



CLU POLICY STUDIES SERIES -1

OBSTACLES TO NATIONALIST DEVELOPMENT

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Published by Karrel, Inc.

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CLU Policy Studies Group
Quezon City, Metro Manila
Third Printing 1986

PLANTATION

OBSTACLES TO NATIONALIST DEVELOPMENT

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Foreword

Analyses and critiques of the existing state of affairs, to date, have been noted for their predominantly polemical content. While issues have been ventilated, the personal and emotional biases and the anger of the critics have supervened over the necessary objective and scientific discussion of the roots of the present malaise.

The critiques have remained basically critical, dedicated largely to exposing the weaknesses and errors of the Marcos administration. What has been lacking so far is the presentation of alternative proposals to judge present policies by, or programs detailing policies that should be adopted in the country's interest.

The Civil Liberties Union has decided to undertake a series of studies that will be rounded up with the presentation of suggested policies for national development. However it is essential, as a first step, that the studies delineate certain trends that continue to restructure present society and acquaint the readers with the motivations of those elements that stand to benefit from this restructuring.

We start, in the present paper, with a nationalist appraisal of the 1973 Constitution which reveals the reversal of previous attitudes toward foreign investments and through which external forces are guaranteed privileges that violate the fundamental canon of national sovereignty.

THE DENATIONALIZATION OF THE CONSTITUTION

It is to the credit of the delegates to the 1934 Constitutional Convention that, although they labored under the authority of a colonial power, they succeeded in framing a Constitution which installed nationalism as the primary principle of government. The events and developments which took place during the last ten years, unfortunately, have diluted the strong nationalistic sentiment which pervaded the 1935 Constitution and have become obstacles to the country's nationalist development.

The essence of nationalism, as a fundamental principle, is defined in the provisions of the 1935 Constitution relating to the Filipinization of ownership and control of the country's economic resources.

Specifically, the provisions "which express the anxiety of the Filipino people over alien control of the nation's economic life",¹ dictate public ownership of natural resources and the limitation of their exploitation to Filipino citizens or Filipino-controlled corporations, Filipinization of public utilities, and prohibition against landholding by aliens.

The delegates to the 1934 Constitutional Convention reached a broad consensus, early in their deliberations, on the imperative need for economic protection to ensure the country's survival as a viable and sovereign republic. Voicing this sentiment, the Convention's Committee on Nationalization and Conservation of Lands and Other Resources laid down this basic principle in its formal report:

... that land, minerals, forests and other natural resources constitute the exclusive heritage of the Filipino nation. They should, therefore, be preserved for those under the sovereign authority of that nation and for their posterity.²

The report emphasized that if the natural resources were not nationalized and the nationals of foreign countries were given the opportunity to own or control them, "conflicts of interests among them might arise, inviting the danger to the safety and independence of this country".³

On the whole, the consensus in favor of Filipinization was embodied in Section 1

Article 13 of the 1935 Constitution, which provided that:

All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines, or to corporations or associations at least sixty *per centum* of the capital stock of which is owned by such citizens.

Up to the proclamation of martial law in 1972, the development of our Constitution had acquired a distinct character in what the Supreme Court then called "an intense spirit of nationalism."⁴ As interpreted by a recognized authority on the subject, this is founded on the

general feeling that alien dominance over the economic life of the country is not desirable and that if such a situation should remain, political independence alone is no guarantee to national stability and strength. (The Constitution) envisages an organized movement for the protection of the nation, not only against the possibilities of armed invasion but also against its economic subjection by alien interests in the economic field.⁵

Independence and the Erosion of Nationalism

The heaviest foreign investors in our economy, the Americans, were not seriously disturbed by the nationalist protectionism under the Constitution at the time of its promulgation in 1935. This was because they were protected, for the duration of the Commonwealth regime at least, by the requirement of the Tydings-McDuffie Law that

Citizens and corporations of the United States shall enjoy in the Commonwealth of the Philippine Islands all the civil rights of the citizens and corporations, respectively, thereof.

Upon the proclamation of independence on July 4, 1946, however, this nationalist policy became an impediment to the exploitation of our natural resources by American capital, because this would mean that, from then on, the full force of the Filipinization requirement would fall as well on American as on other foreign investments.

At this juncture, the Congress of the United States stepped in. In passing the War Damage Act of 1946, it inserted a proviso that no war damage claims filed by Filipinos should be paid by the U.S. unless the Philippine Constitution was first amended to give Americans parity rights (or equal rights as the Filipinos) until July 3, 1974.

Explicitly, the Parity Amendment provided that

The exploitation, development, and utilization of all agricultural, timber, mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines, and the operation of public utilities, shall, if open to any person, be open to citizens

the United States and to all forms of business enterprise owned or controlled, directly or indirectly, by citizens of the United States in the same manner as to, and under the same conditions imposed upon, citizens of the Philippines or corporations or associations owned or controlled by citizens of the Philippines.

Parity officially ended on July 3, 1974, and, for all practical purposes, the privileges American investors enjoyed under the amendment ceased. They were then faced with the problem of surmounting the restrictions imposed by the 1935 Constitution. This problem was complicated by the decision of the Supreme Court in the Quasha case,⁶ which held that the end of parity would have the effect of terminating the rights they had acquired under the Parity Amendment.

