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18 August 2014

SENATOR JOSEPH VICTOR G. EJERCITO

Chairman of the Committee on Economic Affairs

Philippine Senate

Rm. 511 GSIS Bldg., Financial Center

Roxas Blvd., Pasay City

Dear Honorable Chairman:

We thank you for inviting us to participate in the public hearing on PSR No. 762, “A Resolution directing the Senate Committees to Conduct an Inquiry in Aid of Legislation on the Procedure of Registration of Foreign Investments and Fees Imposed of Government Agencies in Order to Rationalize the Administration of fiscal and Non Fiscal Incentives to Foreign Investors.” The European Chamber of Commerce fully supports this inquiry.

At present, there are about thirteen (13) investment promotion agencies (IPAs) that administer their respective investment incentive packages. IPAs may be defined as government entities created by law, executive order, decree or other issuance for the purpose of attracting domestic and foreign direct investment through the administration of their respective fiscal and non-fiscal incentives; and, exercise regulatory powers over the economic zones. These include the following: BOI, PEZA, Bases Conversion Development Authority (BCDA), SBMA, CDC, Poro Point Management Corporation (PPMC), Bataan Technology Park, Inc. (BTPI), CEZA, ZCSEZA, PIA, APECO, Authority of the Freeport Bataan (AFAB), and Tourism Infrastructure and Enterprise Zone Authority (TIEZA).

In a study conducted by the World Bank with the International Finance Corporation in 2013,¹ relative to the ease of doing business in 185 economies, the Philippines ranked 138.² The first top five criteria where the country ranked low were in a) starting a business; b) registration of property; c) paying taxes; d) getting credit; and, e) protecting investors.³

Sadly, it has been reported that the Philippines has lagged behind its neighboring countries in terms of gross domestic investment as a percentage of gross domestic product and in attracting foreign investments, as well.⁴ In a recent study conducted by Dr. Rafaelita M. Aldaba of the Philippines Institute for Development Studies,⁵ the respondents of the survey consisting of the private sector stakeholders within NCR, PEZA, Subic and Clark including heads of government IPAs namely, PEZA, BOI, Subic and Clark revealed the causes for the lacklustre performance was attributable to the following causes, to wit: a) lengthy procedures, slow processing and delays, lack of transparency in procedure, corruption; b) policy inconsistencies, lack of streamlining of interrelated procedures; c) Bureau of Internal Revenue (BIR) registration, local government units (LGU) permits, income tax holiday; and, d) high power cost, utilities, shipping.⁶ On the other hand, the government IPAs believed that the causes are the delays in the issuance of permits from LGUs and the national government such as the Environmental Compliance Certificate (ECC) from the Department of Environment and Natural Resources (DENR), visa from the Bureau of Immigration (BI), and product registration from the Food and Drug Administration (FDA) which takes 90 to 120 days.⁷

We agree that the documentary requirements for registration and doing business by foreigners here in the country need to be streamlined. The pervasive bureaucratic red tape persists to discourage and ward off potential investors. For instance, while we need to secure power generation plants, build energy capacity, and foster competition; we are weighed down by compliance with 162 permits and signatures of officials. This bureaucratic pathology has no social redeeming value and is only centered on rules, regulations and procedure that entail compliance

¹ Doing Business 2013, Smarter Regulations for Small and Medium-Size Enterprises by World Bank and the International Finance Corporation 2013

² Ibid., p.11

³ Doing Business 2013, Smarter Regulations for Small and Medium-Size Enterprises by World Bank and the International Finance Corporation 2013, p. 196

⁴ Investment Facilitation and Liberalization in the AEC: Challenges for the Philippines, *10th Development Policy Research Month Forum on Regional Economic Integration and Inclusive Growth* by Rafaelita M. Aldaba, September 17, 2012, pp. 5-6

⁵ The Philippine Institute for Development Studies (PIDS) is a nonstock, nonprofit government corporation engaged in long-term policy-oriented research to assist the government in long-term planning and policy formulation. Created by P.D. 1201. Retrieved from <http://dirp4.pids.gov.ph/ServiceCharter.pdf> and <http://pids.gov.ph>

⁶ Ibid., p.9

⁷ Ibid.

burden on new entrants and businesses and have no efficacy on rules' functional object.

