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PHILIPPINE FOREIGN INVESTMENT EFFORTS: THE FOREIGN INVESTMENTS ACT AND THE LOCAL GOVERNMENTS CODE

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Abstract: The Philippine Government's efforts to attract foreign direct investments have been ineffectual, especially when compared with the efforts of its Southeast Asian neighbors. Foreign investment incentive legislation has been relatively ineffectual in attracting the investment the Philippines sought due to the ambiguous and arbitrary execution of its investment laws and policies. The Philippine Judiciary's unsettled attitude toward foreign investment further enhanced the overall impression that the Philippines was not a safe or stable investment host country. The Philippines' most recent legislative attempt to lure foreign investment is the Foreign Investments Act of 1991. The Foreign Investments Act goes much further than its predecessors in liberalizing access to the Philippine economy by promoting more transparent and efficient investment laws and regulations. However, the Foreign Investments Act is potentially marginalized by the Local Governments Code, which diffuses much of the central government's powers to lure and to control foreign investment to local government units, most of whom have diverse development and investment priorities. Thus, the Foreign Investments Act alone is not likely to attract and keep the desired investment. To lure foreign investment, the Philippines should provide some form of efficient investor services that will account for the central and local governments' priorities, differences and needs. This would promote productive and equitable foreign investment by building on the strengths of the Foreign Investments Act while preserving the integrity of local decisions mandated by the Local Governments Code.

INTRODUCTION

The Philippines actively seeks direct foreign investment through a myriad of investment incentives.[1] Currently, however, the Philippines has difficulty attracting and keeping foreign investment. Investors perceive the Philippines to be a risky investment host due to the capricious administration of its investment laws and policies.[2] Recognizing that investment disincentives exist, and that the Philippines needs to improve its investment

[1] Investment incentives are generally statutory devises that encourage investors to invest in a particular country, region or industry by reducing the investor's operating costs. These incentives generally take the form of lower tax obligations, guarantees against specific state actions, and specific market protections. The Philippines latest investment promotion effort, the Foreign Investments Act of 1991 (Investments Act), Republic Act No. 7042, is discussed at length below and in Appendix A.

[2] Joel McCormick, *Instability Hampers Philippines' Growth . . .* , 17:11 Electronic Business 3, 49 (June 1991): citing unpredictable policy administration as an investment deterrent. *See also* Leo P. Gonzaga, *Foreign Investment: Regulatory Developments*, 11: 8 East Asian Executive Reports 13 (Aug. 15, 1989).

climate, the Philippine government has recently enacted a new investment regulatory scheme.

This Comment analyzes the Philippines' two recent statutory efforts to improve its foreign investment climate. In 1991, the Philippines adopted the Foreign Investments Act (Investments Act),[3] and the Local Governments Code (Local Code),[4] both of which substantially liberalize foreign investment laws and policies. The Investments Act increases foreign investor access to the Philippine economy while attempting to make the Act's requirements and administration more transparent and predictable. The Local Code decentralizes the administration of investment laws by granting more investment regulatory control to Philippine local government units. These statutory efforts to improve the investment climate will likely succeed in attracting increased foreign investment, yet may not be enough to overcome the perception that the Philippines is a difficult, costly and risky place to invest. To increase the efficacy of the Foreign Investments Act and the Local Governments Code, and to ensure that foreign investment laws and policies are fairly and efficiently administered, the Philippines should create a centralized investor service center, modeled after the one established by Thailand.[5]

I. PHILIPPINE INVESTMENT

A. The Present Foreign Investment Climate

Direct foreign investment is considered a vital element of a developing country's strategy for economic development. Foreign investment provides real economic benefits to the host country, including increased employment, foreign exchange from exports, technology transfer, technical and managerial expertise, and an increase in the government's tax base.[6]

The Philippine government recognizes that greater private foreign investment is needed to provide jobs to its growing population, reduce its foreign debt burden, and catch up (or maintain its relative position) to its

[3] The Foreign Investments Act of 1991 (Investments Act), Republic Act No. 7042.

[4] The Local Governments Code of 1991 (Local Code), Republic Act No. 7160.

[5] The Regulation of the Office of the Prime Minister concerning the Formation of the Investment Service Centre, the Government Gazette, Volume 99, Part 125, Special Issue of September 3, 1982.

[6] Michael P. Todaro, *Economic Development in the Third World*, 436-41 (New York: Longman Press, 1985); and Anthony Kleitz, *Trimming Investment Disincentives*, 8:4 Asian-Pacific Tax and Investment Bulletin 124-127 (Aug. 1990).

rapidly developing Southeast Asian neighbors.[7] However, investors perceive the Philippines to be a poor investment alternative to its Southeast Asian neighbors.[8] Consequently, the Philippines has experienced only marginal economic growth due to a decline in foreign investment activity, and economic growth is predicted to be only 0.5% for 1992.[9] The Philippines has fallen well behind the rapid economic growth and development of its Southeast Asian neighbors, particularly Thailand.[10]

Several factors contribute to the perception of potential foreign investors that the Philippines is a risky investment host. The inconsistent administration of the Philippines' investment laws and policies undermines the confidence of potential investors.[11] Investment statutes tend to be vague,

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[7] Leo P. Gonzaga, *Foreign Investment: Nationalistic Mood Begins to Change*, 11:5 East Asian Executive Reports 15, 18 (May 1989). Philippine Representative Mario Serra-Ty called for the relaxation of the Philippines' investment policies, noting that the "tiger economies of Asia" are not afraid to welcome foreign investors, and that was a reason that the "tigers were well ahead of the Philippines in economic growth." *See* note 11.

[8] Country Reports, Philippines - Second Quarter 1991, *The Economist Intelligence Unit*, 17-18; Leo P. Gonzaga, *Foreign Investment Climate*, 10:6 East Asian Executive Reports 22 (June 15, 1988): article cites several examples of investors opting for other Asian countries considered more hospitable to foreign investment. *See Bill Passes in Philippines allowing Developers to Own 100% of Projects*, Independent Power Report, 8 (July 5, 1991): A United Nations study confirmed Representative Serra-Ty's remarks concluding that the Philippines must "radically reform its economy to promote industry" if it hoped to compete with its Asian neighbors.

[9] *IMF Predicts 0.5% Growth for Philippine Economy*, Kyodo News Service (Nov. 1991): citing International Monetary Fund (IMF) official Christopher Browne.

[10] *Foreign Investors Keep Cool, Look to New Thai Leadership for Signals*, Los Angeles Times, 3 (Mar. 4, 1991):

Projected Annual Percentage Growth of Gross Domestic Product (GDP):

Nation	1990	1991	1992
Hong Kong	2.3	3.5	4.5
South Korea	8.7	7.5	6.8
Singapore	8.3	5.9	6.5
Taiwan	5.1	5.9	6.0
Indonesia	7.0	7.0	6.6
Malaysia	9.4	8.5	8.7
Philippines	**2.5**	**2.1**	**4.1**
Thailand	**10.0**	**7.4**	**8.0**
China	5.0	5.7	6.0
Japan	5.6	3.1	4.0
United States	0.9	0.5	2.3
Germany	4.6	2.8	2.6
World	1.7	1.0	2.7

Source: Asian Development Bank.

[11] Victor Mallet, *The Philippines 4; Belated Attempt to Remedy Matters - Investment*, Financial Times, 4 (Feb. 17, 1992); and Victor Mallet, *The Philippines 2; Important Issues Still Need to be Tackled*, Financial Times, 2 (Feb. 16, 1992). *See* notes 2 and 8.

and difficult for potential investors to interpret clearly.[12] Potential investors also perceive the actions of the Philippine government to be contradictory.[13] For example, when the nation's executive, President Corazon Aquino, loudly advocated policies that welcomed foreign investment,[14] and took direct measures to that end,[15] the Philippine Congress issued rules discouraging or limiting foreign investment.[16]

The actions of the Philippine judiciary further enhance the perception of uncertainty. As discussed below, the Philippine judiciary has inconsistently challenged the legitimacy and power of the executive and legislative branches to regulate foreign investment. These rulings have given foreign investors mixed signals regarding the receptiveness of the investment climate, and have generated more lengthy and costly review of investment applications and approvals.

