

Investment Treaty Arbitration **Philippines**

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| Mongolia (1 November 2001) | Yes | Yes | No | Yes | Yes | 6 months | Yes | Yes |
| Myanmar (11 September 1998) | No | Yes | Yes | Yes | No | N/A | No | No |
| Netherlands (1 October 1987) | Yes | Yes | Yes | Yes | Yes | No | No | Yes |
| Pakistan (not in force) | Yes ⁸ | Yes | No | Yes | No | 6 months | Yes | Yes |
| Portugal (14 August 2003) | Yes | Yes | Yes | Yes | Yes | 6 months | Yes | Yes |
| Romania (14 June 2003) | Yes | Yes | No | Yes | No | 6 months | Yes | Yes |
| Russia (29 October 1998) | Yes | Yes | Yes | Yes | No | 6 months | Yes | Yes |
| Saudi Arabia (11 November 1996) | No | Yes ⁹ | No | Yes | No | N/A | No | No |
| Spain (21 September 1994) | Yes | Yes | No | Yes | No | 6 months | Yes | Yes |
| Sweden (not in force) | Yes | Yes | No ¹⁰ | Yes | No | 6 months | Yes | Yes |
| Switzerland (23 April 1994) | Yes | Yes | Yes | Yes | Yes | 6 months | Yes | Yes |
| Syrian Arab Republic (4 April 1999) | N/A | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| Taiwan (28 February 1992) | Yes | Yes | No ¹¹ | Yes | No | No | No | Yes ¹² |
| Thailand (6 September 1996) | Yes | Yes | Yes ¹³ | Yes | Yes | 3 months | Yes | Yes |
| Turkey (17 February 2006) | Yes | Yes | No | Yes | No | 3 months | Yes | Yes |
| United Kingdom (2 January 1981) | Yes | Yes | Yes | Yes | Yes | No | No | Yes |
| Viet Nam (29 January 1993) | Yes | Yes | Yes | Yes | No | 6 months | Yes | Yes |

| FTAs/EPAs | Substantive protections | | | | | Procedural rights | | |
|--|------------------------------------|---------------|-------------------------|----------------------------|-----------------|--------------------|--------------|-------------------|
| | Fair and equitable treatment (FET) | Expropriation | Protection and security | Most-favoured-nation (MFN) | Umbrella clause | Cooling-off period | Local courts | Arbitration |
| ASEAN-Australia-New Zealand FTA (10 January 2012) (AANZ FTA) | Yes | Yes | Yes | No ¹⁴ | No | 180 days | Yes | Yes |
| ASEAN Investment Agreement (29 March 2012) | Yes | Yes | Yes | Yes | No | 180 days | Yes | Yes |
| Japan-Philippines EPA (11 December 2008) | Yes | Yes | Yes | Yes | No | No | No | Yes ¹⁵ |

II. QUALIFYING CRITERIA

2. Definition of investor

What are the distinguishing features of the definition of 'investor' in this country's investment treaties?

| Issue | Distinguishing features in relation to the definition of 'investor' |
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| Natural persons | <p>Almost all of Philippine treaties define an investor as a national or citizen in accordance with or within the meaning of its laws. At least one treaty adds to the investor definition persons who are permanently residing in each Contracting Party's territory.¹⁶ The Saudi Arabia BIT does not define the term investor.</p> <p>The ASEAN treaties all have a similar formulation, including in their definition of 'investor' 'a natural person of a Party or a juridical person of a Party that is making, or has made an investment in the territory of another Party.'¹⁷</p> |
| Legal persons | <p>The treatment for legal or juridical persons as investors is broadly defined. In most cases, Philippine BITs only cover legal persons whose 'headquarters' and /or 'effective management' and/or 'effective economic activities' is situated in the Philippines. Certain BITs, such as the Cambodia, Denmark, Finland and Thailand BITs, only require a protected legal person to be constituted under the law of that Contracting Party. Other BITs (such as the BIT with Australia, India and the Republic of Korea) have the less stringent formulation only for the non-Philippine investor. Uniquely, the Russian BIT also protects Philippine entities 'established under Philippine law but effectively controlled by Philippine citizens or by companies established under Philippine laws,'¹⁸ and the Sweden BIT provides protection to businesses properly organized and doing business 'in a third country with a predominant interest of an investor of either Contracting Party.'¹⁹</p> |
| Organization of legal persons | <p>At least one BIT has specified a for profit requirement for a duly organized company engaging in business enterprise.²⁰ The rest of the BITs do not have such a requirement. A few of the BITs, including the Australia, Korea and Thailand BITs specifically note that an investor need not have been organized with a limited liability status to qualify.²¹</p> |