Weeding through the layers of requirements in starting up a business is often attended by bureaucratic red tape, inconsistent, complex and lengthy procedures, delays and a high cost for regulatory processes.

Business registration is a slow process. Corporations and partnerships must register with the Securities and Exchange Commission (SEC) and sole proprietorship with the DTI. After the requisite registration, the investor is left with the other layers of requirements for the availment of the incentives under the pertinent laws. Albeit, the grant of incentives appear to be non-discriminatory, the application process is complicated and incentives can only be finally granted by BOI after a favorable evaluation and approval of other agencies like the Department of Finance and the Bureau of Customs (BoC).

Navigating through business registration requirements is often easier with simplified and transparent licensing and registration policies. Uganda and Vietnam⁸ were successful in streamlining their business registration. This attracted more business entrants to the local economy on reduced costs.⁹ “Transparency, simplicity and predictability are among its most important principles. The costs of opacity far outweigh the costs of enhancing transparency. Investors look for an investment environment that is stable, and that offers international best practice standards of protection, including the swift and equitable resolution of investment disputes”(APEC 2008).¹⁰

In the Philippines, the rights of a foreign investor are provided for in the Investment Incentives Act, to wit: a) right to repatriate the entire proceeds of the liquidation of the investment; b) right to remit earnings from the investment; c) right to remit sums as may be necessary to meet the payments of interest and principal on foreign loans and obligations arising from technological assistance contracts; and, d) freedom from expropriation except for public use or in the interest of national welfare or defense and upon payment of just compensation.¹¹ Terminal 3 of the NAIA was expropriated by the government in 2004. In 2005, the

⁸ Vietnam used to require curriculum vitae, business plans, character references, and other documents which do not serve vital public interests. It took 6-12 months to complete these requirements. Vietnam enacted the Enterprise Law in 2000 which shortened the process.

⁹Investment Promotion and Facilitation by Michael Gestrin, Policy Framework for Investment Good Practices, OECD 2006, pp. 37-38

¹⁰ APEC Investment Facilitation Action Plan, Agenda Item 4.

¹¹ Section 4 of R.A. 5186

Supreme Court declared the contract between the government and Philippine International Air Terminals Company Inc. (Piatco) as null and void. While there has been a decision of the Court of Appeals, for the government to pay Piatco the just compensation for expropriation in the amount of \$371M; the said decision was appealed by the Office of the Solicitor General before the Supreme Court and is still pending resolution. Clearly, it had been a span of ten (10) years and just compensation has not been paid yet. This is translated into investments tied down for nearly 10 years without any assurance of its return or return on investments.

Investor protection requires a “well-defined standard of responsibility of a state to a foreign investor which will safeguard the foreign investment” (Landau 1968).¹² In general, foreign investments are protected through private investment agreements with the host country such as incentives of income tax holidays and through bilateral and multi-lateral agreements, treaties, legislation and arbitration.¹³ Disputes relating to foreign investments are resolved through submission to international commercial arbitration, i.e. International Centre for Settlement of Investment Disputes (ICSID).¹⁴

Albeit fiscal incentives are granted in importing capital machinery, investors advance money for VAT and then later are faced with administrative and/or judicial environment where it makes it nearly impossible for them to receive the reimbursement.

Domestically, issues relating to investors on their investments in the Philippines are brought before the courts. However, judicial dispute resolution takes years and is often tedious and expensive. Moreover, courts are known to promulgate decisions with varying interpretations on laws thereby changing the generally accepted rules at the time when investment was made. This apparent uncertainty and lack of stability renders the investor vulnerable and at a high risk of losing his investment or one that necessitates an abrupt change in his investment structure.

