OPENING FOREIGN INVESTMENT AND FLOODGATES: A CRITICAL ANALYSIS OF REMOVING BARRIERS TO FULL FOREIGN INVESTMENT IN THE PHILIPPINE RENEWABLE ENERGY INDUSTRY*

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ABSTRACT

The renewable energy ("RE") sector's liberalization in 2022 raises significant legal questions on compliance with constitutional restrictions on foreign ownership of natural resources. This Article examines the legal conflict between the Department of Energy's (DOE) November 2022 Circular, which lifted the 40% foreign ownership cap for certain RE projects, and the constitutional limitations on foreign equity in the exploitation, development, and use ("EDU") of natural resources. It critiques the Department of Justice's (DOJ) 2022 Opinion, which excluded hydro and ocean ("HO") energy from the constitutional definition of "natural resources," arguing that inland waters and territorial seas—including HO resources—should remain subject to the foreign equity limitation. The Article explores the implications of this misinterpretation on foreign investment and the development of the RE sector, offering recommendations to address these legal inconsistencies.

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I. INTRODUCTION

The Philippines is a country bedeviled by major energy insecurity challenges. Despite the strong imperatives and massive potential for renewable energy ("RE") resource development, its RE industry suffers from declining investment—attributable, in part, to the ban on foreign ownership of more than 40% equity in RE projects.

To mobilize foreign investment in renewables, the Department of Energy ("DOE") issued Department Circular No. DC2022-11-0034[1] ("Circular") in November 2022, effectively lifting this ban. This Circular was

[1] Sec'y of Energy (DOE) Circ. No. 2022-11-0034 [hereinafter "DOE Circular"] (Nov. 15, 2022). Prescribing Amendments to Section 19 of Department Circular No. DC2009-05-2008 Titled, Rules and Regulations Implementing Republic Act No. 9513, Otherwise Known as "The Renewable Energy Act of 2008."

based on Department of Justice ("DOJ") Opinion No. 21, Series of 2022,[2] dated September 29, 2022 ("Opinion"), which concluded that solar, hydro, ocean, and wind ("SHOW") energy sources are not considered the "natural resources" or "forces of potential energy" subject to the constitutionally established 40% cap on foreign equity.

This Article will claim that while the term "natural resources" indeed excludes solar and wind resources, it does—contrary to the DOJ's contention—include hydro and ocean ("HO") resources within the country's inland bodies and territorial seas, consequently making their exploitation, development, and use ("EDU") subject to the 40% foreign equity restriction. Thus, the full, unqualified, and all-encompassing liberalization by the DOE directly violates the 1987 Constitution.

Initially, the Philippine energy landscape will be examined, followed by a discussion tracing the limitation from its origin to its abolition. After showing that the DOJ's erroneous conclusion resulted from a misapplication of basic principles of constitutional and statutory construction, the Article will then demonstrate how an application in line with these principles results in the classification of HO resources within Philippine inland and territorial sea waters as "natural resources." The nuances of the EDU of Philippine waters will then be examined, in light of jurisprudence exempting a particular phase of hydropower projects from the foreign equity rule. From here, the technical dimensions of HO projects will be studied, establishing the inherent impossibility for some HO technologies to undergo the step which, based on jurisprudence, would convert such HO resources into a commodity ownable by foreigners. This limitation creates a direct conflict between the foreign equity participation for certain HO projects allowed by the Constitution, on one hand, and that allowed by the Opinion and the Circular on the other. Finally, the paper discusses the implications of such issues and provides recommendations for the way forward.

II. THE PHILIPPINE CASE FOR RENEWABLES

Now more than ever, an energy crisis looms over the Philippines.[3] Because of its scattered geography and heavy reliance on imported coal and

[2] Sec'y of Justice (DOJ) Op. No. 21 [hereinafter "First DOJ Opinion"] (Sept. 29, 2022), slip op.

[3] Danielle Fallin, Karen Lee, & Gregory Poling, *Decarbonization in Southeast Asia*, CTR. FOR STRATEGIC AND INT'L STUD. (2023), *at* https://www.csis.org/analysis/clean-energy-and-decarbonization-southeast-asia-overview-obstacles-and-opportunities.

diesel, its electricity rates are among the highest in Asia and the world, with surging energy demand and limited resources.[4] Its offshore Malampaya gas reserve—from which roughly 20% of its electricity supply is sourced—will be totally depleted by 2027.[5] Recent countrywide energy shortages, caused by unplanned outages at five aging fossil fuel plants, have resulted in nationwide brownouts and further raised electricity prices.[6] Domestic energy demand is projected to double between 2009 to 2030, with domestic supply potentially being unable to meet this demand.[7]

Coupled with the global energy crisis,[8] these major supply challenges have pushed the pursuit of energy independence to the forefront of domestic policy development.[9] Attaining this will require the EDU of the Philippines' indigenous renewable energy or RE resources.[10] Thus, the government has turned its eye to RE as a solution for increasing domestic energy production, targeting a 35% share of renewables in the power generation mix by 2030 and 50% by 2040.[11]

Despite these strong imperatives to scale up RE deployment,[12] power generation from RE sources has been declining.[13] The share of RE in the country's power generation mix declined from 34% in 2008 to only 21% in 2021.[14] Currently, the Philippines' power mix consists of 55% coal, 22%

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[4] Efren II R. Resurreccion, *Finding an Oft-Forgotten Solution to the Persistent Energy Problem: An Introduction to the Philippine Energy Efficiency and Conservation Law*, 93 PHIL. L.J. 1136, 1137 (2020).

[5] Fallin, Lee, & Poling, *supra* note 3.

[6] Sam Reynolds, *In the Philippines, Coals Demised Makes Way for a Renewable Energy Boom,* INST. FOR ENERGY ECON. AND FIN. ANALYSIS (2021), *at* https://ieefa.org/resources/ieefa-philippines-coals-demise-makes-way-renewable-energy-boom.

[7] Resurreccion, *supra* note 4.

[8] Nick Butler, *The Impact of the Ukraine War on Global Markets*, CTR. FOR EUR. REFORM (2022), *at* https://www.cer.eu/insights/impact-ukraine-war-global-energy-markets.

[9] INT'L RENEW. ENERGY AGENCY, RENEWABLES READINESS ASSESSMENT: THE PHILIPPINES (2017), *at* https://www.irena.org/publications/2017/Mar/Renewables-Readiness-Assessment-The-Philippines.

[10] Juan Arturo Iluminado C. de Castro, *The Philippine Renewable Energy Act of 2008: Law, Policy, and Promise of Renewables in the Philippines*, 54 ATENEO L.J. 343 (2009).

[11] Melanie Ricardo, *Drivers, Roadblocks and Status Quo of Renewable Energy Development in the Philippines: A Literature Review*, 12 J. FUNDAM. RENEW. ENERGY & APPL. 1, 3 (2022).

[12] *Id.*

[13] Fallin, Lee, & Poling, *supra* note 3.

[14] Alexander Chipman Koty, *Philippines Opens Renewable Energy to Full Foreign Ownership*. ASEAN BRIEFING (2023), *at* www.aseanbriefing.com/news/philippines-opens-renewable-energy-to-full-foreign-ownership.

oil and gas, 11% geothermal, 7% hydro, and 4% wind and solar.[15] Clearly, RE still lags behind traditional sources of power.