B. *The Restrictiveness of Past Investment Laws and Practice*

In order to understand this uncertainty among foreign investors, one must understand the factors contributing to the Philippines "economic nationalism." Philippine economic nationalism found expression in particular provisions of the Philippine Constitution and the Omnibus Investment Code of 1987, as discussed below.

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12 Jamie P. Horseley, *Philippines Enacts New Investment Code*, 13:7 East Asian Executive Reports 9 (July 15, 1991).

13 *Id.*

14 *Conditions to Improve For Foreign Investors, Aquino Says*, Kyodo News Service (Nov. 20, 1991).

15 American Embassy in Manila, *Philippines - Country Marketing Report FY '91*, 1991 National Trade Data Bank Market Reports, 21 (June 12, 1991): Aquino ordered the Board of Investment to relax its rules, simplify its procedures and devote its efforts to foreign investment and export promotion.

16 Leo P, Gonzaga, *Foreign Investment Climate*, 10:6 East Asian Executive Reports 22-23 (June 15, 1988): To illustrate, the Philippine legislature has proposed the forced divestiture of all foreign equity or the "Filipinization" of the oil and insurance industries, while the Philippine drug industry has been totally "Filipinized." Leo P. Gonzaga, *Presence of Foreign Business Has Become Emotional Issue*, 10:10 East Asian Executive Reports 24 (Nov. 15, 1988): Among the investment restrictive statutes considered by the Philippine Congress have been an entire ban on advertisements not "totally produced in the Philippines" and whose concepts are not "intrinsically Filipino," a total ban on advertisements using foreign talent, and the prohibition of construction contract awards to firms with Filipino equity ownership of less than 60 percent. Leo P. Gonzaga, *Foreign Investment: Nationalistic Mood Begins to Change*, 11:5 East Asian Executive Reports 22-23 (May 15, 1989).

1. Economic Nationalism

One can understand the Philippines historical disinclination toward foreign investment in light of the nation's economic history under colonial domination. Over four centuries of foreign domination has motivated strong nationalistic sentiments in the Philippines, and explains much of the nation's desire for more Filipino participation and protection of local interests in economic development. Nationalistic motives have dominated the legislative and administrative bodies,[17] and led the Philippine government to create a legal framework that imposed limits on foreign investment in economic activities.[18]

2. Constitutional Restrictions on Foreign Equity and Land Ownership

The hallmarks of this legal framework are the restrictions on foreign equity and on land ownership. The Philippine Constitution contains specific provisions that restrict foreign equity in Philippine corporations or business enterprises to 40 percent of outstanding equity.[19] Further, the Constitution prohibits all foreign ownership of land.[20] These provisions create substantial

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[17] Leo P. Gonzaga, *Foreign Investment: Nationalistic Mood Begins to Change*, 11:5 East Asian Executive Reports 18 (May 15, 1989).

For the historical basis of Philippine nationalism, *see generally*, Castro, *Foreign Business Enterprise* . . . , 14-23: After Ferdinand Magellan stumbled upon the Philippine Islands in search of the Spice Islands in 1521, the Spanish established a colonial government and imposed the galleon trade, thus completely controlling trade. The Spanish government's economic administration and anti-foreign trade policies forced the Philippines into a situation in which it became helplessly non-self-supporting. High import duties were imposed on non-Spanish goods and shipping, and the entry of non-Spanish foreigners and their investment capital were prevented. After 1898, under American rule, increased foreign investment displaced indigenous investment. These investments targeted development of natural resources for exports, and the manufacture of products for the domestic market, thus preventing domestic investment and growth in these areas. This pattern of investment intensified and persisted in most areas until the Philippines gained independence from the United States in 1946. The factors contributed to the Philippine economic nationalism. *See* Stanley Karnow, *In Our Image: America's Empire in the Philippines*, (New York: Ballantine, 1990), 78-226. *See* William L. Schurz, *The Manila Galleon*, (New York: Dutton, 1939) for further discussion of the opening of the Philippines to foreign trade and the evolution of Spanish economic policy; Stuart C. Miller, *Benevolent Assimilation: The American Conquest of the Philippines*, (New Haven: Yale University Press, 1982); and Shirley Jenkins, *American Economic Policy Toward the Philippines*, (Palo Alto: Stanford University Press, 1954).

[18] Seija Naya, Miguel Urrutia, Shelley Mark, and Alfredo Fuentes, eds., *Lessons in Development: A Comparative Study of Asia and Latin America*, (San Francisco: International Center for Economic Growth, 1989), 28-29: The Philippines, unlike most A.S.E.A.N. states, took an "inward looking" development strategy, meaning a "pessimistic view was taken of the possibilities for promoting exports and for transforming domestic savings into capital goods through trade."

[19] Constitution of the Republic of the Philippines, Article 7, Section 10 (1986).

[20] Constitution of the Republic of the Philippines, Article 7, Section 2 (1986).

disincentives to foreign investment. In the wake of the People Power Revolution of 1986,[21] President Corazon Aquino promulgated a new Constitution which carried over the previous Constitution's restrictions on foreign equity and land ownership.[22]

3. *The Omnibus Investment Code of 1987*

President Aquino's government also enacted a new foreign investment law, the Omnibus Investment Code of 1987 (Omnibus Code).[23] The Omnibus Code was more liberal toward foreign investment than those enacted under Marcos.[24] However, the Omnibus Code still contained several onerous provisions that have dissuaded prospective investors. For example, the Omnibus Code limited foreign equity to less than 40 percent, and required divestment of foreign equity over that amount.[25] The Omnibus Code also barred foreign ownership of real estate (as required under the Constitution),[26] and provided a broad definition of the industries in which all or most foreign investment is prohibited.[27] The Omnibus Code also required that all foreign investments seeking investment incentives receive prior approval of the

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[21] In February 1986, Corazon Aquino and her supporters overturned the dictatorial rule of Ferdinand and Imelda Marcos. Aquino's metorical rise to power was based on her promises to make radical reforms in the govemance of the Philippines. Her ultimate victory, and the Marcos' flight from the country was commonly viewed as a dictate to make massive changes in the government, such as a new Constitution, new foreign investment policies, and a new land reform program. Lawrence MacDonald, *Six Years After Revolution in the Philippines. Many Question the Extent of Promised Reforms*, Asian Wall Street Journal, 1, 4 (Apr. 27, 1992); Jeffrey M. Reidinger, "Redistributive Reform in Transitional Democracies: Philippine Agrarian Reform." Dissertation Presented to the Faculty of Princeton University, 62-81, 251-306 (Jan. 1991). See for brief discussion of land reform laws and problems in the Philippines: Timothy M. Hanstad, *Philippine Land Reform: The Just Compensation Issue*, 66 Wash L Rev 2 (1988).

[22] Constitution of the Republic of the Philippines (1986).

[23] The Omnibus Investment Code of 1987 (Omnibus Code), Executive Order No. 226, enacted on July 17, 1987.

[24] *See* the following sources for discussion of Marcos' economic and foreign investment policies that were dissuasive of foreign investment: Ferdinand Marcos, *The Democratic Revolution in the Philippines*, (Englewood Cliffs, N.J.: Prentice Hall. 1979): for Marcos' views on the Philippine economy; H.G.A. Averch, F.H. Denton and J.E. Koehler, *A Crisis of Ambiguity: Political and Economic Development in the Philippines*, (Santa Monica, CA: Rand Corporation, Jan. 1970): on the decline of the Philippine economy before martial law.

[25] Omnibus Code, Articles 15 and 46. However, the Omnibus Code permitted 100 percent equity in particular export and "Pioneer" enterprises, "Pioneer" enterprises are those ventures, that due to their technological, economic strategic value, that are given special preferences and incentives to invest in the Philippines. Omnibus Code, Articles 17 and 32(1). The Omnibus further permitted 100 percent equity ownership in enterprises registered with the Export Processing Authority. Omnibus Code, Articles 39 and 78.

[26] Constitution of the Republic of the Philippines, Article 7, Section 2.

[27] Omnibus Code, Article 47.

