

# Easing of investment rules in the Philippines

2022

The background of the lower half of the page features a dark blue gradient. Overlaid on this are two financial data visualizations. A white line graph with circular markers at each data point trends upwards from the bottom left towards the top right. Below the line graph is a candlestick chart with alternating red and green bars, also trending upwards from left to right. The overall aesthetic is modern and professional, typical of a financial or legal publication cover.

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The law is stated as of 15 June 2022.

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# Foreword

The Philippines has taken active steps not only in revitalizing its economy from the wake of the COVID-19 pandemic, but in ensuring that economic growth continues in the years to come. In 2020, two crucial stimulus laws have already been passed: Republic Act No. 11469 and Republic Act No. 11494, otherwise known as Bayanihan Acts [One](#)<sup>1</sup> and [Two](#)<sup>2</sup>. These were passed to jumpstart the Philippine economy and to serve as an immediate solution to the havoc that the pandemic has brought.

In addition to the Bayanihan Acts, the government pursued a policy of liberalizing the economy to attract foreign direct investments into the country, while putting in place certain safeguards to protect national security.

This policy is being implemented through four landmark laws:

1. Republic Act No. 11659, "An Act Amending Commonwealth Act No. 146, Otherwise Known as the Public Service Act, as amended" ("**PSA Amendatory Law**");
2. Republic Act No. 11647, "An Act Promoting Foreign Investments, Amending Thereby Republic Act No. 7042, Otherwise Known as the 'Foreign Investments Act of 1991' as Amended, and for Other Purposes" ("**FIA Amendatory Law**");
3. Republic Act No. 11595, "An Act Amended Republic No. 8762, Otherwise Known as the 'Retail Trade Liberalization Act of 2000,' by Lowering the Required Paid-Up Capital for Foreign Retail Enterprises, and for Other Purposes" ("**RTLA Amendatory Law**") and its implementing rules and regulations ("**IRR**"); and
4. Republic Act No. 11534, "An Act Reforming the Corporate Income Tax and Incentives System, Amending for the Purpose Sections 20, 22, 25, 27, 28, 29, 34, 40, 57, 109, 116, 204 and 290 of the National Internal Revenue Code of 1997, as Amended, and Creating Therein New Title XIII, and for Other Purposes," ("**CREATE Law**").

Apart from attracting foreign investments into the country, some of these laws also provide a foreign investment review mechanism to protect national security. Moreover, outside of Congress and these four landmark laws, there have been other legal developments that will further liberalize foreign investments into the country. These will all be discussed below.

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<sup>1</sup> "[Philippines: COVID-19 - BSP releases FAQs on IRR of Bayanihan Act](#)", Quisumbing Torres, 19 April 2020, (accessed 15 June 2022)

<sup>2</sup> "[Philippines: Philippine economic stimulus law now in effect](#)", Quisumbing Torres, 29 September 2020 (accessed 15 June 2022)

## I. PSA Amendatory Law

### a. Definition of Public Utilities

Under the 1987 Constitution, a public utility is required to obtain a franchise or any other form of authorization before it may operate in the Philippines. Furthermore, no franchise may be granted except to citizens of the Philippines or to corporations organized under Philippine law and at least 60% owned by such citizens (*i.e.* maximum foreign ownership is capped at 40%). The 1987 Constitution does not define what a "public utility" is and reference has consistently been made to Commonwealth Act No. 146 or the Public Service Act of 1936 ("**PSA**") to define the term.

Under the PSA, the term "public utility" was used interchangeably with "public services" which meant that all businesses and services engaged in "regularly supplying the public with some commodity or service of public consequence" is subject to the 60-40 equity restriction under the Constitution. This covered a wide range of businesses ranging from expressways, telecommunications, and transportation, among others.

Now, the PSA Amendatory Act gives a specific enumeration of what public utilities are:

1. Distribution of electricity;
2. Transmission of electricity;
3. Petroleum and petroleum products pipeline transmission systems<sup>3</sup>;
4. Water pipeline distribution systems and wastewater pipeline systems, including sewerage pipeline systems<sup>4</sup>;
5. Seaports; and
6. Public utility vehicles<sup>5</sup>.