A major reason for this lukewarm adoption of RE technologies is the partial nationalization of the EDU of natural resources in the Philippines, which the 1987 Constitution reserves exclusively for Filipino citizens and at least 60% Filipino-owned corporations or associations.[16] Prior to November 2022, RE resources had been interpreted as among these "natural resources," the EDU of which is subject to this constitutional limitation.[17] This barred aliens from owning more than 40% of projects for the EDU of renewable energy resources,[18] disallowing them from acquiring control of the business enterprise and unfavorably affecting their interests.[19] It hence served as an inexpedient hurdle to foreign investment,[20] and in turn, a major investment obstacle to RE project development.[21]

Cognizant of these impediments, the DOE, in November 2022, issued its Circular No. 2022-11-0034, which effectively lifted this foreign equity restriction for the EDU of SHOW energy sources. As a result, full foreign ownership of projects for the EDU of SHOW energies is now permitted in the Philippines.[22]

III. THE FOREIGN EQUITY RESTRICTION ON THE EDU OF PHILIPPINE RENEWABLE ENERGY RESOURCES

A. 1987 Philippine Constitution

The restriction on foreign equity participation in the EDU of natural resources traces its roots to the fundamental law of the land. Section 2,

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[15] Fallin, Lee, & Poling, *supra* note 3.

[16] Artemio V. Panganiban, *Aliens May Explore, Develop, Utilize RE*, INQUIRER.NET, (2022), *at* https://opinion.inquirer.net/158303/aliens-may-explore-develop-utilize-re.

[17] Baker McKenzie, *Philippines: Renewable Energy Sector is Now Open to Full Foreign Ownership*, BAKER MCKENZIE INSIGHTS, *at* insightplus.bakermckenzie.com/bm/projects/philippines-renewable-energy-sector-is-now-open-to-full-foreign-ownership.

[18] Panganiban, *supra* note 16.

[19] Joselito John G. Blando, et al., *The Philippine Foreign Investment Climate and the Multilateral Investment Guarantee Agency: The Continuing Struggle towards Economic Development*, 67 PHIL. L.J. 190, 258 (1992).

[20] Anselmo Reyes, *Foreign Direct Investment in the Philippines and the Pitfalls of Economic Nationalism*, 18 J. OF WORLD INVEST. & TRADE 1025, 1035 (2017).

[21] Ricardo, *supra* note 11, at 3.

[22] Baker McKenzie, *supra* note 17.

Article XII of the 1987 Philippine Constitution (hereinafter referred to as the "limitation" or "constitutional limitation") provides that the EDU of natural resources may be undertaken only by Filipino citizens, or corporations or associations at least 60% of which are Filipino-owned:

> 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. […] 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[.][23]

Thus, the EDU of "natural resources" and "all forces of potential energy" is prohibited for corporations with foreign ownership beyond 40%.[24] The foreign equity restriction with respect to RE resource exploitation was based on the interpretation that solar, hydro, ocean, and wind energy sources were considered as "natural resources,"[25] placing RE exploitation within the ambit of the constitutional limitation.

B. Renewable Energy Act of 2008

The Renewable Energy Act of 2008 ("RE Act")[26] is the country's main legislation on RE[27] which establishes the legal and institutional framework for the accelerated development of geothermal, hydropower, solar, biomass, wind and ocean energy technologies.[28] It defines "RE resources" as "energy resources that do not have an upper limit on the total quantity to be used […] includ[ing], among others, biomass, solar, wind, geothermal, ocean energy, and hydropower conforming with internationally accepted norms and standards on dams, and other emerging renewable energy technologies."[29]

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[23] CONST. art. XII, § 2.

[24] Panganiban, *supra* note 16.

[25] Baker McKenzie, *supra* note 17.

[26] Rep. Act No. 9513 [hereinafter "RE Act"] (2008).

[27] Ricardo, *supra* note 11, at 1.

[28] Rommel J. Casis, *Constructing the Philippine Climate Change Legal Framework,* 83 PHIL. L.J. 1011, 1054 (2009).

[29] RE Act, § 6(uu).

Notably, the RE Act does not classify RE resources as "natural resources,"[30] nor does it impose or mention any nationality requirement for developers of RE resources.[31]

C. DOE Department Circular No. DC2009-05-0008

The DOE, as the lead agency for the implementation of the RE Act,[32] issued the RE Act Implementing Rules and Regulations ("IRR") through Department Circular No. DC2009-05-0008,[33] and it was through this IRR that the nationality restrictions for the development of RE resources in the Philippines were introduced.[34] The IRR provided that the State owns "all forces of potential energy," which includes energy sourced from "water, marine current and wind; thermal energy from solar, ocean, geothermal and biomass." It likewise stated that the State may enter into RE Service/Operating Contracts with foreign RE developers, subject to the constitutional limitation:

> SEC. 19. Renewable Energy Service/ Operating Contract
>
> A. State Ownership of All Forces of Potential Energy
>
> *All forces of potential energy and other natural resources are owned by the State and shall not be alienated. These include potential energy such as kinetic energy from water, marine current and wind; thermal energy from solar, ocean, geothermal and biomass.*
>
> B. Parties to a Service/Operating Contract
>
> The exploration, development, production, 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 co-production sharing agreements with Filipino citizens or corporations or associations

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[30] Pedro Maniego, Jr., *Owning the Sun,* INST. FOR CLIMATE AND SUSTAINABLE CITIES (2020), *at* https://icsc.ngo/owning-the-sun/.

[31] Patricia O. Ko, *Renewable Energy Projects Open to Full Foreign Ownership*, NAGASHIMA OHNO & TSUNEMATSU (2022) *at* https://www.noandt.com/en/publications/publication20221221-2/.

[32] Rep. Act No. 9513, § 5.

[33] DOE Circ. No. DC2009-05-02008 [hereinafter "RE Act IRR"] (May 25, 2009). *See* Rep. Act No. 9513, § 9.

[34] Ko, *supra* note 31.

> at least sixty percent (60%) of whose capital is owned by Filipinos. *Foreign RE Developers may also be allowed to undertake RE development through an RE Service/Operating Contract with the government, subject to Article XII, Section 2 of the Philippine Constitution.*[35]

Section 19 of the IRR established the rule that only Filipino citizens, or at least 60% Filipino-owned corporations or associations, could undertake the EDU of SHOW energies,[36] as it was this IRR which classified water, marine current and wind, thermal energy from solar, ocean, geothermal, and biomass as forces of potential energy or FPEs owned by the State.[37]

D. DOE Circular No. 2022-11-0034 ("Circular")

The DOE issued Circular No. 2022-11-0034 ("Circular"), which amended Section 19 of the RE Act IRR by removing the foreign ownership restriction, effectively allowing full foreign ownership for the EDU of SHOW energies in the Philippines.[38]

Section 19 of the IRR now reads:

> SEC. 19. Renewable Energy Service/Operating Contract
>
> A. *[deleted]*
>
> B. Parties to a Service/Operating Contract
>
> *The State* may directly undertake the exploration, development, production and utilization of RE resources, or it *may enter into RE Service or Operating Contracts with Filipino and/or foreign citizens or Filipino and/or foreign-owned corporations or associations.*[39]

According to the DOE, this amendment was undertaken in accordance with a DOJ Opinion, where the DOJ concluded that SHOW energies are neither "natural resources" nor "forces of potential energy" as contemplated in Section 2, Article XII of the Constitution.[40] Consequently, said the DOJ, the EDU of solar, hydro, ocean, and wind energy sources are not subject to the constitutional foreign equity limitation.[41] Such Opinion

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[35] RE Act IRR, § 19. (Emphasis added.)
[36] Koty, *supra* note 14.
[37] Maniego, Jr., *supra* note 30.
[38] Baker McKenzie, *supra* note 17.
[39] DOE Circular, § 19. (Emphasis supplied.)
[40] First DOJ Opinion, slip op. at 6.
[41] *Id.*

was, in turn, rendered pursuant to the DOE's requests it had submitted to the DOJ since 2022.[42]

IV. ANALYSIS

This section uncovers the Opinion's infirmities and the erroneous conclusion resulting therefrom. It then examines how the application of the correct principles ultimately gives rise to the conflict between the Constitution and the Circular with respect to a specific class of hydro and ocean energy projects. The implications of this conflict and recommendations for their resolution are then presented.

