Implications to Doing Business of the House and Senate versions of the BBL

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Effect of policy uncertainty on investments, what do they say?

- “TRAIN 2 and the effects of TRAIN 1 have created uncertainties for new investment…” PEZA Director General Charito B. Plaza said in a mobile phone message on Thursday, claiming that tax reform “created fears, worries and directives to investors’ principals to start looking at other countries to transfer.” “Unstable laws, policies that can be changed in the middle of the game, that can be removed at the pleasure or threats from government is dangerous and will discourage… the investors already here.” (***FDI pledges drop 37.9% in first quarter***, Business World, June 8, 2018)

Cont. policy uncertainty

- The Philippines is currently a "hard sell" to foreign investors as the country reviews corporate income taxes and incentives, the head of a European trade group said on Wednesday. While Vietnam has attracted $15 billion in investments last year, Malaysia $49 billion and Singapore around $110 billion, the Philippines got only $1.1 billion, said Guenter Taus, chairman of the European Chamber of Commerce in the Philippines. "We are not sending the right signals to entice people to set up manufacturing in the Philippines," Taus told ANC's Market Edge with Cathy Yang. "Incentives are certainly not enough," he said. (***PH a 'hard sell' to foreign investors: European business group***, ABS-CBN News, Posted at Jun 13 2018 04:43 PM

Cont. policy uncertainty

- Overall, AmCham is concerned about the second tax reform package which will cover both rationalization of fiscal incentives and reduction of corporate income tax (CIT) rates, saying the proposed bill “creates uncertainty for existing and new investors.” “Until the proposed TRAIN 2 bill is enacted, investors will face uncertainty about the future CIT and fiscal incentives. Tax projections, an important part of calculations of future revenues, will be handicapped by this uncertainty. CIT and fiscal incentives in countries competing against the Philippines for investments will be more certain and predictable,” it said. (***MNCs nix fiscal policy changes under TRAIN 2***, Richmond Mercurio (The Philippine Star) - June 6, 2018)

- ***Foreign chambers blame TRAIN uncertainty for flat FDI outlook,*** Business World, June 19, 2018

Cont. policy uncertainty

- “Foreign investment decisions take into consideration the long-term policy direction of the host country. Changes in policies may lead to an impression of unpredictability and inconsistency that may occur every time there will be a change in administration. This level of uncertainty will make it difficult to attract new investments. The regular business operations of foreign companies in the Philippines would likewise be disrupted given the changes in the regulatory environment,” the group added. (***TRAIN 2 to scare away Korean investors***, The Philippine Star, March 19, 2018)

- “Major exploration companies have all adopted a ‘wait and see’ attitude and nobody is actively looking for indigenous oil and/or for the next Malampaya because of apparent instability of government policies,” Bomasang said. (***Oil explorers back retention of fiscal perks***, The Philippine Star, June 20, 2018)

Cont. policy uncertainty

- Investments could slow over the next few months amid uncertainties over corporate taxes, BMI Research said, noting that the second tax reform package being pushed by the government could do more harm than good for businesses. “While the proposed tax reforms may be fiscally prudent, it will likely make the Philippines less competitive versus its regional peers. Investment could slow over the near-term as the proposed conditional corporate tax reduction and repealing of fiscal incentives create uncertainties for businesses,” the unit of Fitch Group said in a research note. “Although the quid pro quo approach may be fiscally prudent, it creates more uncertainty for businesses. We believe that this could weigh on investment over the near-term as investors adopt a wait-and-see approach.” (***BMI sees investment slowdown as tax reform creates ‘uncertainty’***, Business World, March 13, 2018

Current ARMM context

- The Foreign Investment Advisory Service (FIAS) based in Washington, D. C. conducted in 1998 a landmark review of constraints to foreign direct investment in Mindanao, particularly in the ARMM following the negotiation of the 1996 Final Peace Agreement between the national government and the secessionist Moro National Liberation Front (MNLF). Because of its political autonomy the ARMM can offer fiscal incentive such as tax holidays, but more importantly it can offer non-fiscal incentives in the form of a more attractive investment approval and start-up process. These advantages can be created in two different aspects:

