



OCAMPO & SURALVO
ANTONIO · AURELLANO
LAW OFFICES

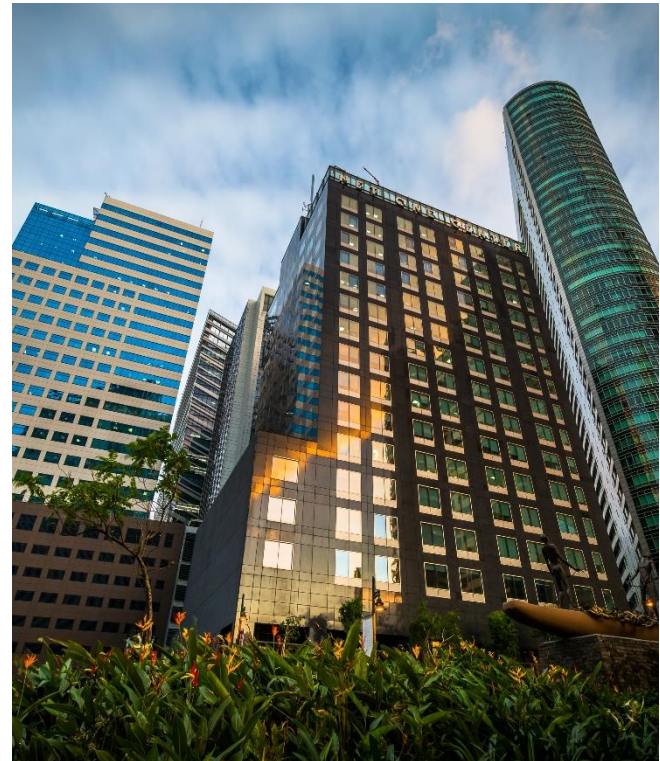
KINSTELLAR

Territorial workshop Philippines

(ICC Czech Republic event)

1 September 2021

Kinstellar Office, Prague





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LAW OFFICES



PARTNERS OF OCAMPO & SURALVO LAW OFFICES

Ocampo & Suralvo Law Offices (OS Law) is a full-service Philippine law firm with a special focus on corporate, commercial and tax law. It has a team of 16 lawyers dedicated to helping clients achieve their business goals.

The partners of OS Law have distinguished themselves in the area of mergers & acquisitions. The OS Law team is relied upon by top global and regional law firms to deliver the Philippine scope in multi-jurisdictional engagements. The head of OS Law's M&A team, Atty. Jude Ocampo, is acknowledged as among the top 100 lawyers in the Philippines (Asia Business Law Journal) and as a leading lawyer (Asialaw) primarily due to the firm's M&A work. The firm has also received Firm of the Year honors (from In-house Community) for its Regulatory/Compliance and Antitrust practices. OS Law's tax practice has also been recognized as a Top Tax firm (Asia Business Law Journal).

OS Law assists its clients with their legal needs across a spectrum of business concerns including general corporate and commercial matters, company establishment and registration, contract negotiation and drafting, mergers and acquisitions, joint ventures, corporate restructuring, foreign direct investments, tax advisory, tax advocacy, transfer pricing and litigation.

OS Law is also driven to provide Philippine businesses with solutions that enable them to thrive in the global economy. It provides its clients with access to the tax and legal expertise in many of the world's fastest-growing investment destinations through collaborations with DFDL, an international law firm focused on Asia's emerging economies with twelve offices in eight countries, and Kinstellar, a trusted legal counsel to leading investors across Emerging Europe and Central Asia with offices in ten jurisdictions.

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BBB

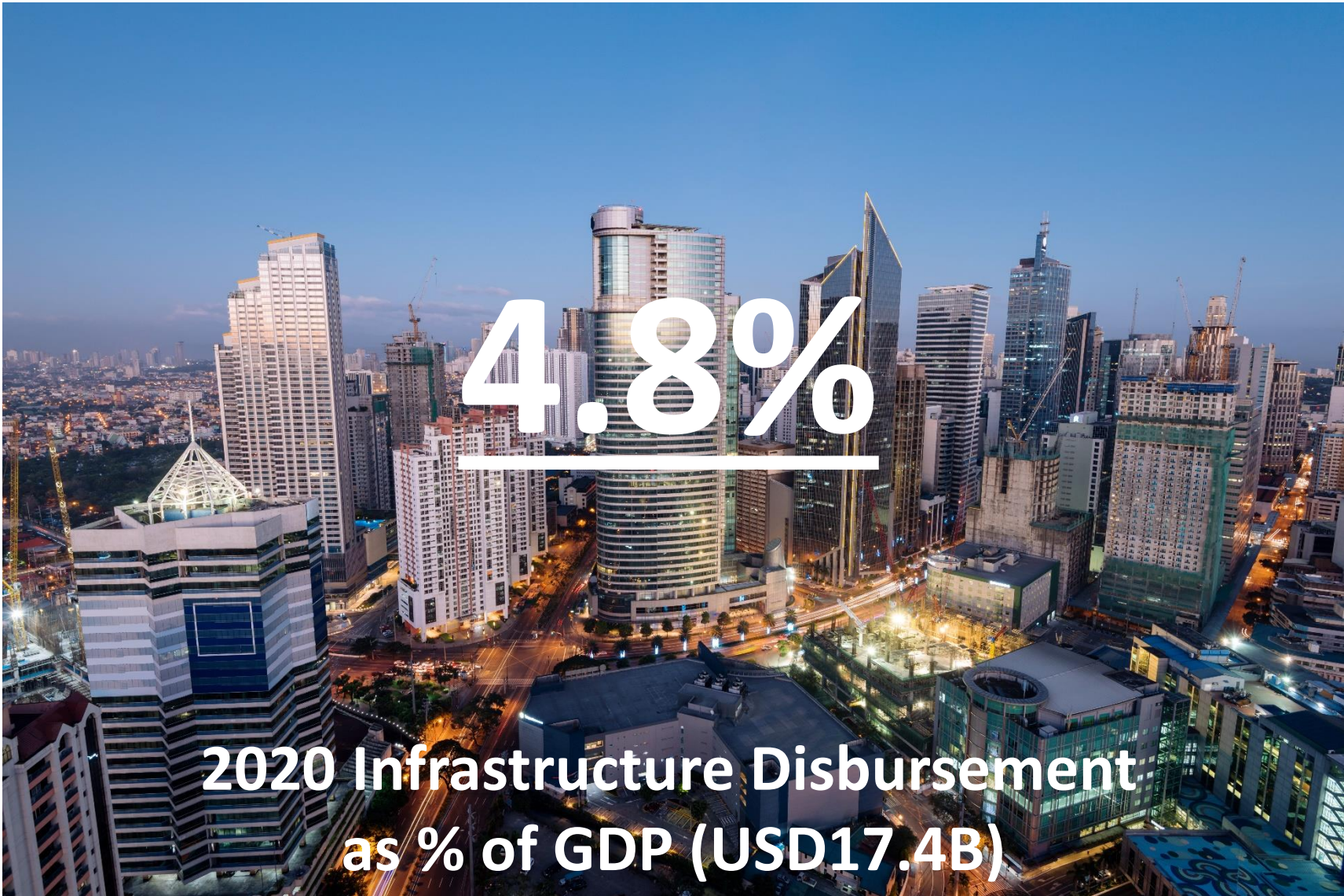
Credit Rating of the Philippines - Fitch