A. DOJ Opinion No. 21, Series of 2022

Ultimately, the DOJ concluded that Section 2, Article XII of the Constitution does not apply to the EDU of SHOW energy resources:

> [C]onsidering that solar, wind, hydro and ocean or tidal energy sources are beyond the ambit of the term "natural resources" in Section 2, Article XII of the Constitution and that the term "all forces of potential energy" is to be understood in its technical sense, which necessarily excludes kinetic energy, […] the EDU of solar, wind, hydro and ocean or tidal energy should not be subject to the forty percent (40%) foreign equity limitation under Section 2.[43]

The DOJ's arguments can be broadly categorized into two. First, SHOW energy sources are not covered by the term "natural resources" in Section 2, Article XII; and second, SHOW energies are kinetic, not potential, energy, and are hence likewise not covered by the term "all forces of potential energy" in the same provision. It is the first of these two—that relating to natural resources—on which this analysis shall focus.

1. SHOW Energies are not "Natural Resources"

Under the DOJ Opinion, SHOW energies are not considered "natural resources" because they are not (1) appropriable, and (2) exhaustible.[44] The DOJ construes the term "natural resources" to apply only

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[42] Ko, *supra* note 31.
[43] First DOJ Opinion, slip op. at 6.
[44] *Id.* at 3–4.

to things which are susceptible to appropriation and, by applying the statutory construction principles of *noscitur a sociis* and *ejusdem generis*, pertains only to "those belonging to the same class or kind, or having the same characteristics or qualities as those included in the enumeration it belongs."[45] The DOJ further explained that the enumeration of the term "natural resources"—"lands, fisheries, forests and wildlife—consists of things that are all susceptible to appropriation. It concluded that this enumeration implies that "natural resources" could not include *res communes* (common things that belong to all and not subject to appropriation), such as the sun, the wind, the ocean, or the waters beyond the territorial sea of the Philippines.[46]

The DOJ Opinion further concluded that SHOW energies "are considered inexhaustible and could not be included within the ambit of the term 'natural resources'" in the Constitution, citing records of the Constitutional Commission which "centered on the strong concern and fear against fully opening to foreign exploitation the natural resources […] as it may lead to the possibility of running out of these limited and exhaustible resources." Commissioner Davide—arguing for a cap on foreign ownership of projects for the EDU of natural resources—warned that "our natural resources are depleting; our population is increasing, [and] if we allow these aliens to exploit our natural resources, there will be no more natural resources for the next generation of Filipinos."[47] Consequently, this "compelling reason" for the imposition of the foreign ownership limits "finds no application to inexhaustible renewable energy sources."[48]

2. Rule on Appropriation of Water Direct from the Source for Power Generation Still Applies

However, the DOJ clarified that the Opinion did not alter the rule on directly sourcing water from the source for power generation purposes.[49] Under the Water Code[50] and jurisprudence, water is considered "natural resources" within the ambit of Section 2, Article XII, and if harvested directly from the source, may be done only by Filipino citizens or by at least 60% Filipino-owned entities. The Opinion reads:

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[45] *Id.*
[46] *Id.*
[47] *Id. citing* 2 RECORD CONST. COMM'N 57, 359 (Aug. 15, 1986).
[48] *Id.*
[49] Baker McKenzie, *supra* note 17.
[50] Pres. Decree No. 1067 [hereinafter "WATER CODE"] (1976).

> [T]he Water Code [and] *IDEALS, Inc. v. PSALM* continue to prevail with respect to limiting to Filipino citizens and juridical persons the appropriation of waters, direct from the source, for power generation. In the *IDEALS Inc.* case, the Supreme Court ruled that water is within the meaning of natural resources in [the] Constitution and if the same is harvested directly from the source, only Filipino citizens or juridical persons can be validly allowed to do so. Article 10 (d) of the Water Code of the Philippines includes power generation as a means of appropriating water, and […] only Filipino citizens and qualified juridical persons may appropriate water. Thus, the use of hydro and ocean or tidal energy sources, if the same is directly harvested from the source by foreign nationals or entities, may not be allowed.[51]

Roughly a month after this Opinion, the DOJ issued Opinion No. 23 dated October 24, 2022 ("Second Opinion")[52] where it reiterated its position and commented further on the matter of appropriation of waters. The DOJ added:

> We however clarify […] that with respect to hydropower […], the Water Code […] and *IDEALS Inc. v. PSALM* continue to prevail […]. Generation of hydroelectric power entails the use of a dam or a diversion structure to alter the flow of […] any inland body of water to generate kinetic energy […]. Under the Water Code, only Filipino citizens and entities can directly appropriate such waters, such as by the use of a dam, for purposes of power generation. […] However, once water passes through the dam and rushes downstream, the energy produced by it is considered kinetic energy, which […] is not within the ambit of the term "natural resources." […] The EDU of such kinetic energy […] is not covered by the Constitutional limitation […].[53]

Thus, with respect to hydro and ocean energy, only Filipino citizens or 60% Filipino-owned corporations or associations may harvest water directly from the source. However, after such waters pass through a dam, the waters are converted to kinetic energy which, under the first DOJ Opinion, are considered neither "natural resources" nor "FPEs."

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[51] First DOJ Opinion.

[52] DOJ Op. No. 23 [hereinafter 'Second Opinion"] (Oct. 24, 2022), slip op.

[53] Second DOJ Opinion, slip op. at 2–3.

3. Critique of the DOJ Opinion

Under its interpretive rules, the DOJ created a two-part test—(1) appropriability and (2) exhaustibility—to determine what qualifies as a "natural resource" under. Section 2, Article XII.

On appropriability, the DOJ held that only items that the State can own and acquire are considered as falling within the term "natural resources," thus excluding non-appropriable things, such as the sun, the wind, and the ocean. To arrive at this conclusion, the DOJ applied two canons of statutory construction: *nosicitur a sociis* (interpreting an ambiguous term by considering the surrounding words in which it is found) and *ejusdem generis* (construing a general term which follows an enumeration of particular and specific words of the same class, the general word or phrase is to be construed to include only things of the same kind).[54]

Although "natural resources" must be limited to appropriable properties, the DOJ's reliance on these two canons is misplaced. *Noscitur a sociis* applies only when a word or phrase is (1) in itself ambiguous, or (2) when different meanings of the word are equally possible.[55] In other words, it applies only if a term "is obscure or of doubtful meaning, taken by itself,"[56] or when a word has more than one meaning, "i.e., limited and broad, ordinary and technical,"[57], in which case its accompanying words may be referred to in order to remove the obscurity or doubt.[58]

Black's Law Dictionary defines *ambiguity* as "doubtfulness; doubleness of meaning; indistinctness or uncertainty of meaning of an expression used in a written instrument."[59] A law is ambiguous if it admits of two or more possible meanings.[60] Here, the term "natural resources" is neither clouded by doubt, uncertainty, nor a multiplicity of meanings. On the contrary, it is unassailably clear and could only refer to one thing. The classification of "natural resources" based on their exhaustibility does not

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[54] First DOJ Opinion, slip op. at 3–4.

