

Department of Justice Opined that 100% Foreign Ownership in Renewable Energy Projects Should Be Allowed in the Philippines

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1. Renewable Energy in the Philippines

In the Philippines, foreign participation in projects involving exploration, development and utilization of natural resources is capped to only 40%.¹ This restriction does not really advantage the Philippines in minimizing its reliance on imported energy due to insufficient domestic energy production.

The Philippines sources its energy requirements from domestic energy resources as well as imported energy. Unfortunately, despite being rich in natural resources, the Philippines is still deficient in terms of production of indigenous products and its imported energy significantly compensates for such shortfall. Indigenous energy includes renewable energy (such as geothermal, hydro, wind, solar and other renewable energy) and fossil fuels.²



In terms of power generation, the share of renewable energy which is mainly from geothermal and hydro, declined from 26% in 2010 to 21% in 2019. This decline is mainly due to the significant increase in coal power generation in the Philippines.³ The National Renewable Energy Program, 2020-2040 aims to revert the share of renewable energy to at least 35% level by 2030 and aspires to increase it to at least 50% by 2040.⁴

Timely with these targets, is the Department of Justice (hereinafter referred to as “DOJ”) Opinion No. 21, series of 2022, dated September 29, 2022 (see: <https://www.doj.gov.ph/opinion.html>). According to the DOJ, exploration, development and utilization of solar, wind, hydro and ocean or tidal energy should not be subject to the 40% foreign equity limitation under Section 2, Article XII of the Constitution. This interpretation however, is still in conflict with the provisions of the Implementing Rules and Regulations of the Renewable Energy Act of 2008 (Republic Act No. 9513, hereinafter referred to as “Renewable Energy Act”) as will be discussed below.

2. Foreign Equity in Renewable Energy Projects

Currently, the implementing rules and regulations of the Renewable Energy Act limits the foreign participation in exploration, development and utilization of renewable energy projects to

¹ Section 2, Article XII, 1987 Constitution; 12th Regular Foreign Investment Negative List, List A, no. 16

² DOE, Primer on the Energy Balance Table (EBT) of the Philippines, page 2-3

³ NREP, 2020-2040 p. 1

⁴ NREP, 2020-2040 p. 15

40%. However, with the release of the Department of Justice Opinion No. 21, the Department of Energy officials has commented that it wants the renewable energy sector to be opened 100% foreign ownership before the end of November, once the amendments to the implementing rules and regulations of the Renewable Energy Act of 2008 are finalized and signed.

1. Implementing Rules and Regulations of the Renewable Energy Act

Under the current implementing rules and regulations of the Renewable Energy Act of 2008 (Rule 6, Section 19), kinetic energy from water, marine current and wind; thermal energy from solar, ocean geothermal and biomass, are owned by the state and shall not be alienated.

It also mandates that the exploration development, production, and utilization of natural resources shall be under the full control and supervision of the state. And according to the implementing rules and regulations, the government may undertake such activities, or it may enter into co-production, joint venture or co-production sharing agreements with Filipino citizens or corporations or associations that are at least sixty percent (60%) owned by Filipinos. It further highlights that Foreign renewable energy developers may be allowed to undertake renewable energy development through a renewable service/operating contract with the government, subject to Article XII, Section 2 of the Philippine Constitution which limits the foreign participation to 40%.

The above-cited provision has been the subject of the letter request of the Department of Energy for legal opinion of the Department of Justice.

2. DOJ Opinion No. 21 s. 2022

In this subject opinion, the Department of Justice opined that the exploration, development and utilization of solar, wind, hydro and ocean or tidal energy should not be subject to the forty percent (40%) foreign equity limitation under Section 2, Article XII of the Constitution because such energy resources are beyond the ambit of the term “natural resources” as used in the said Section and that the term “all forces of potential energy,” also mentioned in said Section 2, is to be understood in its technical sense, which necessarily excludes kinetic energy.

The Department of Justice further discussed that the ambit of the term “natural resources” as contemplated in the Constitution are properties that are susceptible to appropriation and could not include the sun, the wind or the ocean as they are not subject to appropriation. While these energy sources are not subject to appropriation they could be used, exploited or harnessed by anyone. Moreover, it stated that the compelling reason behind the imposition of limit to foreign participation in the exploration, development and utilization of natural resources, particularly the fear of depletion of the Philippines’ exhaustible resources by said foreigners, cannot be applied to inexhaustible renewable energy sources such as the sun, wind and the waters of the ocean.

Further, the Department of Justice opined that the term “all forces of potential energy,” also mentioned in the Section 2, Article XII of the constitution, should be interpreted to exclude kinetic energy and that the term “potential energy” should be understood in its technical sense.

The Department of Justice, however, emphasized that its opinion is subject to the following qualifications:

- i. The executive construction, as provided in Section 19 of the implementing rules and regulations of the Renewable Energy Act of 2008, that solar, wind, hydro and ocean or tidal energy is subject to the forty percent (40%) foreign equity limitation, would remain, unless amended;
- ii. The Water Code and Supreme Court decision limiting to Filipino citizens or juridical persons owned by at least sixty percent (60%) Filipinos, the appropriation of waters, direct from the source, for power generation shall continue to prevail, unless repealed or reversed.

3. What's Next?

As was mentioned above, at present, exploration, development and utilization of renewable energy is restricted to the government and joint projects with Filipino citizens or corporations at least sixty percent (60%) owned by Filipinos. But the implementing rules and regulations of the Renewable Energy Act is expected to be amended soon to allow 100% foreign ownership in renewable energy projects in line with the Department of Justice Opinion no. 21. We will keep you updated in our next newsletters.

[2023.1 update]

In relation to this newsletter, the Department of Energy has issued Department Circular No. DC2022-11-0034⁵, Prescribing Amendments to Section 19 of Department Circular No. DC 2009-05-0008 Titled, Rules and Regulations Implementing Republic Act No. 9513, Otherwise Known as “The Renewable Energy Act of 2008” , recommending amendments to the effect that the Philippine government may directly undertake the exploration, development, production and utilization of Renewable Energy Service or Operating Contracts with Filipino and/or foreign citizens or Filipino and/or foreign-owned corporations or associations.

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⁵ <https://www.doe.gov.ph/sites/default/files/pdf/issuances/dc2022-11-0034.pdf>



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