Service Contracts — Negation of the 1935 Charter

The declaration of martial law on September 21, 1972 changed the situation entirely and drastically, to the great relief, and benefit, of foreign investors, especially the Americans.⁷ Instead of introducing an amendment to the 1935 Constitution, the Marcos administration produced an entirely new constitution which, in effect, under martial law conditions, opened the floodgates to the entry of foreign investors in the exploitation of our natural resources. The new charter shattered the framework of nationalism in our fundamental law. While the 1935 Constitution enshrined nationalism as a principle governing the state, the 1973 version literally debased that concept.

Indeed, the nationalistic phraseology of the 1935 Constitution was retained by the new charter; but the essence of nationalism was reduced to hollow rhetoric. The new charter still provides that the exploitation or development of the country's natural resources is limited to Filipino citizens or corporations owned or controlled by them. However, the martial-law Constitution allows them, once these resources are in their name, to enter into service contracts with foreign investors for financial, technical, management, or other forms of assistance. Since foreign investors have the capital resources, the actual exploitation and development, as well as the effective disposition, of the country's natural resources would be under their direction and control, relegating the Filipino investors to the role of second-rate partners in joint ventures, holding no more than the formal license, concession or franchise.

Through the instrumentality of the service contract, the 1973 Constitution has legitimized at the highest level of state policy that which was prohibited under the 1935 Constitution, namely: the exploitation of the country's natural resources by foreign nationals. The onerousness of this constitutional change becomes more pronounced when it is considered that the active party to any service contract may be a corporation wholly owned by foreign interests. In such a case, the citizenship requirement is completely set aside, permitting foreign corporations to obtain *actual* possession, control, and enjoyment of the country's natural resources.

Under the 1973 Constitution, authority to allow service contracts resides in the Batasang Pambansa. Because of the martial-law conditions, this arrangement obviously excludes meaningful public participation. It is worth noting that, within three years after martial law, such constitutional provision was transformed into empty verbiage: specific authority for service contracts in various fields of natural resources were issued by

President Marcos himself, by means of presidential decrees. Thus, authority to enter into service contracts in *petroleum resources* came in 1972 under Presidential Decrees Nos. 8 and 87; in 1973, for *lands* of public domain under Presidential Decree No. 151; in 1974, for *mineral resources* under Presidential Decree No. 463; in 1975, for *forestry resources* under Presidential Decree No. 705; and for *fisheries* under Presidential Decree No. 704. In 1978, service contracts were allowed in *geothermal resources* under Presidential Decree No. 1442.

Influence of Popular Will Minimized

As it is, the authoritarian power of the President to enter into international agreements in derogation of Constitutional limitations relating to the national patrimony effectively minimizes the influence of popular will, at least insofar as it is capable of expressing itself through the legislative organ of the Government.

Such popular will is further subverted by the fact that, in vital matters pertaining to the national economy, the National Economic and Development Authority (NEDA), a body dominated by foreign-oriented technocrats, assumes a central role under the new Constitution. It is charged with the function of recommending to the Batasang Pambansa the "continuing, coordinated, and fully integrated social and economic plans and programs." The recommendation of the NEDA is required before the Batasan can exercise the authority to "reserve to citizens of the Philippines or to corporations or associations wholly owned by such citizens, certain traditional areas of investments when the national interest so dictates."

Thus, initiative in policy-making has increasingly been shifted to the President, and consequently away from the broadly-based legislative and representative organ. The new Constitution reposed in the Prime Minister and the Cabinet the authority to determine the guidelines of national policy. Under the constitutional amendments adopted in 1981, this prerogative was shifted to the President exclusively. As things now stand, the President alone formulates the guidelines of national policy.

Presidential Prerogative

Under the system of service contracts, whatever is left of nationalism as a constitutional precept that underscored the rationale of proceedings in the 1934 Constitutional Convention has been rendered meaningless by the provision that the President "may enter into international treaties or agreements as the national welfare and interest may require" despite any restriction or limitation whatsoever relating to the "National Economy and Patrimony of the Nation" under Article 14 of the martial-law Constitution.

This means that, if the President believes that "national interest" would require the exploitation or development of our natural resources by foreign governments, foreign corporations, or international consortia, then he can exercise the authority to enter into international treaties or agreements to this effect, even without the consent of the legislature. In so doing, he is not limited by any citizenship requirements.

In truth, the citizenship requirement is the least of the worries of the President once he is convinced that "national interest" requires foreign enjoyment, exploitation and

development of our natural resources. Mr. Marcos announced recently⁸ that his administration was considering the granting of citizenship or permanent resident status to foreigners who invest at least \$200,000 in the country. Under this government plan, the foreign investors could also buy and own real property if they bought shares in real estate companies.

Earlier, the President had issued a presidential decree (PD No. 1851) amending a previous foreign investments decree (PD No. 1623) authorizing the issuance of special investors resident visas to aliens who would invest at least \$200,000 in the country. The latest plan to grant such investors citizenship or permanent resident status would thus liberalize further the present (already liberal) foreign investments policy.

Constitutionalizing the Dummy

As will be recalled, the nationalist protectionism under the 1935 Constitution was reinforced by the Anti-Dummy Law.⁹ Under this law, the following persons or corporations are considered *dummies*:

1. Those who having in their names or under their control, a right, franchise, privilege, or property, the exercise or enjoyment of which is expressly reserved by the Constitution to Filipino citizens or to Filipino-controlled corporations, who permit the use, exploitation or enjoyment of such right, franchise, privilege or property by a person or corporation not possessing the requisites prescribed by the Constitution.
2. Those who transfer or convey such right, franchise, privilege or property to a person or corporation not qualified under the Constitution.
3. Those who in any manner permit or allow any person or corporation not qualified under the Constitution to acquire, use, exploit or enjoy such right, franchise, privilege or property which is expressly reserved by the Constitution to Filipino citizens or to corporations controlled by them.
4. Those who permit or allow non-qualified persons to intervene in the management, operations, administration or control of such right, franchise, privilege or property either as officer, employee or laborer (except as technical personnel with appropriate government permit).

