EN BANC

G.R. No. 176579 (*Wilson P. Gamboa v. 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, et al.*)

Promulgated:

OCTOBER 09, 2012

x----------x

DISSENTING OPINION

VELASCO, JR., *J.*:

Before Us are separate motions for reconsideration of the Court's June 28, 2011 Decision,[1] which partially granted the petition for prohibition, injunction and declaratory relief interposed by Wilson P. Gamboa (petitioner or Gamboa). Very simply, the Court held that the term "capital" appearing in Section 11, Article XII of the 1987 Constitution refers only to common shares or shares of stock entitled to vote in the election of the members of the board of directors of a public utility, and not to the total outstanding capital stock.

Respondents Manuel V. Pangilinan (Pangilinan) and Napoleon L. Nazareno (Nazareno) separately moved for reconsideration on procedural and substantive grounds, but reserved their main arguments against the majority's holding on the meaning of "capital." The Office of the Solicitor General (OSG), which initially represented the Securities and Exchange Commission (SEC), also requested reconsideration even as it manifested agreement with the majority's construal of the word "capital." Unable to join the OSG's stand on the determinative issue of capital, the SEC sought leave to join the fray on its own. In its *Motion to Admit Manifestation and*

[1] Penned by Justice Antonio T. Carpio.

Omnibus Motion, the SEC stated that the OSG's position on said issue does not reflect its own and in fact diverges from what the Commission has consistently adopted prior to this case**.** And because the decision in question has a penalty component which it is tasked to impose, SEC requested clarification as to **when the reckoning period of application of the appropriate sanctions may be imposed on Philippine Long Distance Telephone Company (PLDT) in case the SEC determines that it has violated Sec. 11, Art. XII of the Constitution**.

To the foregoing motions, the main petitioner, now deceased, filed his *Comment and/or Opposition to Motions for Reconsideration*.

Acting on the various motions and comment, the Court conducted and heard the parties in oral arguments on April 17 and June 26, 2012.

After considering the parties' positions as articulated during the oral arguments and in their pleadings and respective memoranda, I vote to grant reconsideration. This disposition is consistent with my dissent, on procedural and substantive grounds, to the June 28, 2011 majority Decision.

Conspectus

The core issue is the meaning of the word "capital" in the opening sentence of Sec. 11, Art. XII of the 1987 Constitution which reads:

> **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 <u>capital</u> 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.)

For an easier comprehension of the two contrasting positions on the contentious meaning of the word "capital," as found in the first sentence of the aforequoted provision, allow me to present a brief comparative analysis showing the dissimilarities.

The majority, in the June 28, 2011 Decision, as reiterated in the draft resolution, is of the view that the word "capital" in the first sentence of Sec. 11, Art. XII refers to common shares or voting shares **only**; thus limiting foreign ownership of such shares to 40%. The rationale, as stated in the basic *ponencia*, is that this interpretation ensures that control of the Board of Directors stays in the hands of Filipinos, since foreigners can only own a maximum of 40% of said shares and, accordingly, can only elect the equivalent percentage of directors. As a necessary corollary, Filipino stockholders can always elect 60% of the Board of Directors which, to the majority, translates to control over the corporation.

The opposite view is that the word "capital" in the first sentence refers to the entire capital stock of the corporation or both voting and non-voting shares and NOT solely to common shares. From this standpoint, 60% control over the capital stock or the stockholders owning both voting and non-voting shares is assured to Filipinos and, as a consequence, over corporate matters voted upon and decisions reached during stockholders' meetings. On the other hand, the last sentence of Sec. 11, Art. XII, with the word "capital" embedded in it, is the provision that ensures Filipino control over the Board of Directors and its decisions.

To resolve the conflicting interpretations of the word "capital," the first sentence of Sec. 11, Art. XII must be read and considered in conjunction with the last sentence of said Sec. 11 which prescribes that "the participation of foreign investors in the governing body of any public utility

enterprise shall be limited to their proportionate share in its capital." After all, it is an established principle in constitutional construction that provisions in the Constitution must be harmonized.

It has been made very clear during the oral arguments and even by the parties' written submissions that control by Filipinos over the public utility enterprise exists on three (3) levels, namely:

1. Sixty percent (60%) control of Filipinos over the capital stock which covers both voting and non-voting shares and inevitably over the stockholders. This level of control is embodied in the first sentence of Sec. 11, Art. XII which reads:

> **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 x x x.**

The word "capital" in the above provision refers to capital stock or both voting and non-voting shares. Sixty percent (60%) control over the capital stock translates to control by Filipinos over almost all decisions by the stockholders during stockholders' meetings including ratification of the decisions and acts of the Board of Directors. During said meetings, voting and even non-voting shares are entitled to vote. The exercise by non-voting shares of voting rights over major corporate decisions is expressly provided in Sec. 6 of the Corporation Code which reads:

> Sec. 6. x x x x
>
> Where the articles of incorporation provide for non-voting shares in the cases allowed by this Code, the holders of such shares shall nevertheless be entitled to vote on the following matters:
>
> 1. Amendment of the articles of incorporation;
> 2. Adoption and amendment of by-laws;
> 3. Sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the corporate property;

> 4. Incurring, creating or increasing bonded indebtedness;
>
> 5. Increase or decrease of capital stock;
>
> 6. Merger or consolidation of the corporation with another corporation or other corporations;
>
> 7. Investment of corporate funds in another corporation or business in accordance with this Code; and
>
> 8. Dissolution of the corporation.

Construing the word "capital" in the first sentence of Sec. 11, Art. XII of the Constitution as capital stock would ensure Filipino control over the public utility with respect to major corporate decisions. If we adopt the view espoused by Justice Carpio that the word "capital" means only common shares or voting shares, then foreigners can own even up to 100% of the non-voting shares. In such a situation, foreigners may very well exercise control over all major corporate decisions as their ownership of the non-voting shares remains unfettered by the 40% cap laid down in the first sentence of Sec. 11, Art. XII. This will spawn an even greater anomaly because it would give the foreigners the opportunity to acquire ownership of the net assets of the corporation upon its dissolution to include what the Constitution enjoins—land ownership possibly through dummy corporations. With the view of Justice Carpio, Filipinos will definitely lose control over major corporate decisions which are decided by stockholders owning the majority of the non-voting shares.

2. Sixty percent (60%) control by Filipinos over the common shares or voting shares and necessarily over the Board of Directors of the public utility. Control on this level is guaranteed by the last sentence of Sec. 11, Art. XII which 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"** x x x.

In its ordinary signification, "participation" connotes "the action or state of taking part with others in an activity."[2] This participation in its decision-making function can only be the right to elect board directors. Hence, **the last sentence of Sec. 11, Art. XII of the Constitution effectively restricts the right of foreigners to elect directors to the board in proportion to the limit on their total shareholdings.** Since the first part of Sec. 11, Art. XII of the Constitution specifies a 40% limit of foreign ownership in the total capital of the public utility corporation, then the rights of foreigners to be elected to the board of directors, is likewise limited to 40 *percent*. If the foreign ownership of common shares is lower than 40%, the participation of foreigners is limited to their proportionate share in the capital stock.

In the highly hypothetical public utility corporation with 100 common shares and 1,000,000 preferred non-voting shares, or a total of 1,000,100 shares cited in the June 28, 2011 Decision, foreigners can thus only own up to 400,040 shares of the corporation, consisting of the **maximum** 40 (out of the 100) voting shares and 400,000 non-voting shares. And, assuming a 10-member board, the foreigners can elect only 4 members of the board **using the 40 voting shares they are allowed to own**.

Following, in fine, the dictates of Sec. 11, Art. XII, as couched, the foreign shareholders' right to elect members of the governing board of a given public utility corporation is proportional only to their right to hold a part of the total shareholdings of that entity. Since foreigners can only own, in the maximum, up to 40% of the total shareholdings of the company, then **their voting entitlement as to the numerical composition of the board would depend on the level of their shareholding in relation to the capital stock, but in no case shall it exceed the 40% threshold.**

---

[2] Webster's Third New International Dictionary of the English Language: Unabridged (1981), Springfield, MA, p. 1646.

Contrary to the view of Justice Carpio that the objective behind the first sentence of Sec. 11, Art. XII is to ensure control of Filipinos over the Board of Directors by limiting foreign ownership of the common shares or voting shares up to 40%, **it is actually the first part of the aforequoted last sentence of Sec. 11, Art. XII that limits the rights of foreigners to elect not more than 40% of the board seats** thus ensuring a clear majority in the Board of Directors to Filipinos. If we follow the line of reasoning of Justice Carpio on the meaning of the word "capital" in the first sentence, then there is no need for the framers of the Constitution to incorporate the last sentence in Sec. 11, Art. XII on the 40% maximum participation of the foreigners in the Board of Directors. The last sentence would be a useless redundancy, a situation doubtless unintended by the framers of the Constitution. A construction that renders a part of the law or Constitution being construed superfluous is an aberration,[3] for it is at all times presumed that each word used in the law is intentional and has a particular and special role in the approximation of the policy sought to be attained, *ut magis valeat quam pereat.*

3. The third level of control proceeds from the requirement tucked in the second part of the ultimate sentence that "**all the executive and managing officers of the corporation must be citizens of the Philippines**." This assures full Filipino control, at all times, over the management of the public utility.

To summarize, the Constitution, as enacted, establishes not just one but a three-tiered control-enhancing-and-locking mechanism in Sec. 11, Article XII to ensure that Filipinos will always have full beneficial ownership and control of public utility corporations:

1. 40% ceiling on foreign ownership in the capital stock that ensures sixty percent (60%) Filipino control over the capital stock which

[3] *Allied Banking Corporation v. Court of Appeals*, G.R. No. 124290, January 16, 1998, 284 SCRA 327, 367 and *Inding v. Sandiganbayan*, G.R. No. 143047, July 14, 2004, 434 SCRA 388, 403.

covers both voting and non-voting shares. As a consequence, Filipino control over the stockholders is assured. (First sentence of Sec. 11, Art. XII). Thus, foreigners can own only up to 40% of the capital stock.

2. 40% ceiling on the right of foreigners to elect board directors that guarantees sixty percent (60%) Filipino control over the Board of Directors. (First part of last sentence of Sec. 11, Art. XII).

3. Reservation to Filipino citizens of the executive and managing officers, regardless of the level of alien equity ownership to secure total Filipino control over the management of the public utility enterprise (Second part of last sentence of Sec. 11, Art. XII). Thus, all executive and managing officers must be Filipinos.

Discussion

Undoubtedly there is a clash of conflicting opinions as to what "capital" in the first sentence of Sec. 11, Art. XII means. The majority says it refers only to common or voting shares. The minority says it includes both voting and non-voting shares. A resort to constitutional construction is unavoidable.

It is settled though that the "primary source from which to ascertain constitutional intent or purpose is the language of the constitution itself."[4] To this end, **the words used by the Constitution should as much as possible be understood in their ordinary meaning** as the Constitution is not a lawyer's document.[5] This approach, otherwise known as **the *verba legis* rule, should be applied save where technical terms are employed**.[6]

---

[4] Agpalo, Ruben E. Statutory Construction, 6th ed. (2009), p. 585.

[5] Id.; citations omitted.

[6] See also *Macalintal v. Presidential Electoral Tribunal*, G.R. No. 191618, November 23, 2010, 635 SCRA 783; *La Bugal-B'Laan Tribal Assn., Inc. v. Ramos*, G.R. No. 127882, December 1, 2002; *Francisco v. House of Representatives*, November 10, 2010; *Victoria v. COMELEC*, G.R. No. 109005, January 10, 1994.

The plain meaning of "capital" in the first sentence of Sec. 11, Art. XII of the Constitution includes both voting and non-voting shares

J.M. Tuason & Co., Inc. v. Land Tenure Administration illustrates the *verba legis* rule. There, the Court cautions against departing from the commonly understood meaning of ordinary words used in the Constitution, *viz.*:

> We look to the language of the document itself in our search for its meaning. We do not of course stop there, but that is where we begin. It is to be assumed that the **words in which constitutional provisions are couched express the objective sought to be attained**. They are to be given their ordinary meaning except where technical terms are employed in which case the significance thus attached to them prevails**.** As the Constitution is not primarily a lawyer's document, it being essential for the rule of law to obtain that it should ever be present in the people's consciousness, **its language as much as possible should be understood in the sense they have in common use**. What it says according to the text of the provision to be construed compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say. Thus, there are cases where the need for construction is reduced to a minimum.[7] (Emphasis supplied.)

The primary reason for the *verba legis* approach, as pointed out by Fr. Joaquin Bernas during the June 26, 2012 arguments, is that the people who ratified the Constitution voted on their understanding of the word capital in its everyday meaning. Fr. Bernas elucidated thus:

> x x x [O]ver the years, from the 1935 to the 1973 and finally even under the 1987 Constitution, the prevailing practice has been to base the 60-40 proportion on total outstanding capital stock, that is, the combined total of common and non-voting preferred shares. This is what occasioned the case under consideration.
>
> What is the constitutional relevance of this continuing practice? I suggest that it is relevant for determining what the people in the street voted for when they ratified the Constitution. **When the draft of a Constitution is presented to the people for ratification, what the people vote on is not the debates in the constituent body but the text of the draft. <u>Concretely, what the electorate voted on was their understanding of the word capital in its everyday meaning they encounter in daily life</u>.** We cannot attribute to the voters a jurist's sophisticated meaning of capital and its breakdown into common and preferred. What they vote on is what they see. Nor do they vote on what

[7] No. L-21064, February 18, 1970, 31 SCRA 413, 422-423.

> the drafters saw as assumed meaning, to use Bengzon's explanation. In the language of the sophisticates, what **voters in a plebiscite vote on is *verba legis* and not *anima legis* about which trained jurists debate.**
>
> What then does it make of the contemporary understanding by SEC etc. Is the contemporary understanding unconstitutional or constitutional? I hesitate to characterize it as constitutional or unconstitutional. I would merely characterize it as popular. What I mean is it reflects the common understanding of the ordinary *populi*, common but incomplete.[8] (Emphasis supplied.)

"Capital" in the first sentence of Sec. 11, Art. XII must then be accorded a meaning accepted, understood, and used by an ordinary person not versed in the technicalities of law. As defined in a non-legal dictionary, capital stock or capital is ordinarily taken to mean "the **outstanding shares** of a joint stock company considered as an aggregate"[9] or "the **ownership element** of a corporation divided into shares and represented by certificates."[10]

The term "capital" includes all the outstanding shares of a company that represent "the proprietary claim in a business."[11] **It does not distinguish based on the voting feature of the stocks but refers to all shares, be they voting or non-voting**. Neither is the term limited to the management aspect of the corporation but clearly refers to the separate aspect of **ownership** of the corporate shares thereby encompassing all shares representing the equity of the corporation.

This plain meaning, as understood, accepted, and used in ordinary parlance, hews with the definition given by Black who equates capital to capital stock[12] and defines it as "the total number of shares of stock that a corporation may issue under its charter or articles of incorporation, **including both common stock and preferred stock**."[13] This meaning is

---

[8] Memorandum, *The Meaning of "Capital,"* p. 10, read by Fr. Bernas as amicus curiae in the June 26, 2012 Oral Argument.

[9] Webster's Third New International Dictionary Unabridged, Merriam-Websters Inc., Springfield, MA. 1981, p. 322.

[10] Id.; emphasis supplied.

[11] Id.

[12] Black's law Dictionary, 9th Ed., for the iPhone/iPad/iPod touch, Version 2.0.0 (B10239), p. 236.

[13] Id.; emphasis supplied.

also reflected in legal commentaries on the Corporation Code. The respected commentator Ruben E. Agpalo defines "capital" as the "money, property or means contributed by stockholders for the business or enterprise for which the corporation was formed and generally implies that such money or property or means have been contributed in payment for stock issued to the contributors."[14] Meanwhile, "capital stock" is "**the aggregate of the shares actually subscribed** [or] the amount subscribed and paid-in and upon which the corporation is to conduct its operations, or the amount paid-in by its stockholders in money, property or services with which it is to conduct its business."[15]

This definition has been echoed by numerous other experts in the field of corporation law. Dean Villanueva wrote, thus:

> In defining the relationship between the corporation and its stockholders, the capital stock represents the proportional standing of the stockholders with respect to the corporation and corporate matters, such as their rights to vote and to receive dividends.
>
> In financial terms, **the capital stock of the corporation as reflected in the financial statement of the corporation represents the financial or <u>proprietary claims</u> of the stockholders to the net assets of the corporation upon dissolution.** In addition, the capital stock represents the totality of the portion of the corporation's assets and receivables which are covered by the trust fund doctrine and provide for the amount of assets and receivables of the corporation which are deemed protected for the benefit of the corporate creditors and from which the corporation cannot declare any dividends. [16] (Emphasis supplied.)

Similarly, renowned author Hector S. de Leon defines "capital" and "capital stock" in the following manner:

> *Capital* is used broadly to indicate the entire property or assets of the corporation. It includes the amount invested by the stockholders plus the undistributed earnings less losses and expenses. In the strict sense, the term refers to that portion of the net assets paid by the stockholders as consideration for the shares issued to them, which is utilized for the prosecution of the business of the corporation. It includes all balances or

---

[14] Agpalo, Ruben E. Agpalo's Legal Words and Phrases, 1987 Ed., p. 96 citing Ruben E. Agpalo Comments on the Corporation Code, 1993 ed., p. 45.

[15] Id.

[16] Villanueva, Cesar Lapuz. Philippine Corporate Law. 2003 Ed., p. 537. Emphasis and underscoring supplied.

> instalments due the corporation for shares of stock sold by it and all unpaid subscription for shares.
>
> x x x x
>
> The term is also used synonymously with the words "capital stock," as meaning the amount subscribed and paid-in and upon which the corporation is to conduct its operation (11 Fletcher Cyc. Corp., p. 15 [1986 ed.]) and **it is immaterial how the stock is classified, whether as common or preferred**.[17] (Emphasis and underscoring supplied.)

Hence, following the *verba legis* approach, I see no reason to stray away from what appears to be a common and settled acceptation of the word "capital," given that, as used in the constitutional provision in question, **it stands unqualified** by any restrictive or expansive word as to reasonably justify a distinction or a delimitation of the meaning of the word. *Ubi lex non distinguit nos distinguere debemus*, when the law does not distinguish, we must not distinguish.[18] Using this plain meaning of "capital" within the context of Sec. 11, Art. XII, foreigners are entitled to own **not more than 40% of the outstanding capital stock**, which would include both voting and non-voting shares.

Extraneous aids to ferret out constitutional intent

When the seeming ambiguity on the meaning of "capital" cannot be threshed out by looking at the language of the Constitution, then resort to extraneous aids has become imperative. The Court can utilize the following extraneous aids, to wit: (1) proceedings of the convention; (2) changes in phraseology; (3) history or realities existing at the time of the adoption of the Constitution; (4) prior laws and judicial decisions; (5) contemporaneous construction; and (6) consequences of alternative interpretations.[19] I submit that all these aids of constitutional construction affirm that the only acceptable construction of "capital" in the first sentence of Sec. 11, Art. XII

---

[17] De Leon, Hector S. The Corporation Code of the Philippines Annotated, 2002 Ed. Manila, Phil. P. 71-72 citing (SEC Opinion, Feb. 15, 1988 which states: The term "capital" denotes the sum total of the shares subscribed and paid by the stockholders or agreed to be paid irrespective of their nomenclature. It would, therefore, be legal for foreigners to own more than 40% of the common shares but not more than the 40% constitutional limit of the outstanding capital stock which would include both common and non-voting preferred shares." (Emphasis and underscoring supplied.)

[18] *Tongson v. Arellano,* G.R. No. 77104, November 6, 1992, 215 SCRA 426.

[19] Agpalo, Ruben E. Statutory Construction, 6th ed. (2009), p. 588.

of the 1987 Constitution is that it refers to **all** shares of a corporation, both voting and non-voting.

Deliberations of the Constitutional Commission of 1986 demonstrate that capital means both voting and non-voting shares (1st extrinsic aid)

The proceedings of the 1986 Constitutional Commission that drafted the 1987 Constitution were accurately recorded in the Records of the Constitutional Commission.

To bring to light the true meaning of the word "capital" in the first line of Sec. 11, Art. XII, one must peruse, dissect and analyze the entire deliberations of the Constitutional Commission pertinent to the article on national economy and patrimony, as quoted below:

August 13, 1986, Wednesday

PROPOSED RESOLUTION NO. 496

RESOLUTION TO INCORPORATE IN THE NEW CONSTITUTION AN ARTICLE ON NATIONAL ECONOMY AND PATRIMONY

Be it resolved as it is hereby resolved by the Constitutional Commission in session assembled, To incorporate the National Economy and Patrimony of the new Constitution, the following provisions:

ARTICLE____
NATIONAL ECONOMY AND PATRIMONY

SECTION 1. The State shall develop a self-reliant and independent national economy. x x x

x x x x

SEC. 3. x x x The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. Such activities may be directly undertaken by the State, or it may enter into co-production, joint venture, production-sharing agreements with Filipino citizens or **corporations or associations at least sixty percent of whose voting stock or controlling interest is owned by such citizens.** x x x

x x x x

SEC. 9. The Congress shall reserve to citizens of the Philippines or to corporations or associations **at least sixty per cent of whose voting stock or controlling interest** is owned by such citizens or such higher percentage as Congress may prescribe, certain areas of investments when the national interest so dictates.

x x x x

SEC. 15. 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 two-thirds of whose voting stock or controlling interest is owned by such citizens.** 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. (Origin of Sec. 11, Article XII)

x x x x

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."

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.[20]

---

[20] Record of the (1986) Constitutional Commission, Vol. III, pp. 250-256.

August 14, 1986, Thursday

MR. FOZ. Mr. Vice-President, in Sections 3 and 9, the provision on equity is both 60 percent, but I notice that this is now different from the provision in the 1973 Constitution in that the basis for the equity provision is voting stock or controlling interest instead of the usual capital percentage as provided for in the 1973 Constitution. We would like to know what the difference would be between the previous and the proposed provisions regarding equity interest.

MR. VILLEGAS. Commissioner Suarez will answer that.

MR. SUAREZ. Thank you.

As a matter of fact, this particular portion is still being reviewed by this Committee. In Section 1, Article XIII of the 1935 Constitution, the wording is that the percentage should be based on the capital which is owned by such citizens. In the proposed draft, this phrase was proposed: "voting stock or controlling interest." This was a plan submitted by the UP Law Center.

Three days ago, we had an early morning breakfast conference with the members of the UP Law Center and precisely, we were seeking clarification regarding the difference. We would have three criteria to go by: One would be based on capital, which is capital stock of the corporation, authorized, subscribed or paid up, as employed under the 1935 and the 1973 Constitution. The idea behind the introduction of the phrase "voting stock or controlling interest" was precisely to avoid the perpetration of dummies, Filipino dummies of multinationals. It is theoretically possible that a situation may develop where these multinational interests would not really be only 40 percent but will extend beyond that in the matter of voting because they could enter into what is known as a voting trust or voting agreement with the rest of the stockholders and, therefore, notwithstanding the fact that on record their capital extent is only up to 40-percent interest in the corporation, actually, they would be managing and controlling the entire company. That is why the UP Law Center members suggested that we utilize the words "voting interest" which would preclude multinational control in the matter of voting, independent of the capital structure of the corporation. And then they also added the phrase "controlling interest" which up to now they have not been able to successfully define the exact meaning of. But they mentioned the situation where theoretically the board would be controlled by these multinationals, such that instead of, say, three Filipino directors out of five, there would be three foreign directors and, therefore, they would be controlling the management of the company with foreign interest. That is why they volunteered to flesh out this particular portion which was submitted by them, but up to now, they have not come up with a constructive rephrasing of this portion. And as far as I am concerned, I am not speaking in behalf of the Committee, **I would feel more comfortable if we go back to the wording of the 1935 and the 1973 Constitution, that is to say, the 60-40 percentage could be based on the capital stock of the corporation.**

MR. FOZ. I understand that that was the same view of Dean Carale who does not agree with the others on this panel at the UP Law Center regarding the percentage of the ratio.