World: 29.6
Singapore: 40.0

24.1

Median Age

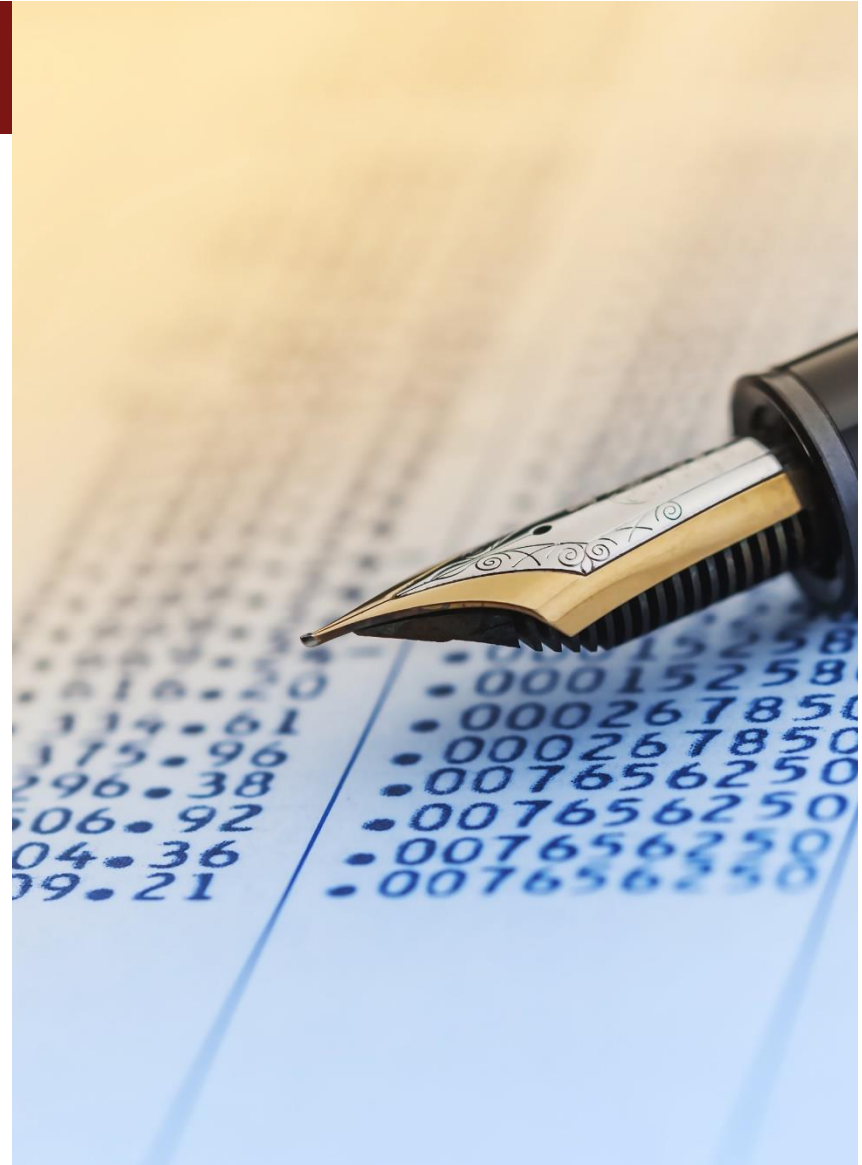


4.8%

**2020 Infrastructure Disbursement
as % of GDP (USD17.4B)**

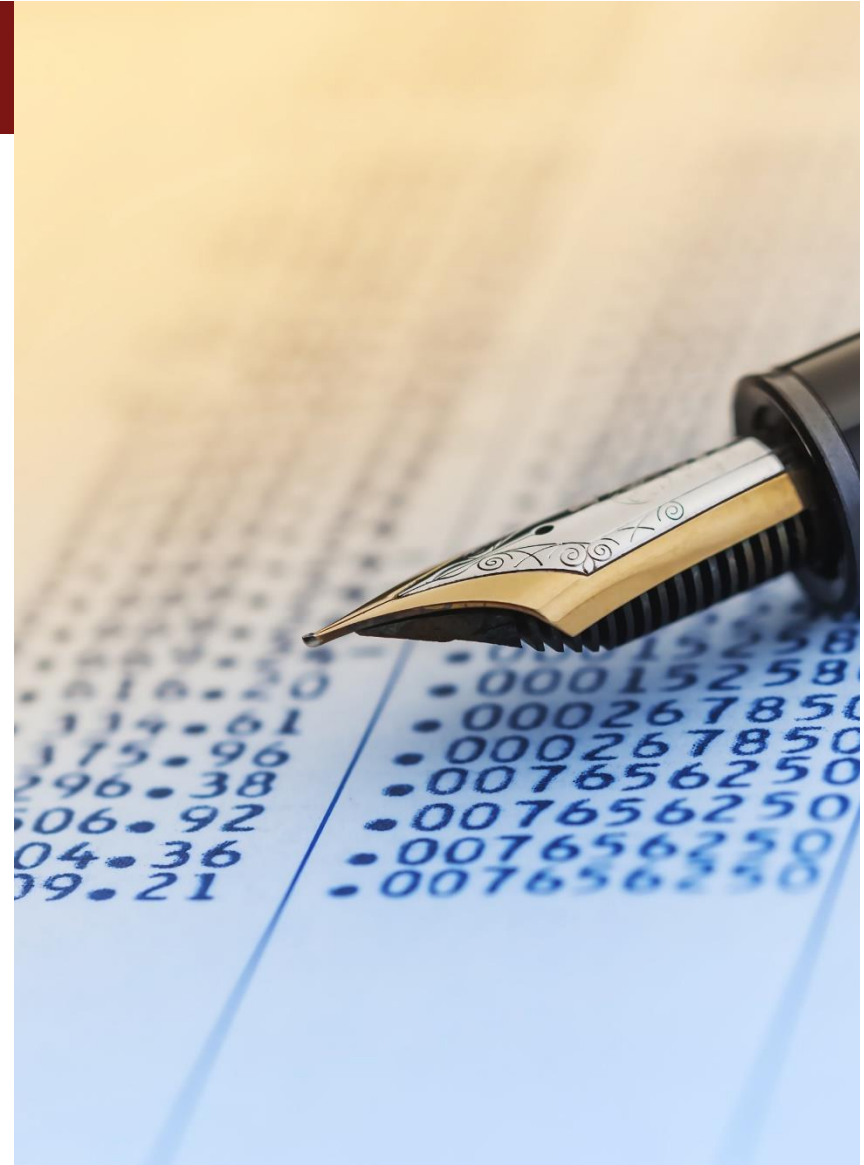
AGENDA

- Investment Laws, Restrictions, Structures
- Philippine Corporations
- Government Contracting
- Q&A



