

THE LEGAL ASPECTS OF FOREIGN INVESTMENTS IN THE PHILIPPINES

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I. SCOPE AND INTRODUCTION

The primary purpose of this paper is to identify and discuss the legal requirements for a foreign investor or a non-Philippine national¹ to do business² in the Philippines. Specifically, it will study the different areas of investment; the extent of allowable foreign capital or equity participation; the various priorities plans drawn by appropriate government agencies; the incentives that go with registration; and the procedures involved in registration and licensing.

The current public policy on foreign investments³ can be found in the Investment Incentives Law (IIL) of 1967,⁴ the Foreign Business Regulations Law (FBRL) of 1968⁵ and the Export Incentives Law (EIL) of 1970.⁶ Administrative rules and regulations have subsequently been passed to implement these laws and help define and further clarify their provisions. Since 1972,⁷ significant amendments have been introduced to these laws by two presidential decrees.⁸ The scope of this paper shall therefore include a study of these three incentives laws as amended by presidential decrees and supplemented by administrative rules and regulations. Whenever necessary or appropriate, we shall refer to other laws and discuss pertinent

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¹ The phrase "non-Philippine national" can be understood to mean a person or corporation, or partnership which is not a Philippine national. The phrase "Philippine national" refers to "a citizen of the Philippines; or a corporation (or entity) organized under the laws of the Philippines of which at least sixty per cent of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines." sec. 3(f), IIL.

² "Doing business" shall include "soliciting orders, purchases, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who stay there for one hundred eighty days or more; participating in the management, supervision or control of any domestic business firm, entity or corporation in the Philippines; and any other act or acts that imply continuity of commercial dealings or arrangements and contemplate to that extent the performance of act or works or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization. Sec. 1(1), FBRL.

³ "Foreign investments" shall mean equity investment by a non-Philippine national in the form of foreign exchange or asset. Sec. 3(e), IIL.

⁴ Republic Act (RA) 5186, approved September 16, 1967.

⁵ RA 5455, approved September 30, 1968.

⁶ RA 6135, approved August 31, 1970.

⁷ Martial Law was declared September 21, 1972.

⁸ Pres. Decree (PD) No. 82 approved January 6, 1972 and Pres. Decree No. 485 approved June 19, 1974.

concepts other than legal, either to clarify or to elaborate our principal discussion. For instance, we shall find occasion to refer to the Constitution or the Tax Codes and also discuss business concepts like investments risks or international law questions of outright or "creeping" expropriation.

A brief but precise look into the various areas of investment defined and classified by the three incentives laws, would give us an introduction to the breadth and scope of our study. Under the Investment Incentives Law, foreign equity investment can constitute the total capital of a "pioneer enterprise", whereas in the so-called "preferred area" of investment, foreign capital participation can only be a maximum of forty per cent (40%). In an area however, which has been originally declared by the Board of Investments as "preferred" but the "measured capacity" of which has not been filled by Philippine nationals within three years from declaration, the capital can be one hundred per cent (100%) foreign, just like the pioneer enterprise. On the other hand, under the Export Incentives Law, foreign investments can make up the total capital requirement when the enterprise is within the "foreign trade zones". Outside this trade zones however, pioneer enterprises may also be established depending on the Export Priorities Plan drawn by the Board of Investments (Board), and, as already pointed out, may consist of one hundred per cent (100%) foreign capital. All other enterprises that involve foreign equity must be established as joint ventures, where foreign investment can only be a maximum of forty per cent (40%). The Foreign Business Regulations Law however, makes the foreign equity participation an even smaller amount of thirty per cent (30%) in "permitted investments", but expands it to a hundred per cent (100%) in "permissible investments".

An equally important information to the prospective foreign investor would be a discussion of the several priorities plans or investment programs of the government and the criteria described in the law by which they are drawn by the appropriate government agency. The IIL authorizes the formulation and drawing up of an "Investment Priorities Plan" and a "public Utilities Priorities Plan". A new Presidential decree⁹ calls for the drawing up of a "Tourism Priorities Plan". The EIL provides for an "Export Priorities Plan" and the implementing rules further include a "Mandatory Inclusion Plan". These plans come out each year with a list of specific industries open to foreign investments.

Likewise important to the foreign investor are the tax advantages and fiscal benefits to which he is entitled according to the area of his investment. These incentives range from tax deduction of organizational and pre-operating expenses; duty free importation of machinery and spare parts; tax deduction for reinvestment and expansion of operations; to a net operating loss carry-over. The foreign investor has also rights and guarantees

⁹ Pres. Decree No. 535 (1974).

under the IIL and the EIL, from full allowance of remittances of earnings, to freedom from expropriation.

These rights and guarantees and incentives can only be availed of, once the foreign investor is aware of them and after he has taken the necessary procedural steps for registration and securing a license. The granting of the certificate of registration or license, signals the accrual and recognition of such rights and benefits. Under the FBRL however, registration of a permitted enterprise is only for record purpose and would have no significant legal consequences as registration under the IIL and the EIL. Thus, we shall discuss the procedural aspects of foreign investments by pointing out the rules as to the proper time of filing an application; the appropriate administrative agency where to file the application; the supporting documents to be submitted; and perhaps the necessity or non-necessity of notice and hearing.

A short comment about the current stability of foreign investments is indeed necessary to allay whatever doubts the prospective foreign investor may have about the long-run legal feasibility and security of his investment. The present government policy on foreign investments is one of encouraging its entry into the country. Official attitude has always emphasized the importance of foreign investments in economic development. Arguments for the almost unbridled entry of foreign investments vary: from the proposition that the road to development can be done through the utilization of the vast multinational set-up with its world-wide business operations and immense pool of expert management and technical knowhow, to the corollary suggestion that it can effectively bring about the transfer of technology from the more advanced nations to the lesser developed ones. Of course, as the foreign investor in need of counsel would find out in the main discussion of this paper, this public policy of encouraging foreign investments is nowhere more evident than in the current laws we are about to study in the following pages.

II. THE INVESTMENT INCENTIVES LAW

This Law specifically categorizes the areas of investment into two: (1) pioneer enterprise; and (2) the preferred area.

1. *The Pioneer Enterprise*

A "pioneer enterprise" is a registered enterprise engaged in the manufacture, processing, or production (and not merely in the assembly or packaging) of goods, products, or commodities, or raw materials that have not been used or are not being produced in the Philippines on a commercial scale. It can also be an enterprise which uses a design, formula, scheme, method, process or system of production or transformation of any element, substance or raw material into another raw or finished good which

is new and untried in the Philippines and the final product of which involves a substantial use or processing of domestic raw materials whenever available.¹⁰ Hence, pioneer industries are those which will produce commodities hitherto not made in the Philippines on a commercial basis or which will utilize a new and better technology.¹¹ As the term "pioneer" connotes, the industry must be engaged in something novel in the Philippines or which is "industry-setting" in an unexplored area. The pioneer character of an enterprise shall in every case be determined with reference to the Philippines, regardless of whether or not it would qualify as such in any other country.¹² By this, it means that the level of Philippine technology and economic development shall be the basis of determining the pioneer nature of an enterprise. In addition, the Board shall take into account which area will best accomplish the declared policy of the Law.¹³ This policy is geared towards the acceleration of the sound development of the economy, consistent with economic nationalism, and economic planning, under conditions of competition which will discourage monopolies, and which may come from domestic and foreign investments in areas of agriculture, mining and manufacturing and which will increase income and exports, bring about economic stability, employment, a higher standard of living and a more equitable distribution of wealth. This policy shall also encourage foreign pioneer enterprise which are capital intensive and would utilize substantial domestic raw materials whenever available.¹⁴ Moreover, the Board shall consider the following criteria:¹⁵

- (a) The gaps between prospective demand and existing supply for specific products, commodities and services and the additional production capacities that must be induced where gaps exist;
- (b) The potential of such areas of investment for new markets;
- (c) The potential to create employment;
- (d) The extent to integrate existing production facilities;
- (e) The amount of import substitution or of new exports produced; this is obviously meant to reduce importation and to conserve dollar earnings.
- (f) The proportion of required capital, raw material and labor inputs of indigenous origin;
- (g) The nature of the risks entailed; it is understandable that when the risk of bankruptcy is high for example, the foreign investor may be in

¹⁰ Sec. 3(h), IIL.

