanding *and entitled to vote*"** is owned by Filipino citizens. A domestic corporation is a "Philippine national" only if at least 60% of its ***voting stock*** is owned by Filipino citizens. This definition of a "Philippine national" is crucial in the present case because the FIA reiterates and clarifies Section 11, Article XII of the 1987 Constitution, which limits the ownership and operation of public

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[31] Section 3 of RA No. 5455 states:

> Section 3. *Permissible Investments.* If an investment by a non-Philippine national in an enterprise not registered under the Investment Incentives Act is such that the total participation by non-Philippine nationals in the outstanding capital thereof shall exceed thirty per cent, the enterprise must obtain prior authority from the Board of Investments, which authority shall be granted unless the proposed investment
>
> (a) Would conflict with existing constitutional provisions and laws regulating the degree of required ownership by Philippine nationals in the enterprise; or
>
> (b) Would pose a clear and present danger of promoting monopolies or combinations in restraint of trade; or
>
> (c) Would be made in an enterprise engaged in an area adequately being exploited by Philippine nationals; or
>
> (d) Would conflict or be inconsistent with the Investments Priorities Plan in force at the time the investment is sought to be made; or
>
> (e) Would not contribute to the sound and balanced development of the national economy on a self-sustaining basis.
>
> x x x x

utilities to Filipino citizens or to corporations or associations at least 60% Filipino-owned.

The FIA is the basic law governing foreign investments in the Philippines, irrespective of the nature of business and area of investment. The FIA spells out the procedures by which non-Philippine nationals can invest in the Philippines. Among the key features of this law is the concept of a negative list or the Foreign Investments Negative List.[32] Section 8 of the law states:

> SEC. 8. ***List of Investment Areas Reserved to Philippine Nationals*** *[Foreign Investment Negative List]*. - The Foreign Investment Negative List shall have two [2] component lists: *A* and *B*:
>
> a. ***List A*** **shall enumerate the** ***areas of activities reserved to Philippine nationals by mandate of the Constitution*** **and specific laws.**
>
> b. *List B* shall contain the areas of activities and enterprises regulated pursuant to law:
>
> 1. which are defense-related activities, requiring prior clearance and authorization from the Department of National Defense [DND] to engage in such activity, such as the manufacture, repair, storage and/or distribution of firearms, ammunition, lethal weapons, military ordinance, explosives, pyrotechnics and similar materials; unless such manufacturing or repair activity is specifically authorized, with a substantial export component, to a non-Philippine national by the Secretary of National Defense; or
>
> 2. which have implications on public health and morals, such as the manufacture and distribution of dangerous drugs; all forms of gambling; nightclubs, bars, beer houses, dance halls, sauna and steam bathhouses and massage clinics. (Boldfacing, underscoring and italicization supplied)

Section 8 of the FIA enumerates the investment areas "reserved to Philippine nationals." **Foreign Investment Negative List A consists of "*areas of activities reserved to Philippine nationals by mandate of the Constitution and specific laws*," where foreign equity participation in any enterprise shall be limited to the maximum percentage expressly prescribed by the Constitution and other specific laws. In short, to own**

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[32] Executive Order No. 858, Promulgating the Eighth Regular Foreign Investment Negative List, signed on 5 February 2010, http://www.boi.gov.ph/pdf/laws/eo/EO%20858.pdf (accessed 17 August 2011).

and operate a public utility in the Philippines one must be a "Philippine national" as defined in the FIA. The FIA is abundant notice to foreign investors to what extent they can invest in public utilities in the Philippines.

To repeat, among the areas of investment covered by the Foreign Investment Negative List A is the ownership and operation of public utilities, which the Constitution expressly reserves to Filipino citizens and to corporations at least 60% owned by Filipino citizens. **In other words, Negative List A of the FIA reserves the ownership and operation of public utilities only to "Philippine nationals," defined in Section 3(a) of the FIA as** "(1) a citizen of the Philippines; x x x or (3) **a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding *and entitled to vote* is owned and held by citizens of the Philippines**; or (4) a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals."

Clearly, from the effectivity of the Investment Incentives Act of 1967 to the adoption of the Omnibus Investments Code of 1981, to the enactment of the Omnibus Investments Code of 1987, and to the passage of the present Foreign Investments Act of 1991, or **for more than four decades, the statutory definition of the term "Philippine national" has been uniform and consistent: it means a Filipino citizen, or a domestic corporation at least 60% of the *voting stock* is owned by Filipinos. Likewise, these same statutes have uniformly and consistently required that only "Philippine**

nationals" could own and operate public utilities in the Philippines. The following exchange during the Oral Arguments is revealing:

> JUSTICE CARPIO:
>
> Counsel, I have some questions. You are aware of the Foreign Investments Act of 1991, x x x? And the FIA of 1991 took effect in 1991, correct? That's over twenty (20) years ago, correct?
>
> COMMISSIONER GAITE:
>
> Correct, Your Honor.
>
> JUSTICE CARPIO:
>
> And Section 8 of the Foreign Investments Act of 1991 states that []only Philippine nationals can own and operate public utilities[], correct?
>
> COMMISSIONER GAITE:
>
> Yes, Your Honor.
>
> JUSTICE CARPIO:
>
> And the same Foreign Investments Act of 1991 defines a "Philippine national" either as a citizen of the Philippines, or if it is a corporation at least sixty percent (60%) of the voting stock is owned by citizens of the Philippines, correct?
>
> COMMISSIONER GAITE:
>
> Correct, Your Honor.
>
> JUSTICE CARPIO:
>
> And, you are also aware that under the predecessor law of the Foreign Investments Act of 1991, the Omnibus Investments Act of 1987, the same provisions apply: x x x only Philippine nationals can own and operate a public utility and the Philippine national, if it is a corporation, x x x sixty percent (60%) of the capital stock of that corporation must be owned by citizens of the Philippines, correct?
>
> COMMISSIONER GAITE:
>
> Correct, Your Honor.
>
> JUSTICE CARPIO:
>
> And even prior to the Omnibus Investments Act of 1987, under the Omnibus Investments Act of 1981, the same rules apply: x x x only a Philippine national can own and operate a public utility and a Philippine national, if it is a corporation, sixty percent (60%) of its x x x voting stock, must be owned by citizens of the Philippines, correct?
>
> COMMISSIONER GAITE:
>
> Correct, Your Honor.

JUSTICE CARPIO:

> And even prior to that, under [the]1967 Investments Incentives Act and the Foreign Company Act of 1968, the same rules applied, correct?

COMMISSIONER GAITE:

> Correct, Your Honor.