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| Denial of benefits to certain investors | <p>The ASEAN treaties and the Japan-Philippines treaty all contain denial of benefits provisions. These provisions entitle the host state to withdraw the benefits of the investment protections to investors of the home state where the investor is owned or controlled by persons from a third state, and where the investor does not have substantial business operations in the home state. The treaties differ in terms of the criteria that must be fulfilled in order for the host state to invoke the denial of benefits provision.</p> <p>All of the ASEAN treaties (with the exception of the ASEAN Investment Agreement) also specifically allow the Philippines to deny the benefits to investors whose investments breach the Anti-Dummy Law, which, among other things, limits foreign ownership of public utilities.</p> <p>The ASEAN Investment Agreement allows any Member State to deny benefits to an investor whose investment is made 'in breach of the domestic laws of the denying Member State by misrepresenting its ownership in those areas of investment which are reserved for natural of juridical persons or the denying Member State.'</p> |
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3. Definition of investment

What are the distinguishing features of the definition of 'investment' in this country's investment treaties?

| Issue | Distinguishing features in relation to the concept of 'investment' |
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| Eligible assets | Most of the Philippine treaties, with slight variances, define 'investment' as any or all kinds of assets, owned or controlled by an investor, accepted in accordance with the host state's laws and regulations. Many of the treaties, such as the ASEAN-India treaty, the AANZ FTA, the ASEAN Investment Treaty, the Japan-Philippines EPA and the Australia, Austria, Denmark, France, the Republic of Korea, Switzerland and the United Kingdom BITs, do not include the 'in accordance with the law' requirement. The list of eligible assets are relatively consistent across all the BITs with the Australia BIT expressly including activities associated with investments such as the organization and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange. ²² |
| Specific assets | All treaties protect intellectual property or similar rights as well as rights conferred under contracts related to activities in the extractive industries. A few BITs, including the Australia, Austria, Czech Republic, Finland, Iran and Vietnam BITs, add industrial design or models and indications of origin as within the classification of investments protected by the treaty. |
| Restriction on investments | Some BITs, including the Argentina, Czech Republic, Pakistan, Russia and Turkey BITs, require that protected assets must be connected with the business of the investment, or associated with or have economic value related to an investment. The BIT with Argentina specifically considers loans an asset only when they are directly related to specific investments. |
| Non-exhaustive list for qualifying investments | The list of eligible assets is not exclusive but provides examples of instruments that are considered to come within the definition of covered investments. The BIT with China is unique in its drafting because instead of stating that the list is not exhaustive as most all other BITs do, it states that investments 'mainly includes' thereby potentially limiting what instruments in the future would fall under the specified provisions. |
| Advance approval of investments | Though many of the treaties require that investments be accepted in accordance with the host state's laws and regulations, they do not generally require advance approval by the host state. In the Iran BIT, however, the definition of investment requires that investments obtain certification in order to be covered under the treaty. |

III. SUBSTANTIVE PROTECTIONS

4. Fair and equitable treatment

What are the distinguishing features of the fair and equitable treatment standard in this country's investment treaties?

| Issue | Distinguishing features of the fair and equitable treatment standard |
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| Formulation of the standard | The majority of the Philippine treaties grant investments fair and equitable treatment (see chart above). Some of the treaties use slightly different formulations of the standard. For instance, the China BIT only provides for 'equitable' treatment, and the Italy and Pakistan BITs provide for 'equitable and reasonable treatment.' |
| Independent versus customary international law based standard | The treaties generally do not limit fair and equitable treatment to the minimum standard of treatment in customary international law. However, the Canada BIT only ensures fair and equitable treatment 'in accordance with principles of international law.' The Japan-Philippines EPA, the ASEAN-India treaty, the ASEAN-Korea treaty, and the AANZ FTA clarify that the fair and equitable treatment provision does not ensure treatment that exceed customary international law. |
| Clarification on what constitutes unfair and inequitable treatment | Very few of the Philippine BITs contain additional explanations as to what constitutes a breach of the fair and equitable treatment standard. The French treaty (like many other French treaties) explains that '[a]ny unfair restriction on the purchase or transport of raw materials and auxiliary materials, energy and fuels, as well as the means of production and operation of all types, any hindrance of the sale, or transport of products within the country and abroad, as well as any other measures that have a similar effect, shall be considered as de jure or de facto impediments to fair and equitable treatment.' All of the ASEAN treaties also, to varying extents, clarify the standard. Those that contain a fair and equitable treatment provision provide that the standard also protects against a denial of justice. |
| MFN fair and equitable treatment | Some BITs, including those with Denmark, Iran, Mongolia, Myanmar, Saudi Arabia and Taiwan provide that the fair and equitable treatment shall be no less favourable than the treatment granted to investors of any third party. |
| Exclusions | Some of the Philippine BITs include carve-outs to fair and equitable treatment. For instance, the Cambodia BIT provides that fair and equitable treatment shall not apply to matters of taxation. The China, India and Russia BITs provides that fair and equitable treatment will not entitle investors to preferences or privileges resulting from the participation of a contracting party in a customs union, economic union, free trade area, or economic organization or an international agreement or arrangement relating mainly to taxation. ²³ The ASEAN treaties and the Japan-Philippines EPA contain broad exception clauses that apply to all of the substantive standards. Each treaty should be consulted to identify the scope of the applicable exceptions. |