With this amendment, the PSA Amendatory Law has effectively delineated public services, which are still under the jurisdiction of their respective regulatory bodies from public utilities that are subject to the 60-40 equity restriction under the Constitution. All businesses and activities that are not part of the enumeration above can now be wholly foreign-owned. As a result, telecommunications, shipping, air transportation, railway and subway businesses, among others, can already be fully-owned by foreigners.

Even value-added service ("**VAS**")<sup>6</sup> providers are also now open to full foreign ownership. However, this is subject to the critical infrastructure qualification and the reciprocity requirements, as will be discussed below.

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<sup>3</sup> Petroleum pipeline systems operated exclusively for private or own use, or incidental to the operations of a distinct business are excluded.

<sup>4</sup> Desludging companies and septic tanks are excluded.

<sup>5</sup> Transport vehicles accredited with and operating through transport network corporations are excluded.

<sup>6</sup> Under Republic Act No. 7925 ("**The Telecomms Act**"), a VAS provided is defined as, "an entity which, relying on the transmission, switching and local distribution facilities of the local exchange and inter-exchange operators, and overseas carriers, offers enhanced services beyond those ordinarily provided for by such carriers."

Moreover, National Telecommunications Commission ("**NTC**") Memorandum Circular No. 02-05-2008 provides the services which are classified as VAS:

- a. Messaging services
- b. Audio conferencing / audio and video conferencing
- c. Voice mail services and electronic mail services
- d. Applications services

The passage of this law allows foreigners to have control over the business and operations over the Philippine entities engaged in business in these sectors, which were previously subject to certain restrictions under the Philippine Anti-Dummy Law ("**ADL**"). The ADL covers corporations that undertake activities where foreign equity is limited to a maximum of 40% of a corporation's capital.

Under the ADL, a person who has a right, franchise, privilege, property or business, which is expressly reserved by law to be at least 60% owned by Philippine nationals (e.g., public utilities), is prohibited from: (i) permitting or allowing the use, exploitation or enjoyment of such right, franchise, privilege, property or business by a person, corporation or association not possessing the qualifications prescribed by law, or (ii) in any manner permitting or allowing any person not so qualified to intervene in the management, operation, administration or control of such right, franchise, privilege, property or business, whether as an officer, employee or laborer, with or without remuneration (except technical personnel whose employment may be specifically authorized by the Secretary of Justice). However, foreign nationals may serve as members of the board or governing body of corporations engaged in partially nationalized activities, in a number proportionate to their actual and allowable equity in the company.

The PSA Amendatory Law takes these liberalized sectors outside of the scope of the ADL, which would now allow investors to have full and direct control over the businesses considering that they may now directly wholly-own the business, and may nominate foreign directors, officers, and employees.

Moreover, the PSA Amendatory Law also provides that no other person or entity shall be deemed a public utility unless otherwise subsequently provided for by law. This means that investors seeking to engage in public services in the country may not be prevented by anyone going to an administrative court and have their business declared as a public utility subject to the 60-40 equity restriction.

## b. Critical Infrastructure

Under the PSA Amendatory Act , "critical infrastructure" refers to any public service, which owns, uses, or operates systems and assets, whether physical or virtual, so vital to the Republic of the Philippines that the incapacity or destruction of such systems or assets would have a detrimental impact on national security, including telecommunications and other vital services as may be declared by the President.

Generally, foreign nationals can only own up to 50% of the capital of entities engaged in the operation and management of critical infrastructure, unless the country of such foreign national accords reciprocity to Philippines nationals as may be provided by law, treaty, or international agreement. Reciprocity here may be satisfied by according rights of similar value in other economic sectors; and, the National Economic Development Authority ("**NEDA**") shall promulgate rules and regulations for this purpose.

Therefore, subject to the rules that NEDA will promulgate, foreign nationals can own up to 100% of entities operate and manage critical infrastructure. This balances national security concerns with the need to attract foreign investments.

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- e. Content and program services
  - f. Audiotext services
  - g. Facsimile services
  - h. Virtual Private Network (VPN) services
  - i. Hosting services.