These dummies are subject to criminal punishment by imprisonment or fine.

Foreigners who profit from such prohibited acts, including those who knowingly abet, assist or aid in their planning or perpetuation, are also criminally liable as their dummies.

The foregoing acts, which are defined as offenses by the Anti-Dummy Law, constitute the essential or normal undertaking under a service contract, whereby a foreigner or a foreign corporation, otherwise not qualified under the Constitution, engages in "the exploitation, exploration, or utilization of the country's natural resources through financial, technical, management, or other forms of assistance." Since service contracts are now expressly recognized as legitimate arrangements under the martial-law Constitution, the conversion of prohibited acts into lawful acts has received constitutional sanction.

In a word, the dummy has been virtually "constitutionalized" under the new charter.

Framework for Foreign Interests

The fundamental law of 1935, as earlier pointed out, limited the right to operate public utilities to Filipino citizens and to corporations owned or controlled by them. As reinforced by the Anti-Dummy Law, before the 1973 Constitution went into effect, this nationalist safeguard precluded the intervention of foreign interests in the management or operation of a public utility, either as an officer, employee, or laborer (except as a technical personnel with appropriate government permit). Any such intervention is defined as an offense under that law.¹⁰

The martial-law Constitution has set aside this nationalist protection. It now provides that the "participation of foreign interests in the governing body of any public utility enterprise shall be limited to their share in the capital thereof."¹¹

This brief survey gives some insights into the changes wrought by martial law that have profoundly affected the political and economic development of the country. They are structural changes with far-reaching and grave implications for our destiny as a free people.

NOTES

- 1 V. Sinco, Philippine Constitutional Law, p. 20, 1960.
- 2 Id., p. 606.
- 3 Id., p. 593.
- 4 See Gold Creek Mining Co. v. Rodriguez, 66 Phil. 259, 270 (1938).
- 5 V. Sinco, Philippine Political Law, p. 470 (1962).
- 6 Republic vs. Quasha (1972), 46 SCRA 160.
- 7 American investments in the Philippines under martial law increased nine times. In 1973, U.S. investments reached \$113.8 million; in 1981 these were valued at \$920 million. The 1981 figure represented 53.9% of total foreign investments in the country, down from 63.9% in 1973. The reason for the decrease in the American share of total foreign investments is the entry of Japanese investments.
- 8 In identical reports appearing in all major Manila newspapers, Dec. 7, 1982.
- 9 Commonwealth Act No. 108, Sec. 2-A, as amended by Rep. Act No. 134.
- 10 Ibid.
- 11 This new provision finds implementation in Pres. Decree No. 715 (1975), which amends the Anti-Dummy Law to the effect that "the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participations or share in the capital of such entities."

PART II

DEFILIPINIZING THE ECONOMY

This part of the study concretizes the points raised in the main paper. It presents a compilation of rules and guidelines that clearly illustrate how the objective of preserving the national patrimony for the benefit of Filipinos has been negated in the feverish effort to attract and accommodate foreign investments.

I. NATIONALITY, RESIDENCE AND IMMIGRATION STATUS

Nationality Requirement Dispensable

In accordance with the policy to encourage and protect foreign investments, the National Economic Development Authority (NEDA) is empowered to suspend nationality requirements existing in Philippine statutes and Presidential Decrees, particularly in cases of international complementation projects or those undertaken to take advantage of economies of scale. (P.D. No. 92, sec. 6.) NEDA may also recommend to the President the suspension of nationality requirements in cases where foreign financial, management, technical or other forms of assistance may be vital to national economic interest. (P.D. No. 151, sec. 2)

The Omnibus Investments Code empowers the Board of Investments (BOI) to suspend the nationality requirements "provided for in this Code or any other nationalization statute in cases of ASEAN projects or investments by ASEAN nationals in preferred projects". With the approval of the President, the BOI may exercise this authority for the benefit of other international complementation arrangements for the manufacture of a particular product on regional basis to take advantage of economies of scale. (P.D. No. 1789, art. 7(13).)

Under the same Code, the BOI may change the percentage of Philippine ownership and control required for registration of export traders. (P.D. No. 1789, art. 35.) If the measured capacity of any preferred non-pioneer area of investment is not filled up within three years from its declaration as such area, the BOI may allow foreigners to be registered in these areas, for the production of goods primarily for export during that period. (P.D. No. 1789, art. 37.)

In the event that the BOI suspends or sets aside the nationality requirement, foreign investors could qualify for all investment incentives granted by the Omnibus Investments Code to registered investors or enterprises. In such cases, foreign investors are given national treatment, thereby virtually doing business on the same terms as Philippine citizens.

Special Residence Status

Foreign investors are entitled to Special Residence Visas if they invest a substantial amount in "an economically depressed priority area", as this may be declared by the President. In other words, they acquire the privilege to reside in the Philippines for as long as their investments subsist. This privilege extends to their spouses and minor children. (P.D. No. 1623, May 17, 1979.)