AGENDA

- **Investment Laws, Restrictions, Structures**
- Philippine Corporations
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Investment Rules

Nationality Restrictions

- Philippine Constitution and Laws cap foreign equity investment in select businesses
- Anti-dummy law criminalizes nominee arrangements in nationalized or partially nationalized businesses
- Reporting requirements of the Securities and Exchange Commission (SEC) requires information on beneficial ownership

Investment Rules

Nationality Restrictions: Small Business Protection

- All businesses with paid-in capital of less than USD200,000: RESERVED FOR FILIPINO CITIZENS OR CORPORATIONS THAT ARE AT LEAST 60% FILIPINO-OWNED
- SEC requires reporting if any corporation's foreign shareholders own more than 40%

Investment Rules

Nationality Restrictions: Real Estate

- Land Ownership: Corporations that own land must be 60% Filipino-owned
- Buildings and Other Infrastructure on land: no nationality restrictions
- Usual Investment Structure: Leisure/Hotels
 - Compliant SPV (60% Filipino) owns land;
 - OpCo (100% Foreign-owned) owns building;
 - SPV leases land to OpCo for 50 years (renewable for additional 25 years)

Investment Rules

Nationality Restrictions: Retail

- Retail: Sale of goods to the general public/end-user;
 - B2B is **not** retail; may be 100% foreign-owned
 - Service **not** retail
 - Restaurants – sale of goods or sale of services?
- Reserved for Filipinos if investment is less than threshold
 - USD2.5M for general retail (USD830k per store investment)
 - USD250k per store for high-end, luxury products

Investment Rules

Nationality Restrictions: Construction

- No law prohibiting foreign entities from engaging in construction activities
- BUT: Law requires contractors to obtain license from the Philippine Contractors Accreditation Board (PCAB)
- PCAB only grants Regular Licenses to entities that have more than 40% foreign equity holders under AAAA Gold License:
 - PHP1 Billion (USD20Million) - must be in cash for new applicants
 - May only engage in the following PRIVATE projects (i) vertical projects - minimum contract cost of PHP 5 Billion, (ii) horizontal projects - minimum contract cost of PHP 3 Billion
- Foreign entities may also obtain Special License for foreign funded projects or projects with special exemption from other government entities (usually under international agreements)

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 - PHP1 Billion (USD20Million) - must be in cash for new applicants
 - May only engage in the following FRI/FTL projects (i) vertical projects - minimum contract cost of PHP 5 Billion, (ii) horizontal projects - minimum contract cost of PHP 3 Billion
- Foreign entities may also obtain Special License for foreign funded projects or projects with special exemption from other government entities (usually under international agreements)

**But case of
Manilawater vs. PCAB
might change this!**

Investment Rules

Nationality Restrictions: Public Utility

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

Investment Rules

Nationality Restrictions: Public Utility

- Public Service Act: (b) The term "public service" includes:
 - common carrier, railroad, street railway, traction railway, subway motor vehicle (either for freight or passenger or both), freight or carrier service of any class, express service, steamboat or steamship line, pontines, ferries, and water craft, engaged in the transportation of passengers or freight or both, shipyard, marine railways, marine repair shop, 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...

Investment Rules

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Moves to Amend Definition

Investment Rules

Nationality Restrictions: Negative List

- Available for download:

<https://www.officialgazette.gov.ph/downloads/2018/10oct/20181029-EO-65-RRD.pdf>



MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

EXECUTIVE ORDER NO. 65

PROMULGATING THE ELEVENTH REGULAR FOREIGN
INVESTMENT NEGATIVE LIST

WHEREAS, Republic Act (RA) No. 7042, also known as the "Foreign Investments Act of 1991," as amended, mandates the formulation of a Regular Foreign Investment Negative List, covering investment areas or activities which are open to foreign investors and/or reserved to Filipino nationals; and

WHEREAS, there is a need to formulate the Eleventh Regular Foreign Investment Negative List, replacing the Tenth Regular Foreign Investment Negative List, to reflect changes to List A and List B, pursuant to existing laws, consistent with the policy to ease restrictions on foreign participation in certain investment areas or activities;