JUSTICE CARPIO:

> **So, for the last four (4) decades, x x x, the law has been very consistent – only a Philippine national can own and operate a public utility, and a Philippine national, if it is a corporation, x x x at least sixty percent (60%) of the voting stock must be owned by citizens of the Philippines, correct?**

COMMISSIONER GAITE:

> **Correct, Your Honor.**[33] (Emphasis supplied)

Government agencies like the SEC cannot simply ignore Sections 3(a) and 8 of the FIA which categorically prescribe that certain economic activities, like the ownership and operation of public utilities, are reserved to corporations "at least sixty percent (60%) of the capital stock outstanding ***and entitled to vote*** is owned and held by citizens of the Philippines." Foreign Investment Negative List A refers to "activities reserved to Philippine nationals by mandate of the Constitution and specific laws." **The FIA is the basic statute regulating foreign investments in the Philippines**. Government agencies tasked with regulating or monitoring foreign investments, as well as counsels of foreign investors, should start with the FIA in determining to what extent a particular foreign investment is allowed in the Philippines. Foreign investors and their counsels who ignore the FIA do so at their own peril. Foreign investors and their counsels who rely on opinions of SEC legal officers that obviously contradict the FIA do so also at their own peril.

Occasional opinions of SEC legal officers that obviously contradict the FIA should immediately raise a red flag. There are already numerous opinions of SEC legal officers that cite the definition of a "Philippine national" in Section 3(a) of the FIA in determining whether a particular

[33] TSN (Oral Arguments), 26 June 2012, pp. 71-74.

corporation is qualified to own and operate a nationalized or partially nationalized business in the Philippines. This shows that SEC legal officers are not only aware of, but also rely on and invoke, the provisions of the FIA in ascertaining the eligibility of a corporation to engage in partially nationalized industries. The following are some of such opinions:

1. Opinion of 23 March 1993, addressed to Mr. Francis F. How;

2. Opinion of 14 April 1993, addressed to Director Angeles T. Wong of the Philippine Overseas Employment Administration;

3. Opinion of 23 November 1993, addressed to Messrs. Dominador Almeda and Renato S. Calma;

4. Opinion of 7 December 1993, addressed to Roco Bunag Kapunan Migallos & Jardeleza;

5. SEC Opinion No. 49-04, addressed to Romulo Mabanta Buenaventura Sayoc & De Los Angeles;

6. SEC-OGC Opinion No. 17-07, addressed to Mr. Reynaldo G. David; and

7. SEC-OGC Opinion No. 03-08, addressed to Attys. Ruby Rose J. Yusi and Rudyard S. Arbolado.

The SEC legal officers' occasional but blatant disregard of the definition of the term "Philippine national" in the FIA signifies their lack of integrity and competence in resolving issues on the 60-40 ownership requirement in favor of Filipino citizens in Section 11, Article XII of the Constitution.

The PSE President argues that the term "Philippine national" defined in the FIA should be limited and interpreted to refer to corporations seeking to avail of tax and fiscal incentives under investment incentives laws and cannot be equated with the term "capital" in Section 11, Article XII of the 1987 Constitution. Pangilinan similarly contends that the FIA and its predecessor statutes do not apply to "companies which have not registered

and obtained special incentives under the schemes established by those laws."

Both are desperately grasping at straws. The FIA does not grant tax or fiscal incentives to any enterprise. Tax and fiscal incentives to investments are granted separately under the Omnibus Investments Code of 1987, not under the FIA. In fact, the FIA expressly repealed Articles 44 to 56 of Book II of the Omnibus Investments Code of 1987, which articles previously regulated foreign investments in nationalized or partially nationalized industries.

The FIA is the applicable law regulating foreign investments in nationalized or partially nationalized industries. There is nothing in the FIA, or even in the Omnibus Investments Code of 1987 or its predecessor statutes, that states, expressly or impliedly, that the FIA or its predecessor statutes do not apply to enterprises not availing of tax and fiscal incentives under the Code. The FIA and its predecessor statutes apply to investments in all domestic enterprises, whether or not such enterprises enjoy tax and fiscal incentives under the Omnibus Investments Code of 1987 or its predecessor statutes. **The reason is quite obvious – mere non-availment of tax and fiscal incentives by a non-Philippine national cannot exempt it from Section 11, Article XII of the Constitution regulating foreign investments in public utilities**. In fact, the Board of Investments' **Primer on Investment Policies in the Philippines**,[34] which is given out to foreign investors, provides:

> **PART III. FOREIGN INVESTMENTS WITHOUT INCENTIVES**
>
> Investors who do not seek incentives and/or whose chosen activities do not qualify for incentives, (i.e., the activity is not listed in the IPP, and they are not exporting at least 70% of their production) may go ahead and make the investments without seeking incentives. **They only have to be guided by the Foreign Investments Negative List (FINL).**

[34] Published by the Board of Investments. For on-line copy, see http://www.fdi.net/documents/WorldBank/databases/philippines/primer.htm (accessed 3 September 2012)

> The FINL clearly defines investment areas requiring at least 60% Filipino ownership. All other areas outside of this list are fully open to foreign investors. (Emphasis supplied)

V.
Right to elect directors, coupled with beneficial ownership, translates to effective control.

The 28 June 2011 Decision declares that the 60 percent Filipino ownership required by the Constitution to engage in certain economic activities applies not only to voting control of the corporation, but **also to the beneficial ownership of the corporation**. To repeat, we held:

> Mere legal title is insufficient to meet the 60 percent Filipino-owned "capital" required in the Constitution. **Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is required**. The legal and beneficial ownership of 60 percent of the outstanding capital stock must rest in the hands of Filipino nationals in accordance with the constitutional mandate. Otherwise, the corporation is "considered as non-Philippine national[s]." (Emphasis supplied)

This is consistent with Section 3 of the FIA which provides that where 100% of the capital stock is held by "a trustee of funds for pension or other employee retirement or separation benefits," the trustee is a Philippine national if "at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals." Likewise, Section 1(b) of the Implementing Rules of the FIA provides that "for stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. **Full beneficial ownership of the stocks, coupled with appropriate voting rights, is essential."**

Since the constitutional requirement of at least 60 percent Filipino ownership applies not only to voting control of the corporation but also to the beneficial ownership of the corporation, it is therefore imperative that such requirement apply uniformly and across the board to all classes of

shares, regardless of nomenclature and category, comprising the capital of a corporation. Under the Corporation Code, capital stock[35] consists of all classes of shares issued to stockholders, that is, common shares as well as preferred shares, which may have different rights, privileges or restrictions as stated in the articles of incorporation.[36]

The Corporation Code allows denial of the right to vote to preferred and redeemable shares, but disallows denial of the right to vote in specific corporate matters. Thus, common shares have the right to vote in the

[35] In his book, Fletcher explains:

> The term "stock" has been used in the same sense as "capital stock" or "capital," and it has been said that "tis primary meaning is capital, in whatever form it may be invested. More commonly, it is now being used to designate shares of the stock in the hands of the individual shareholders, or the certificates issued by the corporation to them. (Fletcher Cyclopedia of the Law of Private Corporations, 1995 Revised Volume, Vol. 11, § 5079, p. 13; citations omitted).