The privilege of Special Residence Visa has been extended to any foreign investor who is "willing and able to invest the amount of at least US\$200,000 in the Philippines" and has remitted such amount to the Philippines in acceptable currency. With this privilege, all that he has to show is that he is of sound mind and body and of good moral character. (P.D. No. 1851, Nov. 6, 1982.)

Special Immigration Status

Foreign investors are allowed to stay in the country on a more permanent status, as holders of special non-immigrant visa under section 47(a), paragraph 2 of the Immigration Act. This new policy allows an extension of the original 72-hour no-visa period of stay previously applied. A principal feature of this policy is the waiver of requirements of fingerprinting and of filing of cash bonds, which are otherwise strictly enforced. This special treatment is for the benefit, in particular, of officers of foreign investment houses, stockholders and foreign investors who show satisfactory proof of plans for substantial investment in the Philippines of not less than \$100,000. (See Office Orders No. 117 of Feb. 26, 1973 and No. 118 of March 2, 1973, Commissioner of Immigration and Deportation.)

II. MULTINATIONAL CORPORATIONS IN SPECIAL AREAS

Regional Headquarters

It is now the policy of the Philippines to attract multinational corporations (MNCs) to establish their regional or area headquarters in the Philippines. When they do so, these headquarters are given the following incentives:

- (a) Exemption from income tax;
- (b) Exemption from the 3% contractors' tax;
- (c) Exemption from local licenses, fees, dues, imposts, or any local taxes or burdens.

Foreign personnel employed in the MNCs' regional headquarters are allowed the following incentives:

- (a) Facility of travel by means of a multiple-entry special visa (this extends to spouses and minor children);

- (b) Exemption from all fees under the immigration and alien registration laws;
- (c) Exemption from customs duties and compensating tax for personal and household effects which they bring into the Philippines when they settle for the first time;
- (d) Exemption from securing alien certificate of registration;
- (e) Exemption from obtaining immigration clearance certificate and "all clearances required by any government department or agency" (except a tax clearance upon departure); and
- (f) Limiting his income tax to a flat rate of 15% on gross income derived from the regional headquarters. (P.D. No. 218, as amended by P.D. No. 348.)

As of June 1981, 245 MNCs had registered to establish regional headquarters in the Philippines. As of the end of 1980, 195 of them had been operational. (*Bulletin Today*, June 1, 1981, p. 28.)

Regional Warehouses

MNCs which are licensed to establish regional headquarters in the Philippines are allowed to set up regional warehouses. These warehouses will serve as supply depots for safe-keeping of spare parts, components or raw materials of the MNCs and as a place where the MNCs can undertake packing, covering, putting up, marking, labelling, cutting or altering to specified specifications, or packing into kits or marketable lots, for the purpose of filling up transactions and sales made by the parent MNCs.

If directly used or re-exported for distribution to the MNCs' Asia-Pacific markets, spare parts, components, raw materials, and articles thus packed, labelled, or covered are exempt from customs duty, internal revenue tax, export tax, and local taxes when brought into the regional warehouses and thus directly used or re-exported.

Foreign personnel in regional warehouses are entitled to the same incentives granted to foreign executives employed in regional headquarters of the MNCs. (P.D. No. 1149, June 9, 1978.)

An export-oriented foreign investment which entails the maintenance of bonded manufacturing warehouses is entitled to exemption from customs duty with respect to imported materials used in manufacturing articles in such warehouses, if such articles are exported directly or laden for immediate exportation. (P.D. No. 34, amending the Tariff and Customs Code.)

III. REPATRIATION OF INVESTMENT AND REMITTANCE OF PROFITS

Foreign investors are entitled as a matter of right to repatriate the entire proceeds of their investments in case of liquidation or dissolution of business, in the currency in which the original investment was made and at the exchange rate prevailing at the time of repatriation. Profits or earnings are also remittable as a matter of right, under the same terms. Remittance at the exchange rate prevailing at the time of remittance is likewise recognized by the Government with respect to payment of interest and principal of foreign loans. (P.D. No. 1789, art. 42(a),(b) & (c).)

Registered Investments

In implementing this policy of full repatriation, the Central Bank makes a distinction between registered foreign investments existing as of March 15, 1973 and those made after that date.

With reference to the first group, if the investments are in export-oriented industries certified by the Central Bank, they may be repatriated in full or in annual installments to the extent of the applicant's share in net foreign exchange earnings of the firm for the preceding year. If the investments are in BOI-registered enterprises engaged in the production of import-substitute and/or export items, they may be repatriated either to the extent of the total foreign exchange earnings beginning one year after the liquidation of investment, or in equal annual installments starting one year after liquidation. If the BOI-registered investments are not in the production of import-substitutes, the repatriation may be done in four equal annual installments starting one year after liquidation.

In all other industries existing as of March 15, 1973, repatriation of investments may be done according to the following schedule:

- | | |
|-------------------------------------------|----------------------------------------------------------------|
| (a) \$250,000 or less | in 5 equal annual installments after liquidation of investment |
| (b) Over \$250,000 to \$500,000 | in 7 equal annual installments after liquidation |
| (c) Over \$500,000 | in 9 equal annual installments after liquidation |

Foreign investments in cash made after March 15, 1973 may be repatriated at any time. (Central Bank Circular No. 365, March 16, 1973.)

