

# Joint Foreign Chambers of the Philippines

American Chamber of Commerce of the Phils., Inc. ♦ Australian-New Zealand Chamber of Commerce (Phils.), Inc.  
Canadian Chamber of Commerce of the Phils., Inc. ♦ European Chamber of Commerce of the Phils., Inc.  
Japanese Chamber of Commerce & Industry of the Phils., Inc. ♦ Korean Chamber of Commerce of the Phils., Inc.  
Philippine Association of Multinational Companies Regional Headquarters, Inc.

June 1, 2011



AMERICAN



AUSTRALIAN-NEW ZEALAND



CANADIAN



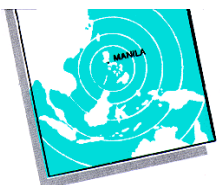
EUROPEAN



JAPANESE



KOREAN



PAMURI

**HON. CAYETANO W. PADERANGA, JR.**

Director General

National Economic and Development Authority

12 Saint Josemaria Escriva Drive

Ortigas Center, Pasig City

Dear Director General Paderanga:

The current effort to review the Implementing Rules and Regulations (IRR) of Republic Act No. 6957 as amended (the “BOT law”) is a welcome sign that the public-private partnership (PPP) policy of the Aquino administration is moving forward on an operational level. We hope this exercise will result in a more flexible framework within which foreign investors can participate in nation building.

It is with this in mind that we respectfully submit these proposed amendments to the IRR of the BOT law. The primary consideration in crafting the said amendments is that while the Constitution restricts foreign equity participation in public utilities to forty percent (40%), the restriction applies only to the operation of a public utility but not to any other component of the project, including ownership over its facilities. Otherwise stated, the Constitution does not impose any franchise requirement – and therefore no nationality restriction – in the ownership of facilities used to serve the public. The dichotomy between operation and ownership of public utilities has likewise been well settled in Philippine jurisprudence, and has been the basis for majority foreign ownership of infrastructure facilities such as the EDSA MRT III.

Indeed, foreign investment has a critical role to play in financing, in whole or in part, priority infrastructure and development projects that are vital to the country’s economic growth and future, especially where government and local private funding is insufficient to meet capital needs. It is in understanding this role, and working in a collaborative spirit, that we can spur foreign investor interest in the country and fully realize the economic growth potential that the PPP policy holds.

Best regards,

**AUSTEN CHAMBERLAIN**

President

American Chamber of Commerce  
of the Philippines, Inc.

**JOHN CASEY**

President

Australian-New Zealand Chamber  
of Commerce of the Philippines, Inc.



**JULIAN PAYNE**

President

Canadian Chamber of Commerce  
of the Philippines, Inc.



**HUBERT D'ABOVILLE**

President

European Chamber of Commerce  
of the Philippines, Inc.



**N OBUYA ICHIKI**

President

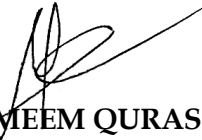
Japanese Chamber of Commerce  
& Industry of the Philippines, Inc.



**EUN GAP CHANG**

President

Korean Chamber of Commerce  
of the Philippines, Inc.



**SHAMEEM QURASHI**

President

Philippine Association of Multinational Companies  
Regional Headquarters, Inc.

Cc:

Secretary Gregory L. Domingo, DTI

Secretary Jose P. de Jesus, DOTC

Secretary Rogelio L. Singson, DPWH

Undersecretary John Philip A. Sevilla, DOF

Deputy Director General Rolando G. Tungpalan, NEDA

Executive Director Philamer C. Torio, PPP Center

# PROPOSED AMENDMENTS TO THE IMPLEMENTING RULES AND REGULATIONS OF R.A. 6957

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Inserted items: ALL CAPS UNDERLINED

## Sec. 2 Definition of Terms

(k) Facility Operator – Refers to a company registered with the Securities and Exchange Commission (SEC) which may or may not be the Project Proponent, and which is responsible for all aspects of operation ~~and maintenance~~ of the infrastructure or development facility, including but not limited to the collection of tolls, fees, rentals or charges from facility users; provided, that in case the facility requires a public utility Franchise, the Facility Operator shall, no later than the commencement of operation of the facility, comply with the nationality and ownership requirements under the Constitution and other applicable laws and jurisprudence.