5. Expropriation

What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

| Issue | Distinguishing features of the 'expropriation' standard |
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| Conditions For Lawful Expropriation | Under all of the Philippines treaties (except Saudi Arabia BIT where there is no protection against expropriation), expropriation (whether direct or indirect) is conditional on payment of prompt, adequate and effective or 'just' ²⁴ compensation, on a non-discriminatory basis under due process of law. It can only be undertaken for public benefit / public purpose / public interest. Certain BITs expand on the public purpose requirement. For instance the Bangladesh, Czech Republic, Italy, Korea, the Netherlands, Pakistan and United Kingdom BITs allow for expropriations that are for public use or in the interest of national defense. ²⁵ The BLEU and China BITs allow expropriations for security and national interests. And the BLEU BIT also provides that an expropriation may not be contrary to any specific commitments. The Romania BIT allows expropriation measures to be taken for the public interest as well as 'any other grounds provided by law of each expropriating party.' The Germany BIT provides that investors shall enjoy MFN treatment in respect of expropriation protections provided therein. Under the Thailand and Vietnam BITs, in a case of a direct/indirect expropriation, investors are guaranteed fair and equitable treatment on a non-discriminatory basis in relation to such expropriatory measures. The ASEAN-India treaty provides an explanation of what constitutes an indirect expropriation. ²⁶ |
| Ownership of Shares | A distinguishing feature of the expropriation clause of some Philippines BITs, including those with Austria, Denmark, Germany, India, Taiwan, Thailand, the United Kingdom, Vietnam, and the ASEAN-China treaty is a further provision that a Contracting Party which expropriates assets of a company which is incorporated or constituted in accordance with its own laws and in which an investor of the other Contracting Party owns shares shall ensure that the expropriation provision of the BIT is applied to the extent necessary to guarantee 'prompt, adequate and effective' / 'due' / 'fair and equitable compensation' in respect of such shares. |
| Compensation | As a general rule, all Philippines BITs require that the investor be provided with compensation equivalent to the (fair) ²⁷ market value of the expropriated asset just before the date of expropriation or the time at which it was publicly known. The Germany, Romania and Taiwan BITs also expressly require a proper/appropriate procedure to be in place for the determination of the amount and manner of payment of compensation. Some BITs establish that in determining the value, generally recognized equitable principles of valuation bearing in mind the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate and other relevant factors will be taken into account (eg, Argentina and Australia BITs). The Cambodia BIT makes provision for the determination of the market value in the absence of internationally acknowledged principles by mutual agreement of the Contracting Parties. The Vietnam BIT is similar to the Cambodia BIT and foresees the calculation method to be agreed upon by the parties in conformity with internationally agreed upon standards. The Netherlands, United Kingdom and Vietnam BITs stipulate that in the absence of determinable value, the compensation shall be equal to the actual loss sustained. Most BITs provide compensation to be freely transferable and/or in a freely convertible currency and paid without delay. In case of delay, interest at a commercial rate (the India BIT refers to a 'fair and equitable rate' and the ASEAN-Korea treaty, the ASEAN Investment treaty, and the AANZ FTA refer to 'appropriate interest') from the date of expropriation ²⁸ is foreseen. Finland BIT on the other hand provides specifically for the interest rate at LIBOR for three months deposits. The United Kingdom BIT allows the compensation to be paid in reasonable installments in cases where large amounts of compensation have to be paid. |
| Review | A number of BITs add that the affected Party shall have a right to review the legality of an expropriation by the authorities of the expropriating Party (ie, Austria, Chile, Denmark, Finland, Germany, Taiwan, Turkey and Vietnam BITs) ²⁹ and/or the amount and provisions of payment of compensation by either competent/ judicial/independent authorities of the expropriating Party (ie, Canada, China, Czech Republic, Denmark, India, The Netherlands, Romania, Turkey and the United Kingdom BITs) or by an arbitral tribunal (Austria BIT). The India BIT also expressly requires such review to be undertaken expeditiously whereas the Netherlands and United Kingdom BITs refer to the review being 'promptly' undertaken. |
| Exclusions | As noted above, the ASEAN treaties include general exceptions that apply equally to expropriation measures. Some treaties also include expropriation-specific exceptions. For instance, the ASEAN-India, the ASEAN-China, ASEAN-Korea, ASEAN Investment treaties, the AANZ FTA and the Japan-Philippines EPA include an exception for the 'issuance of compulsory licences granted in relation to intellectual property rights,' and non-discriminatory measures or measures by judicial bodies that are 'designed and applied in pursuit of public policy to achieve legitimate public interest or public welfare objectives.' |

6. National treatment/most-favoured-nation treatment

What are the distinguishing features of the national treatment/most favoured nation treatment standard in this country's investment treaties?