Profits and Dividends

Profits and dividends accruing to foreign investments, out of net profits realized beginning January 1, 1973 and thereafter, are allowed to be remitted in full at the prevailing exchange rate, net after taxes. Remittable under the same conditions are capital gains, profits and dividends derived by foreign investors from Central Bank-approved Philippine securities listed in the local stock exchanges. (CB Circular No. 365, March 16, 1973.)

Investment in Banks

If CB-approved foreign investments are made in domestic commercial banks and existing as of May 31, 1973, they may be repatriated according to the following schedule:

- | | |
|-------------------------------------------|----------------------------------------------------------------|
| (a) \$250,000 or less | in 5 equal annual installments after liquidation of investment |
| (b) Over \$250,000 to \$500,000 | in 7 equal annual installments after liquidation |
| (c) Over \$500,000 | in 9 equal annual installments |

Cash investments in such banks made after May 31, 1973 may be repatriated at any time at the prevailing rate of exchange. Foreign investors are assured remittance of profits and dividends realized out of investments in domestic commercial banks beginning June 1, 1973 and thereafter. (CB Circular No. 375, August 8, 1973.)

Royalty and Rental

Allowed remittance in full, net after taxes, at the exchange rate prevailing at the time of remittance are royalties and rentals arising from contracts between residents and non-residents, involving —

- (a) the use of trade marks, copyrights and patents,
- (b) the use of transfer of technology,
- (c) furnishing of services, or
- (d) movie and television films procured under no-dollar arrangements. (CB Circular No. 393, December 7, 1973.)

IV. BANKING INDUSTRY

The banking industry had been known to be among the most nationalistic, in the sense that it had strongly resisted the entry of foreign capital into the ownership and control of the domestic banks. Before the declaration of martial law, the General Banking Act limited foreign ownership of *capital stock* in Philippine commercial banks to 40%. Rural banks were closed to foreign capital.

Significant changes were introduced by the martial-law regime under Presidential Decree No. 11:

(a) Participation of foreign capital (foreign banking institutions) is limited to 30% in Philippine banks but this percentage now expressly refers to *voting stock*, not only capital stock. This change assures foreign investors' participation in active control of a domestic banking institution..

(b) Moreover, with the approval of the President, the Monetary Board may increase the foreign-owned *voting stock* to 40%.

This increased percentage of 40% has actually been put into effect. In its Resolution 35 (1974), NEDA approved the acquisition of 30% of the equity of People's Bank & Trust Company by the Morgan Guaranty & Trust Company, despite the fact that the People's Bank had already a 10% foreign equity at the time of the acquisition. The extraordinary increase of foreign equity to 40%, 10% beyond the normal statutory level, was justified by the NEDA on the ground that "the infusion of additional capital into the banking system of the Philippines will be in the interest of national economic interest development."

Again, and for the same reason, NEDA approved Sanwa Bank's purchase of 10% of the equity of Rizal Commercial Banking Corporation (RCBC) at a time when Continental International Finance Corporation, an American company, already owned 30% of RCBC's equity.

(c) Foreign banking institutions are now allowed to invest in equities of rural banks and private development banks.

The Batasang Pambansa has just approved a bill allowing foreigners to sit on the board of directors of private development banks up to one-third of its membership. (*Bulletin Today*, Jan. 6, 1983, p. 28) This sets aside the express mandate under the Private Development Banks Act that "All members of the board of directors of the private development banks shall be citizens of the Philippines". (Republic Act No. 4093, sec. 4, as amended.)

Offshore Banking

Foreign banks, their branches, subsidiaries and affiliates are allowed to operate offshore banking units (OBUs) in the Philippines, the primary function of which is to conduct banking operations in foreign currencies involving receipt of funds from external sources and the utilization of such funds. (See P.D. Nos. 1034 and 1035.)

Transactions of OBUs with non-residents or with other OBUs are freely allowed. Transactions of OBUs with residents, including domestic commercial banks, are also allowed but under stricter regulation.

The present policy of the Administration is to attract foreign banks to set up OBUs in the country, on the basis of the following incentives:

- (a) Exemption for OBUs from all taxes on business except a low rate of 5% on net income from offshore banking transactions with non-residents and other OBUs;
- (b) Exemption for non-residents from income tax on income derived from transactions with OBUs;
- (c) Exemption for OBUs from all forms of local licenses, dues, imposts, or any other local taxes or burdens;
- (d) Limit of 15% income tax on gross income on the part of foreign personnel employed by OBUs;
- (e) Multiple entry special visa for foreign personnel employed by OBUs, their spouses and minor children; and
- (f) Exemption for OBUs' foreign personnel, their spouses and minor children from payment of all fees under the immigration and alien registration law, from securing alien registration certificate, from obtaining emigration clearance certificate and all types of clearance required by any government agency (except tax clearance on final departure).

V. LAND RESOURCES AND AGRICULTURE

Lands Covered by Parity Amendment

Expiration of the Parity Rights on July 3, 1974 had the effect of terminating ownership by US nationals of lands acquired under the Parity Amendment. However, Presidential Decree No. 713 makes exception in favor of the following persons:

- (a) US citizens who were formerly citizens of the Philippines;
- (b) US citizens who have resided in the Philippines continuously for 20 years on July 3, 1974;
- (c) US citizens who became permanent residents of the Philippines.

This Decree allows them to continue enjoying their right over private residential lands in the Philippines, not exceeding 5,000 sq. meters for a family dwelling, which they acquired before the expiration of the Laurel-Langley Agreement.