MR. SUAREZ. That is right. Dean Carale shares my sentiment about this matter.

MR. BENGZON. I also share the sentiment of Commissioner Suarez in that respect. So there are already two in the Committee who want to go back to the wording of the 1935 and the 1973 Constitution.[21]

August 15, 1986, Friday

MR. MAAMBONG. I ask that Commissioner Treñas be recognized for an amendment on line 14.

THE PRESIDENT. Commissioner Treñas is recognized.

MR. TREÑAS. Madam President, may I propose an amendment on line 14 of Section 3 by deleting therefrom "whose voting stock and controlling interest." **And in lieu thereof, insert the CAPITAL so the line should read: "associations at least sixty percent of the CAPITAL is owned by such citizens.**

MR. VILLEGAS. We accept the amendment.

MR. TREÑAS. Thank you.

THE PRESIDENT. The amendment of Commissioner Treñas on line 14 has been accepted by the Committee.

Is there any objection? (*Silence*) The Chair hears none; the amendment is approved.

x x x x

THE PRESIDENT. Commissioner Suarez is recognized.

MR. SUAREZ. Thank you, Madam President.

Two points actually are being raised by Commissioner Davide's proposed amendment. One has reference to the percentage of holdings and the other one is the basis for that percentage. Would the body have any objection if we split it into two portions because there may be several Commissioners who would be willing to accept the Commissioner's proposal on capital stock in contradistinction to a voting stock for controlling interest?

MR. VILLEGAS. The proposal has been accepted already.

MR. DAVIDE. Yes, but it was 60 percent.

MR. VILLEGAS. That is right.

MR. SUAREZ. So, it is now 60 percent as against wholly owned?

MR. DAVIDE. Yes.

---

[21] Id. at 326-327.

MR. SUAREZ. Is the Commissioner not insisting on the voting capital stock because that was already accepted by the Committee?

MR. DAVIDE. Would it mean that it would be 100-percent voting capital stock?

MR. SUAREZ. No, under the Commissioner's proposal it is just "CAPITAL" not "stock."

MR. DAVIDE. No, I want it to be very clear. What is the alternative proposal of the Committee? How shall it read?

MR. SUAREZ. It will only read something like: "the CAPITAL OF WHICH IS FULLY owned."

MR. VILLEGAS. Let me read lines 12 to 14 which state:

> **… enter into co-production, joint venture, production sharing agreements with Filipino citizens or corporations or associations at least 60 percent of whose CAPITAL is owned by such citizens.**

We are going back to the 1935 and 1973 formulations.

MR. DAVIDE. I cannot accept the proposal because the word CAPITAL should not really be the guiding principle. It is the ownership of the corporation. It may be voting or not voting, but that is not the guiding principle.

MR. SUAREZ. So, the Commissioner is insisting on the use of the term "CAPITAL STOCK"?

MR. DAVIDE. Yes, to be followed by the phrase "WHOLLY owned."

MR. SUAREZ. Yes, but we are only concentrating on the first point – "CAPITAL STOCK" or merely "CAPITAL."

MR. DAVIDE. CAPITAL STOCK?

MR. SUAREZ. Yes, it is "CAPITAL STOCK."

SUSPENSION OF SESSION

At 4:42 p.m., the session was resumed.

THE PRESIDENT. The session is resumed.

Commissioner Davide is to clarify his point.

MR. VILLEGAS. Yes, Commissioner Davide has accepted the word "CAPITAL" in place of "voting stock or controlling interest." This is an amendment already accepted by the Committee.

We would like to call for a vote on 100-percent Filipino versus 60-percent Filipino.

MR. ALONTO. Is it 60 percent?

MR. VILLEGAS. Sixty percent, yes.

MR. GASCON. Madam President, shall we vote on the proposed amendment of Commissioner Davide of "ONE HUNDRED PERCENT?"

MR. VILLEGAS. Yes.

MR. GASCON. Assuming that it is lost, that does not prejudice any other Commissioner to make any recommendations on other percentages?

MR. VILLEGAS. I would suggest that we vote on "sixty," which is indicated in the committee report.

MR. GASCON. It is the amendment of Commissioner Davide that we should vote on, not the committee report.

MR. VILLEGAS. Yes, it is all right.

MR. AZCUNA. Madam President.

THE PRESIDENT. Commissioner Azcuna is recognized.

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

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

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 there.

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."

MR. BENGZON. In the case of stock corporations, it is assumed.

MR. AZCUNA. Yes, but what I mean is that the control should be with the Filipinos.

MR. BENGZON. Yes, that is understood.

MR. AZCUNA. Yes, because if we just say "sixty percent of whose capital is owned by the Filipinos," the capital may be voting or nonvoting.

MR. BENGZON. That is correct.

MR. AZCUNA. My concern is the situation where there is a voting stock. It is a stock corporation. What the Committee requires is that 60 percent of the capital should be owned by Filipinos. But that would not assure control because that 60 percent may be non-voting.

MS. AQUINO. Madam President.

MR. ROMULO. May we vote on the percentage first?

THE PRESIDENT. Before we vote on this, we want to be clarified first.

MS. AQUINO. Madam President.

THE PRESIDENT. Commissioner Aquino is recognized.

MS. AQUINO. I would suggest that we vote on the Davide amendment which is 100-percent capital, and if it is voted down, then we refer to the original draft which is "capital stock" not just "capital."

MR. AZCUNA. The phrase "controlling interest" is an important consideration.

THE PRESIDENT. Let us proceed to vote then.

MR. PADILLA. Madam President.

THE PRESIDENT. The Vice-President, Commissioner Padilla, is recognized.

MR. PADILLA. The Treñas amendment has already been approved. The only one left is the Davide amendment which is substituting the "sixty percent" to "WHOLLY owned by Filipinos." (The Treñas amendment deleted the phrase "whose voting stocks and controlling interest" and inserted the word "capital." It approved the phrase "associations at least sixty percent of the CAPITAL is owned by such citizens.)(see page 16)

Madam President, I am against the proposed amendment of Commissioner Davide because that is an ideal situation where domestic capital is available for the exploration, development and utilization of these natural resources, especially minerals, petroleum and other mineral oils. These are not only risky business but they also involve substantial capital. Obviously, it is an ideal situation but it is not practical. And if we adopt the 100-percent capital of Filipino citizens, I am afraid that these natural resources, particularly these minerals and oil, et cetera, may remain hidden in our lands, or in other offshore places without anyone

being able to explore, develop or utilize them. If it were possible to have a 100-percent Filipino capital, I would prefer that rather than the 60 percent, but if we adopt the 100 percent, my fear is that we will never be able to explore, develop and utilize our natural resources because we do not have the domestic resources for that.

MR. DAVIDE. Madam President, may I be allowed to react?

THE PRESIDENT. Commissioner Davide is recognized.

MR. DAVIDE. I am very glad that Commissioner Padilla emphasized minerals, petroleum and mineral oils. The Commission has just approved the possible foreign entry into the development, exploration and utilization of these minerals, petroleum and other mineral oils by virtue of the Jamir amendment. I voted in favour of the Jamir amendment because it will eventually give way to vesting in exclusively Filipino citizens and corporations wholly owned by Filipino citizens the right to utilize the other natural resources. This means that as a matter of policy, natural resources should be utilized and exploited only by Filipino citizens or corporations wholly owned by such citizens. But by virtue of the Jamir amendment, since we feel that Filipino capital may not be enough for the development and utilization of minerals, petroleum and other mineral oils, the President can enter into service contracts with foreign corporations precisely for the development and utilization of such resources. And so, there is nothing to fear that we will stagnate in the development of minerals, petroleum, and mineral oils because we now allow service contracts. It is, therefore, with more reason that at this time we must provide for a 100-percent Filipinization generally to all natural resources.

MR. VILLEGAS. I think we are ready to vote, Madam President.

THE PRESIDENT. The Acting Floor Leader is recognized.

MR. MAAMBONG. Madam President, we ask that the matter be put to a vote.

THE PRESIDENT. Will Commissioner Davide please read lines 14 and 15 with his amendment.

MR. DAVIDE. Lines 14 and 15, Section 3, as amended, will read: "associations whose CAPITAL stock is WHOLLY owned by such citizens."

VOTING

THE PRESIDENT. As many as are in favour of this proposed amendment of Commissioner Davide on lines 14 and 15 of Section 3, please raise their hand. (*Few Members raised their hand*.)

As many as are against the amendment, please raise their hand. (*Several Members raised their hand.*)

The results show 16 votes in favour and 22 against; the amendment is lost.

MR. MAAMBONG. Madam President, I ask that Commissioner Davide be recognized once more for further amendments.

THE PRESIDENT. Commissioner Davide is recognized.

MR. DAVIDE. Thank you, Madam President.

This is just an insertion of a new paragraph between lines 24 and 25 of Section 3 of the same page. It will read as follows: THE GOVERNING AND MANAGING BOARDS OF SUCH CORPORATIONS SHALL BE VESTED EXCLUSIVELY IN CITIZENS OF THE PHILIPPINES.

MR. VILLEGAS. Which corporations is the Commissioner referring to?

MR. DAVIDE. This refers to corporations 60 percent of whose capital is owned by such citizens.

MR. VILLEGAS. Again the amendment will read…

MR. DAVIDE. "THE GOVERNING AND MANAGING BODIES OF SUCH CORPORATIONS SHALL BE VESTED EXCLUSIVELY IN CITIZENS OF THE PHILIPPINES."

REV. RIGOS. Madam President.

THE PRESIDENT. Commissioner Rigos is recognized.

REV. RIGOS. I wonder if Commissioner Davide would agree to put that sentence immediately after "citizens" on line 15.

MR. ROMULO. May I ask a question. Presumably, it is 60-40?

MR. DAVIDE. Yes.

MR. ROMULO. What about the 40 percent? Would they not be entitled to a proportionate seat in the board?

MR. DAVIDE. Under my proposal, they should not be allowed to sit in the board.

MR. ROMULO. Then the Commissioner is really proposing 100 percent which is the opposite way?

MR. DAVIDE. Not necessarily, because if 40 percent of the capital stock will be owned by aliens who may sit in the board, they can still exercise their right as ordinary stockholders and can submit the necessary proposal for, say, a policy to be undertaken by the board.

MR. ROMULO. But that is part of the stockholder's right – to sit in the board of directors.

MR. DAVIDE. That may be allowed but this is a very unusual and abnormal situation so the Constitution itself can prohibit them to sit in the board.

MR. ROMULO. But it would be pointless to allow them 40 percent when they cannot sit in the board nor have a say in the management of the company. Likewise, that would be extraordinary because both the 1935 and the 1973 Constitutions allowed not only the 40 percent but

commensurately they were represented in the board and management only to the extent of their equity interest, which is 40 percent. The management of a company is lodged in the board; so if the 60 percent, which is composed of Filipinos, controls the board, then the Filipino part has control of the company.

I think it is rather unfair to say: "You may have 40 percent of the company, but that is all. You cannot manage, you cannot sit in the board." That would discourage investments. Then it is like having a one hundred-percent ownership; I mean, either we allow a 60-40 with full rights to the 40 percent, limited as it is as to a minority, or we do not allow them at all. This means if it is allowed; we cannot have it both ways.

MR. DAVIDE. The aliens cannot also have everything. While they may be given entry into subscriptions of the capital stock of the corporation, it does not necessarily follow that they cannot be deprived of the right of membership in the managing or in the governing board of a particular corporation. But it will not totally deprive them of a say because they can still exercise the ordinary rights of stockholders. They can submit their proposal and they can be heard.

MR. ROMULO. Yes, but they have no vote. That is like being represented in the Congress but not being allowed to vote like our old resident Commissioners in the United States. They can be heard; they can be seen but they cannot vote.

MR. DAVIDE. If that was allowed under that situation, why can we not do it now in respect to our natural resources? This is a very critical and delicate issue.

MR. ROMULO. Precisely, we used to complain how unfair that was. One can be seen and heard but he cannot vote.

MR. DAVIDE. We know that under the corporation law, we have the rights of the minority stockholders. They can be heard. As a matter of fact, they can probably allow a proxy to vote for them and, therefore, they still retain that specific prerogative to participate just like what we did in the Article on Social Justice.

MR. ROMULO. That would encourage dummies if we give them proxies.

MR. DAVIDE. As a matter of fact, when it comes to encouraging dummies, by allowing 40-percent ownership to come in we will expect the proliferation of corporations actually owned by aliens using dummies.

MR. ROMULO. No, because 40 percent is a substantial and fair share and, therefore, the bona fide foreign investor is satisfied with that proportion. He does not have to look for dummies. In fact, that is what assures a genuine investment if we give a foreign investor the 40 percent and all the rights that go with it. Otherwise, we are either discouraging the investment altogether or we are encouraging circumvention. Let us be fair. If it is 60-40, then we give him the right, limited as to his minority position.

MR. MAAMBONG. Madam President, the body would like to know the position of the Committee so that we can put the matter to a vote.

MR. VILLEGAS. The Committee does not accept the amendment.

THE PRESIDENT. The Committee does not accept.

Will Commissioner Davide insist on his amendment?

MR. DAVIDE. We request a vote.

THE PRESIDENT. Will Commissioner Davide state his proposed amendment again?

MR. DAVIDE. The proposed amendment would be the insertion of a new paragraph to Section 3, between lines 24 and 25, page 2, which reads: "THE GOVERNING AND MANAGING BODIES OF SUCH CORPORATIONS SHALL BE VESTED EXCLUSIVELY IN CITIZENS OF THE PHILIPPINES."

MR. PADILLA. Madam President.

THE PRESIDENT. Commissioner Padilla is recognized.

MR. PADILLA. Madam President, may I just say that this Section 3 speaks of "co-production, joint venture, production sharing agreements with Filipino citizens." If the foreign share of, say, 40 percent will not be represented in the board or in management, I wonder if there would be any foreign investor who will accept putting capital but without any voice in management. I think that might make the provision on "coproduction, joint venture and production sharing" illusory.

VOTING

THE PRESIDENT. If the Chair is not mistaken, that was the same point expressed by Commissioner Romulo, a member of the Committee.

As many as are in favour of the Davide amendment, please raise their hand. (*Few Members raised their hand.*)

As many as are against, please raise their hand. (*Several Members raised their hand.*)

As many as are abstaining, please raise their hand. (*One Member raised his hand.*)

x x x x

THE PRESIDENT. Commissioner Garcia is recognized.

MR. GARCIA. My amendment is on Section 3, the same item which Commissioner Davide tried to amend. It is basically on the share of 60 percent. I would like to propose that we raise the 60 percent to SEVENTY-FIVE PERCENT so the line would read: "SEVENTY-FIVE PERCENT of whose CAPITAL is owned by such citizens."

THE PRESIDENT. What does the Committee say?

SUSPENSION OF SESSION

MR. VILLEGAS. The Committee insists on staying with the 60 percent – 60-40.

Madam President, may we ask for a suspension of the session.

THE PRESIDENT. The session is suspended.

It was 5:07 p.m.

RESUMPTION OF SESSION

At 5:31 p.m., the session was resumed.

THE PRESIDENT. The session is resumed.

MR. SARMIENTO. Madam President.

THE PRESIDENT. The Acting Floor Leader, Commissioner Sarmiento, is recognized.

MR. SARMIENTO: Commissioner Garcia still has the floor. May I ask that he be recognized.

THE PRESIDENT. Commissioner Garcia is recognized.

MR. GARCIA. Thank you very much, Madam President.

I would like to propose the following amendment on Section 3, line 14 on page 2. I propose to change the word "sixty" to SEVENTY-FIVE. So, this will read: "or it may enter into co-production, joint venture, production sharing agreements with Filipino citizens or corporations or associations at least SEVENTY-FIVE percent of whose CAPITAL stock or controlling interest is owned by such citizens."

MR. VILLEGAS. This is just a correction. I think Commissioner Azcuna is not insisting on the retention of the phrase "controlling interest," so we will retain "CAPITAL" to go back really to the 1935 and 1973 formulations.

MR. BENNAGEN. May I suggest that we retain the phrase "controlling interest"?

MR. VILLEGAS. Yes, we will retain it. (The statement of Commissioner Villegas is possibly erroneous considering his consistent statement, especially during the oral arguments, that the Constitutional Commission rejected the UP Proposal to use the phrase "controlling interest.")

THE PRESIDENT. Are we now ready to vote?

MR. SARMIENTO. Yes, Madam President.

VOTING

THE PRESIDENT. As many as are in favour of the proposed amendment of Commissioner Garcia for "SEVENTY-FIVE" percent, please raise their hand. (*Few Members raised their hand.*)

As many as are against the amendment, please raise their hand. (*Several Members raised their hand.*)

As many as are abstaining, please raise their hand. (*One Member raised his hand.*)

The results show 16 votes in favour, 18 against and 1 abstention; the Garcia amendment is lost.

MR. SARMIENTO. Madam President, may I ask that Commissioner Foz be recognized.

THE PRESIDENT. Commissioner Foz is recognized.

MR. FOZ. After losing by only two votes, I suppose that this next proposal will finally get the vote of the majority. The amendment is to provide for at least TWO-THIRDS.

MR. SUAREZ. It is equivalent to 66 2/3.

THE PRESIDENT. Will the Commissioner repeat?

MR. FOZ. I propose "TWO-THIRDS of whose CAPITAL is owned by such citizens." Madam President, we are referring to the same provision to which the previous amendments have been suggested. First, we called for a 100-percent ownership; and then, second, we called for a 75-percent ownership by Filipino citizens.

So my proposal is to provide for at least TWO-THIRDS of the capital to be owned by Filipino citizens. I would like to call the attention of the body that the same ratio or equity requirement is provided in the case of public utilities. And if we are willing to provide such equity requirements in the case of public utilities, we should at least likewise provide the same equity ratio in the case of natural resources.

MR. VILLEGAS. Commissioner Romulo will respond.

MR. ROMULO. I just want to point out that there is an amendment here filed to also reduce the ratio in Section 15 to 60-40.

MR. PADILLA. Madam President.

THE PRESIDENT. Commissioner Padilla is recognized.

MR. PADILLA. The 60 percent which appears in the committee report has been repeatedly upheld in various votings. One proposal was whole – 100 percent; another one was 75 percent and now it is 66 2/3 percent. Is not the decision of this Commission in voting to uphold the percentage in the committee report already a decision on this issue?

MR. FOZ. Our amendment has been previously brought to the attention of the body.

MR. VILLEGAS. The Committee does not accept the Commissioner's amendment. This has been discussed fully and, with only one-third of the vote, it is like having nothing at all in decision-making. It can be completely vetoed.

MR. RODRIGO. Madam President.

THE PRESIDENT. Commissioner Rodrigo is recognized.

MR. RODRIGO. This is an extraordinary suggestion. But considering the circumstances that the proposals from the 100 percent to 75 percent lost, and now it went down to 66 2/3 percent, we might go down to 65 percent next time. So I suggest that we vote between 66 2/3 and 60 percent. Which does the body want? Then that should be the end of it; otherwise, this is ridiculous. After this, if the 66 2/3 percent will lose, then somebody can say: "Well, how about 65 percent?"

THE PRESIDENT. The Chair was made to understand that Commissioner Foz' proposal is the last proposal on this particular line. Will Commissioner Foz restate his proposal?

MR. FOZ. My proposal is "TWO-THIRDS of whose CAPITAL or controlling interest is owned by such citizens."

VOTING

THE PRESIDENT. We now put Commissioner Foz' amendment to a vote.

As many as are in favour of the amendment of Commissioner Foz, please raise their hand. (*Few Members raised their hand.*)

As many as are against, please raise their hand. (*Several Members raised their hand*.)

The results show 17 votes in favour, 20 against, and not abstention; the amendment is lost.[22]

x x x x

August 22, 1986, Friday

THE PRESIDENT. Commissioner Nolledo is recognized.

MR. NOLLEDO. Thank you, Madam President.

I would like to propound some questions to the chairman and members of the committee. I have here a copy of the approved provisions on Article on the National Economy and Patrimony. On page 2, the first two lines are with respect to the Filipino and foreign equity and I said: "At least sixty percent of whose capital or controlling interest is owned by such citizens."

I notice that this provision was amended by Commissioner Davide by changing "voting stocks" to "CAPITAL," but I still notice that there appears the term "controlling interest" which seems to refer to assocaitions other than corporations and it is merely 50 percent plus one percent which is less than 60 percent. Besides, the wordings may indicate that the 60 percent may be based not only on capital but also on controlling interest; it could mean 60 percent or 51 percent.

[22] Id. at 357-365.

Before I propound the final question, I would like to make a comment in relation to Section 15 since they are related to each other. I notice that in Section 15, there still appears the phrase "voting stock or controlling interest." The term "voting stocks" as the basis of the Filipino equity means that if 60 percent of the voting stocks belong to Filipinos, foreigners may now own more than 40 percent of the capital as long as the 40 percent or the excess thereof will cover nonvoting stock. This is aside from the fact that under the Corporation Code, even nonvoting shares can vote on certain instances. Control over investments may cover aspects of management and participation in the fruits of production or exploitation.

So, I hope the committee will consider favorably my recommendation that instead of using "controlling interests," we just use "CAPITAL" uniformly in cases where foreign equity is permitted by law, because the purpose is really to help the Filipinos in the exploitation of natural resources and in the operation of public utilities. I know the committee, at its own instance, can make the amendment.

What does the committee say?

MR. VILLEGAS. We completely agree with the Commissioner's views. Actually, it was really an oversight. We did decide on the word "CAPITAL." I think it was the opinion of the majority that the phrase "controlling interest" is ambiguous.

So, we do accept the Commissioner's proposal to eliminate the phrase "or controlling interest" in all the provisions that talk about foreign participation.

MR. NOLLEDO. Not only in Section 3, but also with respect to Section 15.

Thank you very much.

MR. MAAMBONG. Madam President.

THE PRESIDENT. Commissioner Maambong is recognized.

MR. MAAMBONG. In view of the manifestation of the committee, I would like to be clarified on the use of the word "CAPITAL."

MR. VILLEGAS. Yes, that was the word used in the 1973 and 1935 Constitutions.

MR. MAAMBONG. Let us delimit ourselves to that word "CAPITAL". In the Corporation Law, if I remember correctly, we have three types of capital: the authorized capital stock, the subscribed capital stock and the paid-up capital stock.

The authorized capital stock could be interpreted as the capital of the corporation itself because that is the totality of the investment of the corporation as stated in the articles of incorporation. When we refer to 60 percent, are we referring to the authorized capital stock or the paid-up capital stock since the determinant as to who owns the

corporation, as far as equity is concerned, is the subscription of the person?

I think we should delimit ourselves also to what we mean by 60 percent. Are we referring to the authorized capital stock or to the subscribed capital stock, because the determination, as I said, on the controlling interest of a corporation is based on the subscribed capital stock? I would like a reply on that.

MR. VILLEGAS. Commissioner Suarez, a member of the committee, would like to answer that.

THE PRESIDENT. Commissioner Suarez is recognized.

MR. SUAREZ. Thank you, Madam President.