### c. Power of the President to Suspend or Prohibit Transaction or Investment

Under the PSA Amendatory Law, the President, in the interest of national security and upon recommendation of the relevant government department or agency, may suspend or prohibit: (i) any proposed merger or acquisition transaction or (ii) any investment in a public service that effectively results in the grant of control, whether direct or indirect, to a foreigner or a foreign corporation.

Note however that the NEDA shall still promulgate the rules and regulations to implement this section. Also note that the FIA Amendatory Law also contains a similar provision. See below.



## II. FIA Amendatory Law

### a. Amendments to List B of the Foreign Negative List

The FIA provides for a Foreign Investments Negative List ("**Negative List**"), which enumerates areas of economic activity where foreign ownership is limited. The latest Negative List, promulgated in 2018, lists several businesses and activities categorized under List A or List B. List A enumerates the areas of economic activities reserved for Philippine nationals under the Constitution and specific laws, while List B lists the activities where foreign ownership is limited for reasons of security, defense, risk to health and morals and the protection of small and medium scale enterprises.

The FIA Amendatory Law has made significant changes to List B of the Negative List. First, the FIA Amendatory Law still reserves micro and small domestic market enterprises ("**SMEs**") with paid in capital of less than USD 200,000 to Philippine nationals. However, this threshold is lowered to USD 100,000 if the enterprise falls under any one of the following categories:

1. If it involves advanced technology as determined by the Department of Science and Technology;
2. If it is endorsed as a start-up<sup>7</sup> or a start-up enabler<sup>8</sup> by lead host agencies pursuant to Republic Act No. 11337 ("**Innovative Startup Act**"); or
3. If majority of its employees are Filipinos, and where the number of Filipino employees is at least 15.

The FIA Amendatory Law introduced the exception for the start-up and start-up enablers; and this is aimed at making the Philippines one of the leading start-up hubs in the region. Moreover, for the third requirement, the original FIA previously required the enterprise to employ at least 50 direct employees. The FIA Amendatory Law only requires that majority of the enterprise's employees are Filipinos and it must have at least 15 Filipino employees. These exceptions make it easier for foreign nationals to engage in SMEs with a lower paid-in capital of USD100,000.

Second, the law now allows the manufacture or repair of items requiring prior clearance and authorization from the Department of National Defense as long as the enterprise is authorized by the Secretary of National Defense. The substantial export requirement in the original version of the FIA has been removed.

### b. Easier Procedures for Entry

The FIA Amendatory Law creates the Inter-Agency Investment Promotion Coordination Committee ("**IIPCC**"), which will spearhead the government's promotion and facilitation efforts to encourage foreign investments into the country. The IIPCC is also mandated to develop a comprehensive and strategic Foreign Investment and Marketing Plan ("**FIPMP**"), which provides a medium five-year plan and a long-term 10-year plan. An online portal containing the FIPMP shall be created, containing further details, including the IIPCC's procedures, contacts and schedules, among others. The database, which will form part of the online portal, also intends to include a directory of local enterprises capable and willing to partner with potential foreign investors.

<sup>7</sup> Startup — any person or registered entity in the Philippines which aims to develop an innovative product, process or business model.

<sup>8</sup> Startup enabler — any person or registered entity in the Philippines registered under the Philippine Startup Development Program that provides goods, services or capital identified to be crucial in supporting the operation and growth of startups by the DTI in consultation with the Department of Science and Technology ("**DOST**"), Department of Information and Communications Technology ("**DICT**"), and pertinent government and nongovernment organizations ("**NGOs**").

This is a welcome development as it aims to harmonize the government's efforts to facilitate the entry of investments and reduce bureaucracy. This also aims to lessen the risk of graft and corruption involved when foreign players transact with the various government entities when setting up shop in the country.

Furthermore, to protect foreign investors against graft and corruption, the FIA Amendatory Law also added a penal provision for graft practices in relation to foreign investment promotions. It provides that public officials and employees involved in foreign investment promotions shall uphold the highest standards of public service, accountability and integrity. Therefore, any public official or employee involved in foreign investment promotions who shall commit any of the corrupt practices under the Anti-Graft and Corrupt Practices Act<sup>9</sup> shall, in addition to the penalties therein, be punished by a fine of not less than Php 2 million but not more than Php 5 million.