In the light of the termination of the Parity Rights, US nationals (both individual and corporate) who owned lands covered by the Parity Amendment were encouraged to make irrevocable donations of these lands, particularly on a leaseback agreement which would enable them to continue in possession of the lands on lease from the donees.

Under Presidential Decree No. 697, such irrevocable donations are exempt from payment of donor's tax, if the donation is in favor of —

- (1) the National Government or any non-profit entity created by any of its agencies or by any of its political subdivisions;
- (2) any organization for whom donations made in its favor are exempt from donor's tax under any other laws;
- (3) any charitable or scientific organization, with activity of national scope such as the Philippine Red Cross, Community Chest, Boy Scouts of the Philippines, and the Philippine Heart Foundation.

These donations are recognized as deductible business expense items for income tax purposes. (PD. No. 697.) Thus, such donations of "Parity lands" in favor of the National Development Company are tax exempt.

Service Contracts Over Lands

Foreign persons and corporations are allowed to enter into service contracts for financial, technical, management or other forms of assistance with Filipino citizens or corporations which acquired lands of the public domain, for the exploration, exploitation, development and or utilization of such lands.

Presidential Decree No. 151 considers such service contracts "vital to national interest" if the exploration, exploitation, development or utilization of lands is necessary for agricultural, industrial or commercial development projects, such as the development of export-oriented industries, import substitution or other dollar saving industries, cottage industries, and other projects certified as vital to national interest by the President as recommended by the NEDA.

Rice and Corn Industry

Republic Act No. 3018 Filipinized the rice and corn industry and thus "succeeded in transferring the rice and corn industry in all its aspects to Filipinos and Filipino-owned entities."

But according to Presidential Decree No. 194, this Filipinization law "has created artificial restraints in the national effort to develop the rice and corn industry" and hence it is "imperative to lift the prohibition" with respect to foreign investments. In order to encourage foreign investments, this Decree sets aside the Filipinization requirement and now allows aliens, foreign corporations, associations or partnerships to engage in the rice and corn industry. Under the decree "rice and corn industry" covers the culture, production, milling, processing, trading, and the purchase of rice and corn or by-products for use as raw materials in the manufacturing or processing of finished products.

Agricultural Investments

Foreign investments in registered agricultural enterprises under the Agricultural Investments Incentives Act enjoy the following basic rights, guarantees and incentives:

- (a) The right to repatriate the entire proceeds of the liquidation of investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation;
- (b) The right to remit earnings from the investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance;
- (c) The right to remit such sums as may be necessary to pay foreign loans and foreign obligations arising from technological assistance contracts, at the exchange rate prevailing at the time of remittance;
- (d) Freedom from expropriation by the Government as to the property represented by investments or of the enterprises except for public use or in the interest of national defense and welfare and upon payment of just compensation. In such case, the foreign investors or enterprises are assured the right to remit the compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate at the time of remittance;
- (e) Freedom from requisition of the property represented by the investments or of the enterprises, except in the event of war or national emergency and only for the duration thereof. In such cases, foreign investors are entitled to compensation to be determined and paid at the time of requisition or immediately after the cessation of war or national emergency. Compensation is assured to be remitted in the currency in which the investment was originally made and at the rate of exchange prevailing at the time of remittance;
- (f) The right to be protected from infringement of registered patents, trademarks, copyrights, trade names and other proprietary rights; and
- (g) Exemption from tax on capital gains under specified conditions.

If foreign investments are made in registered enterprises which are engaged in preferred areas of agricultural investments, they enjoy the following incentives:

- (a) Deduction of organizational and pre-operating expenses from taxable income;
- (b) Accelerated depreciation with respect to fixed assets and capital equipment, including breeding stock;

- (c) Carry over of net operating loss in any of the first ten years of operation as a deduction from taxable income for the years immediately following the year of loss;
- (d) Exemption from compensating tax and tariff duties on imported capital equipment; within 7 years from the date of registration of the registered enterprise;
- (e) Tax exemption on breeding stocks and genetic materials within 7 years of the date of registration of the registered enterprise;
- (f) Tax credit on capital equipment purchased locally;
- (g) Tax credit for withholding tax on interest;
- (h) Protection in the form of ban against importation of goods unfairly competing with those produced by the registered enterprise;
- (i) Deduction of one-half of labor training expenses from taxable income;
- (j) Deduction of reinvested profits from taxable income;
- (k) Deduction of 25% of research and development training expenses from taxable income within 7 years from the date of registration of the registered enterprise;
- (l) All expenses for necessary and major infrastructure works may be applied to the payment of taxes due; and
- (m) Deduction from taxable income of 30% of freight and transportation expenses within 5 years from the date of the registration of the registered enterprise.

Foreign investments in pioneer agricultural enterprises benefit from the following incentives:

(a) Exemption from all taxes under the Internal Revenue Code, except income tax, from the date the area of investment is included in the Agricultural Investments Priorities Plan, to the following extent:

- (1) 100% for the first 3 years;
- (2) 75% for the 4th through the 5th years;
- (3) 50% for the 6th and 7th years;
- (4) 25% for the 8th and 9th years; and
- (5) 10% for the 10th year.

(b) Post-operative tariff protection to an extent not exceeding 50% of the dutiable value of imported items similar to those being produced by the pioneer agricultural enterprise, unless a higher rate is provided by the Tariff Code or pertinent laws.