| Issue | Distinguishing features of the 'national treatment' and/or 'most favoured nation' standard |
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| Standard of treatment and scope of protection | Generally, this protection applies to investors, investments ³⁰ and/or returns of investors. It ensures treatment no less favorable than that granted to other investors. ³¹ Most of the Philippines BITs also expressly extend this protection to the 'maintenance, management, use, enjoyment or disposal of investments by investors.' ³² The Canada BIT additionally guarantees MFN/national treatment for the establishment/acquisition of a new business enterprise or shares in such enterprise in addition to the general protection. |
| National treatment v. MFN treatment | Of those available, fifteen of the Philippines BITs include MFN protection only, with no guarantee for national treatment. ³³ The ASEAN-India and the AANZ FTA treaties only include the guarantee of national treatment. Note that national treatment protection was included in the Czech Republic BIT with a protocol executed subsequent to the BIT. |

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| General exclusions | <p>As a general rule, under the MFN/national treatment standard Philippines BITs do not include any treatment, preference or privilege extended currently or in the future under: (i) a free trade area, customs union, common market, membership in an economic community³⁴ or similar international agreements³⁵; and (ii) any international agreement/arrangement regarding wholly or mainly to taxation.³⁶</p> <p>The Austria, Denmark, Finland, France, Italy, Korea, the Netherlands, Sweden, Taiwan, Thailand, United Kingdom and Vietnam BITs also exclude more favourable treatment, preference or privilege extended under domestic legislation regarding taxation. The China-ASEAN and Korea-ASEAN treaties include very broad MFN exceptions, excluding MFN treatment in relation to 'any preferential treatment accorded to investors and their investments under any existing ... agreements, or any forms of economic or regional cooperation with any non-Party.' The ASEAN Investment Agreement contains similar exclusions.³⁷ The China-ASEAN and Korea-ASEAN treaties also exclude existing or future preferential treatment accorded to investors and their investments in any agreement or arrangement with ASEAN Member States. The China-ASEAN treaty expressly clarifies that it does not encompass dispute resolution procedures. The Korea-ASEAN treaty excludes any more favorable treatment that is the result of 'any future agreements or arrangement to which the Party is a party.'</p> <p>As noted above, the ASEAN treaties and the Japan-Philippines EPA also contain broad exception clauses that apply to all of the substantive standards.</p> |
| Specific exclusions | <p>In addition to the standard exclusions, the Netherlands BIT specifically excludes any treatment, preference, privilege resulting from ASEAN with respect to the Philippines; the Argentina BIT specifically excludes any treatment, preference, privilege resulting from the bilateral agreements providing for concessional financing under 1987 and 1988 agreements with Italy and Spain respectively; and the Russian Federation BIT excludes agreements with states that formed the former Soviet Union. The Canada BIT is unique in listing a number of specific and detailed exceptions from both MFN and national treatment.³⁸ The Finland BIT denies the MFN/national treatment guarantee foreseen currently or in the future in a multilateral convention or treaty relating to investors.</p> <p>The Germany BIT excludes measures 'taken for reasons of public security and order, public health or morality.' The China-ASEAN treaty excludes MFN and national treatment to 'non-conforming measures.'</p> |
| Precedence | <p>Some Philippines BITs state that 'if the provisions of law of either Contracting Party or obligations under international law existing at [signature] or established [t]hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the [BIT in question], such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.'³⁹</p> <p>The Bangladesh and China BITs only make reference to more favourable treatment accorded under laws and regulations of Contracting Parties that shall prevail rather than any rules/regulations under international law. About half of the BITs omit any such provision.⁴⁰</p> <p>The Iran BIT gives precedence to more favourable provisions which have been or may be agreed upon by a Contracting Party and an investor.</p> |

7. Protection and security

What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

| Issue | Distinguishing features of the 'protection and security' standard |
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| Scope of standard | <p>A majority of the Philippine BITs grant foreign investors 'full protection and security.'⁴¹ Several Philippine BITs, however, do not contain any such protection.⁴²</p> <p>Some BITs have language that deviates from the standard 'full protection and security' language that is most common. For instance, the Argentina BIT grants 'full legal protection;' the BLEU BIT offers 'continuous protection and security,' and specifies in further detail what the standard entails;⁴³ the China BIT ensures that investments 'shall enjoy protection' in the host state; the France BIT provides for 'full protection and safety;' the Iran BIT ensures 'full legal protection;' the Thailand BIT provides for 'constant protection and security.' and the Vietnam BIT provides for 'adequate protection and security.'</p> <p>The ASEAN treaties and the Japan-Philippines EPA all clarify that full protection and security does not require any additional treatment beyond that required under customary international law, or that the treatment requires the parties to take such measure as may be reasonably necessary to ensure the protection and security of covered investments.</p> |
| Exclusions | <p>Most of the Philippine BITs do not have specific exceptions to the guarantee of full protection and security. A few of the BITs, however, do contain narrow exceptions. The Argentina and China BITs contain the same exceptions that are applicable to their MFN provisions. And the BLEU BIT contains an exception for 'measures required to maintain public order.'</p> <p>As noted above, the ASEAN treaties and the Japan-Philippines EPA contain general exceptions that apply to the full protection and security standard as they do any other substantive standard.</p> |