¹¹ Foreign Investments and Tax Administration in the Philippines prepared by the Board of Investments, Bureau of Internal Revenue, and the Central Bank of the Philippines, p. 4.

¹² Rule I, Sec. 1(f), IIL Administrative Rules and Regulations.

¹³ Sec. 18, IIL.

¹⁴ Sec. 2, IIL.

¹⁵ Sec. 18, IIL, as amended by PD 333.

a better position to avoid it than the local investor. If it were a technical risk, in the sense that more advanced technology is needed, a foreign investor may have the better financial and technical resources to meet the risks.

(h) The amount of capital normally needed; this may be an important index in classifying the area into pioneer or preferred. An area which needs large amount of capitalization may be better declared a pioneer enterprise because foreign corporations may be more able to marshal greater financial and technical resources. Likewise, if there is a need to import expensive machinery requiring at the outset a considerable amount of appropriation, the foreign investor may be more capable than the domestic businessman.

(i) The rate of profitability; with this as a criteria, the Board may be more disposed to declare an area, a preferred enterprise, if the rate of profit is faster, because this is acceptable and practical to a small or middle size firm. Foreign companies may be more willing to run the risks of initial losses or lesser profits during the first few years of operation but hope to achieve greater profitability in the long run.

(j) The rate of return to the economy; this may also refer to the rate of profitability and the predisposition to reinvest or expand operations. This may also refer to a producer of export product which has a high marketability that earnings are immediately apparent or realized.

(k) The maintenance of competition; In an area which has been adequately explored by nationals, it may not be a wise policy to open it to foreigners in that the latter may have a better advantage, thereby actually making the competition unfair. This criteria reflects an economic philosophy which is bent towards private enterprise with a minimum of government interference. This notwithstanding, economic and government planning has proven to be an effective functional component of free enterprise without destroying the essence of the system.

(1) Other criteria that the Board will adopt.

Despite the foregoing criteria, the Board relatively exercises a wide amount of discretion and flexibility which seems a spontaneous feature of any scientific economic planning. This can be attributed to the fact that these criteria can not really be specified with absolute accuracy and their appraisal can not be set in a vacuum but must be analyzed with reference to pertinent economic and labor data, management and scientific studies, and prevailing economic realities and conditions in the world economy. The final results of these appraisal are the "Investment Priorities Plan", the "Public Utilities Priorities Plan", and the "Tourism Priorities Plan".

2. *The Priorities Plans*

The Board every year submits to the National Economic and Development Authority (NEDA) an "Investment Priorities Plan" which contains a classification of the pioneer and preferred areas of investment.¹⁶ Likewise, the Board, in consultation with the Board of Transportation, Board of Power, Power Development Council and other appropriate agency, draws up a listing of specific public utilities which can qualify as pioneer industries or preferred areas of investments. There may be some difficulty here brought about by the constitutional reservation of the operation of public utilities to Philippine nationals.¹⁷ However, the new Constitution allows service contracts with foreign corporations.¹⁸ Also, it contains the general exception that the president (prime minister) may enter into agreements as the national welfare and interest may require.¹⁹ The "Tourism Priorities Plan" which is submitted by the Department of Tourism, contains the tourism activities²⁰ to be encouraged and open to foreign investments, in line with the government policy of promoting the tourism industry. The important areas contemplated here would be the hotel, motel, resort, airline and other transportation businesses.

The foregoing discussion is meant to give the foreign investor an overview of areas of investment and how they are translated into specific pioneer and preferred investments. He should bear in mind always that the pioneer enterprise is virtually a privileged or an open area of investment, in the sense that he can pour in capital as much as one hundred per cent (100%)²¹ of the total requirements. However, a foreign pioneer enterprise has the obligation to convert eventually into a Philippine national within thirty years from registration by having its shares of stocks listed in the Philippine Stock Exchange for fifteen years and actually selling them to nationals. In the case of a pioneer enterprise exporting at least seventy per cent (70%) of its total production, it shall attempt to convert into a national within forty years from registration, by having its shares listed in the Exchange and actually selling them to nationals. This period of forty years can be extended to fifty years for any justifiable reason, taking into account the national interest and the foreign enterprise's genuine effort to attain the status of a national.²²

In a concrete sense, the concept of a pioneer enterprise can be extended into the preferred area, in that when the "measured capacity"²³ of a pre-

¹⁶ *Ibid.*

¹⁷ CONST., art. XIV, sec. 5.

¹⁸ CONST., art. XIV, sec. 9.

¹⁹ CONST., art. XIV, sec. 15.

²⁰ Pres. Decree No. 535 (1974).

²¹ Sec. 19, as amended by Pres. Decree No. 92 (1973).

²² Sec. 19(a)(3), ILL, as amended by Pres. Decree No. 92 (1973).

²³ "Measured capacity" shall mean the estimated volume of production or service which the Board determines to be desirable in each preferred and pioneer area of investment, in order to supply the needs of the economy at reasonable prices, taking

ferred enterprise is not filled by nationals within three years from declaration, the law allows the foreign investor to put in as much as one hundred per cent foreign capital.²⁴

3. *The Preferred Enterprise*

The "preferred enterprise" has no fixed definition in the law. We have mentioned in discussing the pioneer enterprise the different criteria involved in determining whether an area is pioneer or preferred. Since the pioneer enterprise is more clearly defined by the law, the preferred enterprise in a way gets defined by the process of exclusion. In the ultimate analysis, whatever definitions and criteria are found in the law, the law itself recognizes and reserves the matter to be essentially a government policy and may be formulated and decided upon, the way the government wants it. Of course, far from being arbitrary, this decision must reflect a careful consideration of the national interest, the criteria mentioned in the law, and an appraisal of economic conditions.

The foreign investor can invest as much as forty per cent (40%) in a preferred enterprise.²⁵ Like the pioneer enterprise, it is specifically indicated in the priorities plans.

4. *Incentives to Both Pioneer and Preferred Enterprises*

The pioneer and preferred enterprises or simply the "registered enterprises" enjoy the following incentives:

(a) Deduction of organizational and preoperating expenses — the deduction from taxable income includes pre-investment studies; start-up costs, cost of initial recruitment and training and the like. Counselling fees are also included. This incentive is available for ten years from the start of operation.²⁶

(b) Accelerated depreciation — The taxpayer has two options to depreciate fixed assets: (1) depreciated to the extent of not more than twice as fast as normal rate of depreciation or at normal rate if expected life is ten years or less; or (2) depreciated over any number of years and expected life, if the latter is more than ten years.²⁷

into account the export potential of the area. It shall not be less than the amount by which the measurable market demand exceeds the existing productive capacity in said preferred and pioneer areas nor shall it be so much in excess of measurable market demand as to foster or encourage overcrowding in any such area. For export industries, the Board shall base measured capacity on the availability of domestic raw materials after deducting the needs of the domestic market therefore. It shall not be construed to result in a monopoly in any preferred or pioneer area of investment which would unduly restrict trade and fair competition. sec. 3(i), IIL.