### c. Review of Foreign Investments

Similar to the PSA Amendatory Law, the FIA Amendatory Law also provides a foreign investment review mechanism in relation to national security. It provides that IIPCC, in coordination with the National Security Council ("**NSC**"), and the NEDA, shall review foreign investments involving military-related industries, cyber infrastructure, pipeline transportation, or such other activities which may

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<sup>9</sup> **Section 3. Corrupt practices of public officers.** In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

- (a) Persuading, inducing or influencing another public officer to perform an act constituting a violation of rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself to be persuaded, induced, or influenced to commit such violation or offense.
- (b) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other part, wherein the public officer in his official capacity has to intervene under the law.
- (c) Directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit, for himself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section thirteen of this Act.
- (d) Accepting or having any member of his family accept employment in a private enterprise which has pending official business with him during the pendency thereof or within one year after its termination.
- (e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.
- (f) Neglecting or refusing, after due demand or request, without sufficient justification, to act within a reasonable time on any matter pending before him for the purpose of obtaining, directly or indirectly, from any person interested in the matter some pecuniary or material benefit or advantage, or for the purpose of favoring his own interest or giving undue advantage in favor of or discriminating against any other interested party.
- (g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.
- (h) Director or indirectly having financing or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.
- (i) Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel or group.  
Interest for personal gain shall be presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transaction or acts by the board, panel or group to which they belong.
- (j) Knowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage, or of a mere representative or dummy of one who is not so qualified or entitled.
- (k) Divulging valuable information of a confidential character, acquired by his office or by him on account of his official position to unauthorized persons, or releasing such information in advance of its authorized release date.

threaten territorial integrity and the safety, security and well-being of Filipino citizens, upon the order of the President, when such foreign investments are:

1. Made by a foreign government-controlled entity or state-owned enterprises except independent pension funds, sovereign wealth funds and multinational banks, or
2. Located in geographical areas critical to national security.

To emphasize, any recommendation to suspend, prohibit or limit any foreign investment is subject to the President's final action and is therefore subject to his/her review and approval. It is expected that more details on this provision will be provided in the IRR to be issued by NEDA.

### III. RTLA Amendatory Law and the IRR

As defined in the IRR, "retail trade" pertains to any act, occupation, or calling of habitually selling merchandise, commodities or goods for consumption to the general public. A foreign retailer is defined as a foreign national, partnership, association or corporation of which more than 40% of the capital stock outstanding and entitled to vote is owned and held by such foreign national, engaged in retail trade.

Previously, the RTLA provided several categories for the minimum paid-up capital requirement:

1. Category A: Enterprises with paid-up capital of less than USD 2.5 million shall be reserved exclusively for Filipino citizens and corporations wholly owned by Filipino citizens;
2. Category B: Enterprises with a paid-up capital of USD 2.5 million but less than USD 7.5 million may be wholly owned by foreigners except that the first two years from the effectivity of the RTLA where foreign participation was limited to not more than 60%;
3. Category C: Enterprises with paid-up capital of USD 7.5 million or more may be wholly owned by foreigners but investments for establishing a store in categories B and C shall not be less than USD 830,000; and
4. Category D: Enterprises specializing in high-end or luxury products with paid-up capital of USD 250,000 per store may be wholly owned by foreigners.

Now, the RTLA Amendatory Law only imposes the following requirements for all foreign retailers:

1. The foreign retailer shall have a minimum paid-up capital of Php 25 million (approximately USD 500,000);
2. The foreign retailer's country of origin does not prohibit the entry of Filipino retailers; and
3. In case the foreign retailers engaged in retail trade through more than one physical store, the minimum investment per store must be at least Php 10 million (approximately USD 200,000).

As seen from the amendments, the minimum paid-up capital required and the minimum investment per store were significantly decreased, which now makes it easier for foreign retailers to enter the country and offer their products directly to the Filipino market. These requirements are also imposed on retailers seeking to conduct business purely through online platforms.

The DTI, Department of Agriculture ("**DAR**"), Department of Health ("**DOH**"), Department of Environment and Natural Resources ("**DENR**"), Intellectual Property Office ("**IPO**") and the National Privacy Commission ("**NPC**") issued Joint Administrative Order No. 22-01 ("**JAO**") entitled Guidelines for Online Businesses Reiterating the Laws and Regulations Applicable to Online Business and Consumers..