## Sec. 5.4 Pre-qualification requirements

To pre-qualify, a prospective Project Proponent must comply with the following requirements:

a. Legal Requirements

- (i) WHERE AN INFRASTRUCTURE OR DEVELOPMENT PROJECT REQUIRES A PUBLIC UTILITY FRANCHISE FOR ITS OPERATION, AND THE PROJECT PROPONENT AND FACILITY OPERATOR ARE ONE AND THE SAME ENTITY, THE PROJECT PROPONENT MUST BE FILIPINO OR, IF A CORPORATION, MUST BE DULY REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION (SEC) AND OWNED UP TO AT LEAST SIXTY PERCENT (60%) BY FILIPINOS.

~~For projects to be implemented under the BOT scheme whose operations require a public utility Franchise, the prospective Project Proponent and the Facility Operator must be Filipinos or, if corporations, must be duly registered with the Securities and Exchange Commission (SEC) and owned up to at least sixty percent (60%) by Filipinos. For projects other than these, the prospective Project Proponent shall comply with the nationality and ownership requirements under the Constitution and other applicable laws.~~

- (ii) WHERE AN INFRASTRUCTURE OR DEVELOPMENT PROJECT REQUIRES A PUBLIC UTILITY FRANCHISE FOR ITS OPERATION BUT THE PROJECT PROPONENT AND FACILITY OPERATOR ARE TWO SEPARATE AND INDEPENDENT ENTITIES, THE PROJECT PROPONENT MAY BE FILIPINO OR UP TO ONE HUNDRED PERCENT (100%) FOREIGN-OWNED; PROVIDED,

THAT THE FACILITY OPERATOR MUST BE FILIPINO OR, IF A CORPORATION, MUST BE DULY REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION (SEC) AND OWNED UP TO AT LEAST SIXTY PERCENT (60%) BY FILIPINOS.

~~For projects to be implemented through a scheme other than the BOT and requiring a public utility Franchise, the Facility Operator, must be a Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission (SEC) and owned up to at least sixty percent (60%) by Filipinos.~~

~~Consistent with existing laws, the Project Proponent may be the operator but it may be allowed to enter into a management contract with another entity, who may be 100% foreign owned, for the day to day operation of the facility, provided that the Project Proponent will assume all attendant liabilities of the operator.~~

(iii) WHERE AN INFRASTRUCTURE OR DEVELOPMENT PROJECT DOES NOT REQUIRE A PUBLIC UTILITY FRANCHISE FOR ITS OPERATION, THE PROJECT PROPONENT AND THE FACILITY OPERATOR MAY BE FILIPINO OR UP TO ONE HUNDRED PERCENT (100%) FOREIGN-OWNED.

(iv) ~~(iii)~~ In case the prospective Project Proponent is a joint venture or consortium, the members or participants thereof shall already be disclosed during the pre-qualification stage and shall undergo pre-qualification. Further, the members or participants thereof shall execute an undertaking in favor of the Agency/LGU that if awarded the contract, they shall bind themselves to be jointly and severally liable for the obligations of the Project Proponent under the contract.

However if members of the joint venture or consortium organize themselves as a corporation registered under Philippine laws, such corporation shall execute such an undertaking binding itself to be liable for the obligations of the Project Proponent under the contract, which shall substitute or be in lieu of the undertaking submitted by the members or participants of the joint venture or consortium.

(iv) ~~For projects to be operated by the Project Proponent itself or owned by the Project Proponent but operated through a Facility Operator where operations of the facility does not require a public utility Franchise, the Project Proponent of the Facility Operator may be Filipino or foreign-owned.~~

**PROPOSED AMENDMENTS TO THE IMPLEMENTING RULES AND REGULATIONS OF R.A. 6957**

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- (v) For purposes of pre-qualification, the Contractor proposed to be engaged by the Project Proponent to undertake the Construction of the project must be duly licensed and accredited by the PCAB, in the case of a Filipino contractor, or by an equivalent accreditation institution in the contractor's country of origin, in the case of a foreign Contractor. Once the Project Proponent is awarded the project, such foreign Contractor must secure a license and accreditation from the PCAB.

b. xxx