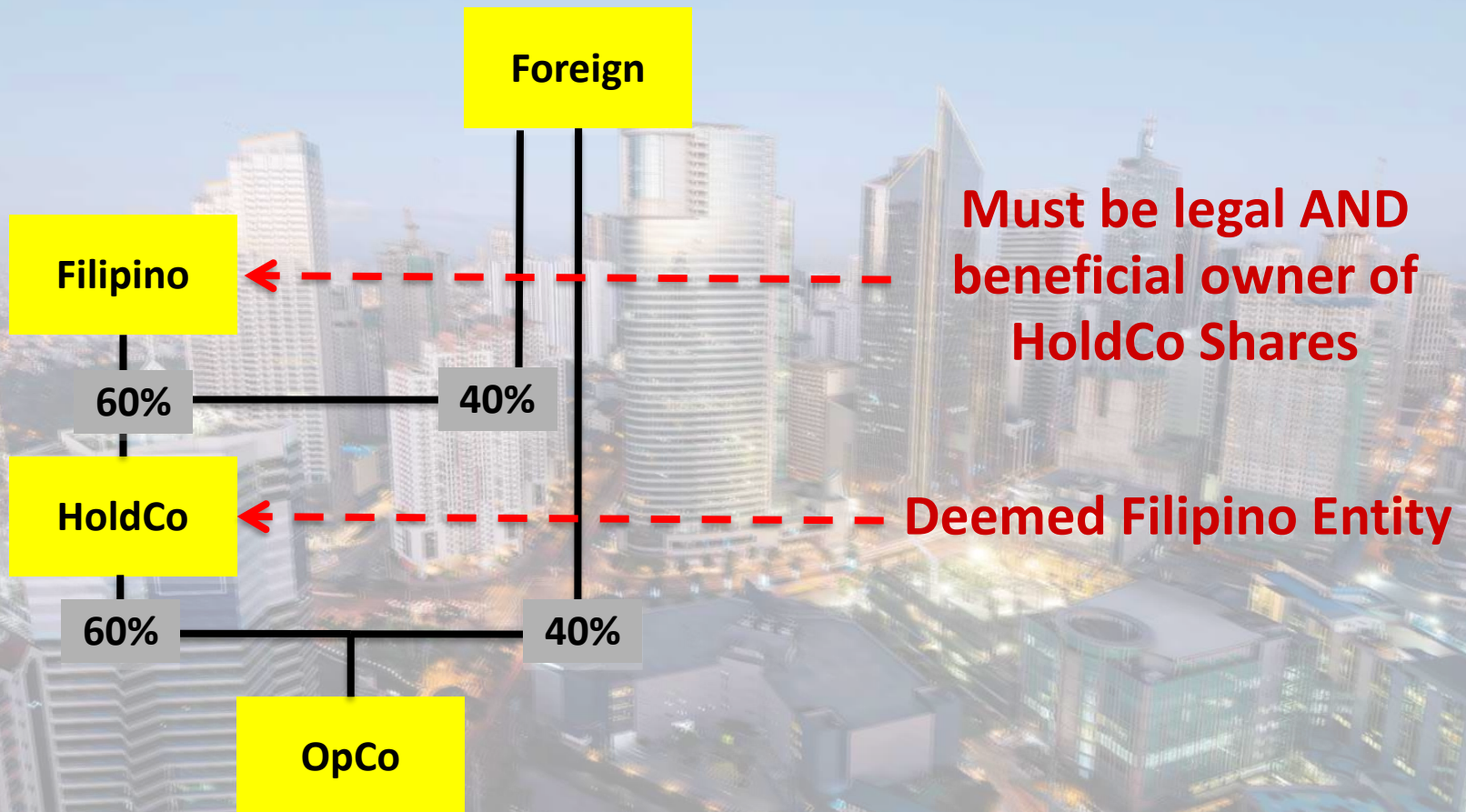
Investment Rules

Nationality Restrictions: Anti-Dummy Law

- Nominee relationships that hide beneficial owner in nationalized businesses: CRIMINAL
- Side Agreements where Filipino citizens promise to hold profits and transmit to foreign principals: UNENFORCEABLE → many stories of Filipinos reneging on dummy agreements
- Other rules:
 - Proportional board representation (e.g. if 60-40, then 3 out of 5 must be Filipinos)
 - Foreign nationals cannot be manager/officer; possibility to act as technical consultant with Dept of Justice permission