8. Umbrella clause

What are the distinguishing features of the umbrella clauses contained within this country's investment treaties?

| Issue | Distinguishing features of any 'umbrella clause' |
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| Observing 'obligations' versus 'commitments' | <p>Less than half of the Philippine BITs contain umbrella clauses. Where umbrella clauses are present, they are largely all variations of the following formulation: 'Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the either Contracting State.' The BLEU and Iran BITs refer to 'commitments' as opposed to 'obligations.' And the Portugal BIT contains language not usually seen in umbrella clauses. It provides that 'Both Contracting Parties shall fulfill any emerging obligations, beyond the ones foreseen in the present Agreement, regarding investments made by investors of the other Contracting Party of its territory.'</p> |

9. Other substantive protections

What are the other most important substantive rights provided to qualifying investors in this country's investment treaties?

| Issue | Other substantive protections |
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| Non-impairment | Several Philippine BITs include language to the effect that the host state 'shall not impair the management, maintenance, use, enjoyment or disposal [of investments] through unjustified or discriminatory measures.' ⁴⁴ The Japan–Philippines EPA has a general provision that parties cannot nullify or impair any of the concessions under the Agreement except as provided for in the Agreement. The AANZ FTA specifically includes language that a 'Party shall not apply licensing and qualification requirements and technical standards that nullify or impair' the specific commitments under the Agreement in a matter that may constitute an unnecessary barrier to trade. |
| Armed conflict/civil unrest | All of the Philippine BITs, except the Netherlands and Saudi Arabia BITs ensure that losses due to war or other armed conflict, state of national emergency, revolt, insurrection or riot be accorded with respect to restitution, indemnification, compensation or other settlement, a treatment which is no less favourable than that accorded to investors of any third states. Most of these BITs also accord investors national treatment in this regard. ⁴⁵ In addition to the security exceptions that allow a Party to take action to protect essential security interests (found in many of the BITs), some of the ASEAN treaties also specify exceptions for actions to protect critical public infrastructure, national treasures, exhaustible natural resources and to ensure compliance with data privacy and the integrity of contracts. ⁴⁶ The Japan-Philippines EPA incorporates by reference Article XX of GATT 1994, mutatis mutandis with regard to its general exceptions. |
| Free transfer of payments | All of the Philippine BITs and several of the ASEAN treaties ⁴⁷ allow an investor unrestricted transfers of its funds, in freely convertible currency, back to its home state without delay. Some of the BITs do not include the express requirement that free transfers be done without delay. ⁴⁸ And the Netherlands BIT provides that large transfers may require transfers to be effected in reasonable instalments. Most of the BITs include an expansive list of the types of funds that are eligible for this protection, including capital invested to maintain and develop the investment, proceeds from the sale of the investment, interest, dividends, profits and other realized returns, payments for the reimbursement of credits, interests, payments under loans or other contracts, remuneration of personnel engaged from abroad, and any compensation for expropriation. Some of the ASEAN treaties have specific provisions allowing for transfers relating to covered investments that must be made freely and without delay, while identifying certain circumstances where delay may be permitted. ⁴⁹ The China-ASEAN and India-ASEAN treaties only cover such transfers within the context of payment for compensation if the investor makes such a request. The Japan–Philippines EPA does not address transfers. |
| Subrogation | All of the Philippine BITs and most of the ASEAN treaties entitle the other Contracting Party (or its relevant agency) to step into the shoes of its investor if that Contracting Party (or its agency) makes a payment to the investor under a guarantee it has accorded in respect of the investment in question. The subrogated rights cannot exceed the original rights of the investor. The Netherlands and Portugal BITs appear to extend the protection of the subrogation provision to third party insurers (ie, not just the other Contracting Party or its agency). The ASEAN treaties include language to the effect that where the Party has taken over the investor's rights and claims, the investor cannot act on behalf of the Party to pursue those rights and claims against the other Party without authorisation. |
| Preservation of rights | Several of the Philippine BITs confirm that the treaty obligations shall not supersede any more favourable obligations under domestic or international law that may apply to a protected investment. ⁵⁰ Similarly, many of the ASEAN treaties state that more favourable treatment provided in other agreements will not be affected by this treaty agreement. |
| Granting of permits | A few of the Philippine BITs provide that the host state is required to issue the necessary permits to foreign investments, in accordance with its laws and regulations. The Bangladesh, Finland, Mongolia and Switzerland BITs all include variations on this requirement. Most ASEAN treaties do not specifically address the granting of permits for foreign investments. |
| Right to employ workers | A number of the Philippine BITs provide that the host state shall, whenever needed, endeavour to issue necessary work authorizations for foreign employees and consultants in connection with activities related to protected investments. Variations on this requirement are contained in the Australia, Bangladesh, Finland, France, Germany, India, Mongolia, Romania, Russia, Sweden, Switzerland, and Turkey BITs. |
| Effective means of asserting rights | Two of the Philippine BITs contain 'effective means' clauses. The Australia BIT ensures foreign investors 'means of asserting claims and enforcing rights' in respect of disputes with the host state's own investors. The Romania BIT has a more typical 'effective means' clause, requiring that each Contracting Party 'undertakes to provide effective means of asserting claims and enforcing rights with respect to investment agreement.' |
| Transparency of investment-related laws | Some of the Philippine treaties and the majority of the ASEAN treaties ensure that each party will make readily accessible any laws and regulations relating to or affecting foreign investments. ⁵¹ A number of the ASEAN treaties specify a designated point of inquiry for information regarding pertinent measures as well as prompt and at least an annual notice to other member states of new laws, changes, or policies significantly affecting investments in its territory and commitments under the agreement. ⁵² |