We stated this because there might be a misunderstanding regarding the interpretation of the term "CAPITAL" as now used as the basis for the percentage of foreign investments in appropriate instances and the interpretation attributed to the word is that it should be based on the paid-up capital. We eliminated the use the phrase "voting stock or controlling interest" because that is only used in connection with the matter of voting. As a matter of fact, in the declaration of dividends for private corporations, it is usually based on the paid-up capitalization.

So, what is really the dominant factor to be considered in matters of determining the 60-40 percentage should really be the paid-up capital of the corporation.

MR. MAAMBONG. I would like to get clarification on this. If I remember my corporation law correctly, we usually use a determinant in order to find out what the ratio of ownership is, not really on the paid-up capital stock but on the subscribed capital stock.

For example, if the whole authorized capital stock of the corporation is P1 million, if the subscription is 60 percent of P1 million which is P600,000, then that is supposed to be the determinant whether there is a sharing of 60 percent of Filipinos or not. It is not really on the paid-up capital because once a person subscribes to a capital stock then whether that capital stock is paid up or not, does not really matter, as far as the books of the corporation are concerned. The subscribed capital stock is supposed to be owned by the person who makes the subscription. There are so many laws on how to collect the delinquency and so on.

I view of the Commissioner's answer, I would like to know whether he is determined to put on the record that in order to determine the 60-40 percent sharing, we have to determine whether we will use a determinant which is the subscribed capital stock or the paid-up capital stock.

MR SUAREZ. We are principally concerned about the interpretation which would be attached to it; that is, it should be limited to authorized capital stock, not to subscribed capital stock.

I will give the Commissioner an illustration of what he is explaining to the Commission.

MR. MAAMBONG. Yes, thank you.

MR. SUAREZ. Let us say the authorized capital stock is P1 million. Under the present rules in the Securities and Exchange Commission, at least 25 percent of that amount must be subscribed and at least 25 percent of this subscribed capital must be paid up.

Now, let us discuss the basis of 60-40. To illustrate the matter further, let us say that 60 percent of the subscriptions would be allocated to Filipinos and 40 percent of the subscribed capital would be held by foreigners. Then we come to the paid-up capitalization. Under the present rules in the Securities and Exchange Commission, a foreign corporation is supposed to subscribe to a 40-percent share which must be fully paid up.

On the other hand, the 60 percent allocated to Filipinos need not be paid up. However, at least 25 percent of the subscription must be paid up for purposes of complying with the Corporation Law. We can illustrate the matter further by saying that the compliance of 25 percent paid-up of the subscribed capital would be fulfilled by the full payment of the 40 percent by the foreigners.

So, we have a situation where the Filipino percentage of 60 may not even comply with the 25-percent requirement because of the totality due to the fully payment of the 40-percent of the foreign investors, the payment of 25 percent paid-up on the subscription would have been considered fulfilled. That is exactly what we are trying to avoid.

MR. MAAMBONG I appreciate very much the explanation but I wonder if the committee would subscribe to that view because I will stick to my thinking that in the computation of the 60-40 ratio, the basis should be on the subscription. If the subscription is being done by 60 percent Filipinos, whether it is paid-up or not and the subscription is accepted by the corporation, I think that is the proper determinant. If we base the 60-40 on the paid-up capital stock, we have a problem here where the 40 percent is fully paid up and the 60 percent is not fully paid up – this may be contrary to the provisions of the Constitution. So I would like to ask for the proper advisement from the Committee as to what should be the proper interpretation because this will cause havoc on the interpretation of our Corporation Law.

MR. ROMULO. Madam President.

THE PRESIDENT. Commissioner Romulo is recognized.

MR. ROMULO. We go by the established rule which I believe is uniformly held. It is based on the subscribed capital. I know only of one possible exception and that is where the bylaws prohibit the subscriber from voting. But that is a very rare provision in bylaws. Otherwise, my information and belief is that it is based on the subscribed capital.

MR. MAAMBONG. It is, therefore, the understanding of this Member that the Commissioner is somewhat revising the answer of Commissioner Suarez to that extent?

MR. ROMULO. No, I do not think we contradict each other. He is talking really of the instance where the subscriber is a non-resident and, therefore, must fully pay. That is how I understand his position.

MR. MAAMBONG. My understanding is that in the computation of the 60-40 sharing under the present formulation, the determinant is the paid-up capital stock to which I disagree.

MR. ROMULO. At least, from my point of view, it is the subscribed capital stock.

MR. MAAMBONG. Then that is clarified.[23]

x x x x

August 23, 1986, Saturday

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?

MR. ROMULO. Madam President, if I may reply.

THE PRESIDENT. Commissioner Romulo is recognized.

MR. ROMULO. May I ask the proponent to read the amendment again.

MS. ROSARIO BRAID. The amendment reads: "THE MANAGEMENT BODY OF EVERY CORPORATION OR ASSOCIATION SHALL IN ALL CASES BE CONTROLLED BY CITIZENS OF THE PHILIPPINES."

MR. DE LOS REYES. Madam President, will Commissioner Rosario Braid agree to a reformulation of her amendment for it to be more comprehensive and all-embracing?

THE PRESIDENT. Commissioner de los Reyes is recognized.

MR. DE LOS REYES. This is an amendment I submitted to the committee which reads: "MAJORITY OF THE DIRECTORS OR TRUSTEES AND ALL THE EXECUTIVE AND MANAGING OFFICERS OF SUCH CORPORATION OR ASSOCIATION MUST BE CITIZENS OF THE PHILIPPINES."

This amendment is more direct because it refers to particular officers to be all-Filipino citizens.

MR. BENGZON. Madam President.

THE PRESIDENT. Commissioner Bengzon is recognized.

---

[23] Id. at 582-584.

MR. BENGZON. The committee sitting out here accepts the amendment of Commissioner de los Reyes which subsumes the amendment of Commissioner Rosario Braid.

THE PRESIDENT. So this will be a joint amendment now of Commissioners Rosario Braid, de los Reyes and others.

MR. REGALADO. Madam President, I join in that amendment with the request that it will be the last sentence of Section 15 because we intend to put an anterior amendment. However, that particular sentence which subsumes also the proposal of Commissioner Rosario Braid can just be placed as the last sentence of the article.

THE PRESIDENT. Is that acceptable to the committee?

MR. VILLEGAS. Yes, Madam President.

MS. ROSARIO BRAID. Thank you.

MR. RAMA, The body is now ready to vote on the amendment.

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.

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.

THE PRESIDENT. The original authors of this amendment are Commissioners Rosario Braid, de los Reyes, Regalado, Natividad, Guingona and Fr. Bernas.

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

THE PRESIDENT. As many as are in favour of this proposed amendment which should be the last sentence of Section 15 and has been accepted by the committee, pleas raise their hand. (*All Members raised their hand.*)

As many as are against, please raise their hand. (*No Member raised his hand.*)

The results show 29 votes in favour and none against; so the proposed amendment is approved.[24]

It can be concluded that the view advanced by Justice Carpio is incorrect as the deliberations easily reveal that **the intent of the framers was not to limit the definition of the word "capital" as meaning voting shares/stocks**.

The majority in the original decision reproduced the CONCOM deliberations held on August 13 and August 15, 1986, but neglected to quote the other pertinent portions of the deliberations that would have shed light on the true intent of the framers of the Constitution.

[24] Id. at 665-666.

It is conceded that Proposed Resolution No. 496 on the language of what would be Art. XII of the Constitution contained the phrase "voting stock or controlling interest," viz:

> PROPOSED RESOLUTION NO. 496
>
> RESOLUTION TO INCORPORATE IN THE NEW CONSTITUTION AN ARTICLE ON NATIONAL ECONOMY AND PATRIMONY
>
> *Be it resolved as it is hereby resolved by the Constitutional Commission in session assembled,* To incorporate the National Economy and Patrimony of the new Constitution, the following provisions:
>
> ARTICLE____
> NATIONAL ECONOMY AND PATRIMONY
>
> x x x x
>
> SEC. 15. 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 two-thirds of whose <u>voting stock or controlling interest</u> is owned by such citizens.** 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.[25] (This became Sec. 11, Art. XII)(Emphasis supplied.)

The aforequoted deliberations disclose that **the Commission eventually and unequivocally decided to use "<u>capital</u>," which refers to the capital stock of the corporation, "as was employed in the 1935 and 1973 Constitution," <u>instead of the proposed "voting stock or controlling interest</u>" as the basis for the percentage of ownership allowed to foreigners**. The following exchanges among Commissioners Foz, Suarez and Bengzon reflect this decision, but the majority opinion in the June 28, 2011 Decision left their statements out:

> MR. FOZ. Mr. Vice-President, in Sections 3 and 9,[26] **the provision on equity is both 60 percent, but** I notice that **this is now different from** the provision in **the 1973 Constitution in that the basis for the equity**

---

[25] Record of the (1986) Constitutional Commission, Vol. III, pp. 250-251.
[26] Referring to Sections 2 and 10, Article XII of the 1987 Constitution.

> **provision is voting stock or controlling interest instead of the usual capital** percentage as provided for in the 1973 Constitution. **We would like to know what the difference would be between the previous and the proposed provisions regarding equity interest.**
>
> x x x x
>
> MR. SUAREZ. x x x As a matter of fact, this particular portion is still being reviewed x x x. In Section 1, Article XIII of the **1935 Constitution**, the wording is that **the percentage should be based on the capital which is owned by such citizens. In the proposed draft, this phrase was proposed: "voting stock or controlling interest."** This was a plan **submitted by the UP Law Center.**
>
> x x x We would **have three criteria** to go by: **One would be based on capital, which is capital stock of the corporation, authorized, subscribed or paid up, as employed under the 1935 and the 1973 Constitution**. The idea behind the introduction of the phrase "voting stock or controlling interest" was precisely to avoid the perpetration of dummies, Filipino dummies of multinationals. It is theoretically possible that a situation may develop where these multinational interests would not really be only 40 percent but will extend beyond that in the matter of voting because they could enter into what is known as a voting trust or voting agreement with the rest of the stockholders and, therefore, notwithstanding the fact that on record their capital extent is only up to 40-percent interest in the corporation, actually, they would be managing and controlling the entire company. That is why the UP Law Center members suggested that we utilize the words "voting interest" which would preclude multinational control in the matter of voting, independent of the capital structure of the corporation. And then **they also added the phrase "controlling interest**" which up to now they have not been able to successfully define the exact meaning of. x x x And as far as I am concerned, I am not speaking in behalf of the Committee, I would feel more **comfortable if we go back to** the wording of **the 1935 and the 1973 Constitution, that is to say, the 60-40 percentage could be based on the capital stock of the corporation**.
>
> x x x x
>
> MR. BENGZON. I also share the sentiment of Commissioner Suarez in that respect. So there are already two in the Committee who want to go back to the wording of the 1935 and the 1973 Constitution.[27]

In fact, in another portion of the CONCOM deliberations conveniently glossed over by the June 28, 2011 Decision, then Commissioner Davide strongly resisted the retention of the term "capital" as used in the 1935 and 1973 Constitution on the ground that the term refers to both voting and non-voting. Eventually, however, he came around to accept the use of "CAPITAL" along with the majority of the members of the Committee on

[27] Records of the Constitutional Commission, Volume III, pp. 326-327.

Natural Economy and Patrimony in the afternoon session held on August 15, 1986:

> **MR. TREÑAS.** x x x **may I propose an amendment** on line 14 of Section 3 **by deleting therefrom "whose voting stock and controlling interest."** And **in lieu thereof, insert the CAPITAL so the line should read: "associations at least sixty percent of the CAPITAL is owned by such citizens.**
>
> **MR. VILLEGAS. We accept the amendment.**
>
> **MR. TREÑAS. Thank you.**
>
> **THE PRESIDENT. The amendment of Commissioner Treñas on line 14 has been accepted by the Committee.**
>
> **Is there any objection? (*Silence*) The Chair hears none; the amendment is approved.**[28]
>
> x x x x
>
> MR. SUAREZ. x x x Two points are being raised by Commissioner Davide's proposed amendment. One has reference to the percentage of holdings and the other one is the basis for the percentage x x x x **Is the Commissioner not insisting on the voting capital stock because that was already accepted by the Committee?**
>
> MR. DAVIDE. Would it mean that it would be 100-percent voting capital stock?
>
> MR. SUAREZ. No, under the Commissioner's proposal it is just "CAPITAL" not "stock."
>
> MR. DAVIDE. No, I want it to be very clear. What is the alternative proposal of the Committee? How shall it read?
>
> MR. SUAREZ. It will only read something like: "the CAPITAL OF WHICH IS FULLY owned."
>
> MR. VILLEGAS. Let me read lines 12 to 14 which state:
>
> > … enter into co-production, joint venture, production sharing agreements with Filipino citizens or corporations or associations at least 60 percent of whose CAPITAL is owned by such citizens.
>
> We are going back to the 1935 and 1973 formulations.
>
> **MR. DAVIDE. I cannot accept the proposal because <u>the word CAPITAL</u> should not really be the guiding principle. <u>It is the ownership of the corporation. It may be voting or not voting</u>, but that is not the guiding principle.**

[28] Id. at 357.

x x x x

THE PRESIDENT…. Commissioner Davide is to clarify his point.

MR. VILLEGAS. Yes, Commissioner Davide has accepted the word "CAPITAL" in place of "voting stock or controlling interest." <u>This is an amendment already accepted by the Committee</u>.[29]

The above exchange precedes the clarifications made by then Commissioner Azcuna, which were cited in the June 28, 2011 Decision. Moreover, the statements made subsequent to the portion quoted in the June 28, 2011 Decision emphasize the CONCOM's awareness of the plain meaning of the term "capital" without the qualification espoused in the majority's decision:

MR. AZCUNA. May I be clarified as to [what] was accepted x x x.

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 xxx there are associations that do not have stocks. That is why we say "CAPITAL."

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

MR. BENGZON. In the case of stock corporation, it is assumed.

---

[29] Records of the Constitutional Commission, Volume III, pp. 357-360.

MR. AZCUNA. Yes, but what I mean is that the control should be with the Filipinos.

MR. BENGZON. Yes, that is understood.

MR. AZCUNA. Yes, because if we just say "sixty percent of whose capital is owned by the Filipinos," the <u>capital may be voting or non-voting</u>.

MR. BENGZON. That is correct.[30]

More importantly, on the very same August 15, 1986 session, Commissioner Azcuna no longer insisted on retaining the delimiting phrase "controlling interest":

MR. GARCIA. Thank you very much, Madam President.

I would like to propose the following amendment on Section 3, line 14 on page 2. I propose to change the word "sixty" to SEVENTY-FIVE. So, this will read: "or it may enter into co-production, joint venture, production sharing agreements with Filipino citizens or corporations or associations at least SEVENTY-FIVE percent of whose CAPITAL stock or controlling interest is owned by such citizens."

MR. VILLEGAS. This is just a correction**. I think Commissioner Azcuna is not insisting on the retention of the phrase "controlling interest," so we will retain "CAPITAL" to go back really to the 1935 and 1973 formulations**.[31] (Emphasis supplied.)

The later deliberations held on August 22, 1986 further underscore the framers' true intent to include both voting and non-voting shares as coming within the pale of the word "capital." The UP Law Center attempted to limit the scope of the word along the line then and now adopted by the majority, but, as can be gleaned from the following discussion, **the framers opted not to adopt the proposal of the UP Law Center to add the more protectionist phrase "voting stock or controlling interest"**:

MR. NOLLEDO. x x x I would like to propound some questions xxx. I have here a copy of the approved provisions on Article on the National Economy and Patrimony. x x x

I notice that this provision was amended by Commissioner Davide by changing "voting stocks" to "CAPITAL," but I still notice that there appears the term "controlling interest" x x x. Besides, the wordings may

---

[30] Records of the Constitutional Commission, Volume III, p. 360.
[31] Id. at 364.

> indicate that the 60 percent may be based not only on capital but also on controlling interest; it could mean 60 percent or 51 percent.
>
> Before I propound the final question, I would like to make a comment in relation to Section 15 since they are related to each other. I notice that in Section 15, there still appears the phrase "voting stock or controlling interest." The term "voting stocks" as the basis of the Filipino equity means that if 60 percent of the voting stocks belong to Filipinos, foreigners may now own more than 40 percent of the capital as long as the 40 percent or the excess thereof will cover nonvoting stock. This is aside from the fact that under the Corporation Code, even nonvoting shares can vote on certain instances. **Control over investments may cover aspects of management and participation in the fruits of production or exploitation.**
>
> So, **I hope the committee will consider favorably my recommendation that instead of using "controlling interests," we just use "CAPITAL" uniformly in cases where foreign equity is permitted by law, because the purpose is really to help the Filipinos in the exploitation of natural resources and in the operation of public utilities**. x x x
>
> What does the committee say?
>
> **MR. VILLEGAS. We completely agree** with the Commissioner's views**.** Actually, it was really an oversight**. We did decide on the word "CAPITAL." I think it was the opinion of the majority that the phrase "controlling interest" is ambiguous.**
>
> **So, we do accept the Commissioner's proposal to eliminate the phrase "or controlling interest" in all the provisions that talk about foreign participation.**
>
> MR. NOLLEDO. Not only in Section 3, but also with respect to Section 15.[32] (Emphasis supplied.)

In fact, on the very same day of deliberations, the Commissioners clarified that the proper and more specific "interpretation" that should be attached to the word "capital" is that it refers to the "subscribed capital," a corporate concept defined as "that portion of the authorized capital stock that is covered by subscription agreements whether fully paid or not"[33] and refers to both voting and non-voting shares:

> **MR. MAAMBONG.** x x x **I would like to be clarified on the use of the word "CAPITAL."**
>
> **MR. VILLEGAS. Yes, that was the word used in the 1973 and the 1935 Constitutions.**

---

[32] Id. at 582.

[33] Sundiang Jose, R. and Aquino, Timoteo B. Reviewer on Commercial Law, 2006 Ed., p. 257.

MR. MAAMBONG. Let us delimit ourselves to that word "CAPITAL." In the Corporation Law, if I remember correctly, we have three types of capital: the authorized capital stock, the subscribed capital stock and the paid-up capital stock.

x x x x

I would like to get clarification on this. **If I remember my corporation law correctly, we usually use a determinant in order to find out what the ratio of <u>ownership</u> is, not really on the paid-up capital stock but on the subscribe capital stock.**

x x x x

x x x I would like to know whether (Commissioner Suarez) is determined to put on the record that in order to determine the 60-40 percent sharing, we have to determine whether we will use a determinant which is the subscribed capital stock or the paid-up capital stock.

MR. SUAREZ. We are principally concerned about the interpretation which would be attached to it, that is, it should be limited to authorized capital stock, not to subscribed capital stock.

I will give the Commissioner an illustration of what he is explaining to the Commission.

x x x x

Let us say authorized capital stock is P1 million. Under the present rules in the [SEC], at least 25 percent of that amount must be subscribed and at least 25 percent of this subscribed capital must be paid up.

Now, let us discuss the basis of 60-40. To illustrate the matter further, let us say that 60 percent of the subscriptions would be allocated to Filipinos and 40 percent of the subscribed capital stock would be held by foreigners. Then we come to the paid-up capitalization. Under the present rules in the [SEC], a foreign corporation is supposed to subscribe to 40-percent share which must be fully paid up.

On the other hand, the 60 percent allocated to Filipinos need not be paid up. However, at least 25 percent of the subscription must be paid up for purposes of complying with the Corporation Law. We can illustrate the matter further by saying that the compliance of 25 percent paid-up of the subscribed capital would be fulfilled by the full payment of the 40 percent by the foreigners.

So, we have a situation where the Filipino percentage of 60 may not even comply with the 25-percent requirement because of the totality due to the full payment of the 40-percent of the foreign investors, the payment of 25 percent paid-up on the subscription would have been considered fulfilled. That is exactly what we are trying to avoid.

MR. MAAMBONG. I appreciate very much the explanation but I wonder if the committee would subscribe to that view because I will stick to my thinking that in the computation of the 60-40 ratio, the basis should be on the subscription. x x x

> x x x x
>
> MR. ROMULO**. We go by the established rule which I believe is uniformly held. It is based on the subscribed capital.** x x x
>
> x x x x
>
> I do not think that we contradict each other. (Commisioner Suarez) is talking really of the instance where the subscriber is a non-resident and, therefore, must fully pay. That is how I understand his position.
>
> MR. MAAMBONG. My understanding is that in the computation of the 60-40 sharing under the present formulation, the determinant is the paid-up capital stock to which I disagree.
>
> MR . ROMULO. At least, from my point of view, **it is the subscribed capital stock.**"[34]

Clearly, while the concept of voting capital as the norm to determine the 60-40 Filipino-alien ratio was initially debated upon as a result of the **proposal** to use "*at least two-thirds of whose voting stock or controlling interest is owned by such citizens,*"[35] in what would eventually be Sec. 11, Art. XII of the Constitution, that proposal was eventually **discarded**. And nowhere in the records of the CONCOM can it be deduced that the idea of full ownership of voting stocks presently parlayed by the majority was earnestly, if at all, considered. In fact, the framers decided that the term "capital," as used in the 1935 and 1973 Constitutions, should be properly interpreted as the "subscribed capital," which, again, does not distinguish stocks based on their board-membership voting features.

Indeed, the phrase "*voting stock or controlling interest*" was suggested for and in fact deliberated, but was similarly dropped in the approved draft provisions on National Economy and Patrimony, particularly in what would become Sections 2[36] and 10,[37] Article XII of the 1987

---

[34] Records of the Constitutional Commission, Volume III, pp. 583-584.

[35] See Bernas, S.J., The Intent of the 1986 Constitution Writers, 1995 ed., p. 849.

[36] Section 2, Article XII, 1987 Constitution:

Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. x x x x (Emphasis supplied.)

[37] Section 10, Article XII, 1987 Constitution:

Constitution. However, the framers expressed preference to the formulation of the provision in question in the 1935 and 1973 Constitutions, both of which employed the word "capital" alone. This was very apparent in the aforementioned deliberations and affirmed by *amicus curiae* Dr. Bernardo Villegas, Chair of the Committee on the National Economy and Patrimony in charge of drafting Section 11 and the rest of Article XII of the Constitution. During the June 26, 2012 oral arguments, Dr. Villegas manifested that:

> x x x Justice Abad was right. [If i]t was not in the minds of the Commissioners to define capital broadly, these additional provisions would be meaningless. And it would have been really more or less expressing some kind of a contradiction in terms. So, that is why I was pleasantly surprised that one of the most pro-Filipino members of the Commission, Atty. Jose Suarez, who actually voted "NO" to the entire Constitution has only said, was one of the first to insist, during one of the plenary sessions that we should reject the UP Law Center recommendation. **In his words, I quote "I would feel more comfortable if we go back to the wording of the 1935 and 1970 Constitutions that is to say the 60-40 percentage could be based on the capital stock of the corporation."** The final motion was made by Commissioner Efren Treñas, in the same plenary session when he moved, "Madam President, may I propose an amendment on line 14 of Section 3 by deleting therefrom 'whose voting stock and controlling interest' and in lieu thereof, insert capital, so the line should read: "associations of at least sixty percent (60%) of the capital is owned by such citizens." **After I accepted the amendment since I was the chairman of the National Economy Committee, in the name of the Committee, the President of the Commission asked for any objection. When no one objected, the President solemnly announced that the amendment had been approved by the Plenary. It is clear, therefore, that in the minds of the Commissioners the word "capital" in Section 11 of Article XII refers, not to voting stock, but to total subscribed capital, both common and preferred.**[38] (Emphasis supplied.)

There was no change in phraseology from the 1935 and 1973 Constitutions, or a transitory provision that signals such change, with respect to foreign ownership in public utility corporations (2nd extrinsic aid)

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. (Emphasis supplied.)