The JAO defined which persons and entities are considered online sellers, businesses, e-commerce platforms and e-retailers, and states their responsibilities and potential liabilities. Moreover, it enumerates specific laws and the corresponding applicability of each on the entities and their products e.g. the Food and Safety Act of 2013 as to advertising, promotions and access of minors to alcoholic beverages.

Thus, online retailers must ensure compliance with these [regulations](#) despite the easier entry allowed by the RTLA Amendatory Law.

Moreover, considering that the categories for minimum paid-up capital have been taken out, retail enterprises with foreign ownership of more than 80% are no longer required to offer a minimum 30% of their equity to the public through any stock exchange in the Philippines within eight years from start of operations.

Before, foreign retailers were required to obtain a Certificate of Prequalification from the Board of Investments ("**BOI**") upon proof of satisfying the following:

1. A minimum net worth of USD 200 million in their parent corporations in categories B and C, and USD 50 million in category D; and
2. Five retailing branches or franchises in operation anywhere around the world unless such retailer has at least one store capitalized at a minimum of USD 25 million; and
3. Five-year track record in retailing.

Now, the law has completely deleted this pre-qualification requirement from the BOI.

Lastly, the IRR has even made such entry easier providing that such paid-up capital may be used to purchase assets for purposes of complying with the investment requirement per store.

## IV. CREATE Law

The CREATE Law was passed in 2021 with the aim of mainly countering the effects of the COVID-19 pandemic. It reduces various financial burdens of foreign and domestic corporations through tax rate reductions and several tax incentives. Through these, the law aims to increase the country's investment appeal.

### a. Income Tax Rate Reductions

One of the most significant changes brought about by the CREATE Law is the reduction of income tax rates for both domestic and foreign corporations. The summary of the changes are provided in the table below.

Type of Tax	Old Rate	New Rate
Corporate Income Tax	30%	25% <ul style="list-style-type: none"><li>For domestic and resident foreign corporations, the new rate shall apply retroactively from 1 July 2020.</li><li>Moreover, the rate of 20% shall be applied for domestic corporations with a net taxable income not exceeding Php 5 million with total assets not exceeding Php 100 million (excluding the land on which the business is situated).</li><li>For non-resident foreign corporations, the rate shall apply starting 1 January 2021.</li></ul>
Minimum Corporate Income Tax	2%	1% <ul style="list-style-type: none"><li>Effective from 1 July 2020 to 30 June 2023</li></ul>
Income Tax for Proprietary Educational Institutions and Hospitals	10%	1% <ul style="list-style-type: none"><li>Effective from 1 July 2020 to 30 June 2023</li></ul>

The reduction in the corporate income tax is a significant development since the 30% corporate income tax rate was known to be one of the highest in the ASEAN region. The reduction to a rate of 25% now makes the Philippines more competitive with its ASEAN neighbours.

The CREATE Law has also repealed the Improperly Accumulated Earnings Tax ("**IAET**") — imposed at the rate of 10% for permitting earnings and profits to accumulate instead of being divided or distributed.

### b. Value-Added Tax ("VAT")

The CREATE Law also added additional exemptions on **VAT**:

1. Sale, importation, printing or publication of books, and any newspaper, magazine, journal, review bulletin, or any such educational reading material including its digital or electronic format, as long as the materials are not principally devoted to the publication of paid advertisements

2. Sale or importation of prescription drugs and medicines for diabetes, high cholesterol and hypertension (beginning 1 January 2020).
3. Sale or importation of prescription drugs and medicines for cancer, mental illness, tuberculosis and kidney diseases (beginning 1 January 2021).
4. Sale or importation of capital equipment, its spare parts and raw materials for the production of personal protective equipment ("**PPE**") for COVID-19 prevention, and all drugs, vaccines and medical devices used for the treatment of COVID-19 (effective from 1 January 2021 to 31 December 2023)

Under the CREATE Law, VAT-exempt taxpayers whose gross annual sales do not exceed Php 3 million, shall be subject to 1% other percentage tax (which was previously subjected to 3% percentage tax). This is effective from 1 July 2020 to 30 June 2023.