[36] SECTION 137. Outstanding capital stock defined. - The term "outstanding capital stock" as used in this Code, means the total shares of stock issued to subscribers or stockholders, whether or not fully or partially paid, except treasury shares.

SEC. 6. *Classification of shares*. - The shares of stock of stock corporations may be divided into classes or series of shares, or both, any of which classes or series of shares may have such rights, privileges or restrictions as may be stated in the articles of incorporation: Provided, That no share may be deprived of voting rights except those classified and issued as "preferred" or "redeemable" shares, unless otherwise provided in this Code: Provided, further, That there shall always be a class or series of shares which have complete voting rights. Any or all of the shares or series of shares may have a par value or have no par value as may be provided for in the articles of incorporation: Provided, however, That banks, trust companies, insurance companies, public utilities, and building and loan associations shall not be permitted to issue no-par value shares of stock.

Preferred shares of stock issued by any corporation may be given preference in the distribution of the assets of the corporation in case of liquidation and in the distribution of dividends, or such other preferences as may be stated in the articles of incorporation which are not violative of the provisions of this Code: Provided, That preferred shares of stock may be issued only with a stated par value. The board of directors, where authorized in the articles of incorporation, may fix the terms and conditions of preferred shares of stock or any series thereof: Provided, That such terms and conditions shall be effective upon the filing of a certificate thereof with the Securities and Exchange Commission.

Shares of capital stock issued without par value shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereto: Provided; That shares without par value may not be issued for a consideration less than the value of five (₱5.00) pesos per share: Provided, further, That the entire consideration received by the corporation for its no-par value shares shall be treated as capital and shall not be available for distribution as dividends.

A corporation may, furthermore, classify its shares for the purpose of insuring compliance with constitutional or legal requirements.

Except as otherwise provided in the articles of incorporation and stated in the certificate of stock, each share shall be equal in all respects to every other share.

x x x x

election of directors, while preferred shares may be denied such right. Nonetheless, preferred shares, even if denied the right to vote in the election of directors, are entitled to vote on the following corporate matters: (1) amendment of articles of incorporation; (2) increase and decrease of capital stock; (3) incurring, creating or increasing bonded indebtedness; (4) sale, lease, mortgage or other disposition of substantially all corporate assets; (5) investment of funds in another business or corporation or for a purpose other than the primary purpose for which the corporation was organized; (6) adoption, amendment and repeal of by-laws; (7) merger and consolidation; and (8) dissolution of corporation.[37]

Since a specific class of shares may have rights and privileges or restrictions different from the rest of the shares in a corporation, the 60-40 ownership requirement in favor of Filipino citizens in Section 11, Article XII of the Constitution must apply not only to shares with voting rights but also to shares without voting rights. Preferred shares, denied the right to vote in the election of directors, are anyway still entitled to vote on the eight specific corporate matters mentioned above. **Thus, if a corporation, engaged in a partially nationalized industry, issues a mixture of common and preferred non-voting shares, at least 60 percent of the common shares and at least 60 percent of the preferred non-voting shares must be owned by Filipinos.** Of course, if a corporation issues only a single class of shares, at least 60 percent of such shares must necessarily be owned by Filipinos. **In short, the 60-40 ownership requirement in favor of Filipino citizens must apply separately to each class of shares, whether common, preferred non-voting, preferred voting or any other class of shares.** This uniform application of the 60-40 ownership requirement in favor of Filipino citizens clearly breathes life to the constitutional command that the ownership and operation of public utilities shall be reserved exclusively to corporations at least 60 percent of whose

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[37] Under Section 6 of the Corporation Code.

capital is Filipino-owned. Applying uniformly the 60-40 ownership requirement in favor of Filipino citizens to each class of shares, regardless of differences in voting rights, privileges and restrictions, guarantees effective Filipino control of public utilities, as mandated by the Constitution.

Moreover, such uniform application to each class of shares insures that the "controlling interest" in public utilities always lies in the hands of Filipino citizens. This addresses and extinguishes Pangilinan's worry that foreigners, owning most of the non-voting shares, will exercise greater control over fundamental corporate matters requiring two-thirds or majority vote of all shareholders.

VI.
Intent of the framers of the Constitution

While Justice Velasco quoted in his Dissenting Opinion[38] a portion of the deliberations of the Constitutional Commission to support his claim that the term "capital" refers to the total outstanding shares of stock, whether voting or non-voting, the following excerpts of the deliberations reveal otherwise. It is clear from the following exchange that the term "capital" refers to **controlling interest** of a corporation, thus:

> MR. NOLLEDO. In Sections 3, 9 and 15, the Committee stated local or Filipino equity and foreign equity; namely, 60-40 in Section 3, 60-40 in Section 9 and 2/3-1/3 in Section 15.
>
> MR. VILLEGAS. That is right.
>
> MR. NOLLEDO. In teaching law, we are always faced with this question: "Where do we base the equity requirement, is it on the authorized capital stock, on the subscribed capital stock, or on the paid-up capital stock of a corporation"? Will the Committee please enlighten me on this?
>
> MR. VILLEGAS. We have just had a long discussion with the members of the team from the UP Law Center who provided us a draft. **The phrase that is contained here which we adopted from the UP draft is "60 percent of voting stock."**

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[38] Dissenting Opinion to the 28 June 2011 Decision.

MR. NOLLEDO. That must be based on the subscribed capital stock, because unless declared delinquent, unpaid capital stock shall be entitled to vote.

MR. VILLEGAS. That is right.

MR. NOLLEDO. Thank you.

With respect to an investment by one corporation in another corporation, say, a corporation with 60-40 percent equity invests in another corporation which is permitted by the Corporation Code, does the Committee adopt the grandfather rule?

MR. VILLEGAS. Yes, that is the understanding of the Committee.

MR. NOLLEDO. Therefore, we need additional Filipino capital?

MR. VILLEGAS. Yes.[39]

x x x x

MR. AZCUNA. May I be clarified as to that portion that was accepted by the Committee.

MR. VILLEGAS. The portion accepted by the Committee is the deletion of the phrase "voting stock or controlling interest."

MR. AZCUNA. Hence, without the Davide amendment, the committee report would read: "corporations or associations at least sixty percent of whose CAPITAL is owned by such citizens."

MR. VILLEGAS. Yes.

MR. AZCUNA. So if the Davide amendment is lost, we are stuck with 60 percent of the capital to be owned by citizens.

MR. VILLEGAS. That is right.