[38] June 26, 2012 Oral Arguments TSN, pp. 115-116.

If the framers wanted the word "capital" to mean voting capital stock, their terminology would have certainly been unmistakably limiting as to leave no doubt about their intention. But **the framers consciously and purposely excluded restrictive phrases**, such as "voting stocks" or "controlling interest," in the approved final draft, the proposal of the UP Law Center, Commissioner Davide and Commissioner Azcuna notwithstanding. Instead, they retained "capital" as "used in the 1935 and 1973 Constitutions."[39] There was, therefore, a conscious design to avoid stringent words that would limit the meaning of "capital" in a sense insisted upon by the majority. *Cassus omissus pro omisso habendus est*—a person, object, or thing omitted must have been omitted intentionally. More importantly, by using the word "capital," the intent of the framers of the Constitution was to include **all** types of shares, whether voting or non-voting, within the ambit of the word.

History or realities or circumstances prevailing during the drafting of the Constitution validate the adoption of the plain meaning of "Capital" (3rd extrinsic aid)

This plain, non-exclusive interpretation of "capital" also comes to light considering the economic backdrop of the 1986 CONCOM when the country was still starting to rebuild the financial markets and regain the foreign investors' confidence following the changes caused by the toppling of the Martial Law regime. As previously pointed out, the Court, in construing the Constitution, must take into consideration the aims of its framers and the evils they wished to avoid and address. In ***Civil Liberties Union v. Executive Secretary***,[40] We held:

> A foolproof yardstick in constitutional construction is the intention underlying the provision under consideration. Thus, it has been held that **the Court in construing a Constitution should bear in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied**. A doubtful provision will be examined in the light of the history of the times, and the condition and circumstances under which the Constitution was framed. **The object is to ascertain the**

[39] Records of the Constitutional Commission, Volume III, pp. 326, 583.
[40] G.R. No. 83896, February 22, 1991, 194 SCRA 317.

> **reason which induced the framers of the Constitution to enact the particular provision and the purpose sought to be accomplished thereby, in order to construe the whole as to make the words consonant to that reason and calculated to effect that purpose**. (Emphasis supplied.)

It is, thus, proper to revisit the circumstances prevailing during the drafting period. In an astute observation of the economic realities in 1986, quoted by respondent Pangilinan, University of the Philippines School of Economics Professor Dr. Emmanuel S. de Dios examined the nation's dire need for foreign investments and foreign exchange during the time when the framers deliberated on what would eventually be the National Economy and Patrimony provisions of the Constitution:

> **The period immediately after the 1986 EDSA Revolution is well known to have witnessed the country's deepest economic crisis since the Second World War.** Official data readily show this period was characterised by the highest unemployment, highest interest rates, and largest contractions in output the Philippine economy experienced in the postwar period. At the start of the Aquino administration in 1986, total output had already contracted by more than seven percent annually for two consecutive years (1984 and 1985), inflation was running at an average of 35 percent, unemployment more than 11 percent, and the currency devalued by 35 percent.
>
> **The proximate reason for this was the moratorium on foreign-debt payments the country had called in late 1983, effectively cutting off the country's access to international credit markets** (for a deeper contemporary analysis of what led to the debt crisis, see de Dios [1984]). **The country therefore had to subsist only on its current earnings from exports, which meant there was a critical shortage of foreign exchange. Imports especially of capital goods and intermediate goods therefore had to be drastically curtailed** x x x.
>
> For the same reasons, obviously, new foreign investments were unlikely to be forthcoming. This is recorded by Bautista [2003:158], who writes:
>
> > Long-term capital inflows have been rising at double-digit rates since 1980, **except during 1986-1990, a time of great political and economic uncertainty following the period of martial law under President Marcos.**
>
> The foreign-exchange controls then effectively in place will have made importing inputs difficult for new enterprises, particularly foreign investors (especially Japanese) interested in relocating some of their-export-oriented but import-dependent operations to the Philippines. x x x The same foreign-exchange restrictions would have made the freedom to remit profits a dicey affairs. Finally, however, the period was also

> characterised by extreme political uncertainty, which did not cease even after the Marcos regime was toppled.[41] x x x

Surely, it was far from the minds of the framers to alienate and disenfranchise foreign investors by imposing an indirect restriction that only exacerbates the dichotomy between management and ownership without the actual guarantee of giving control and protection to the Filipino investors. Instead, it can be fairly assumed that the framers intended to avoid further economic meltdown and so chose to attract foreign investors by allowing them to 40% equity ownership of the entirety of the corporate shareholdings but, wisely, imposing limits on their participation in the governing body to ensure that the effective control and ultimate economic benefits still remained with the Filipino shareholders.

Judicial decisions and prior laws use and/or treat "capital" as "capital stock" (4th extrinsic aid)

That the term "capital" in Sec. 11, Art. XII is equivalent to "capital stock," which encompasses all classes of shares regardless of their nomenclature or voting capacity, is easily determined by a review of various laws passed prior to the ratification of the 1987 Constitution. In 1936, for instance, the Public Service Act[42] established the nationality requirement for corporations that may be granted the authority to operate a "public service,"[43] which include most of the present-day public utilities, by referring to the paid-up "capital stock" of a corporation, viz:

---

[41] Respondent Pangilinan's Motion for Reconsideration dated July 14, 2011, pp. 36-37 citing Philippine Institute of Development Studies, "Key Indicators of the Philippines, 1970-2011", at http://econdb.pids.gov.ph/tablelists/table/326 and de Dios, E. (ed.) [1984] An Analysis of the Philippine Economic Crisis. *A workshop report.* Quezon City: University of the Philippines; also de Dios, E. [2009] "Governance, institutions, and political economy" in: D. Canlas, M.E. Khan and J. Zhuang, eds. *Diagnosing the Philippine economy: toward inclusive growth*. London: Anthem Press and Asian Development Bank. 295-336 and Bautista, R. [2003] "International dimensions", in: A. Balisacan and H. Hill Eds. *The Philippine economy: development, policies, and challenges.* Oxford University Press. 136-171.

[42] Commonwealth Act No. (CA) 146, as amended and modified by Presidential Decree No. 1, Integrated Reorganization Plan and EO 546; Approved on November 7, 1936.

[43] Sec. 13(b), CA 146: The term "public service" includes every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any common carrier, railroad, street railway, traction railway, sub-way motor vehicle, either for freight or passenger, or both with or without fixed route and whether may be its classification, freight or carrier service of any class, express service, steamboat or steamship line, pontines, ferries, and water craft,

> Sec. 16. Proceedings of the Commission, upon notice and hearing. - The Commission shall have power, upon proper notice and hearing in accordance with the rules and provisions of this Act, subject to the limitations and exceptions mentioned and saving provisions to the contrary:
>
> > (a) To issue certificates which shall be known as certificates of public convenience, authorizing the operation of public service within the Philippines whenever the Commission finds that the operation of the public service proposed and the authorization to do business will promote the public interest in a proper and suitable manner. Provided, That thereafter, **certificates of public convenience and certificates of public convenience and necessity will be granted only to** citizens of the Philippines or of the United States or to **corporations, co-partnerships, associations or joint-stock companies constituted and organized under the laws of the Philippines; Provided, That sixty per centum of the stock or paid-up capital of any such corporations, co-partnership, association or joint-stock company must belong entirely to citizens of the Philippines** or of the United States: Provided, further, That no such certificates shall be issued for a period of more than fifty years. (Emphasis supplied.)

The heading of Sec. 2 of Commonwealth Act No. (CA) 108, or the Anti-Dummy Law, which was approved on October 30, 1936, similarly conveys the idea that the term "capital" is equivalent to "capital stock"[44]:

> Section 2. ***Simulation of minimum capital stock*** — **In all cases in which a constitutional or legal provision requires that, in order that a corporation or association may exercise or enjoy a right, franchise or privilege, not less than a certain per centum of its capital must be owned by citizens of the Philippines** or of any other specific country, it shall be unlawful to falsely simulate the existence of such **minimum stock or capital** as owned by such citizens, for the purpose of evading said provision. The president or managers and directors or trustees of corporations or associations convicted of a violation of this section shall be punished by imprisonment of not less than five nor more than fifteen years, and by a fine not less than the value of the right, franchise or privilege, enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos.[45] (Emphasis and underscoring supplied.)

---

engaged in the transportation of passengers or freight or both, shipyard, marine railways, marine repair shop, [warehouse] wharf or dock, ice plant, ice-refrigeration plant, canal, irrigation system, gas, electric light, heat and power water supply and power, petroleum, sewerage system, wire or wireless communications system, wire or wireless broadcasting stations and other similar public services x x x.

[44] "Headnotes, heading or epigraphs of sections of a statute are convenient index to the contents of its provisions." (Agpalo, Ruben, *Statutory Construction*, Sixth Edition [2009], p. 166 citing *In re* Estate of Johnson, 39 Phil. 156 [1918]; Kare v. Platon, 56 Phil. 248 [1931]).

[45] As amended by Republic Act No. 134, which was approved on June 14, 1947.

Pursuant to these legislative acts and under the aegis of the Constitutional nationality requirement of public utilities then in force, Congress granted various franchises upon the understanding that the "capital stock" of the grantee is at least 60% Filipino. In 1964, Congress, via Republic Act No. (RA) 4147,[46] granted Filipinas Orient Airway, Inc. a legislative franchise to operate an air carrier upon the understanding that its "capital stock" was 60% percent Filipino-owned. Section 14 of RA 4147, provided:

> Sec. 14. This franchise is granted with the understanding that **the grantee is a corporation sixty per cent of the capital stock of which is the bona fide property of citizens of the Philippines** and that the interest of such citizens in its capital stock or in the capital of the Company with which it may merge shall at no time be allowed to fall below such percentage, under the penalty of the cancellation of this franchise. (Emphasis and underscoring supplied.)

The grant of a public utility franchise to Air Manila. Inc. to establish and maintain air transport in the country a year later pursuant to RA 4501[47] contained exactly the same Filipino capitalization requirement imposed in RA 4147:

> Sec. 14. This franchise is granted with the understanding that the grantee is a corporation, **sixty per cent of the capital stock of which is owned or the bona fide property of citizens of the Philippines** and that the interest of such citizens in its capital stock or in the capital of the company with which it may merge shall at no time be allowed to fall below such percentage, under the penalty of the cancellation of this franchise. (Emphasis and underscoring supplied.)

In like manner, RA 5514,[48] which granted a franchise to the Philippine Communications Satellite Corporation in 1969, required of the grantee to

---

[46] Entitled "An Act Granting A Franchise To Filipinas Orient Airways, Incorporated, To Establish And Maintain Air Transport Service In The Philippines And Between The Philippines And Other Countries." Approved on June 20, 1964.

[47] Entitled "An Act Granting A Franchise To Air Manila, Incorporated, To Establish And Maintain Air Transport Service In The Philippines And Between The Philippines And Other Countries." Approved on June 19, 1965.

[48] Entitled "An Act Granting The Philippine Communications Satellite Corporation A Franchise To Establish And Operate Ground Satellite Terminal Station Or Stations For Telecommunication With Satellite Facilities And Delivery To Common Carriers." Approved on June 21, 1969.

execute management contracts only with corporations whose "capital or capital stock" are at least 60% Filipino:

> Sec. 9. The grantee shall not lease, transfer, grant the usufruct of, sell or assign this franchise to any person or entity, except any branch or instrumentality of the Government, without the previous approval of the Congress of the Philippines: Provided, That the grantee may enter into management contract with any person or entity, with the approval of the President of the Philippines: Provided, further, That such person or entity with whom the grantee may enter into management contract shall be a citizen of the Philippines and in case of an entity or **a corporation, at least sixty per centum of the capital or capital stock of which is owned by citizens of the Philippines**. (Emphasis supplied.)

In 1968, RA 5207,[49] otherwise known as the "Atomic Energy Regulatory Act of 1968," considered a corporation sixty percent of whose capital stock as domestic:

> Sec. 9. **Citizenship Requirement**. No license to acquire, own, or operate any atomic energy facility shall be issued to an alien, or any corporation or other entity which is owned or controlled by an alien, a foreign corporation, or a foreign government.
>
> For purposes of this Act, a corporation or entity is **not owned or controlled by an alien,** a foreign corporation of a foreign government **if at least sixty percent (60%) of its capital stock is owned by Filipino citizens**. (Emphasis supplied.)

Anent pertinent judicial decisions, this Court has used the very same definition of capital as equivalent to the entire capital stockholdings in a corporation in resolving various other issues. In ***National Telecommunications Commission v. Court of Appeals***,[50] this Court, thus, held:

> **The term "capital" and other terms used to describe the capital structure of a corporation are of universal acceptance, and their usages have long been established in jurisprudence**. Briefly, **capital refers to the value of the property or assets of a corporation. The capital subscribed is the total amount of the capital that persons (subscribers or shareholders) have agreed to take and pay for, which need not necessarily be, and can be more than, the par value of the shares. In fine, it is the amount that the corporation receives, inclusive**

---

[49] Entitled "An Act Providing For The Licensing And Regulation Of Atomic Energy Facilities And Materials, Establishing The Rules On Liability For Nuclear Damage, And For Other Purposes," as amended by PD 1484. Approved on June 15, 1968 and published in the Official Gazette on May 5, 1969.

[50] G.R. No. 127937 July 28, 1999, 311 SCRA 508.

> **of the premiums if any, in consideration of the original issuance of the shares.** In the case of stock dividends, it is the amount that the corporation transfers from its surplus profit account to its capital account. It is the same amount that can loosely be termed as the "trust fund" of the corporation. The "Trust Fund" doctrine considers this subscribed capital as a trust fund for the payment of the debts of the corporation, to which the creditors may look for satisfaction. Until the liquidation of the corporation, no part of the subscribed capital may be returned or released to the stockholder (except in the redemption of redeemable shares) without violating this principle. Thus, dividends must never impair the subscribed capital; subscription commitments cannot be condoned or remitted; nor can the corporation buy its own shares using the subscribed capital as the consideration therefor.[51]

This is similar to the holding in ***Banco Filipino v. Monetary Board***[52] where the Court treated the term "capital" as including both common and preferred stock, which are usually deprived of voting rights:

> [I]t is clear from the law that a solvent bank is one in which its assets exceed its liabilities. It is a basic accounting principle that assets are composed of liabilities and capital. The term "assets" includes capital and surplus" (Exley v. Harris, 267 p. 970, 973, 126 Kan., 302). On the other hand, **the term "capital" includes common and preferred stock, surplus reserves, surplus and undivided profits**. (Manual of Examination Procedures, Report of Examination on Department of Commercial and Savings Banks, p. 3-C). If valuation reserves would be deducted from these items, the result would merely be the networth or the unimpaired capital and surplus of the bank applying Sec. 5 of RA 337 but not the total financial condition of the bank.

In ***Commissioner of Internal Revenue v. Court of Appeals***,[53] the Court alluded to the doctrine of equality of shares in resolving the issue therein and held that *all shares* comprise the capital stock of a corporation:

> A common stock represents the residual ownership interest in the corporation. It is a basic class of stock ordinarily and usually issued without extraordinary rights or privileges and entitles the shareholder to a *pro rata* division of profits. Preferred stocks are those which entitle the shareholder to some priority on dividends and asset distribution. **Both shares are part of the corporation's capital stock. Both stockholders are no different from ordinary investors who take on the same investment risks. Preferred and common shareholders participate in the same venture, willing to share in the profit and losses of the enterprise. Moreover, under the doctrine of equality of shares --- all stocks issued by the corporation are presumed equal with the same**

---

[51] Emphasis supplied.
[52] G.R. No. 70054, December 11, 1991, 204 SCRA 767. Emphasis and underscoring supplied.
[53] G.R. No. 108576, January 20, 1999, 301 SCRA 152.

> **privileges and liabilities**, provided that the Articles of Incorporation is silent on such differences.[54] (Emphasis supplied.)

The SEC has reflected the popular contemporaneous construction of capital in computing the nationality requirement based on the total capital stock, not only the voting stock, of a corporation (5th extrinsic aid)

The SEC has confirmed that, as an institution, it has always interpreted and applied the 40% maximum foreign **ownership** limit for public utilities to the total capital stock, and not just its total voting stock.

In its July 29, 2011 Manifestation and Omnibus Motion, the SEC reaffirmed its longstanding practice and history of enforcement of the 40% maximum foreign ownership limit for public utilities, viz:

> 5. The Commission respectfully submits that it has always performed its duty under Section 17(4) of the Corporation Code to enforce the foreign equity restrictions under Section 11, Article XII of the Constitution on the ownership of public utilities.
>
> x x x x
>
> 8. Thus, in **determining compliance with the Constitutional restrictions on foreign equity, the Commission consistently construed and applied the term "capital" in its commonly accepted usage, that is – the sum total of the shares subscribed irrespective of their nomenclature and whether or not they are voting or non-voting** (Emphasis supplied).
>
> 9. This commonly accepted usage of the term 'capital' is based on persuasive authorities such as the widely esteemed *Fletcher Cyclopedia of the Law of Private Corporations*, and doctrines from American Jurisprudence. To illustrate, in its *Opinion* dated February 15, 1988 addresses to Gozon, Fernandez, Defensor and Associates, the Commission discussed how the term 'capital' is commonly used:
>
> > "Anent thereto, please be informed that the term 'capital' as applied to corporations, refers to the money, property or means contributed by stockholders as the form or basis for the business or enterprise for which the corporation was formed and generally implies that such money or property or means have been contributed in payment for stock issued to the contributors. (United Grocers, Ltd. v. United States F. Supp. 834, cited in 11 Fletcher,

[54] See also *Republic Planters Bank v. Agana*, G.R. No. 51765, March 3, 1997, 269 SCRA 1, where this Court stated that "Shareholders, both common and preferred, are considered risk takers who invest capital in the business and who can look only to what is left after corporate debts and liabilities are fully paid."

> Cyc. Corp., 1986, rev. vol., sec. 5080 at 18). As further ruled by the court, 'capital of a corporation is **the fund or other property, actually or potentially in its possession, derived or to be derived from the sale by it of shares of its stock or his exchange by it for property other than money**. This fund includes not only money or other property received by the corporation for shares of stock but all balances of purchase money, or instalments, due the corporation for shares of stock sold by it, and all unpaid subscriptions for shares.'" (Williams v. Brownstein, 1F. 2d 470, cited in 11 Fletcher, Cyc. Corp., 1058 rev. vol., sec. 5080, p. 21).
>
> The term 'capital' is also used synonymously with the words 'capital stock', as meaning the amount subscribed and paid-in and upon which the corporation is to conduct its operation. (11 Fletcher, Cyc. Corp. 1986, rev. vol., sec. 5080 at 15). And, as held by the court in Haggard v. Lexington Utilities Co., (260 Ky 251, 84 SW 2d 84, cited in 11 Fletcher, Cyc. Corp., 1958 rev. vol., sec. 5079 at 17), 'The capital stock of a corporation is the amount paid-in by its stockholders in money, property or services with which it is to conduct its business, and ***it is immaterial how the stock is classified, whether as common or preferred***.'
>
> The Commission, in a previous opinion, ruled that the term 'capital' denotes the sum total of the shares subscribed and paid by the shareholders or served to be paid, irrespective of their nomenclature. (Letter to Supreme Technotronics Corporation, dated April 14, 1987)." (Emphasis ours)

10. Further, in adopting this common usage of the term 'capital,' the Commission believed in good faith and with sound reasons that it was consistent with the intent and purpose of the Constitution. In an *Opinion* dated 27 December 1995 addressed to Joaquin Cunanan & Co. the Commission observed that:

> "To construe the 60-40% equity requirement as merely based on the voting shares, disregarding the preferred non-voting share, not on the total outstanding subscribed capital stock, would give rise to a situation where the actual foreign interest would not really be only 40% but may extend beyond that because they could also own even the entire preferred non-voting shares. In this situation, Filipinos may have the control in the operation of the corporation by way of voting rights, but have no effective ownership of the corporate assets which includes lands, because the actual Filipino equity constitutes only a minority of the entire outstanding capital stock. **Therefore, in essence, the company, although controlled by Filipinos, is beneficially owned by foreigners since the actual ownership of at least 60% of the entire outstanding capital stocks would be in the hands of foreigners. Allowing this situation would open the floodgates to circumvention of the intent of the law to make the Filipinos the principal beneficiaries in the ownership of alienable lands."** (Emphasis ours)

> 11. The foregoing settled principles and esteemed authorities relied upon by the Commission show that its interpretation of the term 'capital' is reasonable.
>
> 12. And, it is well settled that courts must give due deference to an administrative agency's reasonable interpretation of the statute it enforces.[55]

It should be borne in mind that the SEC is the government agency invested with the jurisdiction to determine at the first instance the observance by a public utility of the constitutional nationality requirement prescribed vis-à-vis the ownership of public utilities[56] and to interpret legislative acts, like the FIA. The rationale behind the doctrine of primary jurisdiction lies on the postulate that such administrative agency has the "special knowledge, experience and tools to determine technical and intricate matters of fact…"[57] Thus, the determination of the SEC is afforded great respect by other executive agencies, like the Department of Justice (DOJ),[58] and by the courts.

Verily, when asked as early as 1988– "Would it be legal for foreigners to own in a public utility entity more than 40% of the common shares but not more than 40% of the total outstanding capital stock which would include both common and non-voting preferred shares?" –the SEC, citing Fletcher, invariably answered in the affirmative, whether the poser was made in light of the present or previous Constitutions:

> The pertinent provision of the Philippine Constitution under Article XII, Section 7, reads in part thus:
>
> "No franchise, certificate, or any form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines, or to

---

[55] Citations omitted.

[56] *Ponencia*, pp. 30-31.

[57] *Office of the Ombudsman v. Heirs of Margarita Vda. De Ventura*, G.R. No. 151800, November 5, 2009, 605 SCRA 1.

[58] In numerous Opinions, **the DOJ refused to construe the Constitutional provisions on the nationality requirement imposed by various legislative acts like the FIA, in relation to the 1987 Constitution, on the ground that the interpretation and application of the said law properly fall within the jurisdiction of the National Economic Development Authority (NEDA), in consultation with the Bureau of Investments (BOI) and the Securities and Exchange Commission**. (Opinion No. 16, Series 1999, February 2, 1999 citing Sec. of Justice Opn. No. 3, current series; Nos. 16, 44 and 45, s. 1998; Opinion No. 13, Series of 2008, March 12, 2008 citing Sec. of Justice Op. NO. 53, current series No. 75, s. 2006.

> corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens. . .” x x x
>
> **The issue raised on your letter zeroes in on the meaning of the word “capital” as used in the above constitutional provision.** Anent thereto, please be informed that the term “capital” as applied to corporations, refers to the money, property or means contributed by stockholders as the form or basis for the business or enterprise for which the corporation was formed and generally implies that such money or property or means have been contributed in payment for stock issued to the contributors. (United Grocers, Ltd. v. United States F. Supp. 834, cited in 11 Fletcher, Cyc. Corp., 1986, rev. vol., sec. 5080 at 18). As further ruled by the court, “capital of a corporation is the fund or other property, actually or potentially in its possession, derived or to be derived from the sale by it of shares of its stock or his exchange by it for property other than money. This fund includes not only money or other property received by the corporation for shares of stock but all balances of purchase money, or installments, due the corporation for shares of stock sold by it, and all unpaid subscriptions for shares.” (Williams v. Brownstein, 1F. 2d 470, cited in 11 Fletcher, Cyc. Corp., 1058 rev. vol., sec. 5080, p. 21).
>
> The term “capital” is also used synonymously with the words “capital stock”, as meaning the amount subscribed and paid-in and upon which the corporation is to conduct its operation. (11 Fletcher, Cyc. Corp. 1986, rev. vol., sec. 5080 at 15). And, as held by the court in Haggard v. Lexington Utilities Co., (260 Ky 251, 84 SW 2d 84, cited in 11 Fletcher, Cyc. Corp., 1958 rev. vol., sec. 5079 at 17), **“The capital stock of a corporation is the amount paid-in by its stockholders in money, property or services with which it is to conduct its business, and it is immaterial how the stock is classified, whether as common or preferred.”**
>
> **The Commission, in a previous opinion, ruled that the term ‘capital’ denotes the sum total of the shares subscribed and paid by the shareholders or served to be paid, irrespective of their nomenclature.** (Letter to Supreme Technotronics Corporation, dated April 14, 1987). Hence, your query is answered in the affirmative.[59] (Emphasis supplied.)