[55] *See* Co Kim Cham v. Tan Keh, 75 Phil. 113 (1945); Aisporna v. Ct. of Appeals, G.R. No. L-39419, 113 SCRA 459, Apr. 12, 1982; Chavez v. Jud. & Bar Council, 691 Phil. 173 (2012).

[56] Luzon Stevedoring Co. v. Trinidad, 43 Phil. 803 (1922).

[57] RUBEN E. AGPALO, STATUTORY CONSTRUCTION (6th ed. 2009) 303, *citing* Santulan v. Exec. Sec'y, G.R. No. 28021, 80 SCRA 548, Dec. 15, 1977.

[58] *Id.*

[59] Ambiguity, BLACK'S LAW DICTIONARY (2nd ed. 1910).

[60] Rizal Comm. Banking Corp. v. IAC, 378 Phil. 10, 22 (1999).

give the term two or more possible meanings; rather, both classifications—exhaustible and inexhaustible—are subsumed within the term.

As stated by the Supreme Court, "the plain, clear, and unambiguous language of the constitution should be construed in that sense, and should not be given a construction that changes such meaning."[61] As much as possible, the words used in constitutional provisions are to be given their ordinary meaning, except where technical terms are employed, in which case their technical meaning prevails.[62] "The wordings of a constitutional provision do not have a narrow or contracted meaning, but are used in a broad sense."[63]

The phrase which succeeds the entire enumeration—"are owned by the State"—qualifies all the items in such enumeration, making it clear that each of the things preceding it can only be those which are capable of ownership. To sanction any other meaning would lead to absurdity, with the State claiming ownership of non-appropriable things. Thus, the resort to *noscitur a sociis*, or to any maxim of construction, was both unwarranted and unnecessary. In *Allarde v. Commission on Audit*,[64] the Court held that where the words and phrases of a statute are without ambiguity, "the meaning and intention of the legislature should be determined from the language employed, and where there is no ambiguity in the words, there is no room for construction." Since the provision's language itself sufficiently indicates that appropriability is a requirement for all items listed therein, statutory construction was unnecessary.

4. DOJ's Misapplication of Basic Constitutional and Statutory Construction Principles

As to exhaustibility, the DOJ anchored its conclusion that Section 2, Article XII covers only exhaustible natural resources on the above-quoted debates of the Constitutional Commission. This was a grave error. As discussed, the words used in constitutional provisions are to be given their general and ordinary meaning, except where technical terms are employed. Proceeding from this rule, and considering that "natural resources" is not an inherently technical term, its common and ordinary meaning should stand.

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[61] AGPALO, *supra* note 57, at 585.

[62] *See* Ordillo v. Comm'n on Elections, 270 Phil. 113 (1990).

[63] Occeña v. Comm'n on Elections, G.R. No. 52265, 95 SCRA 755, 756, Jan. 28, 1980.

[64] 291-A Phil. 244 (1993).

To unearth such common meaning at the time, dictionaries published before 1935 and 1987 are enlightening.

The *Standard Dictionary of the English Language*, published in 1895, defined "natural" as "produced by nature; not artificial"[65] and "resource" as "that which is resorted to, relied upon, or made available for aid or support."[66]

The *Oxford English Dictionary*, published in 1933, likewise did not contain the definition of "natural resources," but defined "natural" as "existing in, or formed by, nature"[67] and "resources" as "the collective means possessed by any country for its own support or defence."[68] By 1976, however, the term "natural resources" had been defined as "any materials or conditions existing in nature which may be capable of economic exploitation."[69] Throughout its evolution, nowhere was exhaustibility ever mentioned or implied as a characteristic of the term "natural resources." From its common, general, and ordinary meaning, therefore, "natural resources" covers both exhaustible and non-exhaustible types.

It is well-settled that "where the law speaks in clear and categorical language, there is no room for interpretation or construction; there is only room for application,"[70] except when literal interpretation would be impossible or absurd or would lead to an injustice.[71] The literal interpretation of Section 2, Article XII—that the State owns all natural resources appropriable by it, whether exhaustible or inexhaustible, is neither impossible, absurd, nor unjust. It is clear and unambiguous. Thus, it should not have been interpreted or construed via a resort to the records of the Constitutional Commission, and any interpretation resulting therefrom is impermissible.

Further, nothing in Section 2, Article XII expressly imposes exhaustibility as a prerequisite for being considered a "natural resource." Neither can the characteristic of exhaustibility be inferred from the

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[65] Natural, STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (Vol. II, M-Z) 1179 (1895).

[66] Resource, *Id.* at 1519 (1895).

[67] Natural, OXFORD ENGLISH DICTIONARY (Vol. VII, N-Poy, OUP 1933) 36.

[68] Resources, *Id.* at 533.

[69] Natural Resources, A SUPPLEMENT TO THE OXFORD ENGLISH DICTIONARY (Vol. II, H-N, OUP 1976) 1141.

[70] Songco v. Nat'l Lab. Rel. Comm'n, G.R. No. 50999, 183 SCRA 610, 616, Mar. 23, 1990.

[71] *See, e.g.*, Barcellano v. Bañas, 673 Phil. 177, 187 (2011).

enumeration itself via *ejusdem generis*, since "waters," one of the items therein, clearly can be inexhaustible in nature. Other than appropriability, the provision neither expressly nor impliedly imposes any qualifications with respect to the "natural resources" it contemplates.

Notably, nowhere in the Opinion did the DOJ allege ambiguity in the term "natural resources." To support its introduction of the Constitutional Commission's debates, it merely quoted a Supreme Court case mentioning "doubt"[72] without actually alleging the existence of ambiguity in Section 2, Article XII and how such ambiguity had arisen. This silence is fatal, since ambiguity is the sole doorway through which *ratio legis est anima* may enter.

In fact, one of the comments received by the DOE during the public consultation for the Circular was that there is nothing in the Constitution confining "natural resources" to only exhaustible types. The DOE thereto responded: "[W]e based our interpretation not just on the provisions of the Constitution, but also on the debates of the Constitutional Commission, decisions of the Supreme Court, the Water Code, and all other laws related to renewable energy."[73] There was, again, not a whisper about ambiguity. There is thus no ambiguity here; there is only the law. The DOJ's immediate resort to the second principle without having hurdled the first is a flagrant violation of the *verba legis* rule and of the cardinal rules of constitutional construction. It is impermissible to resort to extrinsic aids, e.g. the records of the constitutional convention, to interpret a constitutional provision which is plain.[74] In fact, in determining legislative intent, it is only after intrinsic aids (e.g. title, preamble, words, phrases and sentences, context, headings and marginal notes, legislative definition, and interpretation clauses)[75] have been exhausted that extrinsic aids may be resorted to.[76] When the meaning of a constitutional provision is clear, the proceedings of the

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[72] *Id.*

[73] *Q and A – Public Consultation on the Draft Department Circular Prescribing Amendments to Section 19 of the RE Law IRR*, DOE WEBSITE, *available at* https://doe.gov.ph/announcements/q-and-public-consultation-draft-department-circular-prescribing-amendments-section-19.

[74] *See* People v. Muñoz, G.R. No. L-38969-70, 170 SCRA 107, Feb. 9, 1989.

[75] ROLANDO A. SUAREZ, STATUTORY CONSTRUCTION (3rd ed. 2015) 27.

[76] *Id.* at 53.

