In 2013, after several decades of implementing measures to solve its economic problems, the Philippines attained an investment grade rating from the big three credit rating agencies. The investment grade rating and the fast pace of economic development in the Philippines should have attracted a lot of foreign direct investment (FDI).

However, Philippine laws’ restrictions on foreign ownership of land, educational institutions, public utilities and mass media, to name a few, continued to hinder the growth of such investment. Many foreign ownership restrictions on certain business activities remain in the Constitution and statutes. For example, the ownership of private lands is exclusively reserved for Philippine citizens and corporations with at least 60% of its capital owned by Filipino citizens. The exploitation of natural resources, including all modes of potential energy, is subject to the same nationality requirement. This limited foreign equity investment in renewable energy development, such as hydro, geothermal, wind and solar power generation.

The lack of infrastructure prompted the Philippine government to encourage private sector investment (both local and foreign) in infrastructure through a public private partnership programme, a new term for a build-operate-transfer type arrangement. Unfortunately, most of the much needed infrastructure, such as mass transit, toll roads and airports, fall under the rubric of public utilities, the operation of which is also subject to the 60:40 nationality restriction under the Constitution. This constitutional restriction effectively limited equity participation of foreigners to a minority position.

Moreover, under the Foreign Investments Act (FIA), certain business activities were added to the list of nationality restrictions through what are referred to as the Negative List A and Negative List B.

The Government recognised the need to remove or at least relax some of these restrictions. Administrative and legislative efforts were made to liberalise a few foreign ownership restrictions and foreign currency laws. Nevertheless, Philippine laws that impose nationality restrictions basically remain unchanged.

To complicate matters, the computation of the 60:40 capital requirement was far from simple. While the FIA and the Securities and Exchange Commission provided guidance on the matter, there is a dearth of judicial precedent that could serve as a reliable guide for structuring investments.

Other Asian countries have nationality restrictions but the Philippines continues to be one of the few with a very restrictive policy on foreign ownership of many businesses. If the present economic growth is to be sustained, the legal framework that imposes nationality restrictions on business activities must be reexamined.

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