As it were, the SEC has held on the same positive response long before the 1987 Constitution came into effect, a matter of fact which has received due acknowledgment from this Court. In ***People v. Quasha***,[60] a case decided under the 1935 Constitution, this Court narrated that in 1946 the SEC approved the incorporation of a common carrier, a public utility, where Filipinos, while not holding the controlling vote, owned the majority of the capital, viz:

> The essential facts are not in dispute. On November 4, 1946, the Pacific Airways Corporation registered its articles of incorporation with

[59] SEC Opinion dated February 15, 1988.
[60] 93 Phil. 333 (1953).

> the [SEC]. The articles were prepared and the registration was effected by the accused, who was in fact the organizer of the corporation. The articles stated that the primary purpose of the corporation was to carry on the business of a common carrier by air, land, or water, that its **capital stock was P1,000,000, represented by 9,000 preferred and 100,000 common shares, each preferred share being of the par value of P100 and entitled to 1/3 vote and each common share, of the par value of P1 and entitled to one vote**; that the amount of capital stock actually subscribed was P200,000, and the names of the subscriber were Arsenio Baylon, Eruin E. Shannahan, Albert W. Onstott, James O'bannon, Denzel J. Cavin, and William H. Quasha, **the first being a Filipino and the other five all Americans;** that Baylon's subscription was for 1,145 preferred shares, of the total value of P114,500 and 6,500 common shares, of the total par value of P6,500, while the aggregate subscriptions of the American subscribers were for 200 preferred shares, of the total par value of P20,000 and 59,000 common shares, of the total par value of P59,000; and that Baylon and the American subscribers had already paid 25 percent of their respective subscriptions. **Ostensibly the owner of, or subscriber to, 60.005 per cent of the subscribed capital stock of the corporation, Baylon, did not have the controlling vote because of the difference in voting power between the preferred shares and the common shares. Still, with the capital structure as it was, the articles of incorporation were accepted for registration and a certificate of incorporation was issued by the [SEC]**. (Emphasis supplied.)

The SEC has, through the years, stood by this interpretation. In an Opinion dated November 21, 1989, the SEC held that the basis of the computation for the nationality requirement is the total outstanding capital stock, to wit:

> As to the basis of computation of the 60-40 percentage nationality requirement under existing laws (whether it should be based on the number of shares or the aggregate amount in pesos of the par value of the shares), the following definitions of corporate terms are worth mentioning.
>
> "The term capital stock signifies the aggregate of the shares actually subscribed". (11 Fletcher, Cyc. Corps. (1971 Rev. Vol.) sec. 5082, citing Goodnow v. American Writing Paper Co., 73 NJ Eq. 692, 69 A 1014 aff'g 72 NJ Eq. 645, 66 A, 607).
>
> "Capital stock means the capital subscribed (the share capital)". (Ibid., emphasis supplied).
>
> "In its primary sense a share of stock is simply one of the proportionate integers or units, the sum of which constitutes the capital stock of corporation. (Fletcher, sec. 5083).
>
> The equitable interest of the shareholder in the property of the corporation is represented by the term stock, and the extent of his interest is described by the term shares. The expression shares of stock when qualified by words indicating number and ownership expresses the extent

> of the owner's interest in the corporate property (Ibid, Sec. 5083, emphasis supplied).
>
> Likewise, in all provisions of the Corporation Code the stockholders' right to vote and receive dividends is always determined and based on the "outstanding capital stock", defined as follows:
>
> "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 (as long as there is a binding subscription agreement, except treasury shares."
>
> The computation, therefore, should be based on the total outstanding capital stock, irrespective of the amount of the par value of the shares.

Then came SEC-OGC Opinion No. 08-14 dated June 02, 2008:

> The instant query now centers on whether both voting and non-voting shares are included in the computation of the required percentage of Filipino equity, As a rule, the 1987 Constitution does not distinguish between voting and non-voting shares with regard to the computation of the percentage interest by Filipinos and non-Filipinos in a company. **In other words, non-voting shares should be included in the computation of the foreign ownership limit for domestic corporation.** This was the rule applied [in SEC Opinion No. 04-30] x x x It was opined therein that the ownership of the shares of stock of a corporation is based on the total outstanding or subscribed/issued capital stock regardless of whether they are classified as common voting shares or preferred shares without voting rights. This is in line with the policy of the State to develop an independent national economy effectively controlled by Filipinos. x x x (Emphasis added.)

The SEC again echoed the same interpretation in an Opinion issued last April 19, 2011 wherein it stated, thus:

> This is, thus, the general rule, such that when the provision merely uses the term "capital" without qualification (as in Section 11, Article XII of the 1987 Constitution, which deals with equity structure in a public utility company), the same should be interpreted to refer to the sum total of the outstanding capital stock, irrespective of the nomenclature or classification as common, preferred, voting or non-voting.[61]

The above construal is in harmony with the letter and spirit of Sec. 11, Art. XII of the Constitution and its counterpart provisions in the 1935 and

---

[61] SEC-OGC Opinion No. 26-11.

1973 Constitution and, thus, is entitled to respectful consideration. As the Court declared in ***Philippine Global Communications, Inc. v. Relova***:[62]

> x x x As far back as In re Allen, (2 Phil. 630) a 1903 decision, Justice McDonough, as ponente, cited this excerpt from the leading American case of Pennoyer v. McConnaughy, decided in 1891: "**The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts,** is so firmly embedded in our jurisprudence that no authorities need be cited to support it.' x x x There was a paraphrase by Justice Malcolm of such a pronouncement in Molina v. Rafferty, (37 Phil. 545) a 1918 decision:" Courts will and should respect the contemporaneous construction placed upon a statute by the executive officers whose duty it is to enforce it, and unless such interpretation is clearly erroneous will ordinarily be controlled thereby. (Ibid, 555) Since then, such a doctrine has been reiterated in numerous decisions.[63] (Emphasis supplied.)

Laxamana v. Baltazar[64] restates this long-standing dictum: "[w]here a statute has received a contemporaneous and practical interpretation and the statute as interpreted is re-enacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. The rule here is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment."[65] Hence, it can be safely assumed that the framers, in the course of deliberating the 1987 Constitution, knew of the adverted SEC interpretation.

Parenthetically, it is immaterial whether the SEC opinion was rendered by the *banc* or by the SEC-Office of the General Counsel (OGC) considering that the latter has been given the authority to issue opinions on the laws that the SEC implements under SEC-EXS. Res. No. 106, Series of

---

[62] *Philippine Global Communications, Inc. v. Relova*, No. L-60548, November 10, 1986, 145 SCRA 385; citing *Philippine Association of Free Labor Unions [PAFLU] v. Bureau of Labor Relations*, August 21, 1976, 72 SCRA 396, 402.

[63] Id.

[64] No. L-5955, September 19, 1952.

[65] Id.

2002.[66] The conferment does not violate Sec. 4.6[67] of the Securities and Regulation Code (SRC) that proscribes the non-delegation of the legislative rule making power of the SEC, which is in the nature of subordinate legislation. As may be noted, the same Sec. 4.6 does not mention the SEC's power to issue interpretative "opinions and provide guidance on and supervise compliance with such rules,"[68] which is incidental to the SEC's enforcement functions. A legislative rule and an interpretative rule are two different concepts and the distinction between the two is established in administrative law.[69] Hence, the various opinions issued by the SEC-OGC deserve as much respect as the opinions issued by the SEC *en banc*.

Nonetheless, the esteemed *ponente* posits that the SEC, contrary to its claim, has been less than consistent in its construal of "capital." During the oral arguments, he drew attention to various SEC Opinions, nine (9) to be precise, that purportedly consider "capital" as referring only to voting stocks.

Refuting this position, the SEC in its Memorandum dated July 25, 2012 explained in some detail that **the Commission has been consistent in applying the term "capital" to the total outstanding capital stock, whether voting or non-voting**. The SEC Opinions referred to by Justice Carpio, which cited the provisions of the FIA, is not, however, pertinent or

---

[66] Annex "B" of the SEC Memorandum dated July 25, 2012 wherein the Commission Secretary certified that: "During the Commission *En Banc* meeting held on July 2, 2002 at the Commission Room, 8th Florr, SEC Building, EDSA, Greenhills, Mandaluyong City, the Commission *En Banc* approved the following:

> "***RESOLVED**, That all opinions to be issues by the SEC pursuant to a formal request, prepared and acted upon by the appropriate operating departments shall be reviewed by the OGC and be issued under the signature of the SEC General Counsel. Henceforth, all opinions to be issues by the SEC shall be numbered accordingly*
>
> *(SEC-EXS. RES. NO. 106 s, of 2002)*

[67] SEC. 4.6, SRC: 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.

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.

[68] Sec. 5.1 (g), SRC.

[69] *Misamis Oriental Association of Coco Traders, Inc. v. Department of Finance Secretary*, G.R. No. 108524, November 10, 1994, 238 SCRA 63; citing *Victorias Milling Co. v. Social Security Commission*, 114 Phil. 555 (1962) and *Philippine Blooming Mills v. Social Security System*, 124 Phil. 499 (1966).

decisive of the issue on the meaning of "capital." The said SEC Memorandum states:

> During the oral arguments held on 26 June 2012, the SEC was directed to explain nine (9) of its Opinions in relation to the definition of "capital" as used in Section 11, Article XII of the Constitution, namely: (1) Opinion dated 3 March 1993 for Mr. Francis F. How; (2) Opinion dated 14 April 1993 for Director Angeles T. Wong; (3) Opinion dated 23 November 1993 for Mssrs. Dominador Almeda and Renato S. Calma; (4) Opinion dated 7 December 1993 for Roco Buñag Kapunan Migallos & Jardeleza Law Offices; (5) Opinion dated 22 December 2004 for Romulo Mabanta Buenaventura Sayoc & De Los Angeles; (6) Opinion dated 27 September 2007 for Reynaldo G. David; (7) Opinion dated 28 November 2007 for Santiago & Santiago law Offices; (8) Opinion dated 15 January 2008 for Attys. Ruby Rose J. Yusi and Rudyard S. Arbolado; and (9) Opinion dated 18 August 2010 for Castillo Laman Tan Pantaleon & San Jose.
>
> x x x x
>
> **With due respect, the issue of whether "capital" refers to outstanding capital stock or only voting stocks was never raised in the requests for these opinions**. In fact, the definition of "capital" could not have been a relevant and/or a material issue in some of these opinions because the common and preferred shares involved have the same voting rights. Also, some Opinions mentioned the FIA to emphasize that the said law mandates the application of the Control Test. Moreover, these Opinions state they are based solely on the facts disclosed and relevant only to the issues raised therein.
>
> For one, the Opinion dated 3 March 1993 for Mr. Francis F. How **does not discuss whether "capital" refers to total outstanding capital stock or only voting stocks**. Instead, it talks about the application of the Control test in a mining corporation by looking into the nationality of its investors. **The FIA is not mentioned to provide a definition of "capital," but to explain the nationality requirement pertinent to investors of a mining corporation**.
>
> The Opinion dated 14 April 1993 for Dir. Angeles T. Wong also **does not define "capital" as referring to total outstanding capital or only to voting shares, but talks about the application of the Control Test** x x x. The FIA is again mentioned only to explain the nationality required of investors of a corporation engaged in overseas recruitment.
>
> The Opinion dated 23 November 1993 for Mssrs. Dominador Almeda and Renato S. Calma **distinguishes between the nationality of a corporation as an investing entity and the nationality of a corporation as an investee corporation. The FIA is mentioned only in the discussion of the nationality of the investors of a corporation owning land in the Philippines**, composed of a trustee 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, and another domestic corporation which is 100% foreign owned.

Unlike the *Decision* rendered by this Honorable Court on 28 June 2011, the Opinion dated 07 December 1993 for Roco Buñag Kapunan Migallos & Jardeleza **does not parley on the issue of the proper interpretation of "capital" because it is not a relevant and/or a material issue in this opinion** xxx. **The FIA is mentioned only to explain the application of the control test.** Note, however, that manufacturing fertilizer is neither a nationalized or partly nationalized activity, which is another reason why this Opinion has no relevance in this case.

The Opinion dated 22 December 2004 for Romulo Mabanta Buenaventura Sayoc & De Los Angeles focuses on the nationality of the investors of a corporation that will acquire land wherein one of the investors is a foundation. **It confirms the view that the test for compliance with the nationality requirement is based on the total outstanding capital stock irrespective of the amount of the par value of shares.** The FIA is used merely to justify the application of the Control Test as adopted in the Department of Justice Opinion, No. 18, Series of 1989, dated 19 January 1989m *viz* –

x x x x

The Opinion dated 27 September 2007 for Mr. Reynaldo G. David, likewise, **does not discuss whether "capital" refers to total outstanding capital stock or only to voting stocks, but rather whether the Control Test is applicable in determining the nationality of the proposed corporate bidder or buyer of PNOC-EDC shares**. x x x The FIA was cited only to emphasize that the said law mandates the application of the Control Test.

The Opinion dated 28 November 2007 for Santiago & Santiago Law Offices **maintains and supports the position of the Commission that Section 11, Article XII of the Constitution makes no distinction between common and preferred shares, thus, both shares should be included in the computation of the foreign equity cap for domestic corporations**. Simply put, the total outstanding capital stock, without regard to how the shares are classified, should be used as the basis in determining the compliance by public utilities with the nationality requirement as provided for in Section 11, Article XII of the Constitution. Notably, all shares of the subject corporation, Pilipinas First, have voting rights, whether common or preferred. Hence, the issue on whether "capital" refers to total outstanding capital stock or only to voting stocks has no relevance in this Opinion.

In the same way, the Opinion dated 15 January 2008 for Attys. Ruby Rose J. Yusi and Rudyard S. Arbolada **never discussed whether "capital" refers to outstanding capital stock or only to voting stocks, but rather whether the Control Test is applicable or not.** The FIA was used merely to justify the application of the Control Test. More importantly, the term "capital" could not have been relevant and/or material issue in this Opinion because the common and preferred shares involved have the same voting rights.

The Opinion dated 18 August 2010 for Castillo Laman Tan Pantaleon & San Jose **reiterates that the test for compliance with the nationality requirement is based on the total outstanding capital stock, irrespective of the amount of the par value of the shares. The**

> **FIA is mentioned only to explain the application of the Control Test and the Grandfather Rule** in a corporation owning land in the Philippines by looking into the nationality of its investors. (Emphasis supplied).[70]

In view of the foregoing, it is submitted that the long-established interpretation and mode of computing by the SEC of the total capital stock strongly recognize the intent of the framers of the Constitution to allow access to much-needed foreign investments confined to 40% of the capital stock of public utilities.

Consequences of alternative interpretation: mischievous effects of the construction proposed in the petition and sustained in the June 28, 2011 Decision. (6th extrinsic aid)

> *Filipino shareholders will not control the fundamental corporate matters nor own the majority economic benefits of the public utility corporation.*

Indeed, if the Court persists in adhering to the rationale underlying the majority's original interpretation of "capital" found in the first sentence of Section 11, Article XII, We may perhaps be allowing Filipinos to direct and control the daily business of our public utilities, but would **irrevocably and injudiciously deprive them of effective "control" over the major and equally important corporate decisions and the eventual beneficial ownership of the corporate assets that could include, among others, claim over our soil—our land**. This undermines the clear textual commitment under the Constitution that reserves ownership of disposable lands to Filipino citizens. The interplay of the ensuing provisions of Article XII is unmistakable:

> SECTION 2. All lands of the public domain x x x forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural

[70] SEC Memorandum dated July 25, 2012, pp. 33-36.

> resources shall not be alienated. **The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.** x x x
>
> x x x x
>
> SECTION 3. Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural lands of the public domain may be further classified by law according to the uses which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands. Private corporations or associations may not hold such alienable lands except by lease, for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and not to exceed one thousand hectares in area. Citizens of the Philippines may lease not more than five hundred hectares, or acquire not more than twelve hectares thereof by purchase, homestead or grant.
>
> x x x x
>
> SECTION 7. Save in cases of hereditary succession, **no private lands shall be transferred or conveyed except to individuals, corporations or associations qualified to acquire or hold lands of the public domain.** (Emphasis supplied.)

Consider the hypothetical case presented in the original *ponencia*:

> 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 (P1.00) 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.

Albeit trying not to appear to, the majority actually finds fault in the wisdom of, or motive behind, the provision in question through "highly unlikely scenarios of clinical extremes," to borrow from *Veterans Federation Party v. COMELEC.*[71] It is submitted that the flip side of the *ponencia*'s hypothetical illustration, which will be exhaustively elucidated in this opinion, is more anomalous and prejudicial to Filipino interests.

For instance, let us suppose that the authorized capital stock of a public utility corporation is divided into 100 common shares and 1,000,000

[71] G.R. Nos. 136781, 136786, 136795, October 6, 2000, 342 SCRA 244, 270.

non-voting preferred shares. Since, according to the Court's June 28, 2011 Decision, the word "capital" in Sec. 11, Art. XII refers only to the voting shares, then the 40% cap on foreign ownership applies only to the 100 common shares. Foreigners can, therefore, own 100% of the 1,000,000 non-voting preferred shares. But then again, the *ponencia* continues, at least, the "control" rests with the Filipinos because the 60% Filipino-owned common shares will necessarily ordain the majority in the governing body of the public utility corporation, the board of directors/trustees. Hence, Filipinos are assured of control over the day-to-day activities of the public utility corporation.

Let us, however, take this corporate scenario a little bit farther and consider the irresistible implications of changes and circumstances that are inevitable and common in the business world. Consider the simple matter of a possible investment of corporate funds in another corporation or business, or a merger of the public utility corporation, or a possible dissolution of the public utility corporation. **Who has the "control" over these vital and important corporate matters?** The last paragraph of Sec. 6 of the Corporation Code provides:

> Where the articles of incorporation provide for non-voting shares in the cases allowed by this Code, **the holders of such (non-voting) shares shall nevertheless be entitled to vote on the following matters**:
>
> 1. Amendment of the articles of incorporation;
> 2. Adoption and amendment of by-laws;
> 3. Sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the corporate property;
> 4. Incurring, creating or increasing bonded indebtedness;
> 5. Increase or decrease of capital stock;
> 6. Merger or consolidation of the corporation with another corporation or other corporations;
> 7. Investment of corporate funds in another corporation or business in accordance with this Code; and
> 8. Dissolution of the corporation."(Emphasis and underscoring supplied.)

In our hypothetical case, all 1,000,100 (voting and non-voting) shares are entitled to vote in cases involving fundamental and major changes in the corporate structure, such as those listed in Sec. 6 of the Corporation Code. Hence, with only 60 out of the 1,000,100 shares in the hands of the Filipino shareholders, control is definitely in the hands of the foreigners. The foreigners can opt to invest in other businesses and corporations, increase its bonded indebtedness, and even dissolve the public utility corporation against the interest of the Filipino holders of the majority voting shares. This cannot plausibly be the constitutional intent.

Consider further a situation where the majority holders of the total outstanding capital stock, both voting and non-voting, decide to dissolve our hypothetical public utility corporation. **Who will eventually acquire the beneficial ownership of the corporate assets upon dissolution and liquidation?** Note that Sec. 122 of the Corporation Code states:

> Section 122. Corporate liquidation.–Every corporation whose charter expires by its own limitation or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for three (3) years… **to dispose of and convey its property and to distribute its assets**, but not for the purpose of continuing the business for which it was established.
>
> At any time during said three (3) years, the corporation is authorized and empowered to convey all of its property to trustees **for the benefit of stockholders, members,** creditors, and other persons in interest. From and after any such conveyance by the corporation of its property in trust for the benefit of its stockholders, members, creditors and others in interest, **all interest which the corporation had in the property terminates,** the legal interest vests in the trustees, and **the beneficial interest in the stockholders, members , creditors or other persons in interest.** (Emphasis and underscoring supplied.)

Clearly then, the bulk of the assets of our imaginary public utility corporation, which may include private lands, will go to the beneficial ownership of the foreigners who can hold up to 40 out of the 100 common shares and the entire 1,000,000 preferred non-voting shares of the corporation. These foreign shareholders will enjoy the bulk of the proceeds

of the sale of the corporate lands, or worse, exercise control over these lands behind the façade of corporations nominally owned by Filipino shareholders. Bluntly, while the Constitution expressly prohibits the transfer of land to aliens, foreign stockholders may resort to schemes or arrangements where such land will be conveyed to their dummies or nominees. Is this not circumvention, if not an outright violation, of the fundamental Constitutional tenet that only Filipinos can own Philippine land?

A construction of "capital" as referring to the total shareholdings of the company is an acknowledgment of the existence of numerous corporate control-enhancing mechanisms, besides ownership of voting rights, that limits the proportion between the separate and distinct concepts of **economic right** to the cash flow of the corporation **and** the right to corporate **control** (hence, they are also referred to as proportionality-limiting measures). This corporate reality is reflected in SRC Rule 3(E) of the Amended Implementing Rules and Regulations (IRR) of the SRC and Sec. 3(g) of The Real Estate Investment Trust Act (REIT) of 2009,[72] which both provide that control can exist **regardless of ownership of voting shares**. The SRC IRR states:

> **Control is the power to govern** the **financial** and **operating policies** of an enterprise so as to obtain benefits from its activities. Control is presumed to exist when the parent owns, directly or indirectly through subsidiaries, more than one half of the voting power of an enterprise unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control. **Control also exists even when the parent owns one half or less of the voting power of an enterprise when there is**:
>
> i. **Power over more than one half of the voting rights** by virtue of an **agreement** with other investors;
> ii. **Power to govern the financial and operating policies** of the enterprise under a statute or an **agreement**;
> iii. **Power to appoint or remove the majority of the members of the board** of directors or equivalent governing body;
> iv. **Power to cast the majority of votes** at meetings of the board of directors or equivalent governing body. (Emphasis and underscoring supplied.)

[72] Republic Act 9856, Lapsed into law on December 17, 2009.

As shown above, **ownership of voting shares or power alone <u>without</u> economic control of the company does not necessarily equate to corporate control**. A *shareholder's agreement* can effectively clip the voting power of a shareholder holding voting shares. In the same way, a *voting right ceiling*, which is "a restriction prohibiting shareholders to vote above a certain threshold irrespective of the number of voting shares they hold,"[73] can limit the control that may be exerted by a person who owns voting stocks but who does not have a substantial economic interest over the company. So also does the use of *financial derivatives* with attached conditions to ensure the acquisition of corporate control separately from the ownership of voting shares, or the use of *supermajority provisions* in the by-laws and articles of incorporation or association. Indeed, there are innumerable ways and means, both explicit and implicit, by which the *control of a corporation can be attained and retained even with very limited voting shares*, i.e.., there are a number of ways by which control can be disproportionately increased compared to ownership[74] so long as economic

---

[73] Report on the Proportionality Principle in the European Union: External Study Commissioned by the European Commission, p. 7.