### c. Incentives for Exporters and Domestic Market Enterprises

Under the CREATE Law, exporters and domestic enterprises engaged in strategic activities as defined under the Strategic Investment Priority Plan ("**SIPP**") are given an Income Tax Holiday ("**ITH**") of four to seven years, depending on location and industry priorities, followed by the Special Corporate Income Tax ("**SCIT**") Rate of 5% based on gross income earned, in lieu of all national and local taxes, or enhanced deductions ("**EDs**") for five or 10 years.

Moreover, the following exemptions are also provided:

1. Duty exemption on importation of capital equipment, raw materials, spare parts, or accessories; and
2. VAT exemption on importations and VAT zero-rating on local purchases.

The Strategic Investment Priority Plan defines the coverage of the tiers and provides for the conditions for qualifying activities. For export enterprises:

Location	Tier I	Tier II	Tier III
National Capital Region (" <b>NCR</b> ")	Four yrs ITH + 10 yrs ED/SCIT	Five yrs ITH + 10 yrs ED/SCIT	Six yrs ITH + 10 yrs ED/SCIT
Metropolitan areas or areas contiguous and adjacent to NCR	Five yrs ITH + 10 yrs ED/SCIT	Six yrs ITH + 10 yrs ED/SCIT	Seven yrs ITH + 10 yrs ED/SCIT
All other areas	Six yrs ITH + 10 yrs ED/SCIT	Seven yrs ITH + 10 yrs ED/SCIT	Seven yrs ITH + 10 yrs ED/SCIT

For domestic market enterprises:

Location	Tier I	Tier II	Tier III
NCR	Four yrs ITH + five yrs ED	Five yrs ITH + five yrs ED	Six yrs ITH + five yrs ED

Location	Tier I	Tier II	Tier III
Metropolitan areas or areas contiguous and adjacent to NCR	Five yrs ITH + five yrs ED	Six yrs ITH + five yrs ED	Seven yrs ITH + five yrs ED
All other areas	Six yrs ITH + five yrs ED	Seven yrs ITH + five yrs ED	Seven yrs ITH + five yrs ED

The EDs for export enterprises and domestic market enterprises include the following:

- Additional 10% for buildings and 20% for machineries and equipment depreciation allowance of the assets acquired for the production of goods and services (qualified capital expenditure)
- Additional 50% deduction on labor expenses
- Additional 100% deduction on research and development expenses
- Additional 100% deduction on training expenses
- Additional 50% deduction on domestic input expenses
- Additional 50% deduction on power expenses
- Up to 50% deduction for reinvestment allowance for manufacturing enterprises
- Enhanced net-operating loss carry-over ("**NOLCO**") where the operating loss of the registered project or activity during the first three years from the start of commercial operations may be carried over as a deduction within the next five consecutive taxable years immediately following the year of such loss.

Furthermore, former President Duterte has recently approved the 2022 [SIPP](#). The SIPP lists the economic activities that may be given investment incentives under the CREATE Act and the CREATE IRR. Currently, the economic activities are categorized into three tiers which correspond to the different incentives they are entitled to under the law.

#### d. Tax-Free exchanges for reorganizations

Specific types of reorganizations involving corporations will now be considered as tax-free exchanges:

1. A corporation, which is a party to a merger or consolidation, exchanges property solely for stock in a corporation, which is a party to the merger or consolidation
2. The acquisition by one corporation, in exchange solely for all or a part of its voting stock, or in exchange solely for all or part of the voting stock of a corporation which is in control of the acquiring corporation, of stock of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation, whether or not such acquiring corporation had control immediately before the acquisition
3. The acquisition by one corporation, in exchange solely for all or a part of its voting stock or in exchange solely for all or part of the voting stock of a corporation which is in control of the acquiring corporation, of substantially all of the properties of another



corporation. In determining whether the exchange is solely for stock, the assumption by the acquiring corporation of a liability of the others shall be disregarded

4. A recapitalization, which shall mean an arrangement whereby the stock and bonds of a corporation are readjusted as to amount, income, or priority or an agreement of all stockholders and creditors to change and increase or decrease the capitalization or debts of the corporation or both
5. A reincorporation, which shall mean the formation of the same corporate business with the same assets and the same stockholders surviving under a new charter.