Philippine Board of Investments (BOI).[28] The BOI broadly defined standards for the exclusion of foreign investments which the BOI applied inconsistently on a case-by-case basis to each applicant.[29]

The Omnibus Code also imposed numerous terms and conditions that limited the normal business judgments of the foreign investor.[30] For example, corporations were required to place Philippine nationals on corporate boards, to give priority to Philippine creditors in the distribution of assets upon insolvency, dissolution, or revocation of licenses.[31] Further, the Omnibus Code placed limitations on the nature of manufacturing and technology licenses that may be issued between Philippine enterprises and foreign investors.[32]

Despite the restrictions and conditions imposed on foreign investment, many investors chose to invest in the Philippines. Several of the investments were of significant value. Yet, the two cases discussed below reveal another reason why prospective investors are cautious of investing in the Philippines; inconsistent decisions from the Philippine judiciary have increased uncertainty, cost, and nuisance of judicial review of investment approvals.

C. The Conflicting Case Law

Foreign investors generally view the administration of the Philippine foreign investment laws as capricious and arbitrary.[33] Two recent Philippine Supreme Court cases illustrate why. The first, *Philippine Long Distance Telephone Co. v. National Telecommunications Commission*,[34] upheld the

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28 Omnibus Code, Articles 3, 7(3), and 34.

29 Omnibus Code, Article 47:" *Permissible Investments* . . . the enterprise . . . shall be granted unless the proposed investment -

c) Would be made in an enterprise engaged in an area adequately being exploited by Philippine nationals; or . . .

e) Would not contribute to the sound and balanced development of the national economy on a self-sustaining basis."

30 Omnibus Code, Article 48.

31 Omnibus Code, Article 49.

32 Omnibus Code, Articles 50.

33 Further, foreign investment in the Philippines is often an emotional issue with Filipinos and it has been said that the administration of its investment laws are carried out with "rhetoric instead of logic." Leo P. Gonzaga, *Presence of Foreign Business Has Become Emotional Issue*, 10:10 East Asian Executive Reports 24 (Nov. 15, 1988). Citing policy instability as an investment deterrent, Joel McCormick, *Instability Hampers Philippines' Growth* . . . , 17:11 Electronic Business 3, 49 (June 3, 1991); Leo P. Gonzaga, *Foreign Investment: Regulatory Developments*, 11:8 East Asian Executive Reports 13 (Aug. 15, 1989).

34 *Philippine Long Distance Telephone Co. v National Telecommunications Commission*. 190 Phil. Sup. Ct. Rep. Ann. 717 (1990).

authority of the National Telecommunications Commission, an executive branch agency, to grant permission to Express Telecommunications Co., a domestic subsidiary of an international telecommunications company, to operate its cellular telephone network in the Philippines and to order an equitable sharing of infrastructure with the Philippine Long Distance Telephone Co. The second case, *Garcia v. Board of Investments*,[35] directly overruled the authority of the executive branch agency in charge of regulating foreign investment, holding that the Philippine Board of Investments (BOI), the agency regulating foreign investment, did not have the authority to approve particular investment related decisions, and that the Philippine Government, not the foreign investor, had the "final say" as to where a particular investment may be placed and the particular inputs it may use.

These cases demonstrate the Philippine Supreme Court's ability to legitimize, or overrule, executive branch authority in administering foreign investment laws. The *Philippine Long Distance Telephone* case finds the Court narrowly interpreting its powers over executive branch decisions, thus respecting the executive branch's authority to make foreign investment-related determinations. Conversely, in the *Garcia* case, the Court interpreted its powers to overrule executive decisions broadly, with deleterious results in terms of foreign investment. The *Philippine Long Distance Telephone* and *Garcia* cases also reflect the opposing economic policies that alternately attract and divert foreign investment in the Philippines: the pro-foreign investment desires for "free competition" and "modern, efficient and continuous" products and services,[36] and the nationalistic feelings, that desire to exclude foreign investment, that often underlie Philippine legislation and judicial decisions.[37]

1. Philippine Long Distance Telephone Co. v. National Telecommunications Commission

The Philippine Long Distance Telephone Co. (PLDT), sought to prevent Express Telecommunications Co., Inc. (ETCI) from expanding its existing radio franchise[38] by establishing and operating a cellular mobile

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[35] *Garcia v Board of Investments*, 191 Phil. Sup. Ct. Rep. Ann. 288 (1990).

[36] *Philippine Long Distance Telephone Co.*, 190 Phil. Sup. Ct. Rep. Ann. at 737.

[37] *See* note 18 and accompanying text.

[38] *Philippine Long Distance Telephone Co.*, 190 Phil. Sup. Ct. Rep. Ann. at 722-23; Republic Act No. 2090, otherwise known as "An Act Granting Felix Alberto and Company, Incorporated, a Franchise to Establish Radio Stations for Domestic and Transoceanic Telecommunications." Felix Alberto and Co., Inc (FACI) was the original corporate name, but it was subsequently changed to ETCI in 1964.

telephone system and alpha numeric paging system in Metro Manila and Southern Luzon.[39] PLDT urged the Court to reject ETCI's application to expand its existing franchise, arguing that the regulatory agency that oversees all telecommunications in the Philippines, the National Telecommunications Commission (NTC), was unauthorized to permit the franchise to operate such a telecommunications system. PLDT asserted that the NTC's approval was an abuse of its discretion.[40] The Court weighed both legal and policy considerations in its decision.

The critical legal issue was the NTC's interpretation of the term "radiotelephony" in ETCI's original franchise grant.[41] PLDT argued that "radiotelephony" did not include the operation of a cellular telephone network and paging system. Deferring to the NTC's decision, the Supreme Court ruled that the agency was "legally clothed with authority and given ample discretion" to decide such matters,[42] and that the NTC's interpretation given to the franchise grant's language should be accorded "great weight and respect" as the "agency [was] possessed of the necessary special knowledge, expertise and experience."[43] Thus, the NTC's broad construction of the term "radiotelephony" to include cellular telephone and paging networks, could not be set aside short "proof of gross abuse of discretion, fraud, or error of law."[44]

In addition to this legal issue, the Court considered policy issues, such as public need, public interest, the desire for freer competition, and the poor performance of PLDT's telephone monopoly.[45] The Court found that ETCI's entry into the Philippines' telecommunications market would benefit the public interest by providing improved performance and enhanced infrastructure, despite being a foreign controlled subsidiary.[46] The Court held that this particular exercise of regulatory authority was for the "common

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[39] *Id.*

[40] *Id* at 726, 733.

[41] *Id* at 727. Republic Act No. 2090 grants ETCI "the right and privilege of constructing, installing, establishing and operating in the entire Philippines radio stations for *reception and transmission of messages* on radio stations in the foreign and domestic public fixed point-to-point and public base, aeronautical and *land mobile stations*, xxx with the corresponding relay stations *for the reception and transmission of wireless messages on radiotelegraphy and/or radiotelephony* xxx." (emphasis in the original)

[42] *Id* at 726-27.

[43] *Id* at 728; citing *Asturias Sugar Central, Inc. v Commissioner of Customs. et al.*, 29 Phil. Sup. Ct. Rep. Ann. 617 (1969).

[44] *Id*, citing the rule provided for in *Tupas Local Chapter No. 979 v NLRC, et al.*, 139 Phil. Sup. Ct. Rep. Ann. 478 (1985).

[45] *Id* at 736-37.

[46] *Id.*

good," that such communication services were vital to modernizing the Philippines' infrastructure, and that an inefficient public utility, such as the PLDT, must yield to the public's interests.[47]

The PLDT decision illustrates the degree of deference the Court paid in this instance to the regulatory agency's authority in upholding the exercise of its powers over foreign investment. The case also illustrates a pro-investment sentiment. However, soon after the *Philippine Long Distance Telephone* opinion, the Court appeared to substantially reverse itself in *Garcia v. Board of Investments.*

2. Garcia vs. Board of Investments

In a controversial ruling issued less than one month after *Philippine Long Distance Telephone*, the Philippine Supreme Court issued a decision that had immediate negative repercussions on foreign investment in the Philippines.[48] In *Garcia v. Board of Investments*[49] the Court held that Philippine Board of Investments (BOI), the executive agency empowered to regulate foreign investment in the Philippines, had abused its discretion by approving a revision to a foreign investor's original investment application.[50] In contrast to the *Philippine Long Distance Telephone* case, in *Garcia*, the Court was substantially less deferential to the decision of an executive branch agency which regulated aspects of foreign investment. Underlying the Court's opinion was a nationalistic fervor that has deterred foreign investment for decades.