[74] This fact is recognized even by the Organisation for Economic Cooperation and Development (OECD), viz.:

"Economic literature traditionally identifies two main channels through which corporate investors may decouple the cash flows and voting rights of shares, including the leveraging of voting power and mechanisms to "lock in" control. The most commonly used such mechanisms are listed below. Not covered by the present section are a number of company-internal arrangements that can in some circumstances also be employed to leverage the control of certain shareholders. For instance, the ongoing discussions in the United States about corporate proxies and the voting arrangements at general meetings (e.g. majority versus plurality vote) may have important ramifications for the allocation of control rights in US companies. In addition, a number of marketed financial instruments are increasingly available that can be used by investors, including incumbent management, to hedge their financial interest in a company while retaining voting rights.

Leveraging of voting power. The two main types PLMs used to bolster the voting powers of individuals, hence creating controlling shareholders, are differentiated voting rights on company shares and multi-firm structures. Mechanisms include:

Differentiated voting rights. The most straightforward – and, as the case may be, transparent – way of leveraging voting power is to stipulate differential voting rights in the corporate charter or bylaws. Companies have gone about this in a number of ways, including dual-class share structures and, in addition to common stock, issuing non-voting shares or preference shares without or with limited voting rights. The latter is a borderline case: preference shares have common characteristics with debt as well as equity, and in most jurisdictions they assume voting rights if the issuers fail to honour their preference commitments.

- Multi-firm structures. Voting rights can be separated from cash-flow rights even with a single class of shares by creating a set of cascading shareholdings or a pyramidal hierarchy in which higher-tier companies own shares in lower-tier companies. Pyramids are complementary to dual-class share structures insofar as almost any pyramidal control structure can be reproduced through dual (or, rather, multiple) share classes. However, for complex control structures, the controlling shareholders may prefer pyramids since the underlying shares tend to be more liquid than stocks split into several classes. (In the remainder of this paper the word "pyramid" is used jointly to denote truly pyramidal structures and cascading shareholdings.)

Lock-in mechanisms. The other main category of PLMs consists of instruments that lock in control – that is cut off, or in some cases bolster, the voting rights of common stock. A clear-cut lock-in

rights over the majority of the assets and equity of the corporation are maintained.

Hence, if We follow the construction of "capital" in Sec. 11, Art. XII stated in the *ponencia* of June 28, 2011 and turn a blind eye to these realities of the business world, **this Court may have veritably put a limit on the foreign ownership of common shares but have indirectly allowed foreigners to acquire greater economic right to the cash flow of public utility corporations**, which is a leverage to bargain for far greater control through the various enhancing mechanisms or proportionality-limiting measures available in the business world.

In our extremely hypothetical public utility corporation with the equity structure as thus described, since the majority recognized only the 100 common shares as the "capital" referred to in the Constitution, the entire economic right to the cash flow arising from the 1,000,000 non-voting preferred shares can be acquired by foreigners. With this economic power, the foreign holders of the minority common shares will, as they easily can, bargain with the holders of the majority common shares for more corporate control in order to protect their economic interest and reduce their economic risk in the public utility corporation. For instance, they can easily demand

---

mechanism is voting right ceilings prohibiting shareholders from voting about a certain threshold irrespective of the Corporate Affairs Division, Directorate for Financial and Enterprise Affairs Organisation for Economic Co-operation and Development 2 rue André-Pascal, Paris 75116, France www.oecd.org/daf/corporate-affairs/ number of voting shares they hold. Secondly, a type of lock-in mechanism that confers greater voting right on selected shareholders is priority shares, which grant their holders extraordinary power over specific types of corporate decisions. This type of lock-in mechanism, when held by the state, is commonly referred to as a "golden share". Finally, company bylaws or national legislation may contain supermajority provisions according to which a simple majority is insufficient to approve certain major corporate changes.

Related or complementary instruments. Other instruments, while not themselves sources of disproportionality, may either compound the effect of PLMs or produce some of the same corporate governance consequences as PLMs. One example is cross-shareholdings, which can be used to leverage the effectiveness of PLMs and, in consequence, are often an integral part of pyramidal structures. A second such instrument is shareholder agreements that, while their effects can be replicated by shareholders acting in concert of their own accord, nevertheless add an element of certainty to voting coalitions…" (Lack of Proportionality between Ownership and Control: Overview and Issues for Discussion. Issued by the Organisation for Economic Co-Operation and Development (OECD) Steering Group on Corporate Governance, December 2007, pp. 12-13. Available from http://www.oecd.org/dataoecd/21/32/40038351.pdf, last accessed February 7, 2012. See also Clarke, Thomas and Chanlat, Jean Francois. European Corporate Governance: Readings and Perspectives. (2009) Routledge, New York, p. 33; Report on the Proportionality Principle in the European Union: External Study Commissioned by the European Commission. See also Hu and Black, supra.

the right to cast the majority of votes during the meeting of the board of directors. After all, money commands control.

The court cannot, and ought not, accept as correct a holding that routinely disregards legal and practical considerations as significant as above indicated. Committing an error is bad enough, persisting in it is worse.

Foreigners can be owners of fully nationalized industries

Lest it be overlooked, "capital" is an oft-used term in the Constitution and various legislative acts that regulate corporate entities. Hence, the meaning assigned to it within the context of a constitutional provision limiting foreign ownership in corporations can affect corporations whose ownership is reserved to Filipinos, or whose foreign equity is limited by law pursuant to Sec. 10, Art. XII of the Constitution which states:

> 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.** (Emphasis supplied).

For instance, Republic Act No. 7042, also known as the *Foreign Investments Act of 1991*[75] (FIA), provides for the formation of a Regular Foreign Investment Negative List (RFINL) covering investment areas/activities that are partially or entirely reserved to Filipinos. The 8th RFINL[76] provides that "No Foreign Equity" is allowed in the following areas of investments/activities:

> 1. Mass Media except recording (Article XVI, Section 1 of the Constitution and Presidential Memorandum dated May 4, 1994);

[75] Approved on June 13, 1991, and amended by Republic Act No. 8179.
[76] Executive Order No. 858, February 5, 2010.

2. Practice of all professions (Article XII, Section 14 of the Constitution and Section 1, RA 5181);[77]
3. Retail trade enterprises with paid-up capital of less than $2,500,000 (Section 5, RA 8762);
4. Cooperatives (Chapter III, Article 26, RA 6938);
5. Private Security Agencies (Section 4, RA 5487);
6. Small-scale Mining (Section 3, RA 7076)
7. Utilization of Marine Resources in archipelagic waters, territorial sea, and exclusive economic zone as well as small scale utilization of natural resources in rivers, lakes, bays, and lagoons (Article XII, Section 2 of the Constitution);
8. Ownership, operation and management of cockpits (Section 5, PD 449);
9. Manufacture, repair, stockpiling and/or distribution of nuclear weapons (Article II, Section 8 of the Constitution);
10. Manufacture, repair, stockpiling and/or distribution of biological, chemical and radiological weapons and anti-personnel mines (Various treaties to which the Philippines is a signatory and conventions supported by the Philippines);
11. Manufacture of fire crackers and other pyrotechnic devices (Section 5, RA 7183).

If the construction of "capital," as espoused by the June 28, 2011 Decision, were to be sustained, the reservation of the full ownership of corporations in the foregoing industries to Filipinos could easily be negated by the simple expedience of issuing and making available non-voting shares to foreigners. After all, these non-voting shares do not, following the June 28, 2011 Decision, form part of the "capital" of these supposedly fully nationalized industries. Consequently, while Filipinos can occupy all of the seats in the board of directors of corporations in fully nationalized industries, it is possible for foreigners to own the majority of the equity of the

[77] See also PD 1570 (Aeronautical engineering); RA 8559 (Agricultural Engineering); RA 9297 (Chemical engineering); RA 1582 (Civil engineering) RA 7920 (Electrical Engineering); RA 9292 (Electronics and Communication Engineering); RA 8560 (Geodetic Engineering); RA 8495 (Mechanical Engineering); PD 1536 (Metallurgical Engineering); RA 4274 (Mining Engineering); RA 4565 (Naval Architecture and Marine Engineering); RA 1364 (Sanitary Engineering; RA 2382 as amended by RA 4224 (Medicine); RA 5527 as amended by RA 6318, PD 6138, PD 498 and PD 1534 (Medical Technology); RA 9484 (Dentistry); RA 7392 (Midwifery); RA 9173 (Nursing); PD 1286 (Nutrition and Dietetics); RA 8050 (Optometry); RA 5921 (Pharmacy); RA 5680 (Physical and Occupational Therapy); RA 7431 (Radiologic and X-ray Technology); RA 9268 (Veterinary Medicine); RA 9298 (Accountancy); RA 9266 (Architecture); RA 6506 (Criminology); RA 754 (Chemistry); RA 9280 (Customs Brokerage); PD 1308 (Environmental Planning); RA 6239 (Forestry); RA 4209 (Geology); RA 8534 (Interior Design); RA 9053 (Landscape Architecture); Article VIII, Section 5 of the Constitution, Rule 138, Section 2 of the Rules of Court of the Philippines (Law); RA 9246 (Librarianship); RA 8544 (Marine Deck Officers and Marine Engine Officers); RA 1378 (Master Plumbing): RA 5197 (Sugar Technology); RA 4373 (Social Work); RA 7836 (Teaching); RA 8435 (Agriculture); RA 8550 (Fisheries); and RA 9258 (Guidance Counselling).

corporations through "non-voting" shares, which are nonetheless allowed to determine fundamental corporate matters recognized in Sec. 6 of the Corporation Code. Filipinos may therefore be unwittingly deprived of the "effective" ownership of corporations supposedly reserved to them by the Constitution and various laws.

The Foreign Investments Act of 1991 does not qualify or restrict the meaning of "capital" in Sec. 11, Art. XII of the Constitution.

Nonetheless, Justice Carpio parlays the thesis that the FIA, and its predecessors, the Investments Incentives Act of 1967 ("1967 IIA"),[78] Omnibus Investments Code of 1981 ("1981 OIC"),[79] and the Omnibus Incentives Code of 1987 ("1987 OIC"),[80] (collectively, "Investment Incentives Laws") more particularly their definition of the term "Philippine National," constitutes a good guide for ascertaining the intent behind the use of the term "capital" in Sec. 11, Art. XII—that it refers only to voting shares of public utility corporations.

I cannot share this posture. **The Constitution may only be amended through the procedure outlined in the basic document itself**.[81] **An amendment cannot, therefore, be made through the expedience of a legislative action that diagonally opposes the clear provisions of the Constitution.**

---

[78] Republic Act No. 5186, approved on September 16, 1967.

[79] Presidential Decree 1789, Published in the Daily Express dated April 1, 1981 and Amended by Batas Pambansa Blg. 391 otherwise known as "Investment Incentive Policy Act of 1983," approved April 28, 1983.

[80] Executive Order (s1987) No. 226, known as the "Omnibus Investments Code of 1987," approved on July 16, 1987.

[81] Section 1, Article XVII. Any amendment to, or revision of, this Constitution may be proposed by:

(1) The Congress, upon a vote of three-fourths of all its Members; or

(2) A constitutional convention.

Section 2. Amendments to this Constitution may likewise be directly proposed by the people through initiative….

xxx xxx xxx

Section 4. Any amendment to, or revisions of, this Constitution under Section 1 hereof shall be valid when ratified by a majority vote of the votes cast in a plebiscite which shall be held not earlier than sixty days nor later than ninety days after the approval of such amendment or revision.

Indeed, the **constitutional intent** on the equity prescribed by Sec. 11, Art. XII **cannot plausibly be fleshed out by a look through the prism of economic statutes passed after the adoption of the Constitution**, such as the cited FIA, the *Magna Carta* for Micro, Small and Medium Industries (Republic Act No. 6977) and other kindred laws envisaged to Filipinize certain areas of investment. It should be the other way around. Surely, the definition of a "Philippine National" in the FIA, or for that matter, the 1987 OIC[82] could not have influenced the minds of the 1986 CONCOM or the people when they ratified the Constitution. As heretofore discussed, the primary source whence to ascertain constitutional intent or purpose is the constitutional text, or, to be more precise, the language of the provision itself,[83] as inquiry on any controversy arising out of a constitutional provision ought to start and end as much as possible with the provision itself.[84] **Legislative enactments on commerce, trade and national economy must be so construed, when appropriate, to determine whether the purpose underlying them is in accord with the policies and objectives laid out in the Constitution. Surely, a law cannot validly broaden or restrict the thrust of a constitutional provision unless expressly sanctioned by the Constitution itself**. And the Court may not read into the Constitution an intent or purpose that is not there. Any attempt to enlarge the breadth of constitutional limitations beyond what its provision dictates should be stricken down.

In fact, it is obvious from the FIA itself that its framers deemed it necessary to qualify the term "capital" with the phrase "stock outstanding and entitled to vote" in defining a "Philippine National" in Sec. 3(a). This only supports the construal that the term "capital," standing alone as in Sec. 11, Art. XII of the Constitution, applies to all shares, whether classified as voting or non-voting, and **this is the interpretation in harmony with the Constitution**.

---

[82] The 1987 OIC was enacted as EO 226 on July 16, 1987, or after the ratification of the 1987 Constitution.

[83] Ang Bagong Bayani v. COMELEC, 412 Phil. 308 (2001).

[84] See Dissenting Opinion of Justice Padilla in *Romualdez-Marcos v. COMELEC*, G.R. No. 119976, September 18, 1995, 248 SCRA 300, 369.

In passing the FIA, the legislature could not have plausibly intended to restrict the 40% foreign ownership limit imposed by the Constitution on all capital stock to only voting stock. Precisely, Congress enacted the FIA to liberalize the laws on foreign investments. Such intent is at once apparent in the very title of the statute, i.e., "An Act to Promote Foreign Investments," and the policy: "attract, promote and welcome productive investments from foreign individuals, partnerships, corporations, and government,"[85] expresses the same.

The Senate, through then Senator Vicente Paterno, categorically stated that the FIA is aimed at "liberalizing foreign investments"[86] because "Filipino investment is not going to be enough [and] we need the support and the assistance of foreign investors x x x."[87] The senator made clear that "the term 'Philippine national'" means either Filipino citizens or enterprises of which the "*total* Filipino **ownership**" is 60 *percent* or greater, thus:

> **Senator Paterno.** May I first say that **the term "Philippine national" means either Filipino citizens or enterprises of which the total Filipino ownership is 60 percent or greater.** In other words, we are not excluding foreign participation in domestic market enterprises with total assets of less than P25 million. We are merely limiting foreign participation to not more than 40 percent in this definition.[88]

Even granting, *arguendo*, that the definition of a "Philippine National" in the FIA was lifted from the Investment Incentives Laws issued in 1967, 1981, and 1987 that defined "Philippine National" as a corporation 60% of whose voting stocks is owned by Filipino citizens, such definition does not limit or qualify the nationality requirement prescribed for public utility corporations by Sec. 11, Art. XII of the 1987 Constitution. The latter does not refer to the definition of a "Philippine National." Instead, Sec. 11, Art. XII reiterates the use of the **unqualified term "capital"** in the 1935 and 1973 Constitutions. In fact, neither the 1973 Constitutional Convention nor the 1986 CONCOM alluded to the Investment Incentives Laws in their

---

[85] Republic Act No. 7042, Section 2.
[86] Record of the Senate, Vol. II, No. 57, p. 1965.
[87] Id. at 1964.
[88] Id. Vol. 3, No. 76, p. 205.

deliberations on the nationality requirement of public utility corporations. With the unequivocal rejection of the UP Law Center proposal to use the qualifying "voting stock or controlling interest," the non-consideration of the Investment Incentives Laws means that these laws are not pertinent to the issue of the Filipino-foreign capital ratio in public utility corporations.

Besides, none of the Investment Incentives Laws defining a "Philippine National" has sought to expand or modify the definition of "capital," as used in the Constitutions then existing. The definition of a "Philippine National" in these laws was, to stress, only intended to identify the corporations qualified for registration to avail of the incentives prescribed therein. The definition was not meant to find context outside the scope of the various Investment Incentives Laws, much less to modify a nationality requirement set by the then existing Constitution. This much is obvious in the very heading of the first of these Investment Incentives Laws, 1967 IIA :

> **SECTION 3. Definition of Terms. --- <u>For purposes of this Act</u>**:
>
> x x x x
>
> (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 and existing 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 xxxx (Emphasis and underscoring supplied.)

Indeed, the definition of a "Philippine National" in the FIA cannot apply to the ownership structure of enterprises applying for, and those granted, a franchise to operate as a public utility under Sec. 11, Art. XII of the Constitution. As aptly observed by the SEC, the definition of a "Philippine National" provided in the FIA refers only to a corporation that is permitted to invest in an enterprise as a Philippine citizen (*investor-corporation*). **The FIA does not prescribe the equity ownership structure of the enterprise granted the franchise or the power to operate in a fully**

or partially nationalized industry (*investee-corporation*)**.** This is apparent from the FIA itself, which also defines the act of an "investment" and "foreign investment":

> Section 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 x x x
>
> b) The term "**investment**" shall mean **equity participation** in any enterprise organized or existing the laws of the Philippines;
>
> c) The term **"foreign investment"** shall mean as **equity investment** made by a non-Philippine national in the form of foreign exchange and/or other assets actually transferred to the Philippines and duly registered with the Central Bank which shall assess and appraise the value of such assets other than foreign exchange.

In fact, Sec. 7 of the FIA, as amended, allows aliens or non-Philippine nationals to **own** an enterprise up to the extent provided by the Constitution, existing laws or the FINL:

> Sec. 7. Foreign investments in domestic market enterprises. – Non-Philippine nationals may **own** up to one hundred percent [100%] of domestic market enterprises unless foreign ownership therein is prohibited or limited by the Constitution and existing laws or the Foreign Investment Negative List under Section 8 hereof. (Emphasis supplied.)

Hence, pursuant to the Eight Regular FINL, List A, the foreign "***equity***" is up to 40% in enterprises engaged in the operation and management of public utilities while the remaining 60% of the "***equity***" is reserved to Filipino citizens and "Philippine Nationals" as defined in Sec. 3(a) of the FIA. Notably, the term "equity" refers to the "**ownership** interest in… a business"[89] or a "share in a publicly traded company,"[90] and not to the

---

[89] Black's Law Dictionary, 9th Ed., for the iPhone/iPad/iPod touch. Version: 2.1.0 (B12136), p. 619.

[90] Id.

"controlling" or "management" interest in a company. It necessarily includes all and every share in a corporation, whether voting or non-voting.

Again, We must recognize the distinction of the separate concepts of "ownership" and "control" in modern corporate governance in order to realize the intent of the framers of our Constitution to reserve for Filipinos the ultimate and all-encompassing control of public utility entities from their daily administration to the acts of ownership enumerated in Sec. 6 of the Corporation Code.[91] As elucidated, by equating the word "capital" in Sec. 11, Art. XII to the limited aspect of the right to control the composition of the board of directors, the Court could very well be depriving Filipinos of the majority economic interest in the public utility corporation and, thus, the effective control and ownership of such corporation.

The Court has no jurisdiction over PLDT and foreign stockholders who are indispensable parties in interest

More importantly, this Court cannot apply a new doctrine adopted in a precedent-setting decision to parties that have never been given the chance to present their own views on the substantive and factual issues involved in the precedent-setting case.

To recall, the instant controversy arose out of an original petition filed in February 2007 for, among others, **declaratory relief** on Sec. 11, Art. XII of the 1987 Constitution "to clarify the intent of the Constitutional Commission that crafted the 1987 Constitution to determine the very nature of such limitation on foreign ownership."[92]

---

[91] As early as 1932, Adolf A. Berle and Gardine C. Means in their book "The Modern Corporation and Private Property" explained that the large business corporation is characterized by "separation of ownership and control." See also Hu, Henry T.C. and Black, Bernard S., Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms. As published in Business Lawyer, Vol. 61, pp. 1011-1070, 2006; European Corporate Governance Institute - Law Research Paper No. 64/2006; University of Texas Law, Law and Economics Research Paper No. 70. Available at SSRN: http://ssrn.com/abstract=887183; Ringe, Wolf-Georg, Deviations from Ownership-Control Proportionality - Economic Protectionism Revisited (2010). COMPANY LAW AND ECONOMIC PROTECTIONISM - NEW CHALLENGES TO EUROPEAN INTEGRATION, U. Bernitz and W.G. Ringe, eds., OUP, 2010; Oxford Legal Studies Research Paper No. 23/2011. Available at SSRN: http://ssrn.com/abstract=1789089.

[92] *Rollo*, p. 11.

The petition impleaded the following personalities as the respondents: (1) Margarito B. Teves, then Secretary of Finance and Chair of the Privatization Council; (2) John P. Sevilla, then undersecretary for privatization of the Department of Finance; (3) Ricardo Abcede, commissioner of the Presidential Commission on Good Government; (4) Anthoni Salim, chair of First Pacific Co. Ltd. and director of Metro Pacific Asset Holdings, Inc. (MPAH); (5) Manuel V. Pangilinan, chairman of the board of PLDT; (6) Napoleon L. Nazareno, the president of PLDT; (7) Fe Barin (Barin), then chair of the SEC; and (8) Francis Lim (Lim), then president of the PSE.

Notably, neither PLDT itself nor any of its stockholders were named as respondents in the petition, albeit it sought from the Court the following main reliefs:

> 5. x x x 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 as unconstitutional and a violation of the intent and spirit of the 1987 Constitution;
>
> 6. x x x 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. x x x to direct the [SEC] and [PSE] to require PLDT to make a public disclosure of all of its foreign shareholdings and their actual and real beneficial owners."

Clearly, the petition seeks a judgment that can adversely affect PLDT and its foreign shareholders. If this Court were to accommodate the petition's prayer, as the majority did in the June 28, 2011 Decision and proposes to do presently, PLDT stands to lose its franchise, while the foreign stockholders will be compelled to divest their voting shares in excess of 40% of PLDT's voting stock, if any, even at a loss. It cannot, therefore, be gainsaid that PLDT and its foreign shareholders are indispensable parties to the instant case under the terms of Secs. 2 and 7, Rule 3 of the Rules of Civil Procedure, which read:

> Section 2. Parties in interest.–Every action must be prosecuted and defended in the name of the real party in interest. All persons having an interest in the subject of the action and in obtaining the relief demanded shall be joined as plaintiffs. All persons who claim an interest in the controversy or the subject thereof adverse to the plaintiff, or who are necessary to a complete determination or settlement of the questions involved therein, shall be joined as defendants.
>
> x x x x
>
> Section 7. Compulsory joinder of indispensable parties.– Parties in interest without whom no final determination can be had of an action shall be joined either as plaintiffs or defendants.

Yet, again, PLDT and its foreign shareholders have not been given notice of this petition to appear before, much less heard by, this Court. Nonetheless, the majority has allowed such irregularity in contravention of the settled jurisprudence that an action cannot proceed unless indispensable parties are joined[93] since the non-joinder of these indispensable parties deprives the court the jurisdiction to issue a decision binding on the indispensable parties that have not been joined or impleaded. In other words, if an indispensable party is not impleaded, any personal judgment would have no effectiveness[94] as to them for the tribunal's want of jurisdiction.