Constitutional Commission are powerless to vary its terms,[77] and may only be resorted to for resolution, not creation, of ambiguities.[78]

Moreover, assuming that unearthing the intent of the Constitution's framers was warranted, there are other equally compelling reasons for establishing the foreign equity limitation aside from the fear of depletion of these natural resources. As Helen Go-Tiu observes, the 1935, 1975, and 1987 Philippine Constitutions all reserve to Filipino citizens or to at least 60% Filipino-owned corporations or associations, the EDU of the country's natural resources.[79] One delegate to the 1935 Constitutional Convention explained that the main reasons for resource nationalization were to avoid "Filipinos of the future serving not as owners but at most as tenants or workers under foreign masters," and to serve as "an instrument [of] defense"[80] and a means to "prevent […] danger to […] internal security and independence."[81] Such delegates considered resource nationalization "one of the bulwarks of our national integrity."[82] An opinion of a constitutional law luminary, quoted by the Supreme Court,[83] stated that the *raison d'être* for the limitation was to reserve to Filipinos control of their patrimony, in turn preserving national integrity.

Clearly, apart from the dangers of exhaustibility, there were other equally important reasons for the genesis of the foreign ownership limitation. Thus, the DOJ's focus on the conservation animus alone, and its utilization thereof to exclude inexhaustible resources from the Constitution's coverage, was both misleading and inaccurate. On the contrary, the other objectives of the limitation point strongly to its sweeping application, as exclusive Filipino control, national security, and national integrity may be compromised by foreign control of natural resources, regardless of their exhaustibility. To conclude otherwise is to disregard what Dean Merlin M. Magallona observes

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[77] *See, e.g.*, Civil Liberties Union v. Exec. Sec'y, G.R. No. 83896, 194 SCRA 317, 325, Feb. 22, 1991.

[78] *See, e.g.*, Roman Catholic Apostolic Adm. of Davao, Inc. v. Land Reg. Comm'n, G.R. No. L-8451, 102 Phil. 596 (1957).

[79] Helen Go Tiu, *Limitations on Foreign Equity Participation in the Exploitation of Natural Resources in the Philippines Quo Vadis*, 65 PHIL. L.J. 266, 276 (1991).

[80] Juan C. Reyes, Jr., *Foreign Investment in Real Estate in the Philippines*, 2 INT'L PROP. INVESTMENT J. 185, 188 (1984).

[81] *Id.* at 189.

[82] Go Tiu, *supra* note 79, at 279.

[83] Merlin M. Magallona, *Economic Nationalism and the National Treatment Clause: The Case of the Philippine Constitution vs. the WTO Agreement,* 17 WORLD BULL. 72, 76 (2001).

is the intense spirit of nationalist protectionism underlying Section 2, Article XII.[84]

Finally, the proceedings of the Constitutional Commission are not necessarily decisive.[85] Although writings of the Commission's delegates regarding constitutional provisions have some persuasive force, this cannot be said for their personal opinions verbalized during the deliberations.[86] These debates show the views of individual members, but not of other delegates who remained silent, let alone of the Filipino people who are considered authors of the Constitution. The individual opinions of the framers are, at best, merely persuasive,[87] and relying on their intent "is at least treated with caution, if not suspicion."[88] Thus, the Opinion's reliance on a short excerpt from a speech of one of the Commissioners of the 48-person Constitutional Commission simply does not carry as much weight as the DOJ would have us believe.

Notably, many other statutory construction rules are also applicable to constitutional construction.[89] For example, "where words […] have both a restricted and a general meaning, the general must prevail over the restricted unless the nature of the subject matter of the context clearly indicates that the limited sense is intended."[90] Thus, assuming that ambiguity attended the term "natural resources," enabling its construction, the term would cover both exhaustible and inexhaustible natural resources. Furthermore, there exists also the rule of *ubi lex non distinguit nec nos distinguere debemos*—where the law does not distinguish, neither should we distinguish.[91] Because Section 2, Article XII did not make any distinction between exhaustible and non-exhaustible natural resources, both types should be within its purview.

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[84] *Id.* at 74.

[85] J.M. Tuason & Co., Inc. v. Land Tenure Adm., G.R. No. 21064, 31 SCRA 413, 475, Feb. 18, 1970.

[86] Vera v. Avelino, 77 Phil. 192 (1946).

[87] John Glenn Agbayani & Paolo S. Tamase, *Assessing Compliance with Foreign Ownership Restrictions under Narra Nickel*, 89 PHIL. L.J. 297, 317 (2015).

[88] *Id.* at 319.

[89] AGPALO, *supra* note 57, at 612.

[90] Marcos v. Chief of Staff, AFP, 89 Phil. 246, 248 (1951).

[91] Plopenio v. DAR, 690 Phil. 126, 132, (2012).

5. State Ownership Subjects Hydro and Ocean Energy Projects to Foreign-Ownership Limits

Having established that the State owns all appropriable natural resources, whether exhaustible or inexhaustible, we now turn to the implications of such ownership.

The foremost consequence of this ownership is that, despite the DOJ's pronouncements, resources listed in Section 2, Article XII of the Constitution remain subject to its foreign-ownership limitation. As discussed, the Circular liberalized the EDU of solar, hydro, ocean, and wind or SHOW energies. The lone criterion for determining whether a particular resource falls within the ambit of the constitutional limitation should be appropriability, and not exhaustibility. Solar and wind energies, *res communes* that cannot be privately owned, clearly fall outside the ambit of the constitutional limitation. Hydro and ocean (or "HO," hereinafter, for brevity) energies are, however, an entirely different matter.

Preliminarily, the differences between hydro and ocean energies must first be noted. Hydropower systems refer to "water-based energy systems which produce electricity by utilizing the kinetic energy of falling or running water to turn a turbine generator"[92] while ocean energy systems are "energy systems which convert ocean or tidal current, ocean thermal gradient or wave energy into electrical or mechanical energy."[93] Although both rely on water, they employ fundamentally different technologies.

The DOJ Opinion, in stating that "[t]he same can be [said] of the ocean or the waters beyond the territorial sea of the Philippines,"[94] conflates "waters beyond the territorial sea of the Philippines" with the "ocean." However, "ocean" encompasses the territorial sea, exclusive economic zone, and the high seas,[95] while "territorial sea" is limited to "the belt of the sea located between the coast and the internal waters of the coastal state; on the one hand, and the high seas, on the other hand, which is not to exceed 12 nautical miles."[96] Under the Constitution, the national territory of the Philippines includes all waters of the archipelago—"the territorial sea, the

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[92] RE Act IRR, § 4(x).

[93] RE Act IRR, Rule 1, § 3(mm).

[94] First DOJ Opinion, slip op. at 3.

[95] Fae Sapsford, *What is High Seas Governance?*, OCEAN EXPLORATION, *at* https://oceanexplorer.noaa.gov/facts/high-seas-governance.html.

[96] Adrian S. Cristobal, Jr., *The Constitutional Policy on Natural Resources: A Survey*, 35 ATENEO L.J. 184, 205 (1991).

seabed, the subsoil, the insular shelves, and other submarine areas."[97] Additionally, the Water Code, which primarily implements the constitutional policy on water resources,[98] likewise provides that the State owns all waters,[99] defined as "water under the grounds, water above the ground, water in the atmosphere and the waters of the sea within the territorial jurisdiction of the Philippines."[100]

Under the principle of permanent sovereignty over natural resources recognized in public international law, a State enjoys "national ownership of natural resources."[101] Hence, "waters"—including oceans up until the territorial sea—are appropriable by a State, making them "natural resources" squarely within the ambit of Section 2, Article XII of the Constitution. The provision itself declares that all "waters" are owned by the State. As established above, this refers to waters which are appropriable. Hence, waters can, to a certain extent, be owned by the State.