²⁴ Sec. 19(d), IIL.

²⁵ Sec. 3(g); sec. 18; sec. 19(d), IIL.

²⁶ Sec. 7(a), IIL.

²⁷ Sec. 7(b), IIL.

(c) Net operating loss carry-over — The net operating loss incurred in any of the ten years of operation may be carried over as a deduction from taxable income for the six years immediately following the year of such loss. The entire amount of the loss shall be carried over to the first of the six taxable years following the loss, and any portion of such loss which exceeds the taxable income of such first year shall be deducted in like manner from the taxable income of the next remaining years.²⁸

(d) Tax exemption on imported capital equipment — Importation of machinery and spare parts which are not manufactured domestically in reasonable amounts and quality and at reasonable prices, which are directly needed by the firm shall not be subject to tariff duties and compensating tax within seven years from registration.²⁹

(e) Tax credit on domestic capital — This is equivalent to one hundred per cent of the value of the compensating duties and custom duties that would have been paid if the machinery and spare part had been imported. The firm that purchases machinery from domestic sources is the beneficiary of this tax credit. The seller-manufacturer is also given fifty per cent tax credit.³⁰

(f) Tax credit for withholding tax on interest — A tax credit withheld on interest payments on foreign loans shall be given when no such credit is enjoyed by the lender-remitee in his country and the enterprise has assumed the liability for payment of the tax due from the lender-remitee.³¹

(g) Employment of foreign nationals — The enterprise may employ a foreign national within five years from registration in supervisory, technical, or advisory positions not in excess of five per centum of its total personnel in each category. When the majority of the capital stock of a pioneer enterprise is owned by foreign investors, the president, treasurer and general manager, or their equivalents, are positions which may be retained by foreigners beyond five years. Their spouses and unmarried children under twenty one years old are allowed to reside with the employed foreigner.³²

(h) Deduction for expansion reinvestment — When a registered enterprise reinvests its undistributed earnings by actual transfer to the capital stock for the procurement of new capital goods or other expansion of the business, the firm can deduct these reinvestments to the extent of twenty five per cent (25%), thirty seven and one half per cent (37 ½%) and fifty per cent (50%) in case of non-pioneer projects; and to the ex-

²⁸ Sec. 7(c), IIL.

²⁹ Sec. 7(d), as amended by Pres. Decree No. 92 (1973) and Pres. Decree No. 485 (1974).

³⁰ Sec. 7(e), IIL, as amended by Pres. Decree No. 92 (1973).

³¹ Sec. 7(f), IIL.

³² Sec. 7(g) and sec. 8(b), IIL.

tent of fifty per cent (50%), seventy five per cent (75%), and one hundred per cent (100%) in the case of pioneer projects.³³

(i) Anti-Dumping protection — A directive from the government may issue banning the importation of goods which unnecessarily compete with the products of a registered enterprise.³⁴

(j) Protection from government competition — The government and its agencies shall not import or allow the importation tax and duty free of products which are being produced by registered enterprises except when the President determines that the national interest so requires or when international commitments require international bidding.³⁵ This provision does not disallow the importation of similar goods which are being manufactured by registered enterprises. What it disallows is importation free from tax by the government and its agencies.

(k) Deduction of labor training expenses — One half of the costs of training unskilled personnel to improve their productivity and efficiency is deductible from taxable income, which is not more than ten per cent of direct labor wages.³⁶

(l) Special export incentives — The tax credit equivalent to the sales, compensating and specific taxes on the supplies, raw materials and semi-manufactured products is deductible from taxable income. Also, an amount is deductible equivalent to the sum of direct labor costs and local raw materials used in the manufacture of exports. The deduction however must not exceed twenty five per cent of its total export revenue and in the case of traditional exports, the local raw material component is not included in computing the deduction.³⁷

(n) Preference in government loans — Government financing institutions shall give high priority to application for financial aid of registered enterprises.³⁸

(m) Private financial assistance — Insurance companies are authorized to invest in new issues of stock of registered enterprises.³⁹

(o) Loans for investment — The government insurance system and the social security system shall extend to its members loans for the purchase of stocks of registered enterprises, at a rate of interest not to exceed six per cent per annum.⁴⁰

³³ Sec. 7(b), as amended by Pres. Decree No. 92 (1973).

³⁴ Sec. 7(i), IIL.

³⁵ Sec. 7(j), IIL.

³⁶ Sec. 7(k), IIL, as amended by Pres. Decree No. 92 (1973).

³⁷ Sec. 9, IIL, as amended by Pres. Decree No. 485 (1974).

³⁸ Sec. 10, IIL.

³⁹ Sec. 11, IIL.

⁴⁰ Sec. 12, IIL.

(p) Protection of patents and proprietary rights — Patents, copyrights, trade names, service marks, and other proprietary rights are protected from infringement provided they are registered by the Board and the appropriate government agency.⁴¹ This provision does not simplify the procedure on the matter of trademarks, patents, copyrights, service marks and other intellectual rights because, it actually adds the requirement of registration with the Board.

(q) Capital gains tax exemption — The taxpayer is exempted from income tax to the extent of the gains realized from the sale, disposition, or transfer of capital assets that are actually invested in the purchase of new shares of capital stocks of a registered enterprise within six months from date the gains are realized. The sale should be registered with the Board and the Bureau of Internal Revenue and the shares representing the investment are not disposed within five years from sale, otherwise, the gains shall become due and payable.⁴² This limitation is meant to discourage stock speculation.

“Capital assets”, according to the Revenue Code, refer to property held by a taxpayer whether or not connected with his business, but do not include the following:

- Stock in trade of taxpayer, other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year;

- Property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

- Property used in the trade or business of a character which is subject to the allowance of depreciation;

- Real property used in the trade or business of the taxpayer;

- Capital gains in the case of a taxpayer other than a corporation.

The foregoing shall be taxable one hundred per cent if the assets have been held for less than a year and only fifty per cent if held for more than one year.⁴³

A Presidential Decree⁴⁴ has suspended the tax on capital gains on individuals and non-corporate entities (e.g. partnerships) from the disposition of capital assets except shares of stocks of a corporation. This exception would not hold if the capital gain from the sale is used to purchase new shares of capital stock of a registered enterprise within six months from the time the gain is realized and not sold within five years

⁴¹ Sec. 5(a), IIL.

⁴² Sec. 5(b), IIL.

⁴³ Sec. 34, National Internal Revenue Code (NIRC).

⁴⁴ Pres. Decree No. 86 (1972).

from the date of purchase, otherwise, the tax shall become immediately due and payable.

5. *Rights and Guarantees of Both Enterprises*

In addition to the foregoing incentives, registered enterprises enjoy the following rights and guarantees:⁴⁵

(a) Protection under the Constitution.

(b) Repatriation of investment in liquidation or retirement of capital.

(c) Remittance of earnings.

(d) Foreign loans and contracts — This is the right to pay principal and interest of a foreign loan at the time they are due.

(e) Freedom from expropriation — This is actually a constitutional right.⁴⁶ However, the specific provision in the IIL guarantees that the government will not expropriate foreign investments or property except for public use or in the interest of national welfare and defense and upon payment of just compensation. The compensation can be remitted abroad by the investor at the currency he invested and at the prevailing rate of exchange at the time of remittance.

(f) Freedom from requisition — The government guarantees no requisition of property of a registered enterprise except in war or national emergency and only for the duration thereof, in which case, just compensation will be paid either at the time of requisition or cessation of hostilities. The proceeds can also be remitted in full abroad.