IV. PROCEDURAL RIGHTS

10. Are there any relevant issues related to procedural rights in this country's investment treaties?

| Issue | Procedural rights |
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| Scope | <p>Most of the Philippine and the ASEAN treaties, with slight variances, include arbitration provisions that allow for the arbitration of any disputes coming within the terms of the treaty. There are some exceptions. For instance, the Myanmar and Saudi Arabia BITs do not include arbitration provisions. And the Taiwan BIT only allows for arbitration of disputed on such terms agreed by the parties. The China BIT allows for the arbitration of disputes relating to the compensation for expropriation; any other disputes under the Agreement are to be resolved through means agreed to by the parties.</p> <p>The Canadian BIT contains a fairly detailed arbitration provision. Among other things, the BIT includes a three year limitation period and a precondition that tax measures in breach of an agreement between an investor and the host state must first be submitted for joint consideration by the two Contracting Parties.</p> |
| Allows for ICSID arbitration | <p>Most of the BITs and the ASEAN treaties allow for ICSID arbitration. Those BITs include: the Argentina, Australia, Austria, Bangladesh, BLEU, Cambodia, Canada, Chile, Czech Republic, Denmark, Finland, France, Germany, India, Italy, Korea, Mongolia, Netherlands, Pakistan, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, Turkey, UK and Vietnam BITs. The Canada BIT the India-ASEAN, China-ASEAN, Korea-ASEAN and AANZ FTA treaties also allow for ICSID Additional Facility arbitration.</p> |
| Allows for ad hoc, or other institutional arbitration | <p>Several of the Philippine BITs allow for ad hoc arbitration. Most of those BITs allow for arbitration under the UNCITRAL Rules, including the Argentina, Austria, Cambodia, Canada, Czech Republic, Denmark, Finland, India, Iran, Mongolia, Portugal, Russia, Sweden, and Switzerland. The India BIT also includes an option for UNCITRAL conciliation. The Iran BIT also includes specific provisions with respect to the appointment of the arbitrators and the choice of the seat. The Russia BIT also allows for arbitration before the Stockholm Chamber of Commerce.</p> <p>The China BIT provides for pure ad hoc arbitration in accordance with rules and procedures that the tribunal determines, 'using as a guide' the ICSID Convention. The Australia BIT allows for ad hoc arbitration only where both Contracting Parties are not a party to the ICSID Convention. In such an instance, the procedures set out in the BIT are to be followed, and the tribunal's procedure is to be determined by reference to the rules of procedure contained in the ICSID Convention. The Thailand bit allows for ad hoc arbitration only 'if both parties to the dispute so agree.' And the Vietnam BIT allows for ad hoc arbitration by an arbitral tribunal 'especially constituted by the two Contracting Parties,' or arbitration by 'any existing arbitral tribunals mutually agreed upon by the two Contracting Parties.'</p> <p>A number of the ASEAN treaties allow for arbitration under the UNCITRAL Rules or any other arbitral institution or in accordance with any other arbitral rules if the disputing parties agree.⁵³</p> |
| Insurance or guarantee no defence | <p>A few of the Philippine BITs, the India-ASEAN treaty and the AANZ FTA, include a provision that make clear that no defence, counter-claim or right of set-off arises where an investor has received (or will receive) indemnification under an insurance or guarantee agreement.⁵⁴</p> |
| Applicable law | <p>Some of the Philippine treaties include applicable law provisions. The Argentina BIT provides that dispute will be resolved in accordance with the provisions of the BIT, the laws of the Contracting Party involved in the disputes, the terms of any specific agreement concluded in relation to such an investment and the relevant principles of international law. The Australia BIT compels the application of the BIT, any agreement between the parties to the dispute and relevant domestic laws of the host state. The Canada BIT requires disputes to be decided in accordance with the BIT and applicable rules of international law.</p> |
| Fork-in-the-road | <p>The Argentine, BLEU, Canada, Chile and Turkey BITs have express fork-in-the-road clauses, requiring that investors choose to pursue their remedies for breaches of the BIT in either domestic courts or international arbitration (to the exclusion of the other). The China-ASEAN treaty allows for disputes submitted to a competent domestic court to be submitted to international dispute settlement provided that the investor has withdrawn its case from the domestic court before a final judgment has been reached. However, the treaty also notes that for Indonesia, Philippines, Thailand and Vietnam, once the investor has submitted the dispute to a court or a tribunal, the choice of that procedure is final. The Korea-ASEAN and India-ASEAN treaties, and the AANZ FTA all exclude the submission to another forum when the dispute has been submitted to either a court or to an administrative tribunal.</p> |
| Coverage | <p>Some of the Philippines treaties expressly extend their coverage to local entities with a majority of their shareholders from home state.⁵⁵ The Canadian BIT expressly covers indirect investors covers, with certain caveats.</p> <p>Most of the ASEAN treaties indicate that the agreement is applicable to covered investments or to investors of any other member state Party. The China-ASEAN treaty notes that the geographic coverage includes China's custom territories. The India-ASEAN treaty lists the sectors that are covered subject to certain reservations and the Japan-Philippines EPA lists out the fields of economic activities in which the member states would seek to carry out economic cooperation.</p> |
| Diplomatic channels only after failure to comply with award | <p>A number of the Philippine BITs and ASEAN treaties include a provision that expressly limits the ability of a home state to exercise diplomatic protection on behalf of its investors. However, many of the BITs and a few of the ASEAN treaties generally resurrect the possibility of the home state to exercise diplomatic protection in the event that the host state fails to comply with an Award in favour of an investor from the home state.⁵⁶ Most of the ASEAN treaties expressly state that an informal diplomatic exchange for the sole purpose of facilitating a settlement of the dispute does not constitute diplomatic protection.</p> |