The Opinion itself states that "the sun 'is not subject to national appropriation by claim of sovereignty […].' The same can be of [sic] the ocean or the waters beyond the territorial sea of the Philippines."[102] By arguing that waters "beyond the territorial sea of the Philippines" are not appropriable by the State, it concedes that conversely, those within such territorial sea are appropriable. It further acknowledges that that "[u]nder the United Nations Convention on the Law of the Sea (UNCLOS), the Philippines has no sovereignty over the high seas and the exclusive economic zone (EEZ) and therefore cannot and does not own the waters of these maritime zone,"[103] again implicitly affirming that while Philippines may not own the waters of the high seas and the EEZ, it can own its territorial sea.

Although the DOJ cited a 2015 case classifying "the sun, the moon, the stars and the like" as *res communes* which cannot be appropriated, that decision omitted any mention of waters.[104] As Jose Victor Chan-Gonzaga observes, a claim over territorial seas, even as a derogation of the *res communes*

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[97] CONST. art. I.

[98] IDEALS v. PSALM [hereinafter, "*IDEALS*"], 696 Phil. 486 (2012).

[99] WATER CODE, art. 3(a).

[100] Art. 4.

[101] Petra Gümplová, *Sovereignty over Natural Resources – A Normative Reinterpretation*, 9 GLOBAL CONST. 7, 16 (2020).

[102] First DOJ Opinion, slip op. at 3.

[103] *Id.* at 4.

[104] *Id.* at 3 n.5, *citing* Republic v. Cortez, 768 Phil. 575, 590 (2015).

principle, is necessary to satisfy a State's political, economic, social, and security requirements.[105]

6. IDEALS Doctrine and the EDU of Philippine Waters

Furthermore, the Second Opinion, citing the doctrine in *IDEALS v. PSALM*, acknowledges that water is within the meaning of "natural resources" in Section 2, Article XII.[106] This would hence ordinarily serve as an absolute bar on foreign ownership of more than 40% of projects utilizing waters, now understood to mean both inland waters and territorial sea waters.

Importantly, however, with respect to the use of water for hydropower projects, the *IDEALS* case breaks down such use into two distinct phases or components. Whether such use would be subject to the constitutional limitation would depend on the particular component in question. The first component is the appropriation of water, defined under the Water Code as the "acquisition of rights over the use of waters or the taking or diverting of waters from a natural source in the manner and for any purpose allowed by law"[107] or as interpreted by the DOJ, "the extraction of water from its natural source."[108] This component is subject to the constitutional limitation, such that it is reserved exclusively to Filipino citizens and to corporations or associations with at least 60% Filipino ownership. The second component is the utilization of the water "after it has been extracted from the source by qualified persons or entities," which is open to full foreign ownership.[109] The rationale for such distinction is that "[o]nce removed from its natural source, the water ceases to be a part of the natural resources of the country and may be subject of ordinary commerce and may even be acquired by foreigners."[110]

Put more simply, the rule is that only Filipino citizens or corporations/associations may appropriate waters; however, once removed or extracted, foreigners may fully use and acquire them. To illustrate, for hydropower projects, only Filipinos may qualify to construct and operate a dam, since this involves a taking and diversion of waters. However,

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[105] Jose Victor Villarino Chan-Gonzaga, *UNCLOS and the Philippine Territorial Seas: Problems, Perspectives and Options*, 42 ATENEO L.J. 1, 12 (1997).

[106] Second DOJ Opinion, slip op. at 2, *citing* IDEALS, at 661.

[107] WATER CODE, art. 9.

[108] *IDEALS*, at 658.

[109] *Id.* at 661.

[110] *Id.* at 660.

foreigners may own and operate the power plant that uses water collected from such dam to generate power, since such waters had already been previously appropriated by qualified Filipino citizens.[111] Thus, it is clearly the act of appropriating waters, i.e. extracting water from its natural source, which converts them from a natural resource into a commodity which can be acquired and utilized by foreigners. Absent such step, waters remain a "natural resource."

There are two important implications of this. First, certain hydropower technologies, such as a diversion or "run-of-river" plants, generate electricity not by utilizing dams, but only the natural decline of the river bed elevation.[112] These types of projects may hence not require the prior appropriation of water which, to reiterate, is the act that transforms water from a "natural resource" subject to the foreign-ownership limits into a tradeable commodity. In the absence of such appropriation, the water remains in its "natural resource" state and is, therefore, subject to the constitutional limitation on foreign equity. Accordingly, any hydropower project using unappropriated waters would continue to use them in their "natural resource" state—and therefore must be at least 60% owned by Filipinos.

The same can be said for ocean or tidal energy, also called wave energy.[113] While there are a few tidal energy technologies which use reservoirs similar to the way hydropower dams operate,[114] such as tidal barrages,[115] most do not. Rather, they utilize the motion of tidal streams, ocean waves, or ocean and river currents directly. Tides, in fact, refer to the "regular rise and fall of the ocean's waters," and occur along shores, lakes, and rivers.[116] The IRR also defines "ocean energy systems" as using "ocean or tidal current, ocean thermal gradient or wave energy,"[117] evidencing the direct use of water in its natural, unappropriated state. For example, some tidal energy plants produce electricity using the force of naturally occurring

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[111] *Id.* at 663.

[112] *Types of Hydropower Plants*, U.S. DEPT. OF ENERGY WEBSITE, *at* www.energy.gov/eere/water/types-hydropower-plants (last modified Aug. 2023).

[113] Ana Almerini, *Wave Energy Pros and Cons*, SOLAR REVIEWS, *at* www.solarreviews.com/blog/wave-energy-pros-and-cons (last modified Jan. 2025).

[114] *Hydropower Explained*, US ENERGY INFO. ADMIN., *at* www.eia.gov/energyexplained/hydropower/wave-power.php (last modified May 2024).

[115] Catherine Lane, *How Does Tidal Power Work?*, SOLAR REVIEWS, *at* www.solarreviews.com/blog/how-does-tidal-power-work (last modified Jan. 2025).

[116] *Cause and Effect: Tides*, NAT'L GEOGRAPHIC, *at* https://education.nationalgeographic.org/resource/cause-effect-tides/ (last modified Aug. 2023).

[117] RE Act IRR, r. 1, § 3(mm).

waves in the ocean to propel underwater turbines.[118] Tidal fences use fast-flowing underwater ocean currents, harnessed via submerged turbines.[119] Others use the motion of ocean waves, and semi-submerged devices consisting of cylindrical sections.[120] Yet another are horizontal axis turbines, which extract energy from tidal or river currents[121] and can operate in shallower waters.[122] There are also vertical axis turbines, oscillating hydrofoils, Venturi devices, Archimedes screws, and tidal kites.[123] All these technologies do not use dams, but use waters directly where they are found. Hence, such types of ocean technologies do not require the prior appropriation of waters. More importantly, by their very nature, it is impossible to separate their use of water into two components—first, the appropriation component and second, the power generation component—unlike hydropower technologies utilizing dams or similar means. Rather, the waters must be utilized as they are, directly, in their natural state and location, and cannot first be extracted from their natural source, i.e. appropriated.

To emphasize, appropriation is the step which converts and commodifies waters from a constitutional "natural resource"—subject to the 40% foreign-ownership cap—into a tradable commodity open to full foreign ownership. Without this step, the water remains a "natural resource" under Section 2, Article XII of the Constitution. Accordingly, HO energy projects within the Philippines' inland waters or territorial sea that harness water without requiring prior appropriation, but only harness their motion in their natural location, constitute EDU of natural resources, and must, by constitutional mandate, be at least 60% Filipino-owned.