MR. AZCUNA. But the control can be with the foreigners even if they are the minority. Let us say 40 percent of the capital is owned by them, but it is the voting capital, whereas, the Filipinos own the nonvoting shares. So we can have a situation where the corporation is controlled by foreigners despite being the minority because they have the voting capital. That is the anomaly that would result here.

MR. BENGZON. No, the reason we eliminated the word "stock" as stated in the 1973 and 1935 Constitutions is that according to Commissioner Rodrigo, there are associations that do not have stocks. That is why we say "CAPITAL."

MR. AZCUNA. We should not eliminate the phrase "controlling interest."

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[39] Record of the Constitutional Commission, Vol. III, pp. 255-256.

> **MR. BENGZON. In the case of stock corporations, it is <u>assumed</u>.**[40]
> (Boldfacing and underscoring supplied)

Thus, 60 percent of the "capital" **assumes**, or should result in, a "**controlling interest**" in the corporation.

The use of the term "capital" was intended to replace the word "stock" because associations without stocks can operate public utilities as long as they meet the 60-40 ownership requirement in favor of Filipino citizens prescribed in Section 11, Article XII of the Constitution. However, this did not change the intent of the framers of the Constitution to reserve exclusively to Philippine nationals the "**controlling interest**" in public utilities.

During the drafting of the 1935 Constitution, economic protectionism was "the battle-cry of the nationalists in the Convention."[41] The same battle-cry resulted in the nationalization of the public utilities.[42] This is also the same intent of the framers of the 1987 Constitution who adopted the exact formulation embodied in the 1935 and 1973 Constitutions on foreign equity limitations in partially nationalized industries.

The OSG, in its own behalf and as counsel for the State,[43] agrees fully with the Court's interpretation of the term "capital." In its Consolidated Comment, the OSG explains that the deletion of the phrase "controlling interest" and replacement of the word "stock" with the term "capital" were intended specifically to extend the scope of the entities qualified to operate public utilities to include associations without stocks. The framers' omission of the phrase "controlling interest" did not mean the inclusion of

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40 Id. at 360.

41 Aruego, Jose M., THE FRAMING OF THE PHILIPPINE CONSTITUTION, Vol. II, 1936, p. 658.

42 Id.

43 The OSG stated, "It must be stressed that when the OSG stated its concurrence with the Honorable Court's ruling on the proper definition of capital, it did so, not on behalf of the SEC, its individual client in this case. Rather, the OSG did so in the exercise of its discretion not only in its capacity as statutory counsel of the SEC but as counsel for no less than the State itself."

all shares of stock, whether voting or non-voting. The OSG reiterated essentially the Court's declaration that the Constitution reserved exclusively to Philippine nationals the ownership and operation of public utilities consistent with the State's policy to "develop a self-reliant and independent national economy ***effectively controlled by Filipinos***."

As we held in our 28 June 2011 Decision, to construe broadly the term "capital" as the total outstanding capital stock, treated as a ***single*** class regardless of the actual classification of shares, grossly contravenes the intent and letter of the Constitution that the "State shall develop a self-reliant and independent national economy ***effectively controlled*** by Filipinos." We illustrated the glaring anomaly which would result in defining the term "capital" as the total outstanding capital stock of a corporation, treated as a ***single*** class of shares regardless of the actual classification of shares, to wit:

> Let us assume that a corporation has 100 common shares owned by foreigners and 1,000,000 non-voting preferred shares owned by Filipinos, with both classes of share having a par value of one peso (₱1.00) per share. Under the broad definition of the term "capital," such corporation would be considered compliant with the 40 percent constitutional limit on foreign equity of public utilities since the overwhelming majority, or more than 99.999 percent, of the total outstanding capital stock is Filipino owned. This is obviously absurd.
>
> In the example given, only the foreigners holding the common shares have voting rights in the election of directors, even if they hold only 100 shares. The foreigners, with a minuscule equity of less than 0.001 percent, exercise control over the public utility. On the other hand, the Filipinos, holding more than 99.999 percent of the equity, cannot vote in the election of directors and hence, have no control over the public utility. This starkly circumvents the intent of the framers of the Constitution, as well as the clear language of the Constitution, to place the control of public utilities in the hands of Filipinos. x x x

Further, even if foreigners who own more than forty percent of the voting shares elect an all-Filipino board of directors, this situation does not guarantee Filipino control and does not in any way cure the violation of the Constitution. The independence of the Filipino board members so elected by such foreign shareholders is highly doubtful. As the OSG pointed out,

quoting Justice George Sutherland's words in *Humphrey's Executor v. US,*[44] "x x x it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." Allowing foreign shareholders to elect a controlling majority of the board, even if all the directors are Filipinos, grossly circumvents the letter and intent of the Constitution and defeats the very purpose of our nationalization laws.

VII.
Last sentence of Section 11, Article XII of the Constitution

The last sentence of Section 11, Article XII of the 1987 Constitution reads:

> 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.

During the Oral Arguments, the OSG emphasized that there was never a question on the intent of the framers of the Constitution to limit foreign ownership, and assure majority Filipino ownership and control of public utilities. The OSG argued, "while the delegates disagreed as to the percentage threshold to adopt, x x x the records show they clearly understood that Filipino control of the public utility corporation can only be and is obtained only through the election of a majority of the members of the board."

Indeed, the only point of contention during the deliberations of the Constitutional Commission on 23 August 1986 was the extent of majority Filipino control of public utilities. This is evident from the following exchange:

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[44] 295 U.S. 602, 55 S.Ct. 869, U.S. 1935 (27 May 1935).

THE PRESIDENT. Commissioner Jamir is recognized.

MR. JAMIR. Madam President, my proposed amendment on lines 20 and 21 is to delete the phrase "two thirds of whose voting stock or controlling interest," and instead substitute the words "SIXTY PERCENT OF WHOSE CAPITAL" so that the sentence will read: "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 PERCENT OF WHOSE CAPITAL is owned by such citizens."

x x x x

THE PRESIDENT: Will Commissioner Jamir first explain?

MR. JAMIR. Yes, in this Article on National Economy and Patrimony, there were two previous sections in which we fixed the Filipino equity to 60 percent as against 40 percent for foreigners. It is only in this Section 15 with respect to public utilities that the committee proposal was increased to two-thirds. I think it would be better to harmonize this provision by providing that even in the case of public utilities, the minimum equity for Filipino citizens should be 60 percent.

MR. ROMULO. Madam President.

THE PRESIDENT. Commissioner Romulo is recognized.