Cont. ARMM context

(1) A foreign investor can deal directly with the regional agencies instead of having to go to the national agencies in Metro Manila or their administrative branches. This facilitates the establishment of enterprises and the conduct of business by reducing the time and costs to the investor for filing applications and reports and obtaining permits and licenses;

(2) The ARMM can facilitate matters further by exercising its power where authority to implement national laws has been ***devolved*** to the Autonomous Regional Government (ARG) counterparts to interpret and administer these laws in an investor friendly manner. This situation applies to a number of aspects of investment approval and implementation process. (emphasis mine)

Cont. ARMM context

According to the FIAS, to establish and complement the aforementioned advantages, the ARG should take concrete steps to improve government service in relation to foreign investment. Some of the more important are:

- Review the extent of the powers devolved by the national agencies to the various government agencies in the ARMM, to determine the extent of their ability to act independently of the national government and make full use of these powers.

- Pass legislation to activate and empower the regional agencies and actualize the devolution of the powers and functions from the national agencies. As long as national laws and regulations are observed, these agencies can create their own set of rules and procedures to implement their charter and, in so doing, streamline the issuance of permits and licenses. By doing so, the regional agencies can use their powers pro-actively to promote foreign (and domestic) investment within the ARMM.

Cont. ARMM context

- The FIAS study concluded that the fact that the powers and functions of national agencies have been **devolved** on the regional agencies in the ARMM provides the ARMM the opportunity to offer certain unique advantages, particularly in the form of a simplified investment approval and start up process, which other LGUs cannot. This is the advantage ARMM has over other forms of LGUs with respect to attracting foreign investments. It advised that instead of attempting to create more fiscal incentives, the efforts of the ARG should be directed towards creating, implementing, and improving these advantages, which can be viewed as non-fiscal incentives. This will require the ARG to take bold steps with respect to legislation and changes in administrative policies. It will also require the ARG to assert its autonomy and thereby define the limits of the devolution of power from the national government. (emphasis mine)

Drastic changes in the original BBL as passed by Senate and Congress

This provision was radically changed in the Senate and Congress versions of the BBL. As originally formulated in the BTC versions:

- Art. XII. FISCAL AUTONOMY. Section 9. Tax Incentives. To encourage investments and other economic activities, the Bangsamoro Government shall have the power to grant tax exemptions, rebates, tax holidays, and other incentives including those granted to the Regional Board of Investment of the Autonomous Region in Muslim Mindanao, as provided in RA 6734, RA 9054, other legislations, as well as, executive issuances. As part of incentives to investors, the Bangsamoro may opt instead to impose a flat rate lump sum tax on small and medium enterprises

Effect of removal of lump sum (flat tax) investment incentive in BBL

- Various studies, such as the Carnegie Endowment for Peace sponsored Working Paper on ***Small Enterprises and Economic Policy by Anders Aslund and Simon Johnson, March 2004*** cite the advantage of having a lump sum tax (which the original BBL offers) in encouraging small-scale entrepreneurs to enter the formal economy, to wit: "One view of economic development is that it requires investments by a wide range of people from outside the existing social elite. Such investments were key in both the rise of Western Europe after 1500 and in the 'Reversal of Fortune' through which relatively poor places became relatively rich during the nineteenth century and subsequently stayed rich. Investments by 'new' entrepreneurs require that they enter the formal economy and put capital at risk. But how can this be encouraged when there is no rule of law, a weak judiciary, and less than ideal formal laws? This is a first order issue in much of the world today.