6. *Expropriation, threat to foreign investments*

There is no clear line of distinction between expropriation and requisition of property except that the latter appears to be an incidence of war or emergency where property, particularly food, and services are demanded by the government or a participant in the hostilities to serve some military ends such as feeding the soldiers or supplying them with arms, shelter or munitions. Expropriation is a broader concept in that it covers the taking of private property by the government whether in war or in peace. In so far as the IIL is concerned, any distinction between expropriation and requisition is relevant only as to duration of the government act, in that requisition is supposed to last only during hostilities or emergency, whereas, expropriation can be indefinite or permanent. In any event, the payment of just compensation is clearly guaranteed.⁴⁷

“Just compensation” may be the subject of different interpretations. A fairly objective interpretation is that it must be “adequate in amount;

⁴⁵ Sec. 4, IIL.

⁴⁶ CONST. Art. IV, sec. 2.

⁴⁷ Sec. 4(d) and (e), IIL; and Art. IV, Sec. 2, CONST.

paid promptly; and in a form that is effectively realizable by the alien, to the fullest extent that the circumstances permit.”⁴⁸

Expropriation is an act of taking by the government of a specific entity, normally a corporate or other business forms, by seizing its assets and terminating its private operations.

Sometimes, it may be necessary to distinguish it from nationalization. The distinction may be that there is a specific degree of discrimination in expropriation. “If a foreign investment is expropriated it is discriminated against and that particular company is expressly named in the government takeover decree. In contrast, a nationalization decree does not expressly name a particular company but instead it is directed against a general class of property, or against a whole sector of the economy. Nationalization is a general policy which names a whole sector of the economy into public or state ownership, and usually indicates an attempt to make a fundamental shift in the organization of industry within the host economy.”⁴⁹

Using this useful distinction, the Philippines has never had any record of expropriation. It did nationalize the retail trade industry, but even here, the decree was fairly reasonable to foreigners, giving those already engaged in the enterprise sufficient grace period to legally dispose of their operations or attain the status of a national. There has been no concrete decision by the courts, which has resolved the issue as to whether American citizens are exempted from the Retail Trade Nationalization Law by virtue of the Parity Amendment to the 1936 Constitution. The parity rights however had ended in 1974.

Expropriation has always been the dread of the foreign investor. It is “central to any evaluation (or intelligent investment decision) in less developed countries, perhaps the most serious deterrent to the multinational private corporation is the spectre of confiscation...”⁵⁰ This is not the problem of the foreign investor in the Philippines because of sufficient guarantees in the Constitution and the present law; likewise gauging from past and current history of the government; and the pronouncement of the present administration.⁵¹ Expropriation is normally regarded as a violation of the general principles of international law particularly when it is in

⁴⁸ Sec. 187, Restatement, Second Foreign Relations Law of the U.S. (1965) quoted in Friedman, Lissitzyn and Pugh, “International Law, Cases and Materials”, p. 813.

⁴⁹ Bruce Lloyd, *The Identification and Assessment of Political Risk in the International Environment*, LONG RANGE PLANNING, 27 (1974).

⁵⁰ J.F. Truitt, *Expropriation of Foreign Investment: Summary of Post World War II Experience of American and British Investors in Less Developed Countries*, JOURNAL OF BUSINESS STUDIES, 21-34 Fall (1974) cited in LLOYD, *op. cit.*, p. 27.

⁵¹ The President was quoted in *U.S. News and Report* interview as saying: “... There will be no confiscation while I’m President. Such things as amortization of investment, retirement of capital and transmittal of profits are guaranteed...” cited and quoted in Augusto Cesar Espiritu, *Multinational Corporations and Philippine National Development*, p. 6.

violation of an existing treaty or agreement.⁵² The Philippines, by virtue of a Constitutional provision⁵³ which expressly adopts the general principles of international law as part of the law of the land, is less likely to expropriate foreign investments, even in the absence of an existing treaty or bilateral agreement. The government is very much aware that by virtue of the guarantees of freedom from expropriation and freedom from requisition enunciated in the IIL, upon which a foreign investor relied, a contract in effect was entered into between the government and the investor, the breach of which is cognizable in any court of law.

It is however argued that political risk is much wider than exposure to the risk of expropriation.⁵⁴ Assuming this observation to be accurate, the foreign investor has still less to worry about the Philippine situation. Peace and order have tremendously improved.⁵⁵ The economy is moving towards greater stabilization.

7. No "creeping expropriation"

Expropriation may not only consist of the overt taking of private property. Restrictive policy and regulations have been designed by unfriendly governments meant to "freeze" foreign investments. Because of the "paralyzing" effect to foreign companies, it amounts almost to a sundering of the rights of ownership, resulting in effect to a subtle form of expropriation. Professor Sohn and Baxter have described this "creeping expropriation" in the following words:

"A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference" ⁵⁶

This type of expropriation is particularly difficult to define but is more important in many situations than straight-forward expropriation.⁵⁷ Lloyd has the following description of this kind of expropriation:

"... Measures that could be considered in this category would include: labour laws (including withholding of work permits); price controls and tariff policies; restriction on the transfer of shares; local taxation or dividend policies; and restrictions on imports of essential materials." ⁵⁸

Creeping expropriation is non-existent in the Philippines. On the contrary the measures described by Lloyd are the opposite and positive equivalences of the various incentives in the incentives law of the Philip-

⁵² Justice Harlan, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.E. 2d, 804 (1964).

⁵³ CONST., art. II, sec. 3 (1973).

⁵⁴ Lloyd, *op. cit.*, p. 27.

⁵⁵ Espiritu, *op. cit.*, p. 6.

⁵⁶ Friedman, Lissitzyn and Pugh, *op. cit.*, p. 821.

⁵⁷ Lloyd, *op. cit.*, p. 27.

⁵⁸ *Ibid.*

panies. Labor laws are non-discriminatory in that they apply equally to foreign and domestic corporations. Foreign nationals are allowed to accept employment particularly in the management and technical positions. Spouses and immediate families are permitted to stay within the foreign nationals employed.⁵⁹ Both under the IIL and the EIL, the importation of machinery and spare parts is duty-free and deductible from taxable income as organizational expense.⁶⁰ Export intensive enterprises are exempt from all taxes for a period of time except income tax.⁶¹ Earnings and retirement of capital are allowed to be remitted abroad in full value and at the prevailing rate of exchange.⁶² Gains from sale of stock dividends are exempted from tax.⁶³ Income tax is further reduced by deducting direct labor cost and local raw materials used in manufacture.⁶⁴

8. *Incentives Exclusive Only to Pioneer Enterprises*

In addition to the rights and guarantees already mentioned, the pioneer enterprise has the following exclusive benefits:

(a) Tax exemption — Pioneer enterprises registered in areas included for the first time in the sixth or subsequent Investment priorities plan or carried over from the previous investment priorities plans are exempted from all taxes except the income tax according to the following schedule:

- (1) One hundred per cent for the first five years;
- (2) Seventy-five per cent for the sixth to the eighth year;
- (3) Fifty per cent for the ninth and tenth years;
- (4) Twenty per cent for the eleventh to twelfth year;
- (5) Ten per cent for the thirteenth through the fifteenth year.⁶⁵

On the other hand, the tax schedule for a pioneer enterprise which was previously a preferred⁶⁶ area of investment and a pioneer enterprise carried over the sixth and subsequent Investment priorities plan and already registered at the time, is the following:

- (1) One hundred per cent until Dec. 31, 1972;
- (2) Seventy-five per cent until Dec. 31, 1975;
- (3) Fifty per cent until Dec. 31, 1977;
- (4) Twenty per cent until Dec. 31, 1979; and
- (5) Ten per cent until Dec. 31, 1981.^{66a}

Any pioneer project costing more than one hundred million pesos (approximately U.S. \$12,500,000) may petition the Board for an extension

⁵⁹ Sec. 8(b), IIL; sec. 7, EIL.