In *Garcia v. Board of Investments*, Congressman Enrique T. Garcia, the representative for the district of Bataan, petitioned the Supreme Court to set aside the decision by the BOI approving the transfer of the site of a proposed petrochemical plant from Bataan to Batangas,[51] and to shift the petroleum feed stock for the plant from naphtha only to naphtha and/or

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47 *Id.*

48 *Philippine Investment Falls as Recession Bites*, Reuters Money Report. (Dec. 20, 1991); and Leo P. Gonzaga, *Petrochemicals Project: USI Tired of Hassles*, 12:12 East Asian Executive Reports 18 (Dec. 15, 1990).

49 *Garcia v Board of Investments*, 191 Phil. Sup. Ct. Rep. Ann. 288 (1990).

50 *Id.*

51 Both areas are in Central Luzon, roughly equal distances from Metro-Manila.

liquefied petroleum gas (LPG).[52] The central issue of the case was whether the foreign investor had the right of final choice of the plant's site.[53]

The principal foreign investor in this case, a Taiwanese corporation, USI Far East Corporation, formed a Philippine corporation, Bataan Petrochemical Corporation (BPC) to become a new domestic producer of petrochemicals.[54] In approving the investment, the BOI accorded BPC particular investment incentives, and the House of Representatives approved a bill introduced by the petitioner that eliminated the 48% *ad valorum* (value added) tax on the plant's naphtha feed stock.[55] However, within a year of the investment's approval, BPC sought to amend its original project application by changing the plant site from Bataan to Batangas.[56] BPC cited the following factors for its desire to transfer sites: the continuing Communist insurgency, an unstable labor situation, and the presence of a large LPG depot in Batangas.[57] The BOI approved the transfer of plant site over the objections of several members of the Philippine Senate and House, and President Aquino's stated preference that the plant be established in Bataan.[58] The BOI advocated for Bataan as the petrochemical site because it believed the location would provide a better distribution of resources in the Metro Manila area.[59] However, the BOI believed that it could only recommend a particular site, and that the foreign investor had the "final choice" as to the location of a particular project.[60]

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52 *Garcia*, 191 Phil. Sup. Ct. Rep. Ann. at 289-90. Congressman Enrique T. Garcia, of the district incorporating Bataan. The original petition was denied after petitioner seemed "to lose interest by failing to appear at the hearing."

53 *Id* at 290-91.

54 *Id* at 292.

55 *Id.* These incentives, offered under the Omnibus Investments Code of 1987, included a tax exemption on raw materials, repatriation of the proceeds of investment liquidation, and guaranteed remittance of earnings on investments.

56 *Id* at 292-93. The application stated that BPC would: 1) increase the investment amount from US $220 million to US $320 million, 2) increase the production capacity of its plant, 3) change the feed stock from naphtha only to naphtha and/or LPG, and 4) transfer the job site from Bataan to Batangas.

57 *Id.* The LPG depot in Batangas is owned by a subsidiary of a large multinational corporation, Shell Corporation. The fact that Shell's multinational status was stated in the Court's opinion implies it was important to the Court's determination of the issue. The source of the original petroleum feedstock is a Philippine native corporation.

58 *Id* at 293.

59 *Id.*

60 *Id.* Citing the BOI's Vice-Chairman Tomas I. Alcantara's testimony before the Philippine Senate. Alcantara asserted that: "The BOI has taken a public position preferring Bataan over Batangas as the site of the petrochemical complex, as this would provide a better distribution of industries around the Metro-Manila area. xxx In advocating the choice of Bataan as the project site for the petrochemical complex, the BOI, however, made it clear, and I would like to repeat this that the BOI made it clear in its view that *the BOI or the government for that matter could only recommend as to where the project should be located.*

The Court held the BOI's position to be a "grave abuse of [it's] discretion,"[61] stating that BPC should be held to its original choice of job site as it is "ideal" for BPC's purposes.[62] The Court enumerated several other factors that were decisive in its analysis: the fact that the government owned the corporation that would provide the feed stock naphtha to the BPC plant in Bataan, that such a site change would divert needed dollars from the government's other development projects, and that the move would not be consonant with State's objectives of promoting *"economic nationalism."*[63] Citing the Philippine Constitution as authority, the Court ruled that such a move in job sites would constitute unfair foreign competition and trade practices against Filipino enterprises and in the national interest could not permitted.[64] Striking a notably nationalist tone, the majority opinion written by Justice Gutierrez concluded by stating:

> One can but remember the words of a great Filipino leader who in part said he would not mind having a government run like hell by Filipinos than one subservient to foreign dictation. In this case, it is not even a foreign government but an ordinary investor whom the BOI allows to dictate what we shall do with our heritage.[65]

The dissenting justices argued that the Court should have deferred to the regulatory agencies discretion in this case.[66] In dissent, Justices Grino-Aquino and Melencio-Herrera admitted that the BOI, not the foreign investor, makes the final choice of plant site.[67] However, the dissent argued that the

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The BOI recognizes and respects the principle that the final choice is still with the proponent who would in the final analysis provide the funding or risk capital for the project." (emphasis in the original)

61 *Id* at 297.

62 *Id* at 294.

63 *Id* at 294-96.

64 *Id* at 296-97.

Section 1, Article XII of the Constitution of the Republic of the Philippines (1987):

> The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, *the State shall protect Filipino enterprises against unfair foreign competition and trade practices.* (emphasis added)

65 *Id* at 297.

66 *Id* at 289-302.

67 *Id.*

Court overstepped its Constitutional grant of judicial power by exercising the powers reserved to the BOI, an executive branch agency.[68] The dissenting justices held that BOI's decision to approve the transfer was not an abuse of its discretion.[69] Rather they found that the BOI approved the transfer because it recognized the justifications given by the proponent of the project.[70]

The dissenters stated that the Supreme Court may review and annul executive and legislative actions when they conflict with the Constitution or existing laws, or where the respective branch or authority has abused its discretion, but the Court may not make decisions that the executive should have made nor pass the laws that the legislature should have passed.[71] That the Court may disagree with a particular valid BOI decision does not empower it to annul that decision the dissenters argued; this was a policy-making matter that lay in the area of competence and expertise of the executive and legislative branches.[72] This result would have been consistent with the result of *Philippine Long Distance Telephone.*

The *Garcia* decision represents a contradiction of the Philippine Supreme Court's ruling in *Philippine Long Distance Telephone.* In *Philippine Long Distance Telephone* the Court expressed a deference for the executive branches authority over foreign investment, and acknowledged the benefits of particular forms of foreign investment. In *Garcia* on the other hand, the Court refused to defer to an executive branches decision regarding foreign investment, and explicitly disavowed the benefits of foreign investment. *Garcia* is an extreme illustration of the nationalistic sentiment found in the Philippine Constitution, the Omnibus Investments Code and the Philippine Judiciary.

68 *Id* at 300. Further, the dissenters held that the plaintiff, Garcia, had sought the wrong appeals process to appeal the BOI's decision. According to the Omnibus Investments Act, under which BPC's investment was originally approved, Congressman Garcia's sole recourse against the BOI's action is an appeal to the President, not to the Court. The dissent cited Article 36, Omnibus Investments Code of 1987: the only appeal provided for in the Code is to the Office of the President, which must be made within thirty (30) days after order or decision is made.

69 *Id* at 300-02.

70 *Id* at 300.

71 *Id.*

72 *Id* at 301.

II. THE 1991 STATUTES

Philippine Long Distance Telephone and *Garcia* cases, contributed to an overall decline in foreign investment in the Philippines.[73] Foreign investment, particularly from Taiwan, contracted by much as 90 percent due to the *Garcia* ruling.[74] For example, USI Far East, the principal foreign investor in *Garcia*, completely withdrew its "flagship" petrochemicals project from the Philippines, and moved production to Malaysia.[75] One of USI's Taiwanese partners in the Bataan project, General Plastics, also tired of the lengthy litigation. General Plastics withdrew as USI's joint venture partner and has since established a petrochemical complex in Thailand.[76]

The Philippine legislature responded to these foreign investment declines by enacting two significant statutes to address the substantial declines in foreign investment. Both the Foreign Investments Act of 1991[77] and the 1991 Local Governments Code,[78] increased the accessibility of the Philippine economy to foreign investors. The following section evaluates the effectiveness of these laws and concludes that they are insufficient to address the overwhelming problem of declines in foreign investment.