¹² Protection of Private Foreign Investments in Less Developed Countries-Its Reality and Effectiveness by Henry Landau William and Mary Law Review, Vol. 9, Issue 3, 1968.

¹³ Legal Regimes Governing Foreign Direct Investments (FDI) in Host Countries by Srijaanee Bhattacharyya and Slaughter and May, Advocates for International Development, 2012, pp. 1-7.

¹⁴ ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States to which the Philippines is a signatory. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent. ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute settlement. Retrieved from https://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp

For instance in the case of *Gamboa v. Finance Secretary, et. al.*¹⁵ has changed the interpretation foreign ownership rules. Foreign investors' shareholdings have been structured to comply with that 40% restriction limit on capital which was generally understood to be the total outstanding capital stock (i.e. the combined total of common and non-voting preferred shares), and accordingly the 40% rule has been calculated on that basis. The Supreme Court has now determined that "capital" only means shares with voting rights to appoint directors.

Similarly, in the case of *San Roque Power Corporation*,¹⁶ the Supreme Court overturned the decision of the Court of Tax Appeals in allowing the claim for refund while in the case of *CBK Power Company Limited*, the Supreme Court in its decision dated 15 January 2014 denied tax refunds from a case which started in 2004— again spanning a period of ten years.¹⁷

Again, in a decision by the Court of Appeals in July 2013, it voided the license to operate in 2011 to 2016 granted by the Civil Aeronautics Board (CAB) granted in favor of FedEx.¹⁸ The Court cited the constitutional provision that limits operation of public utility services to Filipino citizens and corporations.¹⁹ *Maynilad* and *Manila Water* have initiated arbitration process in accordance with its concession agreements with the MWSS. Both seek to challenge the denial to increase water rates and cutting water tariffs.²⁰ It may be recalled that MWSS was privatized and the entire distribution system was awarded in favor of these two entities.²¹

It was in this context that we drafted our proposed bill on the creation of the Office of Investor Facilitation and Protection. Rest assured that we will support any action that shall streamline the maze of the myriad of documentary requirements, permits, endorsements, certificates, etc. and delays.

Thank you.

¹⁵ G.R. No. 176579, 28 June 2011. Note that dissenting opinions were delivered by Associate Justices Velasco, Jr. and Abad.

¹⁶ *CIR v. San Roque Power Corporation*, G.R. No. 187485, February 12, 2013. Retrieved from <http://sc.judiciary.gov.ph/jurisprudence/2013/february2013/187485.pdf>

¹⁷ *CBK Power Company Limited vs. CIR*, G.R. Nos. 198729-30, 15 January 2014. Retrieved from http://www.lawphil.net/judjuris/juri2014/jan2014/gr_198729_2014.html

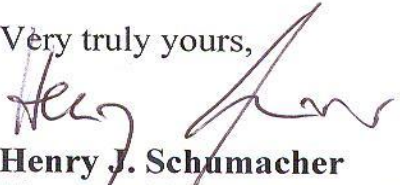
¹⁸ *Court of Appeals Halts FedEx PHL Operations* by Danessa O. Rivera, July 22, 2013, GMA Online. Retrieved from <http://www.gmanetwork.com/news/story/318642/economy/companies/court-of-appeals-halts-fedex-phl-operations>

¹⁹ Article XII, Section 11 of the Constitution

²⁰ Retrieved from <http://www.gmanetwork.com/news/story/326257/economy/business/mwss-cuts-water-rates-of-maynilad-manila-water>

²¹ Retrieved from <http://www.bizlinksphilippines.net/070802.shtml>

Very truly yours,

A handwritten signature in dark ink, appearing to read "Henry J. Schumacher". The signature is written in a cursive style with a large, sweeping initial "H".

Henry J. Schumacher
Vice President-External Affairs