MR. ROMULO. My reason for supporting the amendment is based on the discussions I have had with representatives of the Filipino majority owners of the international record carriers, and the subsequent memoranda they submitted to me. x x x

Their second point is that under the Corporation Code, the management and control of a corporation is vested in the board of directors, not in the officers but in the board of directors. The officers are only agents of the board. And they believe that with 60 percent of the equity, the Filipino majority stockholders undeniably control the board. Only on important corporate acts can the 40-percent foreign equity exercise a veto, x x x.

x x x x[45]

MS. ROSARIO BRAID. Madam President.

THE PRESIDENT. Commissioner Rosario Braid is recognized.

MS. ROSARIO BRAID. Yes, in the interest of equal time, may I also read from a memorandum by the spokesman of the Philippine Chamber of Communications on why they would like to maintain the present equity, I am referring to the 66 2/3. They would prefer to have a 75-25 ratio but would settle for 66 2/3. x x x

x x x x

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[45] Record of the Constitutional Commission, Vol. 3, pp. 650-651 (23 August 1986).

> THE PRESIDENT. Just to clarify, would Commissioner Rosario Braid support the proposal of two-thirds rather than the 60 percent?
>
> MS. ROSARIO BRAID. I have added a clause that will put management in the hands of Filipino citizens.
>
> x x x x[46]

While they had differing views on the percentage of Filipino ownership of capital, it is clear that the framers of the Constitution intended public utilities to be ***majority*** Filipino-owned and controlled. To ensure that Filipinos control public utilities, the framers of the Constitution approved, as additional safeguard, the inclusion of the last sentence of Section 11, Article XII of the Constitution commanding that "[t]he 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." In other words, the last sentence of Section 11, Article XII of the Constitution mandates that (1) the participation of foreign investors in the governing body of the corporation or association shall be limited to their proportionate share in the capital of such entity; and (2) all officers of the corporation or association must be Filipino citizens.

Commissioner Rosario Braid proposed the inclusion of the phrase requiring the managing officers of the corporation or association to be Filipino citizens specifically to prevent management contracts, which were designed primarily to circumvent the Filipinization of public utilities, and to assure Filipino control of public utilities, thus:

> MS. ROSARIO BRAID. x x x They also like to suggest that we amend this provision by adding a phrase which states: "THE MANAGEMENT BODY OF EVERY CORPORATION OR ASSOCIATION SHALL IN ALL CASES BE CONTROLLED BY CITIZENS OF THE PHILIPPINES." I have with me their position paper.
>
> THE PRESIDENT. The Commissioner may proceed.

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[46] Record of the Constitutional Commission, Vol. 3, pp. 652-653 (23 August 1986).

MS. ROSARIO BRAID. The three major international record carriers in the Philippines, which Commissioner Romulo mentioned – Philippine Global Communications, Eastern Telecommunications, Globe Mackay Cable – are 40-percent owned by foreign multinational companies and 60-percent owned by their respective Filipino partners. All three, however, also have management contracts with these foreign companies – Philcom with RCA, ETPI with Cable and Wireless PLC, and GMCR with ITT. Up to the present time, the general managers of these carriers are foreigners. While the foreigners in these common carriers are only minority owners, the foreign multinationals are the ones managing and controlling their operations by virtue of their management contracts and by virtue of their strength in the governing bodies of these carriers.[47]

x x x x

MR. OPLE. I think a number of us have agreed to ask Commissioner Rosario Braid to propose an amendment with respect to the operating management of public utilities, and in this amendment, we are associated with Fr. Bernas, Commissioners Nieva and Rodrigo. Commissioner Rosario Braid will state this amendment now.

Thank you.

MS. ROSARIO BRAID. Madam President.

THE PRESIDENT. This is still on Section 15.

MS. ROSARIO BRAID. Yes.

MR. VILLEGAS. Yes, Madam President.

x x x x

MS. ROSARIO BRAID. Madam President, I propose a new section to read: 'THE MANAGEMENT BODY OF EVERY CORPORATION OR ASSOCIATION SHALL IN ALL CASES BE CONTROLLED BY CITIZENS OF THE PHILIPPINES."

This will prevent management contracts and assure control by Filipino citizens. Will the committee assure us that this amendment will insure that past activities such as management contracts will no longer be possible under this amendment?

x x x x

FR. BERNAS. Madam President.

THE PRESIDENT. Commissioner Bernas is recognized.

FR. BERNAS. Will the committee accept a reformulation of the first part?

MR. BENGZON. Let us hear it.

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[47] Record of the Constitutional Commission, Vol. 3, p. 652 (23 August 1986).

FR. BERNAS. The reformulation will be essentially the formula of the 1973 Constitution which reads: "THE PARTICIPATION OF FOREIGN INVESTORS IN THE GOVERNING BODY OF ANY PUBLIC UTILITY ENTERPRISE SHALL BE LIMITED TO THEIR PROPORTIONATE SHARE IN THE CAPITAL THEREOF AND..."

MR. VILLEGAS. "ALL THE EXECUTIVE AND MANAGING OFFICERS OF SUCH CORPORATIONS AND ASSOCIATIONS MUST BE CITIZENS OF THE PHILIPPINES."

MR. BENGZON. Will Commissioner Bernas read the whole thing again?

FR. BERNAS. "THE PARTICIPATION OF FOREIGN INVESTORS IN THE GOVERNING BODY OF ANY PUBLIC UTILITY ENTERPRISE SHALL BE LIMITED TO THEIR PROPORTIONATE SHARE IN THE CAPITAL THEREOF..." I do not have the rest of the copy.

MR. BENGZON. "AND ALL THE EXECUTIVE AND MANAGING OFFICERS OF SUCH CORPORATIONS OR ASSOCIATIONS MUST BE CITIZENS OF THE PHILIPPINES." Is that correct?

MR. VILLEGAS. Yes.

MR. BENGZON. Madam President, I think that was said in a more elegant language. We accept the amendment. Is that all right with Commissioner Rosario Braid?

MS. ROSARIO BRAID. Yes.

x x x x

MR. DE LOS REYES. The governing body refers to the board of directors and trustees.

MR. VILLEGAS. That is right.

MR. BENGZON. Yes, the governing body refers to the board of directors.

MR. REGALADO. It is accepted.

MR. RAMA. The body is now ready to vote, Madam President.

VOTING

x x x x

The results show 29 votes in favor and none against; so the proposed amendment is approved.

x x x x

THE PRESIDENT. All right. Can we proceed now to vote on Section 15?

MR. RAMA. Yes, Madam President.