⁶⁰ Sec. 7(a) and (c), IIL.

⁶¹ Sec. 8, IIL.

⁶² Sec. 4, IIL.

⁶³ Sec. 6(c), IIL.

⁶⁴ Sec. 7(b) and sec. 9(a)(1), EIL.

⁶⁵ Sec. 8(a), IIL.

⁶⁶ See Sec. 19(d), IIL.

^{66a} Sec. 8(a), IIL.

of tax exemption on either of the above schedules, to a maximum of twenty years.⁶⁷

Note carefully that the exemption given by the law does not include exemption from the income tax. According to the National Internal Revenue Code (NIRC), a foreign corporation (in the same way that a domestic corporation) shall file an accurate statement of its annual net income for each quarter of a taxable year.⁶⁸ A foreign corporation engaged in trade or business in the Philippines is similarly taxed as a Philippine corporation at the rate of twenty-five per cent for the first one hundred thousand pesos of net income and thirty-five per cent in excess of one hundred thousand pesos.⁶⁹ Aside from income tax, a foreign personal holding company like its domestic counterpart is levied a tax equal to forty-five per centum of its undistributed income.⁷⁰ I believe that the broad statement of the tax exemption in the IIL includes exemption from this additional tax if the foreign holding company is a registered enterprise.

(b) Employment of nationals beyond five years — The pioneer enterprise can retain foreign nationals for the position of president, treasurer and general manager or their equivalents beyond five years from registration. They can also retain foreign national in other positions beyond five years from registration when the positions can not be filled with local nationals.⁷¹ It shall however attempt to train local personnel.⁷²

(c) Post-operative tariff protection — The pioneer enterprise is entitled to fifty per cent of the dutiable value of imported items similar to those it manufactures and which can exceed fifty per cent if provided by the Tariff Code and other laws.⁷³ This provision is not exactly clear as to the kind of "tariff protection" given the pioneer enterprise, whether it is in the form of a tax credit or a commensurate increase of tariff on similar competing goods from abroad. The more accurate view seems to be that it is a tax credit.

9. *Incentives Exclusive to Preferred Enterprise*

Although the capital equity investment of the foreign investor in a preferred enterprise can not exceed forty per cent, it may be of interest to the foreign businessman to be informed of the incentives exclusive to the preferred enterprise, either for the purpose of comparison or out of real interest as a joint investor.

⁶⁷ *Ibid.*

⁶⁸ Sec. 46(b), NIRC.

⁶⁹ Sec. 24, NIRC.

⁷⁰ Sec. 63, NIRC.

⁷¹ Sec. 8(b), IIL; see footnote 32, p. 446 this paper.

⁷² See Commonwealth Act (CA) No. 613 (1940).

⁷³ Sec. 8(e), IIL.

The following are exclusive to a preferred enterprise:

(a) Special tax credit which is equivalent to the total sales, compensating and specific taxes and duties on the supplies, raw materials and semi-manufactured goods used in producing its exports. If the firm directly exports the goods abroad, the tax credit accrues on exportation. If it sells to another producer in the Philippines which in turn exports the goods or to a trader who merely acts as a middleman, the tax credit accrues only upon actual exportation.⁷⁴

(b) Reduced income tax for the first five years from registration in that the firm can deduct from its taxable income an amount equivalent to the sum of direct labor cost and raw materials utilized in the manufacture of its products. It shall not exceed however, twenty-five per cent of its total export revenue. In the case of traditional exports (like abaca, sugar, coconut oil, hemp, etc.), the local raw material component is not included in the deduction.⁷⁵

10. *Registration Procedure for the Pioneer Enterprise*

The foreign investor must register as a pioneer enterprise with the Board of Investments. There is no appropriate time period in the law in which to file the application for registration, but since the priorities plan is drawn not later than the end of January of each year,⁷⁶ it may be advisable for the foreign investor to register as soon as the Plan has been drawn and he has made his decision as to the specific area enumerated in the Plan he wants to invest.

The applicant must satisfy the Board that:

(a) The firm proposes to engage in a pioneer project;⁷⁷

(b) It obligates itself to attain the status of a national within the specified periods by having its shares of stock listed in the Philippine Stock Exchange and selling them to nationals;⁷⁸

(c) The area is not reserved by the Constitution and other laws to Philippine nationals.⁷⁹

(d) It will start operation within reasonable time fixed by the Board,^{79a}

(e) It can operate on a sound and efficient basis and contribute to national development;⁸⁰

⁷⁴ Sec. 9(a), IIL.

⁷⁵ Sec. 9(b), IIL, as amended by Pres. Decree No. 483 (1974).

⁷⁶ Sec. 18, IIL.

⁷⁷ Sec. 19(a)(2), IIL.

⁷⁸ Sec. 19(a)(3), IIL, as amended by Pres. Decree No. 92 (1973).

⁷⁹ Sec. 19(a)(4), IIL.

^{79a} Sec. 19(b), IIL.

⁸⁰ Sec. 19(c), IIL.

(f) If it will engage in activities other than pioneer projects, it will install an accounting system which would identify the activities separately.⁸¹

11. *Registration Procedure for the Preferred Enterprise*

The procedure is the same as the foregoing except that the preferred enterprise has no obligation to attain the status of a national and is not subject to the constitutional reservation on certain activities.⁸²

12. *Decision and Certificate of Registration*

The Board of Investment shall decide on the application. Any adverse decision or order may be appealed within thirty days from receipt of the order to the National Economy and Development Authority (NEDA). The NEDA may review the decision or it may choose to ignore the appeal in which case upon failure of the NEDA to act upon within ninety days, the decision of the Board is considered affirmed. The applicant can further appeal to the President within thirty days.⁸³

The Board shall cease to entertain application for an enterprise, the measured capacity of which has already been filled. Controversy often arises when there are many qualified applicants for an area, the measured capacity of which is only limited so as not to accommodate all applicants, in such situation, the Board shall take into consideration the following criteria:

- (a) The extent of ownership and control by nationals;
- (b) The manner in which the enterprises are integrated, and the length of their experience on the field of investment they wish to enter into;
- (c) The cost in their manufacturing processes;
- (d) The amount of foreign exchange earned, used, or saved in their operations;
- (e) The extent to which they employ labor, materials and other resources obtained from indigenous sources;
- (f) The amount of their equity, and the degree to which the ownership of the equity is spread out and diversified;
- (g) The extent to which they shall insure the maintenance of compensation within the industry; and
- (h) The extent of public participation in the enterprise.⁸⁴

⁸¹ Sec. 19(d), IIL.

⁸² See CONST. (1973), art. XIV.

⁸³ Sec. 20, IIL.

⁸⁴ Sec. 20, IIL.

Presumably, if there is a controversy between two or more claimants, there is always the necessity of hearing and notice to comply with the requirements of procedural due process. But as to the simple registration where there is no controversy, there seems to be no difficulty or complication in the procedure.