Foreign investments in registered agricultural enterprises benefit from the following export incentives:

- (a) Tax credit equivalent to the sales, compensating and specific taxes and duties on supplies, raw materials and semi-manufactured products used in the manufacture or production of enterprises' products and forming part thereof; and
- (b) Deduction from its taxable income of an amount equivalent to the sum of the direct labor cost and local raw materials utilized in the manufacture of export products of the enterprises.

Foreign investments in pioneer and other registered agricultural enterprises are also benefited by preference in the grant of government loans from government financial institutions, such as the Development Bank of the Philippines, Government Service Insurance System, the Social Security System and the Land Bank. These enterprises are entitled as beneficiaries of the 10% of a banking institution's loanable funds set aside for agrarian reform credit. (P.D. No. 1159.)

VI. OTHER RESOURCES

Non-Conventional Sources of Energy

Presidential Decree 1068 has the effect of granting national treatment to foreign investors in research, development and utilization of non-conventional sources of energy and in the entitlement of the following incentives:

- (a) Cost incurred in the establishment and construction of non-conventional energy conversion facilities or equipment are deductible from gross income;
- (b) Exemption from payment of tariff duties and compensating tax on importation of machinery and equipment, spare parts, and all materials required in such facilities or equipment;
- (c) Priority in financial assistance from government financial assistance, such as the DBP, PNB, GSIS, SSS, and the Land Bank.

These incentives are open to any person, whether natural or juridical, "the provisions of any law to the contrary notwithstanding." (Section 4.)

Forest Resources

To encourage foreign investment in the utilization of forest resources, the BOI is authorized to change the nationality requirement in favor of foreign investors with respect to industrial tree plantation and tree farms as pioneer areas of investments. (P.D. No. 705, sec. 36.)

Geothermal Resources

Foreign service contractors in geothermal operations are entitled to the following incentives:

- (a) Exemption from payment of tariff duties and compensating tax on importation of machinery and equipment, spare parts and all other materials required in geothermal operations;
- (b) Entry of alien technical and specialized personnel for the operation under the service contract;
- (c) Repatriation of capital investment and remittance of earnings derived from service-contract operations and remittance of the principal and interest of foreign obligations incurred in such operations. (P.D. No. 1442, sec. 4.)

Alumina

For the benefit of the government-approved plan authorizing Reynolds Aluminum Corporation of America to establish an Aluminum Smelter in Samar, this entire island has been closed to mining location insofar as alumina and its related minerals are concerned, to enable the Bureau of Mines to determine possible areas containing these minerals. (Letter of Instruction No. 184, 22 April 1974.)

Import of Breeder Animals

Importation of breeder and slaughter cattle, goat and beef is required by the Government to be done through an experimental ranching project under the management of King Ranch of Texas. Pursuant to a Technical Assistance Agreement, the Government has placed the entire experimental area under the charge of King Ranch to "insure the effective development and growth of the beef-carabeef program involved in large-scale ranching projects." (P.D. No. 1297.)

Executive Positions and Other Employment

Presidential Decree No. 715 in effect nullifies the Anti-Dummy Law since it now allows aliens to become members of the board of directors or governing body of corporations or associations engaging in partially Filipinized activities in proportion to their allowable participation or share in the capital of such entities.

Foreign nationals may be employed in supervisory, technical or advisory positions not in excess of 5% of the total personnel in each of these categories in a registered agricultural enterprise. They are allowed entry and residence in the Philippines for the duration of their stay. This privilege extends to their spouses and their minor children. (P.D. No. 1159, secs. 6 and 9.)

Foreign nationals may also be employed in pioneer agricultural enterprises during the first five years of their operations. They are allowed entry and residence in the Philippines for the duration of their employment. (P.D. No. 1159, sec. 7 (b).)

Foreign nationals may occupy the positions of president, treasurer and general manager when the majority of the capital stock of the pioneer agricultural enterprise is owned by foreign investors. (P.D. No. 1159, sec. 7(b).)

VII. FREE TRADE ZONES

Enterprises which are fully owned or controlled by foreigners are expressly allowed to do business or engage in an industry within the free trade or export processing zones. (PD No. 66, sec. 16.) Free trade zones are now established in Mariveles, Baguio City and Mactan. Twelve zones are planned to be set up throughout the country. (*Phil. Daily Express*, Aug. 12, 1980, p. 16.) A special free trade zone for the electronics industry is authorized to operate in Taguig, Rizal. (Letter of Instruction No. 900, July 25, 1979.)

The Export Processing Zone Authority has an agreement with the Ministry of International Trade and Industry of Japan for the establishment of "Japanese export zones"

in the Philippines, which is "expected to result in more Japanese industries relocated to the Philippines instead of other developing countries". (*Times Journal*, Jan. 15, 1981, p. 9.) The Authority is now authorized to grant private corporations the permit to set up their own export processing zones. The Royal Dutch Shell group of companies has availed of this privilege in the development of its 86-hectare depot in Batangas. (See Executive Order No. 568, 1980; *Times Journal*, Sept. 22, 1980, p.6.)