> THE PRESIDENT. Will the chairman of the committee please read Section 15?
>
> MR. VILLEGAS. The entire Section 15, as amended, reads: "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 60 PERCENT OF WHOSE CAPITAL is owned by such citizens." May I request Commissioner Bengzon to please continue reading.
>
> MR. BENGZON. "THE PARTICIPATION OF FOREIGN INVESTORS IN THE GOVERNING BODY OF ANY PUBLIC UTILITY ENTERPRISE SHALL BE LIMITED TO THEIR PROPORTIONATE SHARE IN THE CAPITAL THEREOF AND ALL THE EXECUTIVE AND MANAGING OFFICERS OF SUCH CORPORATIONS OR ASSOCIATIONS MUST BE CITIZENS OF THE PHILIPPINES."
>
> MR. VILLEGAS. "NOR SHALL SUCH FRANCHISE, CERTIFICATE OR AUTHORIZATION BE EXCLUSIVE IN CHARACTER OR FOR A PERIOD LONGER THAN TWENTY-FIVE YEARS RENEWABLE FOR NOT MORE THAN TWENTY-FIVE 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 Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public."
>
> VOTING
>
> x x x x
>
> The results show 29 votes in favor and 4 against; Section 15, as amended, is approved.[48] (Emphasis supplied)

The last sentence of Section 11, Article XII of the 1987 Constitution, particularly the provision on the limited participation of foreign investors in the governing body of public utilities, is a reiteration of the last sentence of Section 5, Article XIV of the 1973 Constitution,[49] signifying its importance in reserving ownership and control of public utilities to Filipino citizens.

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[48] Record of the Constitutional Commission, Vol. 3, pp. 665-667 (23 August 1986).

[49] Section 5, Article XIV of the 1973 Constitution provides:

> Section 5. 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 the capital of which 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 National Assembly when the public interest 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 the capital thereof.** (Emphasis supplied)

VIII.
The undisputed facts

There is no dispute, and respondents do not claim the contrary, that (1) foreigners own 64.27% of the common shares of PLDT, which class of shares exercises the **sole** right to vote in the election of directors, and thus foreigners control PLDT; (2) Filipinos own only 35.73% of PLDT's common shares, constituting a minority of the voting stock, and thus Filipinos do not control PLDT; (3) preferred shares, 99.44% owned by Filipinos, have no voting rights; (4) preferred shares earn only 1/70 of the dividends that common shares earn;[50] (5) preferred shares have twice the par value of common shares; and (6) preferred shares constitute 77.85% of the authorized capital stock of PLDT and common shares only 22.15%.

Despite the foregoing facts, the Court did not decide, and in fact refrained from ruling on the question of whether PLDT violated the 60-40 ownership requirement in favor of Filipino citizens in Section 11, Article XII of the 1987 Constitution. Such question indisputably calls for a presentation and determination of evidence through a hearing, which is generally outside the province of the Court's jurisdiction, but well within the SEC's statutory powers. Thus, for obvious reasons, the Court limited its decision on the purely legal and threshold issue on the definition of the term "capital" in Section 11, Article XII of the Constitution and directed the SEC to apply such definition in determining the exact percentage of foreign ownership in PLDT.

IX.
PLDT is not an indispensable party;
SEC is impleaded in this case.

In his petition, Gamboa prays, among others:

x x x x

[50] For the year 2009.

> 5. For the Honorable Court to issue a declaratory relief that ownership of common or voting shares is the sole basis in determining foreign equity in a public utility and that any other government rulings, opinions, and regulations inconsistent with this declaratory relief be declared unconstitutional and a violation of the intent and spirit of the 1987 Constitution;
>
> 6. For the Honorable Court to declare null and void all sales of common stocks to foreigners in excess of 40 percent of the total subscribed common shareholdings; and
>
> 7. For the Honorable Court **to direct the Securities and Exchange Commission** and Philippine Stock Exchange **to require PLDT to make a public disclosure of all of its foreign shareholdings and their actual and real beneficial owners**.
>
> Other relief(s) just and equitable are likewise prayed for. (Emphasis supplied)

As can be gleaned from his prayer, Gamboa clearly asks this Court to compel the SEC to perform its statutory duty to investigate whether "the required percentage of ownership of the capital stock to be owned by citizens of the Philippines has been complied with [by PLDT] as required by x x x the Constitution."[51] Such plea clearly negates SEC's argument that

[51] SEC. 17. *Grounds when articles of incorporation or amendment may be rejected or disapproved*. – The Securities and Exchange Commission may reject the articles of incorporation or disapprove any amendment thereto if the same is not in compliance with the requirements of this Code: Provided, **That the Commission shall give the incorporators a reasonable time within which to correct or modify the objectionable portions of the articles or amendment**. The following are grounds for such rejection or disapproval:

x x x x

(4) **That the percentage of ownership of the capital stock to be owned by citizens of the Philippines has not been complied with as required by existing laws or the Constitution**. (Emphasis supplied)

Section 5 of R.A. No. 8799 provides:

Section 5. *Powers and Functions of the Commission*.– 5.1. The Commission shall act with transparency and shall have the powers and functions provided by this Code, Presidential Decree No. 902-A, the Corporation Code, the Investment Houses Law, the Financing Company Act and other existing laws. Pursuant thereto the Commission shall have, among others, the following powers and functions:

(a) Have jurisdiction and supervision over all corporations, partnerships or associations who are the grantees of primary franchises and/or a license or a permit issued by the Government;
x x x x
(c) Approve, reject, suspend, revoke or require amendments to registration statements, and registration and licensing applications;
x x x x
(f) Impose sanctions for the violation of laws and the rules, regulations and orders, issued pursuant thereto;
x x x x

it was not impleaded.

Granting that only the SEC Chairman was impleaded in this case, the Court has ample powers to order the SEC's compliance with its directive contained in the 28 June 2011 Decision in view of the far-reaching implications of this case. In *Domingo v. Scheer*,[52] the Court dispensed with the amendment of the pleadings to implead the Bureau of Customs considering (1) the unique backdrop of the case; (2) the utmost need to avoid further delays; and (3) the issue of public interest involved. The Court held:

> The Court may be curing the defect in this case by adding the BOC as party-petitioner. The petition should not be dismissed because the second action would only be a repetition of the first. In *Salvador, et al., v. Court of Appeals, et al.*, we held that this Court has full powers, apart from that power and authority which is inherent, to amend the processes, pleadings, proceedings and decisions by substituting as party-plaintiff the real party-in-interest. **The Court has the power to avoid delay in the disposition of this case, to order its amendment as to implead the BOC as party-respondent. Indeed, it may no longer be necessary to do so taking into account the unique backdrop in this case, involving as it does an issue of public interest.** After all, the Office of the Solicitor General has represented the petitioner in the instant proceedings, as well as in the appellate court, and maintained the validity of the deportation order and of the BOC's Omnibus Resolution. It cannot, thus, be claimed by the State that the BOC was not afforded its day in court, simply because only the petitioner, the Chairperson of the BOC, was the respondent in the CA, and the petitioner in the instant recourse. In *Alonso v. Villamor,* we had the occasion to state:
>
> > **There is nothing sacred about processes or pleadings, their forms or contents. Their sole purpose is to facilitate the application of justice to the rival claims of contending parties.** They were created, not to hinder and delay, but to facilitate and promote, the administration of justice. They do not constitute the thing itself, which courts are always striving to secure to litigants. They are designed as the means best adapted to obtain that thing. In other words, they are a means to an end. When they lose the character of the one and become the other, the administration of

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(i) Issue cease and desist orders to prevent fraud or injury to the investing public;
x x x x
(m) Suspend, or revoke, after proper notice and hearing the franchise or certificate of registration of corporations, partnership or associations, upon any of the grounds provided by law; and
(n) Exercise such other powers as may be provided by law as well as those which may be implied from, or which are necessary or incidental to the carrying out of, the express powers granted the Commission to achieve the objectives and purposes of these laws.