The DOJ stated that after waters pass through a dam, the waters are converted to kinetic energy—no longer considered "natural resources"[124] or "forces of potential energy." Thus, when Philippine waters in their natural state and situs are utilized, without prior appropriation via dams or similar

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[118] Almerini, *supra* note at 113.

[119] *Tidal Fence*, ALTERNATIVE ENERGY TUTORIALS, *at* www.alternative-energy-tutorials.com/tidal-energy/tidal-fence.html (last modified Aug. 2023).

[120] Dr. Richard Yemm, *Pelamis WEC – Intermediate Scale Demonstration, available at* https://www.osti.gov/etdeweb/servlets/purl/20455934.

[121] Kepler Energy, ¶ 1, *available at* http://keplerenergy.co.uk/index.html (last modified Aug. 2023).

[122] Offshore Energy, *Kepler Transverse Horizontal Axis Water Turbine*, at www.offshore-energy.biz/video-kepler-transverse-horizontal-axis-water-turbine.

[123] European Marine Energy Centre Ltd., *Tidal Devices* ¶ 1, *available at* https://www.emec.org.uk/marine-energy/tidal-devices/ (last modified Aug. 2023).

[124] Second DOJ Opinion, slip op. at 3.

means, they remain unconverted into kinetic energy and thus qualify as "natural resources" subject to the foreign ownership limitation.

B. Conflict between the Constitution and the Circular

The DOE Circular and the second DOJ Opinion strongly suggest that as long as hydro and ocean energy resources are not directly harvested from the source, i.e. appropriated, by foreigners, they may be fully foreign-owned. Under this theory, HO projects requiring dams or similar appropriation structures can be 100% foreign owned provided that prior appropriation of water is first undertaken by Filipinos, consistent with the *IDEALS* ruling. Meanwhile, those which do not have or require such appropriation components may be 100% foreign-owned. While the former contention is correct and aligned with *IDEALS*, the latter conclusion is gravely erroneous. HO projects utilizing Philippine waters directly—those without an appropriation component—would lack the essential step which legally converts such waters from a natural resource into a commodity that can be fully owned by foreigners. As such, these projects remain subject to the constitutional limitation on foreign equity and cannot be fully foreign-owned. By allowing full foreign ownership of such projects, the DOE Circular gives rise to a direct and irreconcilable conflict with the fundamental law.

Although the DOJ classifies HO energies as "kinetic energy" beyond Section 2, Article XII,[125] unappropriated waters remain—contrary to the Opinion— "natural resources" subject to its foreign-equity cap. The Second Opinion itself, citing *IDEALS*, recognizes that "water is within the meaning of natural resources,"[126] a view echoed by Vicente Carlos Lo[127] and Peter Payoyo.[128] The Constitution is unequivocal that "waters" fall within its purview; thus, whether the technology deployed in such waters is hydro or ocean technology is immaterial. As long as they are appropriable State waters, their EDU is perpetually subject to the constitutional foreign ownership limitation.

The Opinion's inconsistencies and incongruence with the Constitution introduce uncertainty to what might appear to be a straightforward easing of the foreign-ownership restrictions. The DOE

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[125] *Id.*

[126] *Id.*

[127] Vicente Carlos S. Lo, *Right to Water, Right to Life,* 55 ATENEO L.J. 1042 (2011).

[128] Peter Bautista Payoyo, *Philippine Marine Resources Policy in the Exclusive Economic Zone,* 2 ASIAN Y. INTL L.J. 127, 138 (1992).

Circular outright reverses its own IRR (the DOE Department Circular No. DC2009-05-0008) and this flip-flopping indicates political risk, or those which, as Joselito Blando describes, threaten the investment's very existence.[129] Compounding the confusion, the DOJ's claim that RE resources are neither "natural resources" nor "forces of potential energy has been disputed by legal scholars,[130] and the policy may likely be challenged which may create further instability.

These uncertainties aggravate already undesirable domestic investment conditions for renewables which disincentivize foreign investment. First, foreign individuals and corporations which are more than 40% foreign-owned are constitutionally barred from directly owning public or private lands.[131] Second, because waters remain "natural resources," the Constitution's Filipino First Policy[132]—which gives Filipinos, by the mere fact of their nationality, preference over their foreign competitors—would apply.[133] Third, there is a lack of political commitment to the RE sector.[134] Despite the Circular, the DOE's approach to investment in the energy industry remains technology-neutral[135]—but one biased, even, towards traditional fossil fuel technologies.[136] This sends mixed signals to investors.[137] Finally, persistent hurdles to RE project development in the Philippines—grid connection challenges, environmental setbacks, policy implementation, and permitting barriers—further exacerbate investment in the sector.[138]

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[129] Blando et al., *supra* note 19, at 213.

[130] *See* Mark Darryl A. Caniban, *Regulatory Framework on the Registration of and Tax Incentives Available to Solar Energy Projects in the Philippines*, 7 RENEW. ENERGY L. & POL'Y REV. 122, 124 (2016); de Castro, *supra* note 10, at 350; Darwin Angeles, *The State of Philippine Law on Geothermal Power: Policies, Projects, Implications*, 87 PHIL. L.J. 415, 449 (2013).

[131] Joanna Smith, *Amending the Philippines' Laws Governing Foreign Property Ownership: The Extent to Which Mexican Law Can Serve as a Workable Template*, 35 GA. J. OF INT'L & COMPAR. L. 613, 621 (2007).

[132] Cesar L. Villanueva, *Revisiting the Philosophical Underpinnings of Philippine Commercial Laws*, 46 ATENEO L.J. 707, 729 (2001).

[133] *Id.* at 731.

[134] IRENA COALITION FOR ACTION, SCALING UP RENEWABLE ENERGY INVESTMENT IN THE PHILIPPINES (2022), *at* https://coalition.irena.org/-/media/Files/IRENA/Coalition-for-Action/Coalition-for-Action-_Scaling-up-RE-Investment-Philippines.pdf.

[135] Ricardo, *supra* note 11, at 6.

[136] *The Philippines is Well Positioned to be a Regional Leader in Wind Energy: GWEC*, REGLOBAL (2022), *at* reglobal.co/the-philippines-is-well-positioned-to-be-a-regional-leader-in-wind-energy-gwec/.

[137] Ricardo, *supra* note 11.

[138] *Id.*

Foreign-ownership restrictions are an important factor affecting a potential investor's decision to invest abroad,[139] and limiting foreign equity participation in business enterprises may deter potential investors.[140] The DOE's Circular has sought to remedy this by opening up the RE industry to full foreign ownership. The substantial uncertainty clouding the Circular, however, compounded by the host of impediments to foreign investment, creates a shadow of doubt which ultimately reduces investor confidence. Unless the uncertainties in the Circular are resolved, the envisioned influx of foreign investment in the RE industry will not be realized.