The following incentives are among those provided by present laws for zone registered enterprises, including foreign corporations:

- (a) Exemption from all taxes, dues, fees, charges and rates, including wharfage and storage fees of all merchandise, raw materials, supplies, articles, equipment, machinery, spare parts, and "wares of every description" not prohibited by law, which are brought into the zone by registered enterprises in connection with their operations;
- (b) Exemption from payment of any and all local government imposts, fees, licenses or taxes, except real estate tax, with regards to their construction, operation or production inside the zone;
- (c) Deduction from taxable income of all capitalized organizational and pre-operating expenses over a period of not more than 10 years, beginning with the month indicated by the enterprise;
- (d) Tax credit equivalent to the sales, compensating and specific taxes and duties on supplies, raw materials and semi-processed products used in the manufacturing and production of export products; (PD No. 1449)
- (e) Exemption from contractor's tax;
- (f) Carry-over deduction from income tax for 6 years immediately following the year of loss of the net operating loss incurred in any year of the first 10 years of operation;
- (g) Exemption from real property tax of the production equipment used directly or indirectly in production, assembly or manufacture of export products; (PD No. 1716)
- (h) Exemption from export tax of foreign merchandise transhipped through the zone and exported therefrom;
- (i) Accelerated depreciation of fixed assets;
- (j) Priority in the allocation of foreign exchange and in the availment of assistance by the Central Bank;
- (k) Preference in financial assistance by way of loans, credit, guarantees or other forms of financial accommodations from government financial institutions; (PD No. 66) and
- (l) Foreigners, together with their spouses and minor children, who are employed by foreign enterprises in the zone, are entitled to entry as special non-immigrants during the period of employment. (LOI No. 63, March 13, 1973)

VIII. TAX INCENTIVES

In addition to tax benefits under the Agricultural Incentives Act (PD No. 1159) given above, the following tax incentives also accrue to foreign investors in respect to their investments in registered enterprises under the Investment Incentives Act (Rep. Act No. 5186):

1. For Registered Enterprises

- (a) Deduction from taxable income of organizational and pre-operating expenses for not more than 10 years from the start of operation;
- (b) Deduction from taxable income of labor training expenses equivalent to ½% but not more than 10% of direct labor wage;
- (c) Accelerated depreciation;
- (d) Exemption from tariff duties and compensating tax on imports of machinery, equipment and spare parts for a period of 7 years from registration;
- (e) Carry-over deduction from taxable income of the operating losses incurred in any of the first 10 years immediately following the year of loss;
- (f) Tax credit equivalent to 100% of the value of compensating tax and customs duties that would have been paid on machinery, equipment and spare parts had these items been imported;
- (g) Tax credit for tax withheld on interest payments on foreign loans;
- (h) Deduction from taxable income of reinvested undistributed profits for the year of reinvestment up to a certain percentage of the amount of undistributed profits;
- (i) Protection from dumping;
- (j) Tax credit equivalent to sales, compensating and specific taxes and duties on supplies, raw materials and semi-manufactured products used in the manufacture, processing or production of export products;
- (k) Additional deduction from taxable income of direct labor cost and local raw materials utilized in the manufacture of export products, not in excess of 25% of the total export revenues for producers, 10% for traders and 50% for service exporters; and
- (l) Preference in loans from government financial institutions.

2. For Pioneer Enterprises

- (a) Exemption from all taxes under the National Revenue Code, except income tax, on gradually decreasing percentage;
- (b) Employment of foreign nationals within 5 years of operation, or even after, in exceptional cases;
- (c) Post-operative tariff protection;
- (d) Tax allowance to the extent of actual investment, but not exceeding 10% of taxable income; and
- (e) Tax exemption on sale of stock dividends provided the sale takes place within 7 years from registration.

Under the Export Incentives Act (Rep. Act No. 6135), the following incentives also accrue to foreign investors in registered enterprises:

1. For Registered Export Producers

- (a) Employment of foreign nationals;
- (b) Expansion of re-investment deduction;
- (c) Anti-dumping protection;
- (d) Protection from government competition; and
- (e) Deduction from taxable income of labor training expenses.

2. For Pioneer Enterprises

- (a) Exemption from all taxes under the National Internal Revenue Code, except income tax;
- (b) Post-operative tariff protection; and
- (c) Employment of foreign nationals.

3. For Export Traders

- (a) Tax credit; and

(b) Deduction from taxable income for the first 5 years from registration of an amount equivalent to 10% of the total export sales for 5 years after registration for those who extend certain financial assistance to registered export producers.

Tax exemption benefits and privileges granted to individuals and corporations are subject to modification, suspension or revocation by the Fiscal Incentives Review Board. However, tax privileges for multinational corporations are among those specified as an exception from this authority of the Board.

IX. TOURISM INDUSTRY

Foreign nationals investing in registered tourism enterprises enjoy exemption from withholding tax on dividends remitted abroad. Their investments in such enterprises also benefit from the following incentives;

- (a) 50% of foreign exchange earned in any of the first 5 years from the start of operation are deductible from taxable income;
- (b) Net operating loss in any of the first 10 years of operation is allowed to be carried over as deduction from taxable income for 6 years following such loss;
- (c) Tax credit for taxes withheld on interest payments on foreign loans;
- (d) Exemption from real estate taxes on land improvements and buildings for the first 5 years from the start of operation;
- (e) Importation of machinery, equipment and spare parts shipped with such equipment are not subject to tariff duties and compensating tax within 7 years from the date of registration;
- (f) Tax credit equivalent to 100% of the value of the compensating tax and customs duties that would have been paid on machinery and spare parts had these items been imported;
- (g) Deduction from taxable income of undistributed profits or surplus which the enterprise reinvests, in the year of reinvestment; and
- (h) Preference in the grant of loans from government financial institutions. (PD No. 535)