III. EXPORT INCENTIVES LAW

The Export Incentives Law has been passed to provide improved motivation to manufacturers in the Philippines of exportable goods. It is designed to minimize imports; to earn more dollars; and to utilize available domestic raw materials. It expresses the current policy of the state to actively encourage, promote and diversify Philippine exports and develop new markets abroad.⁸⁵

Foreign corporations may invest up to one hundred per cent in enterprises within the "foreign trade zones,"⁸⁶ and avail of the benefits under the EIL in the same manner as a domestic corporation. There is no elaboration of the Law on the nature of the foreign trade zone. Neither is there a cross-reference to Republic Act 5490 which provides for the establishment of an export processing zone at Mariveles, Bataan, where foreign investments in export oriented firms can reach hundred per cent.⁸⁷ The legislative history can neither help us on this point. Presumably, the government can declare certain areas as foreign trade zones.

The pioneer enterprises listed in the Export Priorities Plan may of course be totally foreign capital.

There are three types of business activity covered by the EIL: (1) Export Producer; (2) Export Trader; and (3) Service Exporter.

1. *The Export Producer*

The export producer is any person, partnership, or corporation which is registered under the EIL and engaged in the manufacture of export products, either directly exporting them abroad or selling them to a trader or middleman who in turn sells the goods abroad. It can also manufacture and sell goods domestically, provided they are used as direct inputs to an export product. Moreover, it can be a producer of goods and services sold to foreign tourist and travellers and covered by the Tourism Priorities Plan.⁸⁸

2. *Incentives to Producer*

The EIL constantly refers to the IIL, particularly when it comes to certain incentives which are granted by both laws. It provides that the

⁸⁵ See "Declaration of Policy", Sec. 2, EIL.

⁸⁶ Sec. 13, EIL.

⁸⁷ Foreign Investment and Tax Administration in the Philippines, *op. cit.*, p. 6.

⁸⁸ Sec. 3(b), EIL.

export producer, export trader and service exporter shall enjoy also the rights and guarantees under Section 4 of the Investment Incentives Law and those enumerated in Section 5 of the IIL.⁸⁹ The rights and guarantees refer to repatriation of investment, remittance of earnings, foreign loans and contracts, freedom from requisition and expropriation.⁹⁰ Those enumerated in Section 5 of the IIL are: protection of patents, copyrights, and trademarks; and capital gains tax exemption.⁹¹ Because an export producer may at the same time be a pioneer enterprise or a preferred one registered under the IIL they are therefore entitled to the incentives exclusive to the nature of their enterprise.⁹²

Aside from the foregoing, the exporter shall enjoy the following incentives:

(a) Tax credit — This is equivalent to the sales, specific taxes and duties on the supplies, raw materials and semi-manufactured goods used in the manufacture of its goods. Whether directly exported by the producer, or sold to a trader, or another manufacture which form part of the final export product, the tax credit shall accrue only after exportation of the final commodity. This credit can be used to pay a tax due to the national government. It can only be transferred however, by succession and by operation of law. It can not result into a refund when applied to the payment of a lesser tax.⁹³ It must, therefore, be less or exactly the same amount as the tax due when applied. If it is less, the taxpayer is to pay additional amount. If it is more than the tax due, the taxpayer forfeits the excess amount.

(b) Reduced income tax — Direct labor costs and local raw materials used in the manufacture of the exportable good can be deducted from taxable income as much as the equivalent of twenty-five per cent of its total export revenue. This shall not apply to a pioneer enterprise previously declared preferred but whose measured capacity has not been filled by nationals within three years from declaration.⁹⁴

(c) Tax exemption on imported capital equipment — Machinery and spare parts can be imported free from duty provided they are not available locally at reasonable price and in reasonable quantity and quality. They must be directly needed by the firm and covered by shipping documents. The firm can not be a conduit of others for the purchase of tax-free machinery. Neither can the firm engage in speculation. If the machinery is sold within five years from purchase without Board approval, the firm is liable to pay double the tax due. The Board on the other hand, can give

⁸⁹ Sec. 5, EIL.

⁹⁰ Sec. 4, IIL, see footnote 46 and pp. 448-449 of this paper.

⁹¹ Sec. 5, EIL, see pp. 439-440 of this paper.

⁹² See pp. 450-451 of this paper, footnote 65.

⁹³ Sec. 7(a), EIL.

⁹⁴ Sec. 7(b), EIL.

approval to the sale of such machinery within five years from purchase if the sale is for expansion, or because of technical obsolescence or the sale is made to another producer.⁹⁵

(d) Tax credit on domestic capital equipment — If the machinery and spare parts, instead of being imported from abroad are bought from local sources, a hundred per cent tax credit of the compensating tax and custom duties which would have been paid had they been imported. The local seller-manufacturer also gets a tax credit of fifty per cent. This benefit shall be enjoyed by the firm for ten years from registration. If the goods are sold within five years without Board approval, the firm is liable to pay double the value of the tax. But Board approval shall be granted if the sale is for expansion, or because of technical obsolescence, or made to another registered firm under the EIL.⁹⁶

(e) Exemption from export — The producer does not pay export and stabilization taxes.⁹⁷

(f) Tax credit on infrastructure — A credit is given equal to one hundred per cent of the cost of building infrastructure works like portworks, waterworks, aircraft landing facilities, roads and bridges leading from the plant to a loading place or to a national highway or poblacion (town proper) and similar projects normally undertaken by the government. Title to these works should be transferred to the government. If maintenance is needed, credit of one hundred per cent of the maintenance cost is given.⁹⁸

(g) Net-operating loss carry-over — The net operating loss incurred at any time during the first ten years of operation, may be carried over as a deduction from taxable income, for the six year immediately following such loss. If there is an excess, it can be carried over to the five years succeeding the sixth year.⁹⁹

(h) Deduction of increment to export sales — A deduction equal to one per cent of the increment or increase in value of its export sales during the year the incentive is claimed, compared to the value of the sales of the preceding year. This incentive however is only an alternative option to the benefit in (g), once the producer has made his choice.¹⁰⁰

3. *The Export Trader*

The export trader is a person or juridical entity organized and existing under Philippine laws which is registered under the EIL and which derive

⁹⁵ *Ibid.*

⁹⁶ Sec. 7(d), EIL.

⁹⁷ Sec. 7(e), as amended by Pres. Decrees Nos. 92 and 485.

⁹⁸ Sec. 9(a)(1), EIL.

⁹⁹ Sec. 9(b)(1), EIL.

¹⁰⁰ Sec. 9(b)(2), EIL.

at least twenty per cent of its gross income for the year in which the incentives are claimed from the sale abroad of export products or from domestic sale to foreign tourists and travellers in areas listed in the "Tourism Priorities Plan".¹⁰¹

4. *Incentives to Trader*

- (a) Exemption from export tax it buys from a registered producer;
- (b) Tax credit to the amount of specific and sales tax on the registered export products it buys and subsequently sells;
- (c) Tax deduction for five years from registration of ten per cent of its export sales;
- (d) Additional tax deduction of one per cent for five years from registration of total export sales if the trader extends financial help to a registered producer to an amount not less than twenty per cent of the trader's total export sales during the year this incentive is claimed.¹⁰²
- (e) Net-operating loss carry-over or a deduction of one per cent of the increment between export sales during the year this incentive is claimed and the export sales of the preceding year.¹⁰³ These are similar to the incentives given to the producer in our discussion 3 (g) and (h) above.

5. *The Service Exporter*

The service exporter is a person, corporation, partnership or other professional and technical group organized and existing under Philippine laws, registered under the EIL, and engaged in rendering technical, professional or other services which are paid for in foreign currency. It includes the professions of law, medicine, accounting, management valuation and appraisals, engineering and construction, geodetics, surveying, teaching, pharmacy, nursing, cultural presentations and promotion of work of arts and entertainment. It may also include the export of television, motion pictures, and musical recordings made in the Philippines either directly or through a trader. Lastly, it may include rendering services to foreign tourists and travellers.¹⁰⁴

6. *Incentives to Service Exporter*

The following are the benefits enjoyed by the registered service exporter:¹⁰⁵

¹⁰¹ Sec. 3(c), EIL.