## V. PCAB v. MWCC and the Ease of Doing Business Act

The Supreme Court of the Philippines has also released a significant decision, which aligns with the government's current policy of liberalizing and rationalizing investments.

In the 2020 case of Philippine Contractors Accreditation Board ("**PCAB**") v. Manila Waters Company, Inc. ("**MWC**")<sup>10</sup>, the Supreme Court invalidated the requirement that regular contractor's licenses shall only be issued to firms with at least 70% Filipino equity participation and duly organized and existing under the laws of the Philippines. The following provision was also invalidated: that an introduction of 40% or more foreign equity into a construction firm holding a regular license shall automatically invalidate it. Thus, regular contractor's licenses can now be granted to entities whose equity is more than 40% foreign-owned.

In explaining its decision, the Supreme Court gave the following points:

1. Contractors — which are corporations/juridical persons — do not fall under the definition of "professionals" which are being exclusively restricted by the Constitution to Filipino citizens.
2. There is no law subjecting the grant of contractor's licenses to any citizenship or equity requirement. Therefore, the PCAB had no authority to set an equity limit for the grant of such licenses through the rules it issues.

More importantly, the Court articulated that "the constitutional policy of a 'self-reliant and independent national economy' does not necessarily rule out the entry of foreign investments, goods and service." Inasmuch as the Constitution mandates a bias in favor of Filipino goods, services, labor and enterprises, it also recognizes the need to transact business with the rest of the world. The Constitution never intended to prohibit foreign investments, goods and services in the development of the country's economy.

In relation to this decision, it is also worth mentioning the salient points of Republic Act No. 11302, otherwise known as the "Ease of Doing and Efficient Government Service Delivery Act of 2018" ("**Ease of Doing Business Act**"), which amended Republic Act No. 9485, otherwise known as the "Anti-Red Tape Act of 2007" ("**Anti-Red Tape Act**").

This law aims to make the delivery of government services more efficient, while at the same time, prevent graft and corruption in government. The law introduced key reforms to eradicate, or at least minimize, the barriers in doing business in the country.

First, the procurement of business permits and licenses was made faster and easier because of several initiatives. A unified application form is now provided for the application of business permits and renewals which consolidates all the information from the local government departments. A business one-stop shop was also created in all local government units ("**LGUs**") to ensure that businesses can expedite their transactions therein. A preliminary evaluation is now done so that applicants can correct deficiencies before even submitting their applications.

Second, all government agencies are now mandated to complete transactions within specific time periods from the date of request and/or complete application or request was received:

1. **Three working days:** Simple transactions — those which only require ministerial actions or present inconsequential issues for the resolution of the government office.

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<sup>10</sup> G.R. No. 217590, 10 March 2020.

2. **Seven working days:** Complex transactions — those which necessitate evaluation in the resolution of complicated issues by the government office.
3. **20 working days:** Applications which pose a danger to public health, public safety, public morals, public policy and highly technical applications.

Third, the Department of Information and Communications Technology ("**DICT**") was mandated to create an online Central Business Portal where all business permits, licensing, authorizations and other business requirements can be completed. The law also institutionalizes a zero-contact policy wherein no government officer shall have any contact with the persons transacting business except during the preliminary assessment or when strictly necessary. Not only does this expedite the procurement of business requirements, but it also lessens the opportunities of corruption during their procurement.

Fourth, the law also mandated all national government agencies and LGUs to create their respective Citizen's Charters which detail the following:

1. A comprehensive and uniform checklist of requirements for each type of application or request
2. The procedure to obtain a particular service
3. The person/s responsible for each step
4. The maximum time to conclude the process
5. The document/s to be presented by the applicant or requesting party, if necessary
6. The amount of fees, if necessary
7. The procedure for filing complaints

## VI. A Final Word

In consideration of the foregoing discussions, the key benefits, opportunities and challenges of these legal developments are provided below:

	Benefits	Opportunities	Challenges
PSA	<ul style="list-style-type: none"> <li>• Specific enumeration of public utilities subject to the 60-40 equity restriction (take in connection with the PCAB decision allowing regular licenses for foreign contractors).</li> <li>• More stability in the business operations since only Congress can declare what public utilities are.</li> </ul>	<ul style="list-style-type: none"> <li>• Public services not defined as public utilities can be fully-owned by foreigners.</li> <li>• Allows foreigners to have more control over their businesses.</li> <li>• Allows foreign officers and directors to be nominated and elected.</li> </ul>	<ul style="list-style-type: none"> <li>• Businesses must be mindful if they fall within the definition of critical infrastructure as they are subject to the 50% foreign ownership cap and the reciprocity exception.</li> <li>• Foreign governments and state-owned enterprises are effectively barred from owning equity and thus, doing business for public utilities and critical infrastructure.</li> <li>• Uncertainty as to guidelines and extent of President's power to suspend / prohibit a transaction in the interest of national security.</li> </ul>
RTLA	<ul style="list-style-type: none"> <li>• Provides a uniform capital and per store investment requirement for all foreign retailers which makes entry easier.</li> <li>• Bureaucracy is reduced since several burdensome requirements (e.g. certification of pre-qualification) are eliminated.</li> </ul>	<ul style="list-style-type: none"> <li>• Easier and more efficient means of entry in the Philippines.</li> <li>• Smaller retailers are given the opportunity to compete with large enterprises which were favored by the law before.</li> <li>• Smaller retailers can take advantage of the growing middle class in the Philippines.</li> </ul>	<ul style="list-style-type: none"> <li>• Purely online retailers may have to shell out additional capital to comply with the minimum capital requirements.</li> </ul>
FIA	<ul style="list-style-type: none"> <li>• Provides an exception to the minimum capital requirement for start-ups, start-up enablers</li> </ul>	<ul style="list-style-type: none"> <li>• Easier and more efficient entry since only the IIPCC facilitates efforts to</li> </ul>	<ul style="list-style-type: none"> <li>• Uncertainty as to the extent of the President's power to</li> </ul>

	Benefits	Opportunities	Challenges
	<p>and those who have a majority of Filipino employees (at least 15 Filipino employees).</p> <ul style="list-style-type: none"> <li>The creation of the IIPCC, along with the penal provision for graft and corrupt practices, promote an investor-friendly environment.</li> </ul>	<p>encourage direct investments.</p> <ul style="list-style-type: none"> <li>The entry of smaller investors such as start-ups are promoted.</li> </ul>	<p>review foreign investments.</p>
CREATE	<ul style="list-style-type: none"> <li>Philippine corporate tax rates are more competitive in the ASEAN region.</li> <li>Introduced several tax incentives.</li> <li>The creation of the Fiscal Incentives Review Board ("<b>FIRB</b>") which can recommend fiscal and non-fiscal incentives to the President.</li> </ul>	<ul style="list-style-type: none"> <li>Businesses have more income which can be used for operations, investments and expansion</li> <li>This is especially important to industries hardly hit by the pandemic.</li> </ul>	<ul style="list-style-type: none"> <li>Time-bound incentives may discourage foreigners trying to make stable, long-term investments in the country.</li> <li>Incentives being time-bound brings uncertainty when planning out investments.</li> </ul>

The developments discussed above present an enormous economic opportunity for foreign businesses, the government, and ultimately, the Filipinos. First, the PSA Amendment Law opened up several public utilities for full foreign ownership which allows investors to have more control over their operations in the country. Second, the FIA Amendatory Law allowed a lower paid-in capital of USD 100,000 for start-ups, start-up enablers and for those employing at least 15 Filipinos, with a majority of their employees being Filipino as well. It also created the IIPCC which will coordinate and facilitate the entry of investors in the country. Third, the RTLA Amendatory Law also deleted the categories of foreign retailers, removed the prequalification requirement, and imposes a lower amount for the required paid-up capital and investment per store for foreign retailers in the Philippines. Lastly, the CREATE law provides lower tax rates and several incentives, which makes doing business in the Philippines more profitable.

No less that the Supreme Court has recognized that allowing foreign players to participate in various industries would encourage healthy competition. This would then result to the market having more options, depending on their needs in each situation. When this happens, the economy grows as the Filipino people benefit from lower cost and better products and services.<sup>11</sup>

<sup>11</sup> PCAB v. MWCC, G.R. No. 217590, 10 March 2020.

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