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[73] Jeremy Clift, *Investors Steer Clear of Trouble-Prone Philippines*, Reuter Business Report (June 25, 1991). The BOI stated that approved foreign investment in the Philippines dropped 28 percent, from 12.8 billion pesos to 9.2 billion pesos, in the first five months of 1991. Domestic investment also declined substantially.

Among other political and natural events contributing the decline in foreign investment were the eruption of Mt. Pinotubo and the resulting damage to the Philippines infrastructure has diminished investor confidence. Jeremy Clift, *Investors Steer Clear of Trouble-Prone Philippines*, Reuter Business Report (June 25, 1991). The withdrawal of the U.S. military bases is viewed by some as a destabilizing factor in the Philippine investment climate, as have the national elections of May 1992. *See* Lawrence MacDonald, *Manila is Unprepared for Withdrawal by U.S.*, Asian Wall Street Journal, 1, 16 (Jan. 6, 1992); Bob Drogin, *'Guns, Goons, Gold' Time in Philippines*, Los Angeles Times, part A, p. 6 (Feb. 10, 1992); and Claudia Rosett, *Philippine Political Climate Offers Hope*, Asian Wall Street Journal, 14 (Feb. 24, 1992). John J. Hampton, *Around the Pacific in 80 Ways*, Business Insurance, 31 (Aug. 27, 1990). Of nine Asia-Pacific nations rated, the Philippines was held to be the most risky investment host, primarily due to political instability.

[74] *Philippine Investment Falls as Recession Bites*, Reuters Money Report, (Dec. 20, 1991): cites Trade and Industry Secretary Peter Garrucho as stating that Taiwanese investment was particularly affected by the *Garcia* ruling. Leo P. Gonzaga, *Petrochemicals Project: USI Tired of Hassles*, 12:12 East Asian Executive Reports 18 (Dec. 15, 1990): article states that even before the *Garcia* ruling, there appeared to be a negative investment and divestment trend.

[75] Leo P. Gonzaga, *Petrochemicals Project: USI Tired of Hassles*, 12:12 East Asian Executive Reports 18 (Dec. 15, 1990).

[76] *Id.*

[77] The Foreign Investments Act of 1991 (Investments Act), Republic Act No. 7042.

[78] The Local Governments Code of 1991 (Local Code), Republic Act No. 7160.

A. The Foreign Investments Act of 1991

The negative economic effects resulting from declines in foreign investment and the relative success of the Philippines' Southeast Asian neighbors captured the attention of the policy makers and business interests in Manila.[79] After 20 months of negotiations and contentious public debate, the Philippines enacted the Foreign Investments Act of 1991 on June 13, 1991.[80]

The Foreign Investments Act, the first major revision of Filipino investment legislation since the late 1960's, signals to foreign investors that the Philippines has taken on a new seriousness about attracting and utilizing foreign capital.[81] The Investments Act states the government's policy is to attract, promote, and welcome productive investments from foreigners in activities that significantly contribute to national industrialization and socioeconomic growth.[82]

The new legislation clarifies the limitations to foreign investment.[83] The Investments Act includes a Negative List,[84] which explicitly delineates the areas of the Philippine economy that are closed to unrestricted foreign investment.[85] Areas of the economy not included on the Negative List are open to unlimited or specifically limited foreign investment.[86] By making the restrictions on foreign investment explicit and specific, the Philippine

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[79] Leo P. Gonzaga, *Foreign Investment Climate*, 10:6 East Asian Executive Reports 22 (June 15, 1988); and Leo P. Gonzaga, *Foreign Investment: Nationalistic Mood Begins to Change*, 11:5 East Asian Executive Reports 18 (May 15, 1989).

[80] The Foreign Investments Act of 1991 (Investments Act), Republic Act No. 7042.

[81] Leo P. Gonzaga, *Foreign Investment Legislation Proposed*, 13:5 East Asian Executive Reports 17 (May 15, 1991); Jamie P. Horsely, *Forex Controls Liberalized in Third Major Reform Package*, 14:1 East Asian Executive Reports 9 (Jan. 15. 1992).

[82] Investments Act, Section 2.

[83] The following articles discuss the Philippine government's efforts to liberalize the economy by reducing price controls, enacting a new tax code, reducing customs duties, and eliminating foreign exchange regulations. Bernardo Villegas, *Philippine Progress*, The Economist, 6 (July 13, 1991); Jamie P. Horsely, *Forex Controls Liberalized in Third Major Reform Package*, 14:1 East Asian Executive Reports 9 (Jan. 15, 1992); Richard Gourlay, *The Philippines; Rocky Road to Transition*, Financial Times, 1 (Feb. 17, 1992); Victor Mallet, *The Philippines 4; Belated Attempt to Remedy Matters - Investment*, Financial Times, 4 (Feb. 17, 1992); *Trading with the Philippines: Regulations, Taxes, Practices*, 13:3 East Asian Executive Reports 10 (March 15, 1992).

[84] *See* Appendix, an Executive Summary of the Investments Act's "Negative List." Jamie P. Horsely, *Philippines Enacts New Investment Code*, 13:7 East Asian Executive Reports 9 (July 15, 1991).

Other Southeast Asian countries, such as Indonesia, Malaysia, and Thailand have incorporated similar 'Negative Lists' or reserve lists into their respective foreign investment laws with much success. *See Investment Laws of the World*, Oceana Publications, Dobbs Ferry: New York; Indonesia - issued 1978, updated March 1991; Malaysia - issued 1988, updated March 1991; Thailand - Investment Promotion Act, 29 April, B.E. 2520 (A.D. 1977).

[85] Investments Act, Section 3(g).

[86] *See* Appendix.

government intended to reduce bureaucratic discretion in approving investment applications, and to diminish the attendant delays and costs.[87] During a three year transitionary period,[88] the Investments Act gives foreign investors extensive access to industries not listed on the Negative List. After this transitionary period domestic businesses and industries may petition the National Economic and Development Authority (NEDA) to receive protection from foreign investments by their inclusion on the Negative List.[89] At this time one can not predict how NEDA will answer these petitions.

The Investments Act permits greater foreign equity ownership than the previous investment law, the Omnibus Investment Code of 1987.[90] The Omnibus Code limited foreign equity ownership to no more than 40 percent,[91] but permitted 100 percent equity in particular export and "pioneer" enterprises,[92] as well as in enterprises registered with the Export Processing Authority.[93] The Code also required that all foreign investments seeking investment incentives receive prior approval.

By contrast, the Investments Act permits qualifying foreign investments without prior approval,[94] and allows up to 100 percent equity ownership,[95] particularly during the initial three-year transitionary period.[96] Upon registration with the Philippine Securities and Exchange Commission, or in the case of a sole proprietorship, the Bureau of Trade Regulation and Consumer Protection,[97] foreigners can invest up to 100 percent of the capital

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87 Leo P. Gonzaga, *Foreign Investments Legislation Proposed,* 13:5 East Asian Executive Reports 17 (May 15, 1991).

88 Investments Act, Section 15; and *Foreign Investments Act of 1991 (Republic Act No. 7042): Implementing Rules and Regulations,* Published by the National Economic and Development Authority, October 1991, p. 28-29. "Transitionary Period": for three years ending November 12, 1994, List C, areas in which NEDA has determined that existing enterprises already adequately serve the needs of the economy and consumers, will consist solely of: a) import and wholesale activities not integrated with production and manufacture of goods, b) services currently requiring a license, and c) enterprises owned in the majority by a foreign licensor that assemble, process or manufacture goods for the domestic market under license from the licensor. The three-year transitionary period became effective when the Investments Acts' implementing rules were issued on November 13, 1991.