In ***Arcelona v. Court of Appeals***,[95] We explained that the basic notions of due process require the observance of this rule that refuses the effectivity of a decision that was rendered despite the non-joinder of indispensable parties:

> [B]asic considerations of due process, however, impel a similar holding in cases involving jurisdiction over the persons of indispensable parties which a court must acquire before it can validly pronounce judgments personal to said defendants. Courts acquire jurisdiction over a party plaintiff upon the filing of the complaint. On the other hand, jurisdiction over the person of a party defendant is assured upon the service of summons in the manner required by law or otherwise by his voluntary appearance. As a rule, if a defendant has not been summoned, the court acquires no jurisdiction over his person, and a personal judgment rendered against such defendant is null and void. **A decision that is null and void for want of jurisdiction on the part of the trial court is not a decision in the contemplation of law and, hence, it can never become final and executory.**

---

[93] *Cortez v. Avila*, 101 Phil 705 (1957); *Borlasa v. Polistico*, 47 Phil. 345 (1925).
[94] Regalado, Remedial Law Compendium, p. 91.
[95] G.R. No. 102900, October 2, 1997, 280 SCRA 20.

> Rule 3, Section 7 of the Rules of Court, defines indispensable parties as parties-in-interest without whom there can be no final determination of an action. As such, they must be joined either as plaintiffs or as defendants. **The general rule with reference to the making of parties in a civil action requires, of course, the joinder of all necessary parties where possible, and the joinder of all indispensable parties under any and all conditions, their presence being a sine qua non for the exercise of judicial power. It is precisely "when an indispensable party is not before the court (that) the action should be dismissed." The absence of an indispensable party renders all subsequent actions of the court null and void for want of authority to act, not only as to the absent parties but even as to those present.**[96]

Hence, the June 28, 2011 Decision having been rendered in a case where the indispensable parties have not been impleaded, much less summoned or heard, cannot be given any effect and is, thus, null and void. *Ergo*, the assailed June 28, 2011 Decision is virtually a useless judgment, at least insofar as it tends to penalize PLDT and its foreign stockholders. It cannot bind and affect PLDT and the foreign stockholders or be enforced and executed against them. It is settled that **courts of law "should not render judgments which cannot be enforced by any process known to the law,"**[97] hence, this Court should have refused to give cognizance to the petition.

The ineffectivity caused by the non-joinder of the indispensable parties, the deprivation of their day in court, and the denial of their right to due process, cannot be cured by the sophistic expedience of naming PLDT in the *fallo* of the decision as a respondent. The dispositive portion of the June 28, 2011 Decision all the more only highlights the unenforceability of the majority's disposition and serves as an implied admission of this Court's lack of jurisdiction over the persons of PLDT and its foreign stockholders when it did not directly order the latter to dispose the common shares in

---

[96] Id.; citing *Echevarria v. Parsons Hardware Co.*, 51 Phil. 980, 987 (1927); *Borlasa v. Polistico*, 47 Phil. 345, 347 (1925); *People et al. v. Hon. Rodriguez, et al.*, 106 Phil 325, 327 (1959), among others. Emphasis and underscoring supplied.

[97] *Board of Ed. of City of San Diego v. Common Council of City of San Diego*, 1 Cal.App. 311, 82 P. 89, Cal.App. 2 Dist. 1905, July 13, 1905 citing *Johnson v. Malloy*, 74 Cal. 432. See also *Kilberg v. Louisiana Highway Commission*, 8 La.App. 441 cited in *Perry v. Louisiana Highway Commission* 164 So. 335 La.App. 2 Cir. 1935. December 13, 1935 and *Oregon v. Louisiana Power & Light Co.*, 19 La.App. 628, 140 So. 282; Succession of Carbajal, 154 La. 1060, 98 So. 666 (1924) cited in *In re Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement* 297 So.2d 663 LA 1974. July 1, 1974 .

excess of the 40% limit. Instead, it took the circuitous route of ordering the SEC, in the *fallo* of the assailed decision, "to apply this definition of the term 'capital' in determining the extent of allowable ownership in respondent PLDT and, if there is a violation of Sec. 11, Art. XII of the Constitution, to impose the appropriate sanctions under the law."[98]

Clearly, since PLDT and the foreign stockholders were not impleaded as indispensable parties to the case, the majority would want to indirectly execute its decision which it could not execute directly. The Court may be criticized for violating the very rules it promulgated and for trenching the provisions of Sec. 5, Art. VIII of the Constitution, which defines the powers and jurisdiction of this Court.

It is apropos to stress, as a reminder, that the Rules of Court is not a mere body of technical rules that can be disregarded at will whenever convenient. It forms an integral part of the basic notion of fair play as expressed in this Constitutional caveat: "No person shall be deprived of life, liberty or property without due process of law,"[99] and obliges this Court, as well as other courts and tribunals, to hear a person first before rendering a judgment for or against him. As Daniel Webster explained, "due process of law is more clearly intended the general law, a law which hears before it condemns; which proceeds upon enquiry, and renders judgment only after trial."[100] The principle of due process of law "contemplates notice and opportunity to be heard before judgment is rendered, affecting one's person or property."[101] Thus, this Court has stressed the strict observance of the following requisites of procedural due process in judicial proceedings in order to comply with this honored principle:

> (1) There must be a court or tribunal clothed with judicial power to hear and determine the matter before it;

---

[98] *Gamboa v. Teves*, G.R. No. 176579, June 28, 2011, 652 SCRA 690, 744.
[99] Section 1, Article III, 1987 Constitution.
[100] *Oscar Palma Pagasian v. Cesar Azura*, A.M. No. RTJ-89-425, April 17, 1990, 184 SCRA 391.
[101] *Lopez v. Director of Lands*, 47 Phil. 23, 32 (1924); emphasis supplied.

> (2) Jurisdiction must be lawfully acquired over the person of the defendant or over the property which is the subject of the proceedings;
>
> (3) The defendant must be given an opportunity to be heard; and
>
> (4) Judgment must be rendered upon lawful hearing.[102]

Apparently, not one of these requisites has been complied with before the June 28, 2011 Decision was rendered. Instead, PLDT and its foreign stockholders were not given their day in court, even when they stand to lose their properties, their shares, and even the franchise to operate as a public utility. This stands counter to our discussion in ***Agabon v. NLRC***,[103] where We emphasized that the principle of due process comports with the simplest notions of what is fair and just:

> To be sure, the Due Process Clause in Article III, Section 1 of the Constitution embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our entire history. **Due process is that which comports with the deepest notions of what is fair and right and just**. **It is a constitutional restraint on the** legislative as well as on the executive and **judicial powers of the government provided by the Bill of Rights**.[104]

Parenthetically, the present petition partakes of a collateral attack on PLDT's franchise as a public utility. Giving due course to the recourse is contrary to the Court's ruling in ***PLDT v. National Telecommunications Commission***,[105] where We declared a franchise to be a property right that can only be questioned in a direct proceeding.[106] Worse, the June 28, 2011 Decision **facilitates and guarantees the success of that unlawful attack** by allowing it to be undertaken in the absence of PLDT.

The Philippine Government is barred by estoppel from ordering foreign investors to divest voting shares in public utilities in excess of the 40 percent cap

---

[102] *Banco Español Filipino v. Palanca*, 37 Phil. 921, 934 (1918).
[103] G.R. No. 158693, November 17, 2004, 442 SCRA 573.
[104] G.R. No. 158693, November 17, 2004, 442 SCRA 573. Emphasis supplied.
[105] G.R. No. 84404, October 18, 1990, 190 SCRA 717.
[106] Id. at 729.

The Philippine government's act of pushing for and approving the sale of the PTIC shares, which is equivalent to 12 million PLDT common shares, to foreign investors precludes it from asserting that the purchase violates the Constitutional limit on foreign ownership of public utilities so that the foreign investors must now divest the common PLDT shares bought. The elementary principle that a person is prevented from going back on his own act or representation to the prejudice of another who relied thereon[107] finds application in the present case.

Art. 1431 of the Civil Code provides that an "admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against a person relying thereon." This rule is supported by Section 2(a) of Rule 131 of the Rules of Court on the burden of proof and presumptions, which states:

> Section 2. Conclusive presumptions. – The following are instances of conclusive presumptions:
>
> (a) Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

The government cannot plausibly hide behind the mantle of its general immunity to resist the application of this equitable principle for "[t]he rule on non-estoppel of the government is not designed to perpetrate an injustice."[108] Hence, this Court has allowed several exceptions to the rule on the government's non-estoppel. As succinctly explained in ***Republic of the Philippines v. Court of Appeals***:[109]

> The general rule is that the State cannot be put in estoppel by the mistakes or errors of its officials or agents. However, like all general rules, this is also subject to exceptions, viz.:

---

[107] *PNB v. Palma*, G.R. No. 157279, August 9, 2005; citing *Laurel v. Civil Service Commission*, G.R. No. 71562, October 28, 1991, 203 SCRA 195; *Stokes v. Malayan Insurance Inc.*, 212 Phil. 705 (1984); *Medija v. Patcho*, 217 Phil. 509 (1984); *Llacer v. Muñoz*, 12 Phil. 328 (1908).

[108] *Leca Realty Corporation v. Republic of the Philippines, represented by the Department of Public Works and Highways*, G.R. No. 155605, September 27, 2006, 503 SCRA 563.

[109] G.R. No. 116111, January 21, 1999, 301 SCRA 366.

> "Estoppel against the public are little favored. They should not be invoked except in rare and unusual circumstances and may not be invoked where they would operate to defeat the effective operation of a policy adopted to protect the public. They must be applied with circumspection and should be applied only in those special cases where the interests of justice clearly require it. Nevertheless, **the government must not be allowed to deal dishonorably or capriciously with its citizens, and must not play an ignoble part or do a shabby thing; and subject to limitations . . ., the doctrine of equitable estoppel may be invoked against public authorities** as well as against private individuals."

In *Republic v. Sandiganbayan*, the government, in its effort to recover ill-gotten wealth, tried to skirt the application of estoppel against it by invoking a specific constitutional provision. The Court countered:

> "We agree with the statement that the State is immune from estoppel, but this concept is understood to refer to acts and mistakes of its officials especially those which are irregular (Sharp International Marketing vs. Court of Appeals, 201 SCRA 299; 306 [1991]; Republic v. Aquino, 120 SCRA 186 [1983]), which peculiar circumstances are absent in the case at bar. Although the State's right of action to recover ill-gotten wealth is not vulnerable to estoppel[;] it is non sequitur to suggest that **a contract, freely and in good faith executed between the parties thereto is susceptible to disturbance ad infinitum. A different interpretation will lead to the absurd scenario of permitting a party to unilaterally jettison a compromise agreement which is supposed to have the authority of res judicata (Article 2037, New Civil Code), and like any other contract, has the force of law between parties thereto** (Article 1159, New Civil Code; Hernaez vs. Kao, 17 SCRA 296 [1966]; 6 Padilla, Civil Code Annotated, 7th ed., 1987, p. 711; 3 Aquino, Civil Code, 1990 ed., p. 463) . . ."

The Court further declared that "(t)he real office of the equitable norm of estoppel is limited to supply[ing] deficiency in the law, but it should not supplant positive law."[110] (Emphasis supplied.)

Similarly, in ***Ramos v. Central Bank of the Philippines***,[111] this Court berated the government for reneging on its representations and urged it to keep its word, viz:

> Even in the absence of contract, the record plainly shows that the CB [Central Bank] made express representations to petitioners herein that

[110] Citing 31 CJS 675-676; *Republic v. Sandiganbayan*, G.R. No. 108292, September 10, 1993, 226 SCRA 314.

[111] No. L-29352, October 4, 1971, 41 SCRA 565; see also *San Roque Realty and Development Corporation v. Republic of the Philippines (through the Armed Forced of the Philippines)*, G.R. No. 155605, September 27, 2006.

> it would support the OBM [Overseas Bank of Manila], and avoid its liquidation if the petitioners would execute (a) the Voting Trust Agreement turning over the management of OBM to the CB or its nominees, and (b) mortgage or assign their properties to the Central Bank to cover the overdraft balance of OBM. The petitioners having complied with these conditions and parted with value to the profit of the CB (which thus acquired additional security for its own advances), the CB may not now renege on its representations and liquidate the OBM, to the detriment of its stockholders, depositors and other creditors, under the rule of promissory estoppel (19 Am. Jur., pages 657-658; 28 Am. Jur. 2d, 656-657; Ed. Note, 115 ALR, 157).
>
> > "The broad general rule to the effect that a promise to do or not to do something in the future does not work an estoppel must be qualified, since there are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. The doctrine of 'promissory estoppel' is by no means new, although the name has been adopted only in comparatively recent years. According to that doctrine, an estoppel may arise from the making of a promise even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice. In this respect, the reliance by the promises is generally evidenced by action or forbearance on his part, and the idea has been expressed that such action or forbearance would reasonably have been expected by the promisor. Mere omission by the promisee to do whatever the promisor promised to do has been held insufficient 'forbearance' to give rise to a promissory estoppel." (19 Am. Jur., loc. cit.)

The exception established in the foregoing cases is particularly appropriate presently since the "indirect" sale of PLDT common shares to foreign investors partook of a propriety business transaction of the government which was not undertaken as an incident to any of its governmental functions. Accordingly, the government, by concluding the sale, has descended to the level of an ordinary citizen and stripped itself of the vestiges of immunity that is available in the performance of governmental acts.[112]

Ergo, the government is vulnerable to, and cannot hold off, the application of the principle of estoppel that the foreign investors can very well invoke in case they are compelled to divest the voting shares they have

---

[112] *Republic v. Vinzon*, G.R. No. 154705, June 26, 2003, 405 SCRA 126; *Air Transportation Office v. David and Ramos*. G.R. No. 159402, February 23, 2011. See also *Minucher v. Court of Appeals*, G.R. No. 142396, February 11, 2003 *citing* Gary L. Maris', '*International Law, An Introduction,"* University Press of America, 1984, p. 119; D.W. Grieg, '*International Law,"* London Butterworths, 1970, p. 221.

previously acquired through the inducement of no less the government. In other words, the government is precluded from penalizing these alien investors for an act performed upon its guarantee, through its facilities, and with its imprimatur.

Under the "fair and equitable treatment" clause of our bilateral investment treaties and fair trade agreements, foreign investors have the right to rely on the same legal framework existing at the time they made their investments

Not only is the government put in estoppel by its acts and representations during the sale of the PTIC shares to MPAH, it is likewise bound by its guarantees in the Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) with other countries.

To date, the Philippines has concluded numerous BITs and FTAs to encourage and facilitate foreign direct investments in the country. These BITs and FTAs invariably contain guarantees calculated to ensure the safety and stability of these foreign investments. Foremost of these is the commitment to give fair and equitable treatment (FET) to the foreign investors and investments in the country.

Take for instance the BIT concluded between the Philippines and China,[113] Article 3(1) thereof provides that "investments and activities associated with such investments of investors of either Contracting Party **shall be accorded <u>equitable treatment</u> and shall enjoy protection** in the

[113] Particularly relevant in the case of PLDT whose biggest group of foreign shareholders is Chinese, followed by the Japanese and the Americans. Per the General Information Sheet (GIS) of PLDT as of June 14, 2012, the following are the foreign shareholders of PLDT: (1) Hong-Kong based J.P. Morgan Asset Holdings (HK) Limited owns 49,023,801 common shares [including 8,533,253, shares of PLDT common stock underlying ADS beneficially owned by NTT DoCoMo and 7,653,703 shares of PLDT common stock underlying ADS beneficially-owned by non-Philippine wholly-owned subsidiaries of First Pacific Company, Limited]; the Japanese firms, (2) NTT DoCoMo, Inc. holding 22,796,902 common shares; (3) NTT Communications Corporation with 12,633,487 common shares; and the Americans, (4) HSBC OBO A/C 000-370817-550 with 2,690,316 common shares; (5) Edward Tortorici and/or Anita R. Tortorici with 96,874 common shares; (6) Hare and Co., holding 34,811 common shares; and (7) Maurice Verstraete, with 29,744 common shares. (http://www.pldt.com.ph/investor/Documents/GIS_(as%20of%2006%2029%2012)_final.pdf last accessed September 25, 2012)

territory of the other Contracting Party."[114] The same assurance is in the Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the People's Republic of China (ASEAN-China Investment Agreement)[115] where the Philippines assured Chinese investors that the country "shall accord to [them] **fair and equitable treatment** and full protection and security."[116] In the same manner, the Philippines agreed to "accord investments [made by Japanese investors] treatment in accordance with international law, including **fair and equitable treatment** and full protection and security"[117] in the Agreement between the Republic of the Philippines and Japan for Economic Partnership (JPEPA).[118]

Similar provisions are found in the ASEAN Comprehensive Investment Agreement (ACIA)[119] and the BITs concluded by the Philippines with, among others, the Argentine Republic,[120] Australia,[121] Austria,[122] Bangladesh,[123] Belgium,[124] Cambodia,[125] Canada,[126] Chile,[127] the Czech

---

[114] 1992 Agreement Between the Government of The People's Republic Of China and The Government of the Republic of the Philippines Concerning Encouragement and Reciprocal Protection of Investments, Signed in Manila, Philippines on July 20, 1992. Emphasis and underscoring supplied.

[115] January 14, 2007.

[116] ASEAN-China Investment Agreement, Article 7(1), emphasis and underscoring supplied. See also the ASEAN-Korea Investment Agreement, Article 5 (1).

[117] JPEPA, Article 91. Emphasis and underscoring supplied.

[118] Signed on September 9, 2006.

[119] ACIA, Article II (1) requires that the parties thereto must give "investments of investors of [the other parties] **fair and equitable treatment** and full protection and security." Emphasis and underscoring supplied.

[120] Article III (1) – Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, through unjustified and discriminatory measures. (Emphasis and underscoring supplied.)

[121] Article 3(2) thereof provides that the Philippines "shall ensure that [Australian] investments are accorded fair and equitable treatment."

[122] Article 2 (1) – Each Contracting Party shall in its territory promote, as far as possible, investments of investors of the other Contracting Party, admit such investments in accordance with its legislation and in any case accord such investments fair and equitable treatment. (Emphasis and underscoring supplied.)

[123] Article III (1) – Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. (Emphasis and underscoring supplied.)

[124] Article II – Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its Constitution, laws, and regulations. Such investments shall be accorded fair and equitable treatment. (Emphasis and underscoring supplied.)

[125] Article II (2) – Investments of nationals of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party. Emphasis and underscoring supplied.)

[126] Article II (2) – Each Contracting Party shall accord investments or returns of investors of the other Contracting Party [:] (a) fair and equitable treatment in accordance with the principles of international law, and (b) full protection and security. (Emphasis and underscoring supplied.)

Republic,[128] Denmark,[129] Finland,[130] France,[131] Germany,[132] India,[133] Indonesia,[134] Iran,[135] Italy,[136] Mongolia,[137] Myanmar,[138] Netherlands,[139] Pakistan,[140] Portuguese Republic,[141] Romania,[142] Russia,[143] Saudi Arabia,[144]

---

[127] Article IV (1) – Each Contracting Party shall guarantee fair and equitable treatment to investments made by investors of the other Contracting Party on its territory and shall ensure that the exercise of the right thus recognized shall not be hindered in practice. (Emphasis and underscoring supplied.)

[128] Article II (2) – Investment[s[] of investors of [the] other Contracting Party shall at all times be accorded fair and equitable treatment and enjoy full protection and security in the territory of the other Contracting Party. (Emphasis and underscoring supplied.)

[129] Article III (1) – Each Contracting Party shall accord to investments made by investors of the other Contracting Party fair and equitable treatment. (Emphasis and underscoring supplied.)

[130] Article 3(1) – Each Contracting Party shall guarantee fair and equitable treatment to investments made by investors of the other Contracting Party in its territory. Emphasis and underscoring supplied.)

[131] Article 3 – Either Contracting Party shall extend fair and equitable treatment in accordance with the principles of International Law to investments made by nationals and companies of the other Contracting Party in its territory and shall ensure that the exercise of the right thus recognized shall not be hindered. Emphasis and underscoring supplied.)

[132] Article 2 (1) – Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting Party and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1 paragraph 1. Such investments shall be accorded fair and equitable treatment. (Emphasis and underscoring supplied.)

[133] Article IV (1) – Each Contracting Party shall accord fair and equitable treatment to investments made by investors of the other Contracting Party in its territory. (Emphasis and underscoring supplied)

[134] Article II (2) – Investments of investors of either Contracting party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party. (Emphasis and underscoring supplied)

[135] Article 4(1) – Admitted investments of investors of one Contracting Party effected within the territory of the other Contracting Party in accordance with the laws and regulations of the latter, shall receive in the other Contracting Party full legal protection and fair treatment not less favourable than that accorded to its own investor or investors of any third state which are in a comparable situation.

[136] Article I – Each Contracting Party shall promote as far as possible the investments in its territory by investors of the other Contracting party admit such investments according to its laws and regulations and accord such investments equitable and reasonable treatment. (Emphasis and underscoring supplied)

[137] Article IV (2) – Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party… (Emphasis and underscoring supplied)

[138] Article I(1) – Each Contracting Party shall promote as far as possible investments in its territory by nationals and companies of one Contracting Party and shall admit such investments in accordance with its Constitution, laws and regulations. Such investments shall be accorded equitable and reasonable treatment. ((Emphasis and underscoring supplied)

[139] Article 3 (2) – Investments of nationals of either Contracting Party shall, in their entry, operation, management, maintenance, use enjoyment or disposal, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting party. (Emphasis and underscoring supplied)

[140] Article I – Each Contracting Party shall promote as far as possible investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its Constitution, laws, and regulations. Such investments shall be accorded equitable and reasonable treatment. (Emphasis supplied)

[141] Article 2(1) – Each contracting party shall promote and encourage, as far as possible, within its territory investments made by investors of the other Contracting Party and shall admit such investments into its territory in accordance with its laws and regulations. It shall in any case accord such investments fair and equitable treatment. (Emphasis and underscoring supplied)

[142] Article 2(3) – Each Contracting Party undertakes to provide in its territory a fair and equitable treatment for investments of investors of the other Contracting Party. Neither Contracting Party shall in any way impair by arbitrary, unreasonable or discriminatory measures the management, maintenance or use of investments as well as the right to the disposal thereof. (Emphasis and underscoring supplied)

[143] Article III (1) – Each Contracting Party shall ensure in its territory fair and equitable treatment of the investments made by the investor of the other Contracting Party and any activities in connection with such investments exclude the use of discriminatory measures that might hinder management and administration of investments. (Emphasis and underscoring supplied)

Spain,[145] Sweden,[146] Switzerland,[147] Thailand,[148] Turkey,[149] United Kingdom,[150] and Vietnam.[151]

Explaining the FET as a standard concordant with the rule of law, Professor Vandevelde wrote that it requires the host county to treat foreign investments with consistency, security, non-discrimination and reasonableness:

> The thesis is that the awards issued to date implicitly have interpreted the fair and equitable treatment standard as requiring treatment in accordance with the concept of the rule of law. That is, **the concept of legality is the unifying theory behind the fair and equitable treatment standard.**
>
> x x x x
>
> Thus, international arbitral awards interpreting the fair and equitable treatment standard have incorporated the substantive and procedural principles of the rule of law into that standard. **The fair and equitable treatment standard in BITs has been interpreted as requiring that covered investment or investors receive treatment that is reasonable, consistent, non-discriminatory, transparent, and in accordance with due process.** As will be seen, these principles explain virtually all of the awards applying the fair and equitable treatment standard. No award is inconsistent with this theory of the standard.