C. Recommendations

The doubts clouding the Circular can be dispelled via a judicial review of the Circular. Although under Philippine administrative law, administrative bodies such as the DOE possess rule-making powers,[141] agencies like the DOE may only "fix the details in the execution or enforcement of a policy set out in the law itself"[142] and lack authority to alter,[143] to modify, enlarge, or restrict the law, or to impose "additional non-contradictory requirements not contemplated by the Legislature."[144] An IRR should merely carry out the law and one that exceeds this mandate is *ultra vires*.[145] In case where an administrative regulation conflicts with a statute, the statute prevails.[146]

The Supreme Court is exclusively empowered to interpret or construe the Constitution or a statute,[147] and to fully disregard the constructions of other departments when the direct interpretation of the Constitution is involved.[148] Since the central issue involves a constitutional question, then judicial review is the appropriate remedy to resolve this. Specifically, this should be done via a petition for certiorari or prohibition, which are the proper avenues to impugn the constitutionality of executive

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[139] Blando et al., *supra* note 19, at 257.

[140] *Id.*

[141] Holy Spirit Homeowners Ass'n, Inc. v. Sec'y Defensor, 529 Phil. 573 (2006).

[142] Republic v. Drugmaker's Laboratories, Inc., *supra* note 143, at 489.

[143] *See, e.g.*, Republic v. Drugmaker's Laboratories, Inc., 28 Phil. 480 (2014).

[144] Lokin v. COMELEC, 635 Phil. 372, 394 (2010).

[145] *Id.* at 393.

[146] *See, e.g.*, Comm'r of Internal Revenue v. Fortune Tobacco Corp., 581 Phil. 146 (2008); Conte v. Comm'n on Audit, 332 Phil. 20 (1996).

[147] AGPALO, *supra* note 57, at 120.

[148] Agbayani & Tamase, *supra* note 87, at 315.

issuances.[149] When administrative agencies' interpretations are "clearly erroneous, or when there is no ambiguity in the rule," then courts will not hesitate to set them aside.[150] An allegation of "erroneous interpretation of the law" may trigger judicial review.[151] It is thus this ground on which the petition should be based.

If the Supreme Court strikes down the Circular's full liberalization of HO projects without the appropriation components, then the government will need to increase energy generation from fully liberalized renewables (such as wind and solar) to meet its 35% RE target by 2030. Such recalibration may come in the form of alternative corporate structuring schemes per project which will comply with existing equity limits, or, albeit more cumbersome, amending the Constitution.

D. Potential of Renewable Energy

The Philippines presents favorable macro-economic conditions for RE project development,[152] and enjoys a robust financing environment and interest in RE investment from both public and private sectors.[153] With an abundance of potential RE resources, the country's potential for RE development is massive,[154] and, except for geothermal energy, this potential has been greatly underexplored and underdeveloped.[155]

Such promising prospects would certainly be attractive to foreign investors who are constantly searching for potential sources of profit.[156] With increased foreign investment, significant benefits would follow, among them increased RE deployment leading to increased energy access, energy self-sufficiency and security, major socio-economic benefits, and improved climate resilience.[157]

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[149] *See, e.g.*, Zabal v. Duterte, 846 Phil. 743 (2019); *In re* Declaratory Relief on the Validity of BIR Revenue Memorandum Circular No. 65-2012, 868 Phil. 517 (2020).

[150] ERB v. Ct. of Appeals, 409 Phil. 36, 48 (2001).

[151] *See, e.g.*, Continental Marble Corp. v. Nat'l Lab. Rel. Comm'n, G.R. No. L-43825, 161 SCRA 151, May 9, 1988.

[152] Ricardo, *supra* note 11, at 4.

[153] IRENA COALITION FOR ACTION, *supra* note 134, at 1.

[154] Ricardo, *supra* note 11, at 4.

[155] de Castro, *supra* note 10.

[156] Blando et al., *supra* note 19, at 190.

[157] IRENA COALITION FOR ACTION, *supra* note 134, at 1.

Foreign-ownership limits have long deterred foreign investment,[158] prompting the Philippine government to liberalize various key sectors over time.[159] With this Circular, it has now extended such efforts to the renewables industry. Yet the swift reversal of a foundational rule is troubling. Regardless of whether the Circular was an innocuous policy decision to attract foreign investment or an insidious ploy to appease foreign interests, what is certain is that the Constitution's sacrosanct words cannot be so easily manipulated to suit specific ends, and its mandate so easily disregarded—

> The Constitution […] deserves the utmost respect and obedience […]. No one can trivialize the Constitution by cavalierly amending or revising it in blatant violation of the clearly specified modes of amendment and revision laid down in the Constitution itself.[160]

V. CONCLUSION

The DOJ's conclusion that exhaustibility is a requirement for "natural resources" as contemplated in Section 2, Article XII of the Constitution was based on an erroneous application of basic constitutional and statutory construction principles. Not being a technical term, the ordinary meaning of "natural resources" should have controlled. Instead, without establishing the prerequisite ambiguity, the DOJ immediately resorted to *ratio legis est anima*, effectively violating the *verba legis* principle. Moreover, even its application of the former principle was flawed. First, it failed to consider other equally important reasons underpinning the foreign ownership limitation. Second, it overlooked the inherently limited probative value of verbal expressions of constitutional framers. The product of this flawed argumentation is the partly erroneous conclusion that solar, hydro, ocean, and wind energy resources are not "natural resources" contemplated by the Constitution.

The application of the correct rule—*verba legis,* or the "broad and ordinary meaning" rule—leads to the conclusion that first, as aided by the common definitions of the term "natural resources" before 1935 and 1987, both exhaustible and inexhaustible natural resources fall within the ambit of the constitutional limitation. The additional "exhaustibility" criterion for natural resources imposed by the DOJ hence cannot stand, and

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[158] First DOJ Opinion, slip op. at 2.

[159] Marilyn A. Victorio-Aquino, *Acquiring in the Philippines*, 70 PHIL. L.J. 70, 98 (1995).

[160] Lambino v. COMELEC, 536 Phil. 1, 110 (2006).

appropriability should be the sole test for determining whether a thing falls within the term "natural resources." Using this lone criterion, waters, which are owned by the State to the extent of its inland waters and territorial sea, are considered as "natural resources," regardless of whether it is hydro or ocean resources being utilized; solar and wind energies, however, due to their non-appropriability, are not.

With this categorization, the EDU of Philippine inland and territorial sea waters, whether via hydro or ocean technologies, would ordinarily be immediately restricted to 40% foreign equity participation. The *IDEALS* case, however, carved out an exception, in that through the commoditization of waters via the step of prior appropriation exclusively by Filipinos, the power generation component of hydropower projects may be fully foreign-owned. Under *IDEALS*, without this crucial step, water remains a part of the country's natural resources subject to the foreign ownership limitation. This *IDEALS* doctrine, the DOJ emphasized, continues to apply.

Such rule is straightforward when applied to most hydro projects, where water appropriation components and power generation components can be separated. For other hydro types, however, and most ocean or tidal systems—which utilize waters as is, in their natural state and location—prior appropriation is impossible. Without the step which converts State waters from natural resources into a commodity acquirable by foreigners, such HO systems would, in effect, be utilizing natural resources subject to the foreign ownership limitation. Thus, contrary to the import of the Opinion and the Circular, such projects cannot be 100% foreign-owned by constitutional fiat. This places the Circular in direct conflict with the Constitution.

These serious irregularities, compounded by a host of local impediments to foreign investment, cloud the liberalization of the Philippine RE industry and erode investor confidence—the opposite of the intended effect. To dispel this doubt, the issue should be brought before the courts for judicial review. If the courts uphold at 40% foreign-ownership limit on HO projects without appropriation components, the government must either (1) scale up solar and wind generation capacity, (2) pursue a constitutional amendment, or (3) allow alternative corporate structuring schemes may be necessary to meet its RE targets. Until these uncertainties are resolved, the sudden opening of the Philippine floodgates to foreign investment in renewables may, unfortunately, very well be for naught.

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