¹⁰² Sec. 8, EIL.

¹⁰³ Sec. 9(b)(1), EIL.

¹⁰⁴ Sec. 3(d), EIL.

¹⁰⁵ Sec. 10, EIL.

(a) Deduction of export fees in the amount of fifty per cent for five years, with the service exporter remitting its earnings in foreign currency to the Philippines.

(b) Tax credit which is available only to the television, motion picture, or musical recordings producer, equivalent to the amount of specific compensating and sales tax on raw materials and supplies used in production for five years from registration.

(c) Exemption from customs duties on the importation of capital goods not available locally.

7. Cancellation or Suspension of Incentives

Any or all of the incentives given to the producer, trader, or service exporter may be cancelled or suspended by the Board: if there is any violation of the EIL, welfare and labor laws; any action by an international association or foreign nation which would nullify the incentives and impair the export trade of the Philippines, or its relations with other nations; or when the export firm has a paid-up capital of at least five hundred thousand pesos and earned for at least two years profits from exports in excess of thirty-three and one-third per cent of equity even without incentives. Note that two requirements of paid-up capital and profits must concur, and that the incentives appear to be unnecessary. The first reason for cancellation or suspension of incentive is based on the contractual nature of the relationship between the producer, trader, or service exporter on one hand, and the government represented by the Board on the other hand. Violation of any provision or labor law is a breach of that contract and hence a ground for Board action. The second reason is meant to meet any contingency brought about by action on the part of a group of nations or one nation like trade restrictions or embargoes. The third reason is obviously based on the assumption that a huge *paid-up* capital with considerable profits of two years, is a functional index of the relative stability of the enterprise, hence the non-necessity of incentives. All of these reasons for cancellation and suspension are not mandatory rules. The Board shall exercise its wise discretion and shall follow the usual requirements of procedural and substantive due process. Notice shall be made and hearing conducted. The right to counsel is guaranteed and the decision of the Board may be appealed to the President or brought to the courts.

8. Option for Enterprises Registered Under IIL

Registered enterprises in the IIL have the option to register with the Board under the EIL, in which case, the benefits accruing from the EIL shall apply prospectively and the enterprise ceases to be governed by the IIL.¹⁰⁶

¹⁰⁶ Sec. 17, EIL.

There is no fixed counsel, a lawyer can give the foreign enterprise on the exercise of this option. Although there are benefits in the IIL which have been expressly included in the EIL as we have already pointed out,¹⁰⁷ the option has to be exercised upon a careful study of the specific situation. There are certain things to be considered, aside from the nature of the enterprise and the choice of incentives. There is no substitute therefore of a case to case study.

9. *Priorities Plans Under the EIL*

There are two basic priorities plans under the EIL: (1) the Export Priorities Plan (EPP); and (2) the Tourism Priorities Plan (TPP). The EPP is an annual list and identification of export products that shall be encouraged by giving them priority for the year in which the plan is valid.¹⁰⁸ It shall also include the conditions for the availment of incentives pertaining to the various export products stated in the plan.¹⁰⁹ The TPP is the annual listing of tourism areas and the required tourism facilities which can be established with the incentives provided in the EIL.¹¹⁰ Note that there is also a Tourism Priorities Plan under the IIL, which list those tourist areas and facilities which can be better established with the incentives under the IIL. In addition to the two basic plans, the EIL has a "Mandatory Inclusion" plan which is designated to include the status and consider export products not listed in EPP but nevertheless qualified for registration if the conditions are satisfied by the product and the applicant firm:

(a) The C.I.F. cost of any imported materials which may be attributable directly to the manufacturer of the product is not more than eighty per cent of its individual F.O.B. Philippine port value which has been reduced progressively by the Board starting September 1, 1973;¹¹¹

(b) The total F.O.B. Philippine port value of the export of said product in 1963 did not exceed five million dollars; (This condition is not applicable when the exportation is made *substantially* by non-Philippine nationals.)¹¹²

(c) The product meets official quality standards;¹¹³

(d) At least fifty per cent of total revenue of applicant firm was derived from actual exportation; (This condition is, also applicable when the exportation has been made *substantially* by non-Philippine nationals.)¹¹⁴

¹⁰⁷ Sec. 7, EIL, see pp. 455-456 of this paper.

¹⁰⁸ Sec. 4, EIL.

¹⁰⁹ Rule I (c), Administrative Rules and Regulations to Implement RA 6135 (ARRI).

¹¹⁰ Rule I (d), *Ibid.*

¹¹¹ Rule I (e)(1), *Ibid.*

¹¹² Rule I (e)(2), *Ibid.*

¹¹³ Rule I (e)(3), *Ibid.*

¹¹⁴ Rule I (e)(4), *Ibid.*

(c) The total volume of export for the product must not be less than the reasonable quantity fixed by the Board.¹¹⁵

With respect to service exporters, the same conditions in the "Mandatory Inclusion" plan are applicable to the professional and technical services they offer.¹¹⁶

10. *Procedure of Application*

The export trader and export producer under the "Mandatory Inclusion" plan, may apply any time. Also, are service exporters in a "Mandatory Inclusion" plan.¹¹⁷ Moreover, an export trading firm which is *substantially* in the hands of non-Philippine nationals may also apply anytime.¹¹⁸ Otherwise, the filing of applications by the producer and the trader should be made only after the publication of the EPP and the TPP, which is normally not later than January of every year. In the same way, that service exporter should file applications after the publication of the "qualified services" in two newspapers of general publication in the Philippines.¹¹⁹

Four copies of a prescribed form should be accomplished and notaried¹²⁰ and unless the forms require otherwise certain documents should accompany the application. The export producer should present: four copies of a project study showing that the intended project is economically, technically and financially sound; a copy of articles of incorporation and by-laws in the case of a corporation or partnership; resolution of the board of directors authorizing the application and naming a representative, together with a list of officers and directors, and list of stockholders; income tax returns for two years; financial statement for two preceding years; and a standard formula for the computation of tax credit on raw materials and supplies. The export trader shall submit a five-year projection, with and without Board incentives, of its export operations indicating the products for exportation, expected revenues and costs. It shall also submit a statement specifying the names of two or more export producers from which it intends to buy goods for exportation. In the case of a corporation or partnership, the trader, like the producer shall submit copies of its articles of incorporation, by-laws, income tax returns for two years, financial statement for two years, list of officers, directors, and stockholders. The service exporter shall submit all documents required of a producer except that a project study is not required in areas other than television, motion picture, musical recordings, and tourism projects. The service exporter shall present a contract of service or employment, and a commitment

¹¹⁵ Rule I (e)(5), *Ibid.*

¹¹⁶ Rule I (e), *Ibid.*

¹¹⁷ Rule III, sec. 1, *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, refer also to Rule I (j) and sec. 4, EIL.

¹²⁰ Rule III, Sec. 3(A)(1), ARRI.

to remit earnings to the company less reasonable costs and expenses.¹²¹ Within ninety days from the application and submission of all requirements, the Board shall approve or disapprove the application, which shall be communicated in writing to applicant. The applicant is given thirty days to submit its acceptance and compliance with the attached terms and conditions in the notice of approval.¹²² There is no specific procedure in the EIL and the rules and regulations implementing it as to appeal of disapproval order or decisions. Presumably, the same way as the appeal is made under the IIL is appropriate since it is the same administrative agency involved. Likewise, under Philippine administrative law and practice, resort to the courts can be made provided there has been an exhaustion of the administrative remedies or resort to these administrative remedies clearly appears to be futile. Final administrative decision can be reviewed by the Supreme Court upon questions of law because there is considerable reliance made on the finding of facts by the administrative agency.