---

[144] Article @(1) – Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments free and equitable treatment. (Emphasis supplied)

[145] Article II – Each party shall promote, as far as possible, investments in its territory by investors of the other Party and shall admit such investments in accordance with its existing laws and regulation. Such investments shall be accorded equitable and fair treatment.(Emphasis and underscoring supplied)

[146] Article III (1) – Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other contracting party and shall not impair the management, maintenance, use, enjoyment or disposal thereof nor the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures. (Emphasis and underscoring supplied)

[147] Article IV (1) – Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. (Emphasis and underscoring supplied)

[148] Article III (2) – Investments of national or companies of one Contracting Party in the territory of the other Contracting Party, and also the returns therefrom, shall at all times be accorded fair and equitable treatment and shall enjoy the constant protection and security in the territory of the host country. (Emphasis and underscoring supplied)

[149] Article II (1) – Each Contracting Party shall promote as far as possible investments in its territory of one Contracting Party and shall admit, on a basis no less favourable than that accorded in similar situations to investments of any third country, in accordance with its Constitution, laws and regulations. Such investments shall be accorded equitable and reasonable treatment. (Emphasis and underscoring supplied)

[150] Article III (2) – Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. (Emphasis and underscoring supplied)

[151] Article II (2) – Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party. (Emphasis and underscoring supplied)

> Understanding fair and equitable treatment as legality is consistent with the purposes of the BITs. BITs essentially are instruments that impose legal restraints on the treatment of covered investments and investors by host states. The very essence of a BIT is a partial subordination of the sovereign's power to the legal constraints of the treaty. Further, individual BIT provisions are themselves a reflection of the principles of the rule of law. (Emphasis and underscoring supplied.)[152]

On the requirement of consistency, the International Centre for the Settlement of Investment Disputes (ICSID) explained in ***Tecnicas Medioambientales Tecmed S.A. v. The united Mexican States***[153] that the host country must maintain **a <u>stable</u>** and **<u>predictable</u> legal and business environment** to accord a fair and equitable treatment to foreign investors.

> 153. The Arbitral Tribunal finds that t**he commitment of fair and equitable treatment** included in Article 4(1) of the Agreement **is an expression and part of the *bona fide* principle recognized in international law**, although bad faith from the State is not required for its violation:
>
> > To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.
>
> 154. The Arbitral Tribunal considers that **this provision** of the Agreement, in light of the good faith principle established by international law, **requires the Contracting Parties to provide to international investments treatment that <u>does not affect the basic expectations that were taken into account by the foreign investor to make the investment</u>. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.** Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. **The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such**

---

[152] Kenneth J. Vandevelde, A Unified Theory of Fair and Equitable Treatment, 43 N.Y.U. J. Int'l L. & Pol. 43.

[153] ICSID Case No. ARB AF/00/2, Award of May 29, 2003.

> **instruments, and <u>not to deprive the investor of its investment without the required compensation</u>**. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, **compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary**; i.e. as presenting insufficiencies that would be recognized "…by any reasonable and impartial man," or, although not in violation of specific regulations, as being contrary to the law because:
>
> > ...(it) shocks, or at least surprises, a sense of juridical propriety. (Emphasis and underscoring supplied added.)

The Philippines, therefore, cannot, without so much as a notice of policy shift, alter and change the legal and business environment in which the foreign investments in the country were made in the first place. These investors obviously made the decision to come in after studying the country's legal framework—its restrictions and incentives—and so, as a matter of fairness, they must be accorded the right to expect that the same legal climate and the same substantive set of rules will remain during the period of their investments.

The representation that foreigners can invest up to 40% of the entirety of the total stockholdings, and not just the voting shares, of a public utility corporation is an implied covenant that the Philippines cannot renege without violating the FET guarantee. Especially in this case where the Philippines made specific commitments to countries like Japan and China that their investing nationals can own up to 40% of the **<u>equity</u>** of a public utility like a telecommunications corporation. In the table contained in Schedule 1(B), Annex 6 of the JPEPA, the Philippines categorically represented that Japanese investors' entry into the Philippine telecommunications industry, specifically corporations offering "voice telephone services," is subject to only the following requirements and conditions:

A. Franchise from Congress of the Philippines

B. Certificate of Public Convenience and Necessity (CPCN) from the National Telecommunications Commission

C. **Foreign equity is permitted up to 40 percent**.

D. x x x[154] (Emphasis supplied.)

The same representation is made in the Philippines' Schedule of Specific Commitments appended to the ASEAN-China Agreement on Trade in Services.[155]

Further, as previously pointed out, it was the Philippine government that pushed for and approved the sale of the 111,415 PTIC shares to MPAH, thereby indirectly transferring the ownership of 6.3 *percent* of the outstanding common shares of PLDT, to a foreign firm and so increasing the foreign voting shareholding in PLDT. Hence, the presence of good faith may not be convincingly argued in favour of the Philippine government in a suit for violation of its FET guarantee.

In fact, it has been held that a *bona fide* change in policy by a branch of government does not excuse compliance with the FET obligations. In ***Occidental Exploration and Production Company (OEPC) v. the Republic of Ecuador***,[156] the United Nations Commission on International Trade Law (UNCITRAL) ruled that Ecuador violated the US/Ecuador BIT by denying OEPC fair and equitable treatment when it failed to provide a predictable framework for its investment planning. Ruling thus, the tribunal cited Ecuador's change in tax law and its tax authority's unsatisfactory and vague response to OEPC's *consulta*, viz:

---

[154] Annex 6 Referred to in Chapter 7 of the JPEPA: Schedule of Specific Commitments and List of Most-Favored-Nation Treatment Exemptions. Last accessed at http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/annex6.pdf on August 30, 20112.

[155] Annex 1/SC1, ASEAN-China Agreement on Trade in Services. Last accessed at http://www.asean.org/22160.htm on August 30, 2012.

[156] London Court of International Arbitration Administered Case No. UN 3467, July 1, 2004. Last accessed at http://arbitrationlaw.com/files/free_pdfs/Occidental%20v%20Ecuador%20-%20Award.pdf on August 30, 2012.

> 183. x x x The stability of the legal and business framework is thus an essential element of fair and equitable treatment.
>
> 184. The tribunal must note **in this context that the framework under which the investment was made and operates has been changed in an important manner by actions adopted by [the Ecuadorian tax authority].** … The clarifications that OEPC sought on the applicability of VAT by means of "consulta" made to [the Ecuadorian tax authority] received a wholly unsatisfactory and thoroughly vague answer. **The tax law was changed without providing any clarity abut its meaning and extend and the practice and regulations were also inconsistent with such changes.**
>
> 185. Various arbitral tribunals have recently insisted on the need for this stability. The tribunal in *Metalcad* held that the Respondent "failed to ensure a transparent and predictable framework for Metalcad's business planning and investment. The totality of these circumstances demonstrate a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly…" x x x
>
> 186. It is quite clear from the record of this case and from the events discussed in this Final Award that such requirements were not met by Ecuador. Moreover, **this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.**
>
> 187. The Tribunal accordingly holds that the Respondent has breached its obligations to accord fair and equitable treatment under Article II (3) (a) of the Treaty. x x x
>
> x x x x
>
> 191. The relevant question for international law in this discussion is not whether there is an obligation to refund VAT, which is the point on which the parties have argued most intensely, but rather **whether the legal and business framework meets the requirements of stability and predictability under international law.** It was earlier concluded that there is not a VAT refund obligation under international law, except in the specific case of the Andean Community Law, which provides for the option of either compensation or refund, but **there is certainly an obligation not to alter the legal and business environment in which the investment has been made. In this case it is the latter question that triggers a treatment that is not fair and equitable**. (Emphasis supplied.)

To maintain the FET guarantee contained in the various BITs and FTAs concluded by the country and avert a deluge of investor suits before the ICSID, the UNCITRAL or other *fora*, **any decision of this court that tends to drastically alter the foreign investors' basic expectations when they made their investments**, taking into account the consistent SEC

Opinions and the executive and legislative branches' Specific Commitments, **must be applied prospectively**.

This Court cannot turn oblivious to the fact that if We diverge from the prospectivity rule and implement the resolution on the present issue immediately and, without giving due deference to the foreign investors' rights to due process and the equal protection of the laws, compel the foreign stockholders to divest their voting shares against their wishes at prices lower than the acquisition costs, these foreign investors may very well shy away from Philippine stocks and avoid investing in the Philippines. Not to mention, the validity of the franchise granted to PLDT and similarly situated public utilities will be put under a cloud of doubt. Such uncertainty and the unfair treatment of foreign investors who merely relied in good faith on the policies, rules and regulations of the PSE and the SEC will likely upset the volatile capital market as it would have a negative impact on the value of these companies that will discourage investors, both local and foreign, from purchasing their shares. In which case, foreign direct investments (FDIs) in the country (which already lags behind our Asian neighbors) will take a nosedive. Indeed, it cannot be gainsaid that a sudden and unexpected deviation from the accepted and consistent construction of the term "capital" will create a domino effect that may cripple our capital markets.

Therefore, in applying the new comprehensive interpretation of Sec. 11, Art. XII of the Constitution, the current voting shares of the foreign investors in public utilities in excess of the 40% capital shall be maintained and honored. Otherwise the due process guarantee under the Constitution and the long established precepts of justice, equity and fair play would be impaired.

Prospective application of new laws or changes in interpretation

The June 28, 2011 Decision construed "capital" in the first sentence of Section 11, Article XII of the Constitution as "full beneficial ownership of

60 percent of the outstanding capital stocks coupled with 60 percent of the voting rights." In the Resolution denying the motions for reconsideration, it further amplified the scope of the word "capital" by clarifying that "the 60-40 ownership requirement in favor of Filipino citizens must apply separately to each class of shares whether common, preferred, preferred voting or any other class of shares." This is a radical departure from the clear intent of the framers of the 1987 Constitution and the long established interpretation ascribed to said word by the Securities and Exchange Commission—that "capital" in the first sentence of Sec. 11, Art. XII means capital stock or BOTH voting and non-voting shares. The recent interpretation enunciated in the June 28, 2011 and in the Resolution at hand can only be applied PROSPECTIVELY. It cannot be applied retroactively to corporations such as PLDT and its investors such as its shareholders who have all along relied on the consistent reading of "capital" by SEC and the Philippine government to apply it to a public utility's total capital stock.

Lex prospicit, non respicit – "laws have no retroactive effect unless the contrary is provided."[157] As a necessary corollary, judicial rulings should not be accorded retroactive effect since "judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines."[158] It has been the constant holding of the Court that a judicial decision setting a new doctrine or principle ("precedent-setting decision") shall not retroactively apply to parties who relied in good faith on the principles and doctrines standing prior to the promulgation thereof ("old principles/doctrines"), especially when a retroactive application of the precedent-setting decision would impair the rights and obligations of the parties. So it is that as early as 1940, the Court has refused to apply the new doctrine of *jus sanguinis* to persons who relied in good faith on the principle of *jus soli* adopted in ***Roa v. Collector of Customs***.[159] Similarly, in ***Co v. Court of Appeals***,[160] the Court sustained petitioner Co's bona fide reliance

[157] Article 4, Civil Code of the Philippines.
[158] Article 8, Civil Code of the Philippines.
[159] 23 Phil. 315 (1912).
[160] G.R. No. 100776, October 28, 1993, 227 SCRA 444, 448-455; *Monge, et al. v. Angeles, et al.*, 101 Phil. 563 (1957); among others.

on the Minister of Justice's Opinion dated December 15, 1981 that the delivery of a "rubber" check as guarantee for an obligation is not a punishable offense despite the Court's pronouncement on September 21, 1987 in ***Que v. People*** that *Batas Pambansa Blg.* (BP) 22 nonetheless covers a check issued to guarantee the payment of an obligation. In so ruling, the Court quoted various decisions applying precedent-setting decisions prospectively. We held:

> **Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines," according to Article 8 of the Civil Code. "Laws shall have no retroactive effect, unless the contrary is provided," declares Article 4 of the same Code**, a declaration that is echoed by Article 22 of the Revised Penal Code: "Penal laws shall have a retroactive effect insofar as they favor the person guilty of a felony, who is not a habitual criminal . . ."
>
> x x x x
>
> **The principle of prospectivity has also been applied to judicial decisions which, "although in themselves not laws, are nevertheless evidence of what the laws mean, . . . (this being) the reason why under Article 8 of the New Civil Code, 'Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system . . .' "**
>
> So did this Court hold, for example, in *Peo. v. Jabinal*, 55 SCRA 607, 611:
>
> x x x x
>
> So, too, did the Court rule in *Spouses Gauvain and Bernardita Benzonan v. Court of Appeals, et al.* (G.R. No. 97973) and *Development Bank of the Philippines v. Court of Appeals, et al.* (G.R. No 97998), Jan. 27, 1992, 205 SCRA 515, 527-528:
>
> x x x x
>
> A compelling rationalization of the prospectivity principle of judicial decisions is well set forth in the oft-cited case of *Chicot County Drainage Dist. v. Baxter States Bank*, 308 US 371, 374 [1940]. The Chicot doctrine advocates **the imperative necessity to take account of the actual existence of a statute prior to its nullification, as an operative fact negating acceptance of "a principle of absolute retroactive invalidity.**"
>
> x x x x
>
> Much earlier, in *De Agbayani v. PNB*, 38 SCRA 429 xxx the Court made substantially the same observations…
>
> x x x x

> Again, treating of the effect that should be given to its decision in *Olaguer v. Military Commission No 34*, — declaring invalid criminal proceedings conducted during the martial law regime against civilians, which had resulted in the conviction and incarceration of numerous persons — this Court, in *Tan vs. Barrios*, 190 SCRA 686, at p. 700, ruled as follows:
>
> > "**In the interest of justice and consistency, we hold that Olaguer should, in principle, be applied prospectively only to future cases and cases still ongoing or not yet final when that decision was promulgated.** x x x"
>
> It would seem, then, that the weight of authority is decidedly in favor of the proposition **that the Court's decision of September 21, 1987** in *Que v. People*, 154 SCRA 160 (1987) — i.e., that a check issued merely to guarantee the performance of an obligation is nevertheless covered by B.P. Blg. 22 — **should not be given retrospective effect to the prejudice of the petitioner and other persons similarly situated, who relied on the official opinion of the Minister of Justice** that such a check did not fall within the scope of B.P. Blg. 22. (Emphasis supplied).

Indeed, pursuant to the doctrine of prospectivity, new doctrines and principles must be applied only to acts and events transpiring **after** the precedent-setting judicial decision, and not to those that occurred and were caused by persons who relied on the "old" doctrine and acted on the faith thereof.

Not content with changing the rule in the middle of the game, the majority, in the June 28, 2011 Decision, went a little further by ordering respondent SEC Chairperson "to apply this definition of the term 'capital' in determining the extent of allowable foreign ownership in respondent Philippine Long Distance Telephone Company, and if there is a violation of Section 11, Article XII of the Constitution, to impose the appropriate sanctions under the law." This may be viewed as unreasonable and arbitrary. The Court in the challenged June 28, 2011 Decision already made a finding that foreigners hold 64.27% of the total number of PLDT common shares while Filipinos hold only 35.73%.[161] In this factual setting, PLDT will, as clear as day, face sanctions since its present capital structure is presently in breach of the rule on the 40% cap on foreign ownership of voting shares even without need of a SEC investigation.

---

[161] Decision, G.R. No. 176579, June 28, 2011.

In answering the SEC's query regarding the proper period of application and imposition of appropriate sanctions against PLDT, Justice Carpio tersely stated that "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 cases or investigation, there is an existing violation of Sec. 11, Art. XII of the Constitution."[162] As basis therefor, Justice Carpio cited *Halili v. Court of Appeals*[163] and *United Church Board for World Ministries (UCBWM) v. Sebastian*.[164] However, these cases do not provide a jurisprudential foundation to this mandate that may very well deprive PLDT foreign shareholders of their voting shares. In fact, *UCBWM v. Sebastian* respected the voluntary transfer in a will by an American of his shares of stocks in a land-holding corporation. In the same manner, *Halili v. Court of Appeals* sustained as valid the waiver by an alien of her right of inheritance over a piece of land in favour of her son. Nowhere in these cases did this Court order the involuntary dispossession of corporate stocks by alien stockholders. At most, these two cases only recognized the principle validating the transfer of land to an alien who, after the transfer, subsequently becomes a Philippine citizen or transfers the land to a Filipino citizen. They do not encompass the situation that will eventually ensue after the investigation conducted by the SEC in accordance with the June 28, 2011 and the present resolution. They do not justify the compulsory deprivation of voting shares in public utility corporations from foreign stockholders who had legally acquired these stocks in the first instance.

The abrupt application of the construction of Sec. 11, Art. XII of the Constitution to foreigners currently holding voting shares in a public utility corporation is not only constitutionally problematic; it is likewise replete with pragmatic difficulties that could hinder the real-world translation of this Court's Resolution. Although apparently benevolent, the majority's concession to allow "public utilities that fail to comply with the nationality requirement under Section 11, Article XII and the FIA [to] **cure their**

[162] Resolution, p. 47.
[163] 350 Phil. 906 (1998).
[164] 242 Phil. 848 (1988).

deficiencies prior to the start of the administrative case or investigation"[165] could indirectly occasion a compulsory deprivation of the public utilities' foreign stockholders of their voting shares. Certainly, these public utilities must immediately pare down their foreign-owned voting shares to avoid the imposable sanctions. This holds true especially for PLDT whose 64.27% of its common voting shares are foreign-subscribed and held. PLDT is, therefore, forced to immediately deprive, or at the very least, dilute the property rights of their foreign stockholders before the commencement of the administrative proceedings, which would be a mere farce considering the transparency of the public utility from the onset.

Even with the chance granted to the public utilities to remedy their supposed deficiency, the nebulous time-frame given by the majority, i.e., "prior to the start of the administrative case or investigation,"[166] may very well prove too short for these public utilities to raise the necessary amount of money to increase the number of their authorized capital stock in order to dilute the property rights of their foreign stockholders holding voting shares.[167] Similarly, if they induce their foreign stockholders to transfer the

---

[165] Resolution, p. 47.

[166] Id.

[167] Sec. 38, Corporation Code. *Power to increase or decrease capital stock; incur, create or increase bonded indebtedness*. - No corporation shall increase or decrease its capital stock or incur, create or increase any bonded indebtedness unless approved by a majority vote of the board of directors and, at a stockholder's meeting duly called for the purpose, two-thirds (2/3) of the outstanding capital stock shall favor the increase or diminution of the capital stock, or the incurring, creating or increasing of any bonded indebtedness. Written notice of the proposed increase or diminution of the capital stock or of the incurring, creating, or increasing of any bonded indebtedness and of the time and place of the stockholder's meeting at which the proposed increase or diminution of the capital stock or the incurring or increasing of any bonded indebtedness is to be considered, must be addressed to each stockholder at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally.

x x x x

Any increase or decrease in the capital stock or the incurring, creating or increasing of any bonded indebtedness shall require prior approval of the Securities and Exchange Commission.

One of the duplicate certificates shall be kept on file in the office of the corporation and the other shall be filed with the Securities and Exchange Commission and attached to the original articles of incorporation. From and after approval by the Securities and Exchange Commission and the issuance by the Commission of its certificate of filing, the capital stock shall stand increased or decreased and the incurring, creating or increasing of any bonded indebtedness authorized, as the certificate of filing may declare: Provided, That **the Securities and Exchange Commission shall not accept for filing any certificate of increase of capital stock unless accompanied by the sworn statement of the treasurer of the corporation lawfully holding office at the time of the filing of the certificate, showing that at least twenty-five (25%) percent of such increased capital stock has been subscribed and that at least twenty-five (25%) percent of the amount subscribed has been paid either in actual cash to the corporation or that there has been transferred to the corporation property the valuation of which is equal to twenty-five (25%) percent of the subscription**: Provided, further, That no decrease of the capital stock shall be approved by the Commission if its effect shall prejudice the rights of corporate creditors. (Emphasis supplied.)

excess voting shares to qualified Philippine nationals, this period before the filing of the administrative may not be sufficient for these stockholders to find Philippine nationals willing to purchase these voting shares at the market price. This Court cannot ignore the fact that the voting shares of Philippine public utilities like PLDT are listed and sold at large in foreign capital markets. Hence, foreigners who have previously purchased their voting shares in these markets will not have a ready Philippine market to immediately transfer their shares. More than likely, these foreign stockholders will be forced to sell their voting shares at a loss to the few Philippine nationals with money to spare, or the public utility itself will be constrained to acquire these voting shares to the prejudice of its retained earnings.[168]

Whatever means the public utilities choose to employ in order to cut down the foreign stockholdings of voting shares, it is necessary to determine who among the foreign stockholders of these public utilities must bear the burden of unloading the voting shares or the dilution of their property rights. In a situation like this, there is at present no settled rule on who should be deprived of their property rights. Will it be the foreign stockholders who bought the latest issuances? Or the first foreign stockholders of the public utility corporations? This issue cannot be realistically settled within the time-frame given by the majority without raising more disputes. With these loose ends, the majority cannot penalize the public utilities if they should fail to comply with the directive of complying with the "nationality requirement under Section 11, Article XII and the FIA" within the unreasonably nebulous and limited period "prior to the start of the administrative case or investigation."[169]

---

[168] Sec. 41, Corporation Code. *Power to acquire own shares*. - A stock corporation shall have the power to purchase or acquire its own shares for a legitimate corporate purpose or purposes, including but not limited to the following cases: Provided, That the corporation has unrestricted retained earnings in its books to cover the shares to be purchased or acquired:

1. To eliminate fractional shares arising out of stock dividends;

2. To collect or compromise an indebtedness to the corporation, arising out of unpaid subscription, in a delinquency sale, and to purchase delinquent shares sold during said sale; and

3. To pay dissenting or withdrawing stockholders entitled to payment for their shares under the provisions of this Code.

[169] Resolution, p. 47.

In the light of the new pronouncement of the Court that public utilities that fail to comply with the nationality requirement under Section 11, Article XII of the Constitution CAN CURE THEIR DEFICIENCIES prior to the start of the administrative case or investigation, I submit that affected companies like PLDT should be given reasonable time to undertake the necessary measures to make their respective capital structure compliant, and the SEC, as the regulatory authority, should come up with the appropriate guidelines on the process and supervise the same. SEC should likewise adopt the necessary rules and regulations to implement the prospective compliance by all affected companies with the new ruling regarding the interpretation of the provision in question. Such rules and regulations must respect the due process rights of all affected corporations and define a reasonable period for them to comply with the June 28, 2011 Decision.

A final note.

Year in and year out, the government's trade managers attend economic summits courting businessmen to invest in the country, doubtless promising them a playing field where the rules are friendly as they are predictable. So it would appear odd if a branch of government would make business life complicated for investors who are already here. Indeed, stability and predictability are the key pillars on which our legal system must be founded and run to guarantee a business environment conducive to the country's sustainable economic growth. Hence, it behoves this Court to respect the basic expectations taken into account by the investors at the time they made the investments. In other words, it is the duty of this Court to stand guard against any untoward change of the rules in the middle of the game.

I, therefore, vote to **GRANT** the motions for reconsideration and accordingly **REVERSE** and **SET ASIDE** the June 28, 2011 Decision. The Court should declare that the word "capital" in the first sentence of Section

11, Article XII of the 1987 Constitution means the entire capital stock or both voting and non-voting shares.

Since the June 28, 2011 Decision was however sustained, I submit that said decision should take effect only on the date of its finality and should be applied **prospectively**.

PLDT should be given time to undertake the necessary measures to make its capital structure compliant, and the Securities and Exchange Commission should formulate appropriate guidelines and supervise the process. Said Commission should also adopt rules and regulations to implement the prospective compliance by all affected companies with the new ruling on the interpretation of Sec. 11, Art. XII of the Constitution. Such rules and regulations must respect the due process rights of all affected corporations and provide a reasonable period for them to comply with the June 28, 2011 Decision. The rights of foreigners over the voting shares they presently own in excess of 40% of said shares should, in the meantime, be respected.

PRESBITERO J. VELASCO, JR.
Associate Justice