52 466 Phil. 235 (2004).

> justice is at fault and courts are correspondingly remiss in the performance of their obvious duty.[53] (Emphasis supplied)

In any event, the SEC has expressly manifested[54] **that it will abide by the Court's decision and defer to the Court's definition of the term "capital" in Section 11, Article XII of the Constitution. Further, the SEC entered its special appearance in this case and argued during the Oral Arguments, indicating its submission to the Court's jurisdiction. It is clear, therefore, that there exists no legal impediment against the proper and immediate implementation of the Court's directive to the SEC**.

PLDT is an indispensable party only insofar as the other issues, particularly the factual questions, are concerned. In other words, PLDT must be impleaded in order to fully resolve the issues on (1) whether the sale of 111,415 PTIC shares to First Pacific violates the constitutional limit on foreign ownership of PLDT; (2) whether the sale of common shares to foreigners exceeded the 40 percent limit on foreign equity in PLDT; and (3) whether the total percentage of the PLDT common shares with voting rights complies with the 60-40 ownership requirement in favor of Filipino citizens under the Constitution for the ownership and operation of PLDT. These issues indisputably call for an examination of the parties' respective evidence, and thus are clearly within the jurisdiction of the SEC. In short, PLDT must be impleaded, and must necessarily be heard, in the proceedings before the SEC where the factual issues will be thoroughly threshed out and resolved.

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53 Id. at 266-267.

54 In its Manifestation and Omnibus Motion dated 29 July 2011, the SEC stated: "The Commission respectfully manifests that the position of the Office of the Solicitor General ('OSG') on the meaning of the term "capital" does not reflect the view of the Commission. The Commission's position has been laid down in countless opinions that needs no reiteration. **The Commission, however, would submit to whatever would be the final decision of this Honorable Court on the meaning of the term "capital."** (Emphasis supplied; citations omitted)

In its Memorandum, the SEC stated: "In the event that this Honorable Court rules with finality on the meaning of "capital", the SEC will yield to the Court and follow its interpretation."

Notably, the foregoing issues were left untouched by the Court. The Court did not rule on the factual issues raised by Gamboa, except the single and purely legal issue on the definition of the term "capital" in Section 11, Article XII of the Constitution. The Court confined the resolution of the instant case to this threshold legal issue in deference to the fact-finding power of the SEC.

Needless to state, the Court can validly, properly, and fully dispose of the fundamental legal issue in this case even without the participation of PLDT since defining the term "capital" in Section 11, Article XII of the Constitution does not, in any way, depend on whether PLDT was impleaded. Simply put, PLDT is not indispensable for a complete resolution of the purely legal question in this case.[55] In fact, the Court, by treating the petition as one for mandamus,[56] merely directed the SEC to apply the Court's definition of the term "capital" in Section 11, Article XII of the Constitution in determining whether PLDT committed any violation of the said constitutional provision. **The dispositive portion of the Court's ruling is addressed not to PLDT but solely to the SEC, which is the administrative agency tasked to enforce the 60-40 ownership requirement in favor of Filipino citizens in Section 11, Article XII of the Constitution**.

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55 In *Lucman v. Malawi*, 540 Phil. 289 (2006), the Court defined indispensable parties as parties-in-interest without whom there can be no final determination of an action.

56 Section 3, Rule 65 of the Rules of Court states:

> SEC. 3. *Petition for mandamus*. – When any tribunal, corporation, board, officer or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law, the person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered commanding the respondent, immediately or at some other time to be specified by the court, to do the act required to be done to protect the rights of the petitioner and to pay the damages sustained by the petitioner by reason of the wrongful acts of the respondent.
>
> x x x x

Since the Court limited its resolution on the purely legal issue on the definition of the term "capital" in Section 11, Article XII of the 1987 Constitution, and directed the SEC to investigate any violation by PLDT of the 60-40 ownership requirement in favor of Filipino citizens under the Constitution,[57] there is no deprivation of PLDT's property or denial of PLDT's right to due process, contrary to Pangilinan and Nazareno's misimpression. Due process will be afforded to PLDT when it presents proof to the SEC that it complies, as it claims here, with Section 11, Article XII of the Constitution.

X.
Foreign Investments in the Philippines

Movants fear that the 28 June 2011 Decision would spell disaster to our economy, as it may result in a sudden flight of existing foreign investors to "friendlier" countries and simultaneously deterring new foreign investors to our country. In particular, the PSE claims that the 28 June 2011 Decision may result in the following: (1) loss of more than ₱630 billion in foreign investments in PSE-listed shares; (2) massive decrease in foreign trading transactions; (3) lower PSE Composite Index; and (4) local investors not investing in PSE-listed shares.[58]

Dr. Bernardo M. Villegas, one of the *amici curiae* in the Oral Arguments, shared movants' apprehension. Without providing specific details, he pointed out the depressing state of the Philippine economy compared to our neighboring countries which boast of growing economies. Further, Dr. Villegas explained that the solution to our economic woes is for the government to "take-over" strategic industries, such as the public utilities sector, thus:

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[57] See *Lucman v. Malawi*, supra, where the Court referred to the Department of Interior and Local Government (though not impleaded) for investigation and appropriate action the matter regarding the withdrawals of deposits representing the concerned barangays' Internal Revenue Allotments.

[58] *Rollo* (Vol. III), pp. 1444-1445.

> JUSTICE CARPIO:
>
> I would like also to get from you Dr. Villegas if you have additional information on whether this high FDI[59] countries in East Asia have allowed foreigners x x x control [of] their public utilities, so that we can compare apples with apples.
>
> DR. VILLEGAS:
>
> Correct, but let me just make a comment. When these neighbors of ours find an industry strategic, their solution is not to "Filipinize" or "Vietnamize" or "Singaporize." **Their solution is to make sure that those industries are in the hands of state enterprises. So, in these countries, nationalization means the government takes over. And because their governments are competent and honest enough to the public, that is the solution.** x x x [60] (Emphasis supplied)

If government ownership of public utilities is the solution, then foreign investments in our public utilities serve no purpose. Obviously, there can never be foreign investments in public utilities if, as Dr. Villegas claims, the "solution is to make sure that those industries are in the hands of state enterprises." Dr. Villegas's argument that foreign investments in telecommunication companies like PLDT are badly needed to save our ailing economy contradicts his own theory that the solution is for government to take over these companies. Dr. Villegas is barking up the wrong tree since State ownership of public utilities and foreign investments in such industries are diametrically opposed concepts, which cannot possibly be reconciled.