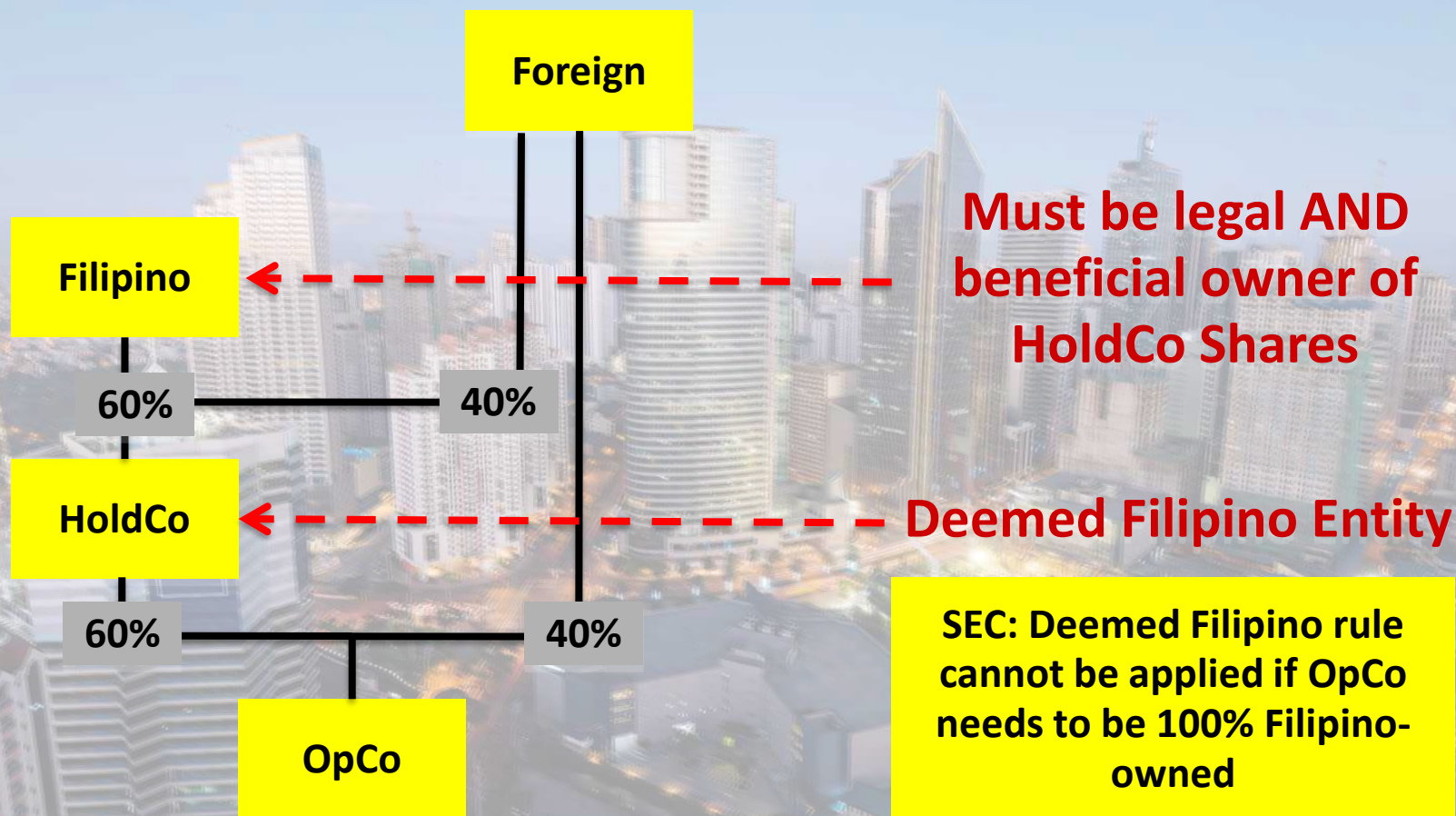
Investment Rules

Nationality Restrictions: FIA Structure



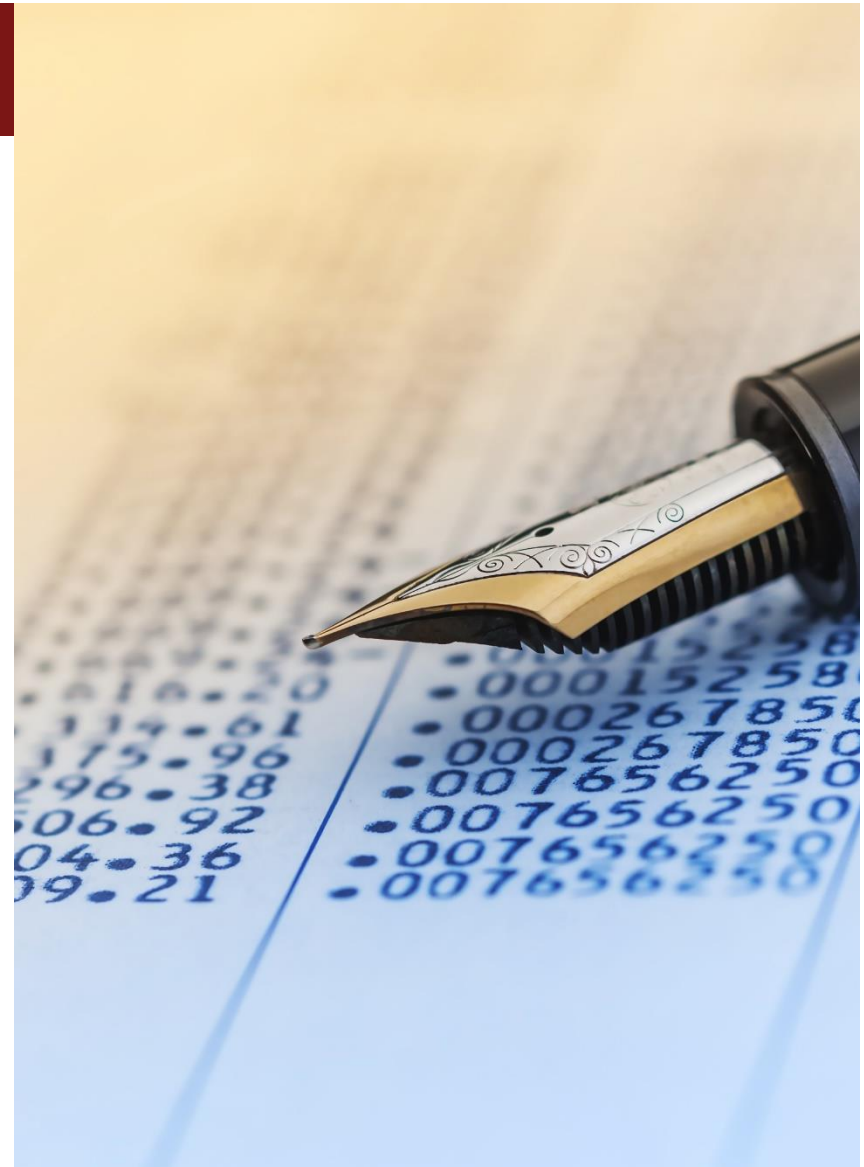
Investment Rules

Nationality Restrictions: FIA Structure



AGENDA

- **Investment Laws, Restrictions, Structures**
- **Philippine Corporations**
- Government Contracting
- Q&A



Philippine Corporations

The Corporation under Philippine Law

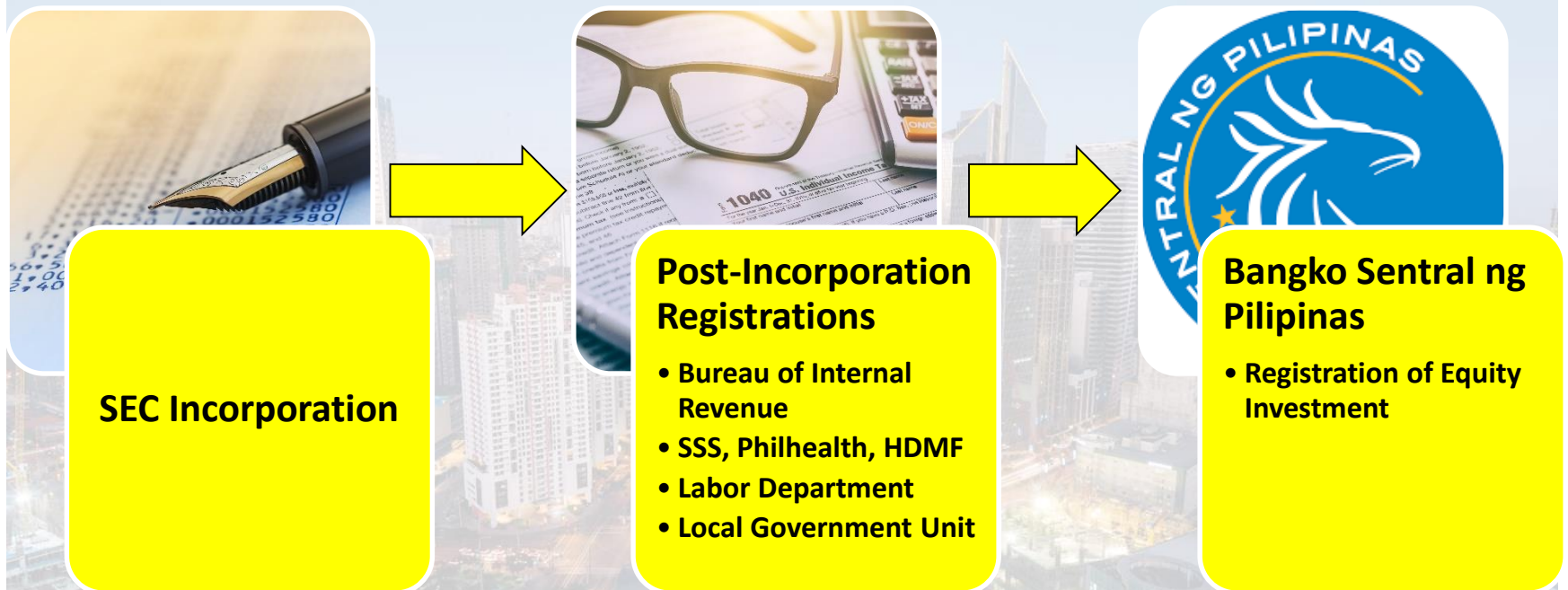
- Limited liability corporation – separate personality from shareholders
- Ownership divided into shares
- Corporate income tax: 25%
- Governed by a Board of Directors
- Board Members must have at least one (1) share