V. FOREIGN BUSINESS REGULATIONS LAW

This legislation has been designed to make foreign investments in the Philippines in line with current government policy of a "sound and balanced development of the national economy on a self-sustaining basis."¹²³

There are two classified areas under the Foreign Business Regulations Law (FBRL) in which foreign equity participation may come in: (1) permitted investments; and (2) permissible investments.

A permitted investment is defined by the Law as an investment wherein the foreign equity investment does not exceed thirty per cent of the outstanding foreign equity investment does not exceed thirty per cent of the outstanding is registered in the IIL, it can qualify for a permitted investment under the FBRL provided the foreign equity investment would not affect its status as a registered enterprise under the IIL.¹²⁴ Meaning to say, that it can either be a pioneer enterprise, in which case foreign equity investment can be hundred per cent, or a preferred enterprise, foreign equity investment thereof cannot exceed forty per cent. The registration of a permitted investment under the FBRL is merely for record purpose, with no other consequence.¹²⁵ This is so because the area of permitted investments is either occupied by pioneer and preferred enterprises which are already registered under the IIL and by enterprises where foreign equity investment is not more than thirty per cent, for which registration is not really of consequence because of the minimal foreign participation.

¹²¹ Rule III, sec. 3(C)(3), *Ibid*.

¹²² Rule IV, sec. 1, *Ibid*.

¹²³ Title of the Act.

¹²⁴ Sec. 2(1)(a), FBRL.

¹²⁵ Sec. 2(2), FBRL.

On the other hand, the permissible investment is one where the foreign equity investment exceeds more than thirty per cent and may reach hundred per cent. Registration here is not merely for record purpose. The authority of the Board is needed to start operations. There are five basic criteria by which the prior authority of the Board shall be granted: (1) The investment would not conflict with existing constitutional provisions¹²⁶ and laws regulating the degree of required ownership by Philippine nationals in the enterprise; (2) It would not pose a clear and present danger of promoting monopolies or combinations in restraint of trade; (3) It is not an area adequately explored by nationals; (4) It will not conflict with the Investment Priorities Plan in force at the time the investment is to be made; and (5) It would contribute to the sound and balanced development of the economy.¹²⁷ In addition to the prior authority of the Board, investments made in foreign currency or assets actually transferred to the Philippines are to be registered with the Central Bank and their value assessed by the Board.¹²⁸ It should also be licensed by the Securities and Exchange Commission (SEC) where it shall file its articles of incorporation and by-laws. The firm must also comply with the following: (1) To appoint a resident agent in the Philippines who must be a Philippine citizen, of age, of good moral character and sound financial standing, who shall receive summons and other legal processes in behalf of the corporation and binding to it; (2) To establish an office in the Philippines; (3) To bring capital assets as prescribed by the Board which shall remain unimpaired during the period the firm does business in the Philippines; (4) To present proof of reciprocity, i.e., Philippine nationals are accorded similar rights by country of the firm; (5) To provide the SEC with its charter; (6) To keep a complete set of accounts subject to official inspection; (7) To give priority to resident creditors and resident stockowners upon liquidation and distribution of assets; (8) To give at least six-month notice to SEC upon termination of business; and (9) Not to terminate without just cause any franchise, licensing or other agreement that the foreign investor may have with a resident authorizing the latter to assemble, manufacture, or sell within the Philippines, the products of the foreign firm.¹²⁹ There shall be publication of the application of the foreign investor immediately upon application, once a week for three consecutive weeks in the *Official Gazette* and in one of the newspapers of general circulation in the province or city where the principal office of applicant is located. Likewise, a copy of the application setting forth the name of the applicant, the business it wishes to engage into, and other pertinent data shall be posted conspicuously in the Office building of the Board of Investments.¹³⁰ There is specifically mentioned, a resort to the courts from a decision of the Board or from its failure to act within

¹²⁶ Sec. 3(a), FBRL.

¹²⁷ Sec. 3(e), FBRL.

¹²⁸ Sec. 3, FBRL.

¹²⁹ Sec. 4, FBRL.

¹³⁰ Sec. 7, FBRL.

sixty days from the final date of the publication of the application. The venue is specific, which is the Court of First Instance of Manila.¹³¹

VI. CONCLUSION

The legal requirements, as we have seen in our study of the investment laws, for the foreign investor to do business in the Philippines, are fairly reasonable and stable. They are reasonable to both foreign investor and host country. They are stable in that they are embodied into law and not subject to erratic or arbitrary policy. Because the Philippines is currently at a transition stage from a purely agricultural economy to a mixed economy of agriculture and industry, the present public policy on foreign investments is one of encouraging its entry upon reasonable terms. This policy is part only of the broader public perception that intensive economic development at this stage can be achieved by marshalling all available resources from land and other natural resources, professional and technical skills, to a generation of capital from both domestic and foreign sources. Foreign investments are not only carriers of capital but are vast repositories of technical, scientific, and managerial expertise, which can make possible the transfer of technology from the more advanced countries to the developing ones like the Philippines.

In line with this public policy, the present laws of foreign investments exhibit no stringent requirements of the allowable foreign equity investments in areas specified, which in many cases reach one hundred per cent. The different incentives and priorities plans which list and identify the specific areas open to foreign investments should guide the foreign investor in reaching a specific investment decision.

There are no complicated rules of procedure designed to confuse the foreign investor. On the contrary, the simple rules of registration and securing a license are meant to have the foreign investor avail of the many benefits which are granted to make his initial operation as easy as possible and his long range profitability and business success, guaranteed to benefit both foreign investor and host country. Hence, tax exemptions, tax credits, and tax deductions of various kinds are granted for the first several years to stabilize the initial operation of the foreign investor which in any business may be the most difficult periods.

There are likewise, no signs of "creeping expropriation" which has been the favorite legal measure of some developing nations.¹³² Labor laws are applied without discrimination against the foreign company. Foreign nationals are permitted to handle highly technical, managerial, and fiduciary positions. Remittance of earnings, and even capital upon retirement or liquidation, are allowed in the currency in which the investment

¹³¹ Sec. 8, FBRL.

¹³² See Lloyd, *op. cit.* p. 27.

was made and in full value at the prevailing rate of exchange. Further incentives in the form of tax credit for reinvestment and expansion, and exemption from duties in the importation of additional machinery and equipment, are meant to encourage the stay of foreign investors. Indeed, there is no evidence of bad faith in the real intentions of government on foreign investments. Once a foreign investment is made, it is free to operate at minimum restrictions and free to terminate at will. The only requirement of the law upon termination of business, is a reasonable notice to the government and a priority in the distribution of assets to resident stockholders and priority of payment to resident creditors.

There has been no "freezing" of assets, more so has there been any record of outright expropriation. While the observation made by one observer¹³³ of multinational corporations, that the exposure to political risks of foreign investments made in developing countries may be wider than exposure to expropriation, may possibly be accurate, the foreign investor has less to worry on this matter, about the Philippine situation. Not only has peace and order markedly improved in recent years, but the people are apparently developing a new sense of discipline and direction which is a prerequisite to any meaningful development. Perhaps, it may only be a matter of time for foreign investments to prove its worth in developmental process, in the Philippine example.

¹³³ *Ibid.*