89 Investments Act, Section 9.

90 The Omnibus Investments Code of 1987 (Omnibus Code), Executive Order No. 226.

91 *See* note 26.

92 "Pioneer" enterprises are those ventures, that due to their technological, economic strategic value, that are given special preferences and incentives to invest in the Philippines. Omnibus Code, Articles 17 and 32(1).

93 Omnibus Code, Articles 39 and 78.

94 Investments Act, Sections 3(a) and 5.

95 *Id.* Foreign investors may own up to 100 percent equity ownership in several specified areas, as opposed to the 40 percent limitation of the Omnibus Code.

96 Investments Act, Section 15.

97 Investments Act, Section 5.

in an enterprise that does not appear on the Negative List. For enterprises appearing on the Negative List, foreign investors can invest up to the legally mandated limit (generally 40 percent of outstanding capital) without prior approval.[98]

In addition to the Negative List, the Investments Act requires the National Economic Development Authority (NEDA)[99] to formulate and publish a list of strategic industries in which foreign investors are encouraged to invest, by way of investment incentives.[100] These are industries that: 1) are crucial to accelerate industrialization of the Philippines, 2) require massive capital investments and highly specialized or advanced technology, 3) are characterized by strong backward and forward linkages to other industries in the country (such as the telecommunications technologies and the petrochemical complex discussed in the *Philippine Long Distance Telephone* and *Garcia* cases above), and 4) generate substantial foreign exchange through import substitution and exports.[101] NEDA must publish the strategic industry list within eighteen months of the date the Investments Act became effective.[102]

The strategic industry list specifies a desired, but not legally mandated, percentage of equity ownership by public and private Filipino investors.[103] In the past, the inability to raise sufficient Filipino capital to satisfy the legally proscribed Filipino equity ownership requirements has stalled many large strategic projects.[104]

Further, the Investments Act repeals the Omnibus Code's divestment requirement.[105] The Investments Act now encourages as a matter of policy, but does not require, foreign-owned enterprises serving the domestic market

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98 Investments Act, Section 3(g).

99 NEDA is the executive agency empowered to establish national development priorities and regulations. and has oversight over the Board of Investments (BOI). Forward, Implementing Rules and Regulations of Republic Act No. 7042 (Foreign Investments Act of 1991), Rule I, Sections 1(s) and (w), Rule VIII. Sections 2 and 3, and Rule XII. Sections 2 and 3.

100 *See* note 1.

101 Investments Act, Section 10.

102 *Id.* Strategic industry list should be published by May 1993.

103 *Id.*

104 Leo P. Gonzaga, *Foreign Investment: Nationalistic Mood Begins to Change*, 11:5 East Asian Executive Reports 18 (May 15, 1989). House Speaker Ramon Mitra cites the inability of Filipinos to raise the 60 percent capital equity required under the Omnibus Investments Code, particularly in capital-intensive joint ventures, as a primary reason that many important projects have not been placed in the Philippines. He also cites this particular issue as a reason to liberalize the Philippines' investment laws.

105 Investments Act, section 2. *See* note 26 regarding the divestment requirement of the Omnibus Code. The Investments Act repealed the Omnibus Codes divestment requirement under Article 46(b) which limited foreign equity ownership to 40 percent.

to undertake measures that will gradually increase Filipino participation in their businesses, such as transferring technology, taking Filipino partners, appointing Filipinos to corporate boards, and enhancing the skills of Filipino workers.[106]

The Foreign Investments Act is perhaps the cornerstone of a series of legislative undertakings to make the Philippines more inviting to foreign investors.[107] The Act places fewer restrictions and conditions on the foreign investor, and eliminates much of the bureaucratic discretion that investors encountered in the past inasmuch as it allows less bureaucratic discretion in interpreting the Act's provisions. The Negative List and strategic industry list permit more access to the Philippine economy while preserving important legal and national interests.

B. Philippine Supreme Court Upholds the Foreign Investments Act

The Philippine Supreme Court upheld the constitutionality of the Foreign Investments Act in a December 1991 opinion. In *Garcia v. The National Economic and Development Authority*, Congressman Enrique T. Garcia, asserted that the Act violated constitutional provisions calling for the development of a "self-reliant and independent national economy effectively controlled by Filipinos,"[108] by permitting 100 percent foreign ownership in most industries except those on the Negative List.[109]

The Court held that the Act did not violate the constitutional provisions Congressman Garcia had raised.[110] The Court stated that the Investments Act was well reasoned and carefully studied by the Philippine Congress and the President, and that the Court was enjoined from passing on the matter short of an abuse of discretion by the other branches. The Court did not find such abuse.[111] Notably, the Court stated in contradiction of its holding in *Garcia*

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106 Investments Act, Section 2. Earlier drafts of the Act, in both the Senate and the House, had required divestment of foreign majority control within specified periods.

107 The Philippines has also liberalized foreign exchange controls, instituted tariff reform, and has considered extending the legally permitted land lease period from 25 years to 50 years. Leo P. Gonzaga, *Foreign Investment: Tinkering with the Rules*, 12:5 East Asian Executive Reports 18 (May 15, 1990); Jamie P. Horsely, *Forex Controls Liberalized in Third Major Reform Package*, 14:1 East Asian Executive Reports 9 (Jan. 15, 1992). *See* note 75.

108 *Garcia v National Economic and Development Authority*, G.R. No. 100883, p. 1-2, citing the Constitution of the Republic of the Philippines, Article 1, Section 2.

109 *See* Appendix.

110 *Garcia*, G.R. No. 100883, at 9-10.

111 *Id* at 10-11.

v. Board of Investments,[112] that it *"may not annul an act of the political departments simply because we feel it is unwise or impractical."* (emphasis added)[113]

Garcia also asserted that the 'three year transitionary period' would place Filipino enterprises at a "fatal disadvantage in their own country."[114] The Court held that the economic rights of Filipinos are preserved under the Constitution and other specific statutes and are not diminished by the Investments Act. [115] Citing the Negative List at length, the Court held that the Investments Act secured the rights and interests of Filipinos in the national economy by reserving to them specific industries, while permitting increased foreign investment in areas where Philippine capital has been lacking.[116] Further, citing the intervenor's argument, the Court held that the Act preserved the rights and interests of Filipino businesses as the Act's overall strategy is "to develop a self-reliant economy" and to promote full employment for Filipinos.[117] The Court commented on Congressman Garcia's "nationalistic zeal," stating that it was misplaced by being directed in the form of this litigation, and should be reserved for his legislative activities.[118]

The *Garcia v. The National Economic and Development Authority* case signifies a significant reversal of the Philippine Supreme Court's nationalistic stance taken in *Garcia v. Board of Investments*. The Court expressed deference for the legislature's and executive's law making powers and upheld the Foreign Investments Act, thus promoting increased and more extensive foreign investment.

C. The Local Rule Code

After years of centralizing important government functions, the Philippine government, in an experiment in local democracy, enacted the Local Governments Code (Local Code).[119] The Local Code allows local

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112 *Garcia v Board of Investments,* 191 Phil. Sup. Ct. Rep. Ann. 288.

113 *Garcia,* G.R. No. 100883. at 11. *See* discussion regarding the previous *Garcia* case in notes 59-67 and accompanying text.

114 *Id* at 4.

115 *Id.*

116 *Id* at 6-8.

117 *Id* at 8. The intervenor cited, Senator Vicente T. Paterno, was one of the Investments Act's principal authors. In Philippine jurisprudence an intervenor serves the similar function as an *amicus curia.*

118 *Id* at 11.

119 The Local Governments Code of 1991 (Local Code), Republic Act No. 7160. The Local Code repeals Batas Pambansa Blg. 337, otherwise known as the "Local Governments Code," Executive Order

authorities to spend higher percentages of the national taxes they collect, giving local government units (LGUs)[120] virtual financial independence. Specifically, the LGUs are to receive 30 percent of national government revenues in 1992, 35 percent in 1993, and 40 percent in 1994 and thereafter.[121] Prior to the Local Code, LGUs received little or none of the national governments revenues.