Philippine Corporations

Changes under Revised Corporation Code

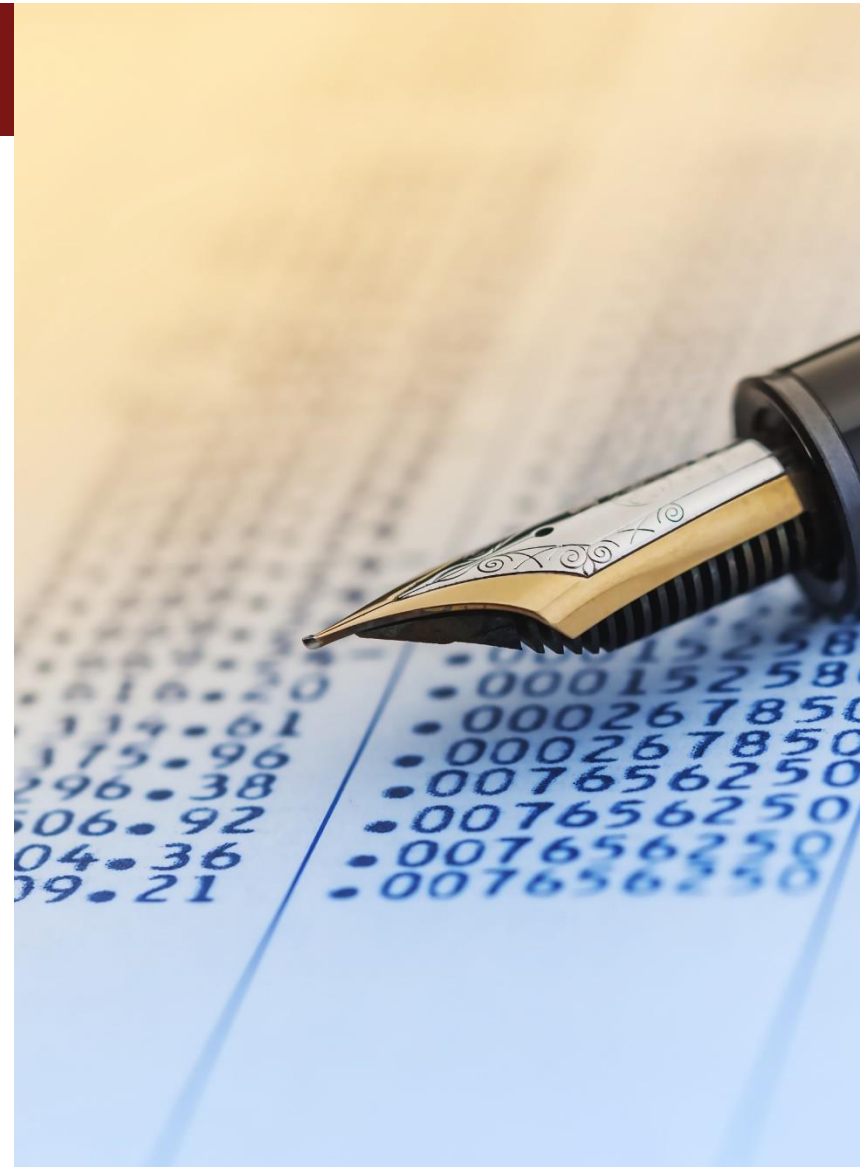
- One Person Corporation
- If 100% foreign owned: 99.99% corporate shareholder, 1 share for at least two (2) individuals – 2 individuals will be board members
- No more definite term – perpetual existence (used to be 50 years – renewable)
- Board may authorize videoconferencing, teleconferencing board and stockholder meetings
- Treasurer – resident of the Philippines

Philippine Corporations



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Government Contracting

Different Procurement Laws for Government Projects

- Government Procurement Reform Act (“**GPRA**”) for goods and services and infrastructure
- Build-Operate and Transfer Law (“**BOT Law**”)
- 2013 Revised Guidelines and Procedures for Entering into Joint Venture Agreements between the Government and Private Entities (the “**NEDA JV Guidelines**”)

The term “Goods” is broadly defined to cover “all items, supplies, materials and general support services, except consulting services and infrastructure projects, which may be needed in the transaction of public businesses or in the pursuit of any government undertaking, project or activity, whether in the nature of equipment, furniture, stationery, materials for construction, or personal property of any kind, including non-personal or contractual services such as the repair and maintenance of equipment and furniture, as well as trucking, hauling, janitorial, security, and related or analogous services, as well as procurement of materials and supplies provided by the procuring entity for such services.”

Government Contracting

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The term “Consulting Services” refers to “services for Infrastructure Projects and other types of projects or activities of the Government requiring adequate external technical and professional expertise that are beyond the capability and/or capacity of the government to undertake such as, but not limited to: (i) advisory and review services, (ii) pre-investment or feasibility studies, (iii) design, (iv) construction supervision, (v) management and related services, and (vi) other technical services or special studies.”

Government Contracting

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The term “*Infrastructure Projects* ” under GPRA:

(k) *Infrastructure Projects* – include the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, communication facilities, civil works components of information technology projects, irrigation, flood control and drainage, water supply, sanitation, sewerage and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings, hospital buildings and other related construction projects of the government. (Underscoring supplied.)

Government Contracting

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- 2013 Revised Guidelines and Procedures for Entering into Joint Venture Agreements between the Government and Private Entities (the “**NEDA JV Guidelines**”)

The term “*Infrastructure Projects*” under BOT Law and NEDA JV Guidelines:

“Private sector infrastructure or development projects – The general description of infrastructure or development projects normally financed and operated by the public sector but which will now be wholly or partly implemented by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be authorized by the appropriate agency/LGU pursuant to this Act. Such projects shall be undertaken through contractual arrangements as defined hereunder and such other variations as may be approved by the President of the Philippines.”

Government Contracting

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Government Contracting

Exceptions to GPRA rule on competitive bidding

- Negotiated Procurement
 - In cases of two (2) failed biddings;
 - In case of imminent danger to life or property during a state of calamity, or when there is urgency due to natural or man-made calamities, or where immediate action is necessary;
 - Takeover of contracts which has been terminated, and immediate action is necessary;
 - Where the subject contract is adjacent or contiguous to an ongoing infrastructure project, provided the original contract is the result of a competitive bidding (subject to various conditions);
 - Purchase of Goods made from another agency of the government.