In any event, the experience of our neighboring countries cannot be used as argument to decide the present case differently for two reasons. First, the governments of our neighboring countries have, as claimed by Dr. Villegas, taken over ownership and control of their strategic public utilities like the telecommunications industry. Second, our Constitution has specific provisions limiting foreign ownership in public utilities which the Court is sworn to uphold regardless of the experience of our neighboring countries.

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59 Foreign Direct Investments.

60 TSN (Oral Arguments), 26 June 2012, p. 117.

In our jurisdiction, the Constitution expressly reserves the ownership and operation of public utilities to Filipino citizens, or corporations or associations at least 60 percent of whose capital belongs to Filipinos. Following Dr. Villegas's claim, the Philippines appears to be more liberal in allowing foreign investors to own 40 percent of public utilities, unlike in other Asian countries whose governments own and operate such industries.

XI.
Prospective Application of Sanctions

In its Motion for Partial Reconsideration, the SEC sought to clarify the reckoning period of the application and imposition of appropriate sanctions against PLDT if found violating Section 11, Article XII of the Constitution.

As discussed, the Court has directed the SEC to investigate and determine whether PLDT violated Section 11, Article XII of the Constitution. Thus, there is no dispute that it is only after the SEC has determined PLDT's violation, if any exists at the time of the commencement of the administrative case or investigation, that the SEC may impose the statutory sanctions against PLDT. In other words, once the 28 June 2011 Decision becomes final, the SEC shall impose the appropriate sanctions only if it finds after due hearing that, at the start of the administrative case or investigation, there is an existing violation of Section 11, Article XII of the Constitution. Under prevailing jurisprudence, public utilities that fail to comply with the nationality requirement under Section 11, Article XII and the FIA can cure their deficiencies prior to the start of the administrative case or investigation.[61]

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[61] See *Halili v. Court of Appeals*, 350 Phil. 906 (1998); *United Church Board for World Ministries v. Sebastian*, 242 Phil. 848 (1988).

XII.
Final Word

The Constitution expressly declares as State policy the development of an economy "***effectively controlled***" by Filipinos. Consistent with such State policy, the Constitution explicitly reserves the ownership and operation of public utilities to Philippine nationals, who are defined in the Foreign Investments Act of 1991 as Filipino citizens, or corporations or associations at least 60 percent of whose capital ***with voting rights*** belongs to Filipinos. The FIA's implementing rules explain that "[f]or stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. **Full beneficial ownership of the stocks, coupled with appropriate voting rights is essential**." In effect, the FIA clarifies, reiterates and confirms the interpretation that the term "capital" in Section 11, Article XII of the 1987 Constitution refers to ***shares with voting rights, as well as with full beneficial ownership***. This is precisely because the right to vote in the election of directors, coupled with full beneficial ownership of stocks, translates to effective control of a corporation.

Any other construction of the term "capital" in Section 11, Article XII of the Constitution contravenes the letter and intent of the Constitution. Any other meaning of the term "capital" openly invites alien domination of economic activities reserved exclusively to Philippine nationals. Therefore, respondents' interpretation will ultimately result in handing over effective control of our national economy to foreigners in patent violation of the Constitution, making Filipinos second-class citizens in their own country.

Filipinos have only to remind themselves of how this country was exploited under the Parity Amendment, which gave Americans the same rights as Filipinos in the exploitation of natural resources, and in the

ownership and control of public utilities, in the Philippines. To do this the 1935 Constitution, which contained the same 60 percent Filipino ownership and control requirement as the present 1987 Constitution, had to be amended to give Americans parity rights with Filipinos. There was bitter opposition to the Parity Amendment[62] and many Filipinos eagerly awaited its expiration. In late 1968, PLDT was one of the American-controlled public utilities that became Filipino-controlled when the controlling American stockholders divested in anticipation of the expiration of the Parity Amendment on 3 July 1974.[63] No economic suicide happened when control of public utilities and mining corporations passed to Filipinos' hands upon expiration of the Parity Amendment.

Movants' interpretation of the term "capital" would bring us back to the same evils spawned by the Parity Amendment, ***effectively giving foreigners parity rights with Filipinos, but this time even without any amendment to the present Constitution***. Worse, movants' interpretation opens up our national economy to ***effective control*** not only by Americans but also by **all foreigners, be they Indonesians, Malaysians or Chinese, even in the absence of reciprocal treaty arrangements**. At least the Parity Amendment, as implemented by the Laurel-Langley Agreement, gave the capital-starved Filipinos theoretical parity – the same rights as Americans to exploit natural resources, and to own and control public utilities, *in the United States of America*. Here, movants' interpretation would effectively mean a ***unilateral*** opening up of our national economy to all foreigners, ***without any reciprocal arrangements***. That would mean that Indonesians, Malaysians and Chinese nationals could effectively control our mining companies and public utilities while Filipinos, even if they have the capital, could not control similar corporations in these countries.

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62 Urbano A. Zafra, *The Laurel-Langley Agreement and the Philippine Economy,* p. 43 (1973). See also *Mabanag v. Lopez Vito*, 78 Phil. 1 (1947).

63 See Hadi Salehi Esfahani, *The Political Economy of the Philippines' Telecommunications Sector,* World Bank Policy Research Department (1994).

The 1935, 1973 and 1987 Constitutions have the same 60 percent Filipino ownership and control requirement for public utilities like PLDT. Any deviation from this requirement necessitates an amendment to the Constitution as exemplified by the Parity Amendment. This Court has no power to amend the Constitution for its power and duty is only to faithfully apply and interpret the Constitution.

WHEREFORE, we **DENY** the motions for reconsideration **WITH FINALITY.** No further pleadings shall be entertained.

SO ORDERED.

ANTONIO T. CARPIO
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice

(Please see Dissenting Opinion)
PRESBITERO J. VELASCO, JR.
Associate Justice

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

ARTURO D. BRION
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

See my dissenting opinion.

ROBERTO A. ABAD
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

JOSE C. MENDOZA
Associate Justice

I join the dissenting opinion of J. Velasco

BIENVENIDO L. REYES
Associate Justice

No part due to prior participation in a related case

ESTELA M. PERLAS-BERNABE
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Resolution had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

MARIA LOURDES P. A. SERENO
Chief Justice