More importantly, the Local Code delegates to local governments new powers to attract foreign investment.[122] To carry out foreign investment policies and other development functions, each LGU will form a 'Local Development Council'[123] that serves several functions. The Development Councils must, among other things: 1) formulate long-term, medium-term, and annual economic development plans and policies,[124] 2) appraise and prioritize socioeconomic development plans and projects,[125] 3) *formulate local investment incentives to promote the inflow and direction of private investment capital,*[126] and 4) coordinate, monitor, and evaluate the implementation of local and national development programs and projects.[127] The development and investment incentive powers devolved to the LGUs under the Local Code, formerly belonged to the Board of Investment under the Foreign Investments Act of 1991.[128] Until the Local Code became effective on January 1, 1992, LGUs such as provinces, cities and barangays were prohibited from assuming or carrying out development or investment

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No. 112 (1987), and Executive Order No. 319 (1988), and other less prominent acts. Local Code, Section 534.

120 LGUs under this code are defined as 'barangays' or villages, municipalities, cities, and provinces. Local Code, Section 17.

121 Local Code, Book II. *See* Jose N. Nolledo, *The 1991 Local Governments Code with Basic Features*, National Book Store: Manila, 1991, p. xlv.

122 Local Code, Section 2(a), Section 17(a). The stated purpose of the Code is: " . . . that the territorial and political subdivisions of the State shall enjoy genuine and meaningful local autonomy to enable them to attain *their fullest development* as self-reliant communities and to make them more effective partners in the attainment of national goals." (emphasis added)

123 Local Code, Section 106(a).

124 Local Code, Section 109(a)(1).

125 Local Code, Section 109(a)(3).

126 Local Code, Section 109(a)(4).

127 Local Code, Section 109(a)(5) and (b)(3).

128 Investments Act, Section 13; Implementing Rules and Regulations of Republic Act No. 7042 (Foreign Investments Act of 1991), Rule 1: Definitions, Section 1(s) and (t). The Board of Investments is overseen by the National Economic and Development Authority.

policies that would conflict with or nullify the powers of the BOI or NEDA.[129]

Thus, the Local Code grants LGUs a greater degree of local development and investment autonomy, which the LGUs never had before. Consequently, the Local Code weakens the decision-making powers of the national government in local matters. Through the BOI and NEDA, the national government will still decide upon development and investment policies of national importance and priority, such as the "Negative List" and investment incentives offered to national government-promoted enterprises.[130] But the LGUs are now free to develop local development and investment programs.[131] Consequently, LGUs would have authority to offer local investment incentives in addition, or *in exception*, to those offered by the national government.[132]

However, other provisions of the Local Code temper the implied power of the LGUs to act contrarily to the wishes of the national government. The Local Code specifically calls for all national agencies to coordinate with the LGUs concerned in the discharge of the agencies' duties, and that these agencies "*ensure the participation of local; government units in the planning and implementation of said national projects*" (emphasis added).[133] Further, the President has direct supervisory authority over the LGUs "to ensure that

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[129] Investments Act, Section 12: "*Consistent Government Action*.- No agency, instrumentality or political subdivision of the Government shall take any action on conflict with or which will nullify the provisions of this Act, or any certificate or authority granted hereunder."

[130] The Foreign Investments Act of 1991 repealed Article 44 to Article 56 of the Omnibus Investments Code of 1987. Articles 10 to 43 of the Omnibus Code qualify and enumerate the investment incentives available to a promoted enterprise by the national government.

[131] Local Code, Section 17(a) provides that the LGUs may "discharge the functions and responsibilities of national agencies and offices devolved to them . . . ," and Section 17(b)(3)(ix) provides provinces the distinct authority to operate investment support services. Section 18 allows the LGU to generate and allocate in furtherance of their development.

[132] Jose N. Nolledo, *The 1991 Local Governments Code with Basic Features*, p. lvi-lvii, (Manila: National Book Store, 1991); Local Code, Section 17(a), Section 106(a), Section 109(a)(1), (3), (5) and Section 109(b)(3).

This assertion is further supported by Local Code. Section 5(a) which states that: "Any provision on a power of a local government unit shall be liberally interpreted in its favor . . . Any fair and reasonable doubt as to the existence of the power shall be interpreted in favor of the local government unit concerned;" by Section 5(c) which states that the Code will be liberally interpreted to emphasize the LGU's powers in accelerating economic development, and under Section 5(e) that local customs and traditions should play an important role in resolving controversies.

Professor Antonio Santos of the University of the Philippines School of Law, telephone conversation with author, April 15, 1992: No cases have been filed challenging the local government unit's powers to offer investment incentives that either accent or contradict those incentives offered by the national government.

[133] Local Code, Section 25(b).

their acts are within the scope of their prescribed powers and functions."[134] Thus, the active supervisory intervention of the President limits the ability of the LGUs to fully exercise discretion to promote development and investment.

The Local Governments Code's delegation to the LGUs of greater regulatory powers over foreign investment has the potential to increase foreign investment in particular regions of the Philippines. The conglomerated effect of these regional gains could substantially increase overall foreign investment in the Philippines. The experience of the city and province of Cebu demonstrates the potential benefits of local authority over foreign investment policy.

1. A Local Government Example: Cebu

Cebu is a densely populated island in the central Visayas region of the Philippines, about 350 miles south of Manila. It has a history of independence from the politics of Manila, and has become the Philippines second largest commercial center.[135] With a large core of entrepreneurial ethnic Chinese, the city has thrived on labor-intensive manufacturing,[136] with little regard for the happenings of politics and government in "politically fog-bound Manila."[137] Cebu has emerged as an economic dynamo, with a 20 percent growth rate in 1988 and double-digits since then, despite the global recession and the typhoon that struck the area in 1990.[138] Cebu has become the model of economic progress for the rest of the Philippines, with exports that run at four times the national level and with unemployment a fraction of Manila's.[139]

Cebu undertook significant investment and development activities prior to the enactment of the Local Governments Code.[140] Cebu actively promoted foreign investment by streamlining the process for approving investments.[141] The government pioneered innovative investment financing such as the country's first regional commercial bonds,[142] municipal bonds known as

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134 Local Code, Section 25(a).

135 Sheila Tefft, *Feisty Filipino Province Rivals Manila as New Business Frontier*, Christian Science Monitor 6 (May 1, 1991).

136 *Id.*

137 Richard Gourlay, *The Philippines 4: Recovery Hopes - Regional Development*, Financial Times, 6 (Feb. 17, 1992).

138 Sheila Tefft, *Feisty Filipino Province* . . . , 6.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

CEBU's (Cebu Equity Bond Units).[143] Cebu has subsequently directed revenues from the bonds toward upgrading regional infrastructure, including the construction of the Philippines' newest international airport.[144] Local rule in Cebu has been successful, and suggests that the new Local Governments Code may enable more local and regional governments to develop "the infrastructure from which more Cebus could sprout."[145]

2. Potential Negative Implications of the Local Governments Code

Contrary to the Local Code's stated purpose,[146] this legislation will enable some LGUs to discourage foreign investment, contributing to unbalanced regional development of the Philippine economy. The Local Code will enable conservative regional governments to use increased tax revenues to promote their own narrow economic interests as opposed to the national policies promoting industrialization and economic development.

In areas of the Philippines dominated by plantation agriculture, local political dynasties have monopolized political and economic power for generations. [147] The local governments in these regions have historically adopted policies which promote the interests of the landholders and their supporters, and not national development priorities. For example, these local governments have successfully opposed the national program of land reform, in order to maintain their social and economic status.[148]

The Local Code envisions that LGUs will use a substantial portion of their increased tax revenues to promote foreign investment through investment incentives,[149] not unlike those offered by Cebu. Because the Local Code gives these rural governments complete discretion over the disposition of these funds, some LGUs probably will use these funds for the benefit of the landed elite by funding projects which serve the needs of plantation agriculture. Such projects could include the construction of extensive

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143 Richard Gourlay, *The Philippines 4 . . .* , 6.

144 *Id.*

145 *Id.*

146 Local Code, Section 2(a).

147 Professor Roy L. Prosterman, University of Washington School of Law, a leading authority on the law and economic development, particularly in the area of agrarian reform, interview with author May 24, 1992.