Effect of removal of lump sum tax

“We suggest the logjam can be broken, at least for former communist countries by combining taxation, regulation and licensing in one single measure – namely, a low lump-sum tax for small entrepreneurs. Anything that complicates the tax system leads to both more evasion and corruption. Strengthening the small business sector economically and politically is not a panacea, but in many countries today it would be a step in the direction of sustainable development. To cross the critical hurdle that may be around 40% of GDP, affirmative action is required to move the economy from a suboptimal equilibrium with few small entrepreneurs to an optimal equilibrium with 50-60 percent of GDP being produced by small enterprises. **There are significant economic benefits** to be reaped from such a policy, but the main gains would be political. Encouraging small entrepreneurs into the formal business sector would greatly strengthen them politically and move former communist countries toward more stable, pro-property rights policies.” (Aslund, 2004)

BBL versions create major policy uncertainties - less than ARMM

- Foreign investors, in particular, tend to place a high premium on **clear lines of authority and decision making**. A common complaint in those countries that were least successful in attracting FDI was that there was no one in a position of authority to make decisions. Nothing exasperates an investor more than the need to shuffle from ministry to ministry or to negotiate a seemingly endless bureaucratic ‘red tape’ where everyone and no one is in a position to resolve issues or grant approvals. As a result, an ideal legal system is not nearly as important as the existence of a clear, consistent, and unambiguous decision-making process. (See ***Foreign Direct Investment: Does the Rule of Law Matter?*** By John Hewko, Number 26, April 2002, Working Papers Rule of Law Series, Democracy and Rule of Law Project funded by Carnegie Endowment for International Peace).

Example of real world consequences of BBL less than ARMM

- In 2015 we already raised the concerns of investors of a BBL less than ARMM: ***ARMM officials wary of diluted Bangsamoro law's impact,*** Business World, Sept. 18, 2015)
- The P1.5 billion **EA Trilink** telecoms and submarine cable project in 2015 did not push through after the policy uncertainties of the passage of BBL at that time spooked the Malaysian investors and the project delays pushed the cost of the project to uneconomic levels.
- Now (2018), we have another Telecoms project, the P3.0 Billion project of **TierOne Communications, Inc.,** that already rolled out some of its provisional and demonstration effect signal towers beginning this year.
- Telecoms projects got their franchises from the RLA.
- TierOne asked us what will happen to their franchise and how will they operate if Transportation and Telecommunications are now RESERVED or CONCURRENT

What happens to Mining licenses and ECCs of ARMM?

- Investors are also asking us what will happen to the mining licenses and Environmental Compliance Certificates (ECC) issued by the DENR-ARMM since the Natural Resources powers are concurrent powers and subject to national laws?
- ECC permitting system is essential to business investments as we can see in the Boracay closure issue.

Power, oil palm, banana and other export firms concerns on BBL

- Power, oil palm, banana and other export firms that are export winners for ARMM are asking what will happen to their fiscal incentives?
- Since transport will become a reserve and concurrent power and subject to national laws that means that ARMM ports will revert to national government.

Land Reform, education, health S & T, private schools to revert to nat'l. govt?

- Land Reform and Science & Technology (S & T) are no longer part of the powers of the Bangsamoro so that the Land Reform program and Halal programs of ARMM, which is subject of S & T, will revert to national government. Land management and issuance of titles by DENR-ARMM and DAR-ARMM may be halted.
- Higher education powers are no longer part of the BBL versions as passed and/or subject to national law so what will happen to licenses issued by CHED-ARMM and TESDA-ARMM to training and educational institutions? On the other hand, education and HEALTH are now concurrent powers or subject to national laws, what will it mean with regard to approvals and supervision of those businesses?

Concurrent powers what it means

- More Concurrent powers means that national policies prevail over autonomy and policy setting will remain with national government and regional government agencies become implementors or similar to current regional line agencies.
- More Concurrent powers mean that there will be no CLEAR LINES OF AUTHORITY and DECISION-MAKING will not be clear and subject to lots of delays deterring investments.
- More Concurrent powers mean National government will have VETO power over investment projects. Investors will be uncertain who to talk to for their projects and will have problem of dealing with extra or double layers of approvals and more bureaucracy and red tape.

Effect of double or even triple layers of gov’t bureaucracy – Informal economy

- The tendency of double or triple (if you include LGU permitting system) layers of governmental authority means that the UNDERGOUND, GREY or INFORMAL ECONOMY will expand as business sector avoids dealing with government regulation and try to keep under the radar because it will be too costly to comply.

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