Government Contracting

Exceptions to GPRA rule on competitive bidding

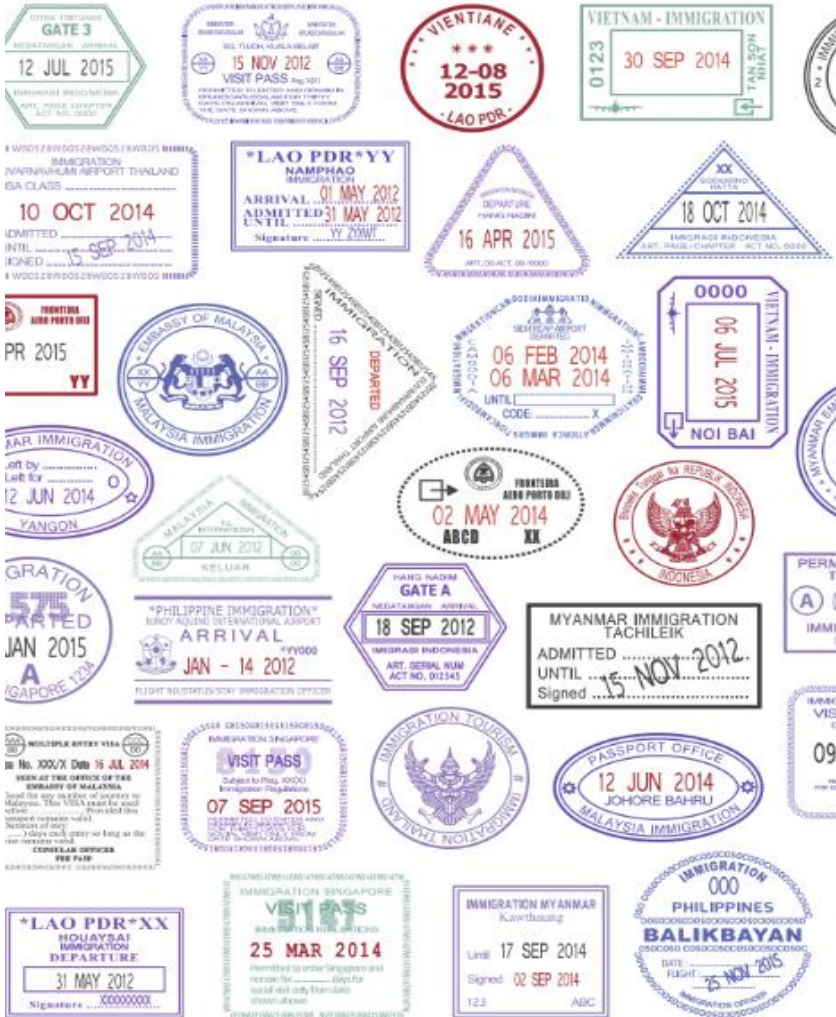
- Direct Contracting
 - Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, i.e., when patents, trade secrets and copyrights prohibit others from manufacturing the same item;
 - When the procurement of critical components from a specific manufacturer, supplier, or distributor is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of his contract; or
 - Those sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices and for which no suitable



Government Contracting

GPRA: Participation of Foreign Entity in Government Procurement Projects

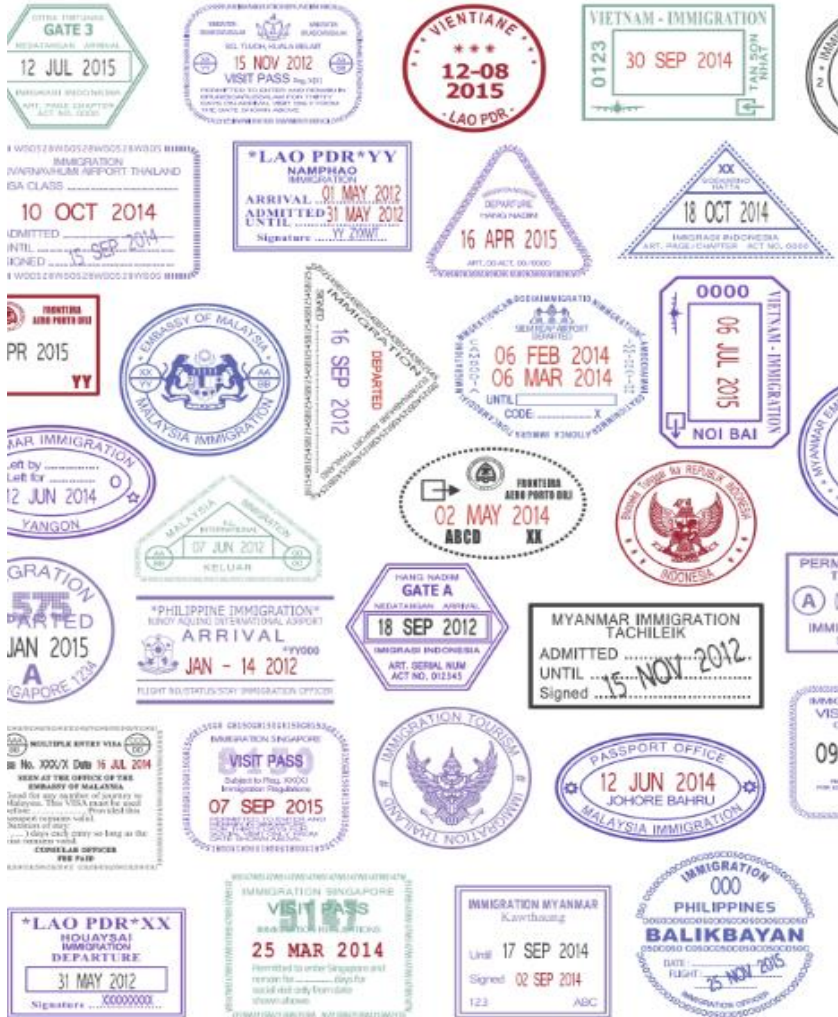
- **General Rule:** Republic Act No. 5183 requires that contracts for the supply of materials, goods, equipment and commodities entered with a GOCC, company, agency or municipal corporation must be awarded only to a contractor who is a Filipino citizen or a corporation at least sixty percent (60%) of the equity is owned by Filipinos.