148 Jeffrey M. Reidinger, "Redistributive Reform in Transitional Democracies: Philippine Agrarian Reform," A dissertation presented to the Faculty of Princeton University, January 1991, p. 98-104, 367-385, 420-425; Joseph Collins, "*Working Against Change*," *The Philippines: Fire on the Rim*, 113-145 (San Francisco: Food First Books, 1989).

149 Local Code, Section 3(d).

irrigation systems, and narrow-gauge railways servicing large farms and processors.

These types of projects do not promote industrialization or encourage foreign investment because they promote the continued dominance of plantation agriculture. The plantation agriculture economy does not provide investment opportunities for foreigners. Foreigners cannot own land,[150] and generally the industries that process agricultural products, such as rice and sugarcane, are protected under the Foreign Investment Act's "Negative List."[151]

Consequently, foreign investors will gravitate to areas such as Cebu which offer significant investment incentives, while avoiding those areas dominated by plantation agriculture. Thus, the Local Governments Code has the strong potential to undermine the national development goals of the Foreign Investments Act.

D. Investor Services

The Foreign Investments Act established generalized national priorities for foreign investment. Effectuating these priorities will require the centralized administration of an investor support agency. Such an agency, or investor service center, will go a long way toward increasing investors' confidence in the Philippines' ability to administer its investment laws and policies in an efficient and consistent manner. Currently the Philippines has no such investor support service, or other agency that promotes investment incentives directly to prospective investors, assists investors in the gathering of investment information, or in complying with the numerous central and provincial government regulations.

A centralized investment authority would: 1) speed approval of promoted investment, 2) limit administrative discretion, and 3) standardize regional investment policies with the priorities of the Foreign Investments Act of 1991.

Thailand's "One-stop Service Centre" provides a model for the investor support service that the Philippines should emulate. The Service Center was created primarily to strengthen the Thai Board of Investment's ability to assist investors in information-gathering and compliance with various governmental

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150 Constitution of the Republic of the Philippines, Article 7, Section 2 (1986).

151 *See* Appendix.

regulations. The Thai Service Center assists foreign investors by providing a centralized, efficient approval process to investors.[152]

1. Speeding-up the Approval Process

A Philippine investor support service would speed the approval of investments in several ways. The service would assist potential investors in gathering information needed for in the application process. Further, the service would advocate for individual investments before any agencies involved in the disposition of the application. The staff of the investor service center would be familiar with the procedural and substantive processes of the concerned agencies. Therefore, the processing of applications would proceed more quickly than if the investors were acting alone. Furthermore, this streamlining effect of the investor support service would attract greater amounts of foreign investment by reducing the cost and nuisance of complying with investment regulations.

The one-stop Service Center in Thailand demonstrates that an investor support service does quicken the approval process. The Thai Service Center issues and obtains required government permits for the promoted investor.[153] The Service Center considers an investment application within five days of its submission, and notifies the applicant within twenty days whether the projects conforms to the conditions requisite for approval. Thereafter, the successful investment applicant receives all the required permits from the Service Center without need for further processing by the applicant.[154]

2. Limiting Administrative Discretion

In the past, unpredictable investment policy administration has been an investment deterrent.[155] A Philippine investor service center would eliminate much of this unpredictability. By representing the investment application to the government agencies involved in the approval process, the service center would assure that the application is treated more objectively and fairly. The

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[152] The Regulation of the Office of the Prime Minister Concerning the Formation of Investment Service Centre, published in the Government Gazette, Volume 99, Part 125, Special Issue of September 3, 1982.

[153] Such permits include those required for the establishment of business enterprises, the expansion and operation of factory facilities, building, land-use, environmental, and customs or trade permits.

[154] *Id*; Kosol Chantikul, *Investment Promotion Laws*, 3 Chulalongkorn L Rev 97, 105-106, (1984).

[155] *See* notes 2 and 7.

service would monitor the process and would thus be in the position to identify arbitrary or inconsistent actions by involved agencies.

The center would also decrease the likelihood of arbitrary decision making by mediating disputes between the investor and involved agencies. The service would negotiate differences between parties so that outright denials would occur less frequently. Furthermore, mediation would increase the likelihood of resolutions acceptable at least in part to all parties.

3. Standardizing Regional Investment Policies with National Goals

A Philippine investor support service would minimize inconsistencies between national and local development policies. As discussed above, regional development policies often do not mirror the national development policies of the Foreign Investments Act because the Local Governments Code permits local governments to provide their own investment incentives.

The investor support service would compile and present to prospective investors local governments' investment incentives as packages. The service would not promote packages containing incentives that conflicted with national development priorities. For example, the service center would not present local incentives promoting those industries listed on the Foreign Investment Act's "Negative List." Refusing to present incentives inconsistent with national investment policies would encourage local governments to bring their investment incentives into compliance with national standards.

CONCLUSION

If the Philippines continues to stand by impotently as increasing streams of foreign investment flows around it to its Southeast Asian neighbors, it can never hope to attain the levels of economic and societal maturity to which it aspires. The Philippines most recent efforts to attract foreign investment, the Foreign Investments Act of 1991 and the Local Governments Code, are a mixed blessing, and alone cannot ensure the results the Philippine government seeks.

Although the Foreign Investments Act of 1991 goes much farther than its predecessors in liberalizing access to the Philippine economy, the Act alone is not likely to attract and keep substantially increased foreign investment. Further, with the advent of the Local Governments Code, the national government has devolved to regional governments much of its ability and authority to carry out a national economic development strategy. As discussed above, the decentralization of investor support services will be beneficial for regions with progressive development plans such as Cebu. Conversely, the decentralization is likely to have mixed to negative results in areas that are less economically and socially progressive, such as areas dominated by large plantation agriculture. For the Philippines to attract the foreign investment it so badly seeks to develop economically, it should create a comprehensive investor support service, not unlike the one available in Thailand.

APPENDIX

THE PHILIPPINES FOREIGN INVESTMENTS ACT OF 1991
REPUBLIC ACT NO. 7042

EXECUTIVE SUMMARY OF INVESTMENTS ACT'S "NEGATIVE LIST"

The "Negative List" consists of the following:

List A: activities specifically reserved to Philippine nationals by mandate of the Philippine Constitution and specific laws, such as:

1) Mass media, the professions (accounting, architecture, law and medicine), retail trade, and national defense industries, all of which are completely closed to foreign investment by law; and

2) Ownership of land, natural resource exploitation, public utilities, educational institutions, advertising, shipping and domestic air transportation, construction, and banks, all of which are subject to 25 to 40 percent on foreign equity. Investments Act, Section 15(A).

List B: areas of activities regulated by law:

1) Areas regulated by law involving,

a) defense related activities requiring prior authorization from the Department of National Defense, such as the manufacture, repair, storage and distribution of firearms, and munitions, unless the activity involves a substantial export component and is expressly authorized to be engaged in by an entity more than 40 percent owned by foreigners. Investments Act, Section 15(B)(1);

b) activities that affect the public health and morals, such as drug manufacturing and distribution, gambling, bars and nightclubs. Investments Act, Section 15(B)(2); and

2) Small and medium sized domestic market enterprises with paid in equity capital of $500,000, unless they involve advanced technology, as determined by the Department of Science and Technology, and export enterprises which utilize raw materials from depletable natural resources; Investments Act, Section 15(B)(3) and (4), Section 8(C), and Section 8(B)(2).

Amendments to List B can be made not more than once every two years after the promulgation of the first Regular Foreign Investment Negative List at the end of the transition period, and then must be made only by Presidential proclamation upon recommendation of NEDA, or upon recommendations by the Secretary of Natural Defense, the Secretary of Health, or the Secretary of Education, Culture and Sports with NEDA's "*motu propio*" endorsement.

List C: after the transitionary period (three years), areas of investment in which existing enterprises already adequately serve the needs of the economy and the consumer and do not require further foreign investments, as determined by NEDA applying specific criteria. This criteria includes firms owned at least sixty percent by Filipinos, ample industry capacity, sufficient industry competition, environmental standards, and industry pricing. Companies whose industries are included in List C will have to petition for their industries' inclusion when the list is amended every two years. Investments Act, Section 9.

NEDA is required to publish the first regular negative list not later than 60 days before the transitionary period expires. Each negative list is to be prospective in operation and will not affect investments existing on its publication date. Investments Act, Section 8.