11. What is the status of this country's investment treaties?

A number of the more recent investment treaties entered into by the Philippines are through ASEAN. There is no know plan to renegotiate / terminate any Philippine BITs or to renounce ICSID membership.

V. PRACTICALITIES (CLAIMS)

12. To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

| | |
|---|---|
| Government entity to which claim notices are sent | Republic of the Philippines Office of the Solicitor General 134 Amorsolo St., Legaspi Village, Makati City, 1229 Phone: +63 (02) 988-10SG Email: docket@osg.gov.ph |
|---|---|

13. Which government department or departments manage investment treaty arbitrations on behalf of this country?

| | |
|--|--|
| Government department which manages investment treaty arbitrations | In the most recent investment treaty cases against the Philippines, the Office of the Solicitor General has been responsible for managing the Republic's representation. |
|--|--|

14. Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

| | |
|---------------------------|---|
| Internal/external Counsel | In some recent instances, the Philippines has issued requests for proposals to solicit bids. The state has most commonly hired former Philippine Supreme Court Justice Flortentino Feliciano alongside White & Case LLP as its counsel. |
|---------------------------|---|

VI. PRACTICALITIES (ENFORCEMENT)

15. Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

| | |
|--|---|
| Washington Convention implementing legislation | The Washington Convention entered into force for the Philippines on 17 December 1978. There is no known implementing legislation. |
|--|---|

16. Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

| | |
|--|---|
| New York Convention implementing legislation | The Philippines signed the New York Convention on June 10, 1959 and it entered into force for the Philippines on 6 July 1967. The New York Convention was implemented in the Philippines through the Alternative Dispute Resolution Act of 2004, Republic Act No. 9285, 2 April 2004. |
|--|---|

17. Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

| | |
|--|--|
| Legislation governing non-ICSID arbitrations | Non-ICSID arbitrations seated in the Philippines are governed by the Alternative Dispute Resolution Act of 2004, Republic Act No. 9285, 2 April 2004. The Alternative Dispute Resolution Act of 2004 adopts the UNCITRAL Model Law on International Commercial Arbitration, UN Doc. A/40/17, 21 June 1985. |
|--|--|

18. Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

| | |
|--------------------------------|---|
| Compliance with adverse awards | The Philippines has no known adverse investment treaty awards against it. |
|--------------------------------|---|

19. Describe the national government's attitude towards investment treaty arbitration.

| | |
|--|--|
| Attitude of government towards investment treaty arbitration | The Philippines settled one ICSID arbitration prior to its conclusion (SGS v. Philippines). At a recent press conference in relation to the Philippines' involvement in an UNCLOS arbitration against China in connection with the South China Sea maritime dispute between the two states, the Philippine Ambassador to the United States remarked: 'We have always been asked why we have resorted to arbitration. Our answer is simple. International law is the great equalizer.' ¹⁵⁷ |
|--|--|

20. To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

| | |
|--|---|
| Attitude of local courts towards investment treaty arbitration | Local courts have not been faced with the need to enforce an adverse investment treaty arbitral award. According to the Philippines, the court where enforcement is to be sought is '[t]he Regional Trial Court of the city or province where the arbitration proceedings were held or where the losing party resides or does business.' ¹⁵⁸ |
|--|---|