Government Contracting

GPR: Preference to domestic goods – domestic supplier will win over foreign even if price is higher when:

- If a domestic supplier is able to obtain certification from DTI that its goods substantially composed of articles, materials, or supplies grown, produced, or manufactured in the Philippines
- Price of domestic supplier is not more than 15% more than foreign bidder's

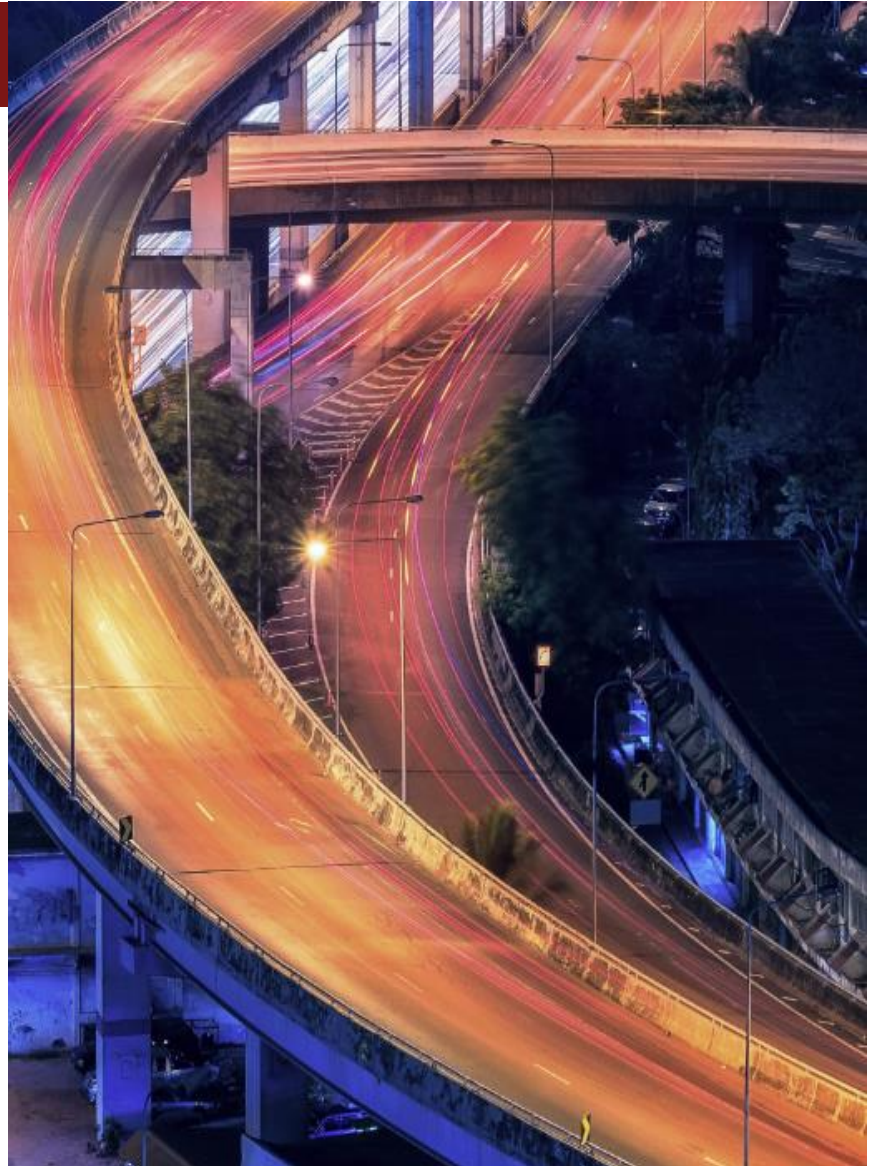


Government Contracting

Infrastructure Projects – Foreign participation

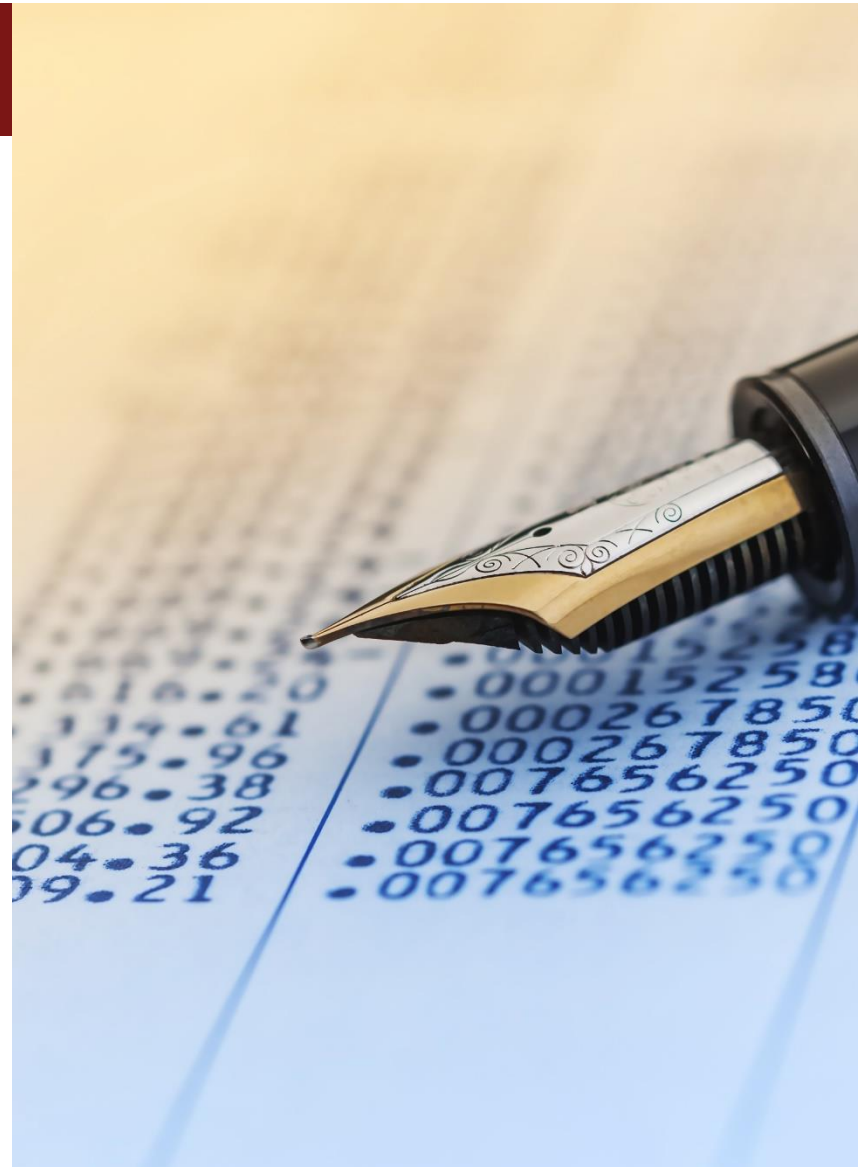
Foreign entities are allowed to participate in infrastructure projects that do not require a public utility franchise.

A “public utility” is defined as an entity that operates a business or facility for “public use”; i.e., it is not confined to privileged individuals, but is open to the indefinite public and as such all persons have the right to the use under the same circumstances. The 1987 Philippine Constitution requires that the franchise, certificate, or any other form of authorization for the operation of a public utility be granted only to Filipino citizens or to corporations or associations organized under the laws of the Philippines, at least sixty percent (60%) of whose capital is owned by Filipino citizens.



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Questions?

This material is for general information purposes only. It is not meant to substitute for direct advice of legal counsel and not designed to be an exhaustive exposition of the law.





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