VII. NATIONAL LEGISLATION PROTECTING INWARD INVESTMENT

21. Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

| National legislation | Substantive protections | | | Procedural rights | |
|---|-------------------------|---------------|---|-------------------|-------------|
| | FET | Expropriation | Other | Local courts | Arbitration |
| The Omnibus Investments Code of 1987, Executive Order No. 226, 16 July 1987 | No | Yes | Repatriation of investments; remittance of earnings and payments under loans and contracts. | Yes | No |

VIII. NATIONAL LEGISLATION PROTECTING OUTGOING FOREIGN INVESTMENT

22. Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

| Relevant guarantee scheme | Qualifying criteria, substantive protections provided and practical considerations |
|---|--|
| Multilateral Investment Guarantee Agency (MIGA) | The Philippines became a member of MIGA on 8 February 1994. MIGA provides political risk insurance for qualifying investments made by Philippine nationals in certain developing states. |

IX. AWARDS

23. Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties

| Awards |
|---|
| <i>SGS Société Générale de Surveillance S.A. v. Republic of the Philippines</i> , ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (and Declaration by one of the arbitrators of the same date) |
| <i>SGS Société Générale de Surveillance S.A. v. Republic of the Philippines</i> , ICSID Case No. ARB/02/6, Award Embodying the Parties' Settlement Agreement, 11 April 2008 |
| <i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines</i> , ICSID Case No. ARB/02/25, Award, 16 August 2007 |
| <i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines</i> , ICSID Case No. ARB/02/25, Decision on Application for Annulment, 23 December 2010 |
| <i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines</i> , ICSID Case No. ARB/11/12, Award, 10 December 2014 |
| Pending proceedings |
| <i>Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines</i> , ICSID Case No. ARB/11/27 |

24. Reading list

Diane Desierto, *ASEAN Integration and Philippine Treaties* (Cambridge University Press, forthcoming)

Philippines, *Investment Treaty Arbitration*, Getting the Deal Through (2014), available at <https://gettingthedealthrough.com/area/60/jurisdiction/111/investment-treaty-arbitration-philippines/>

'Matthew Wendlandt, *SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes*', 43 *Texas Int'l L. J.* 523 (2008).

Notes

- * The authors would like to thank Ceyda Knoebel and Kristine Beaudoin for their helpful research assistance.
- Only provides for national treatment (and not MFN treatment).
 - Only provides for 'equitable' treatment.
 - However, provides that 'investments shall enjoy protection in the territory of the other Contracting Party.'
 - Offers covered investments 'full and complete protection and safety...'
 - Ad Article 3 of the Protocol to the Germany BIT expands on what is meant by 'treatment less favorable.'
 - Provides for 'fair treatment not less favorable than that accorded to its own investor or investors of any third state which are in a comparable situation.'
 - Provides for 'equitable and reasonable treatment.'
 - Provides for 'equitable and reasonable treatment.'
 - Provides that '[t]he contracting parties shall guarantee a fair and urgent compensation in case of injury.'
 - However, provides that 'investments made in accordance with the laws and regulations of the Contracting Party in whole territory they are undertaken, enjoy the full protection of this Agreement.'
 - However, provides that investments 'shall enjoy adequate protection of herein provided for.'
 - Failing amicable settlement the parties shall refer a dispute 'to arbitration on such terms and conditions as the disputing parties may agree.'
 - Provides for 'constant' protection and security.
 - Only provides for national treatment (and not MFN treatment).
 - Arbitration requires mutual consent by the parties.
 - See Denmark BIT.
 - The ASEAN treaties have slight variations of this language.
 - See Russia BIT
 - Sweden BIT.
 - See Turkey BIT.
 - See, eg, Korea, Thailand and Australia BITs.
 - See Australia BIT.
 - The wording of the carve-outs differ slightly in all three treaties.
 - The Bangladesh, Czech Republic, Korea, Myanmar, The Netherlands, Pakistan and United Kingdom BITs prefer 'just' compensation rather than 'prompt, adequate, effective' and the China and India BITs provide 'fair and reasonable/equitable compensation', while the Sweden, Germany, Taiwan and Thailand BITs are entirely silent on this point and only refer to 'compensation.' The Vietnam BIT provides for 'adequate and realisable' compensation.
 - The Italy BIT also refers to 'national welfare.'

- 26 The factors identified include the economic impact of the measure, whether the measure breaches a prior commitment to the investor, and the character of the government measure.
- 27 The Austria, Cambodia, Canada, Denmark, Finland, Sweden BITs and the ASEAN treaties refer to 'fair' market value; the India BIT refers to 'genuine' value.
- 28 Note that the Italian BIT specifically refers to the date of 'actual taking of expropriated asset.'
- 29 Note that the Finland, Germany, Taiwan, Thailand, Vietnam BITs only provide that review of the legality of expropriation and/or amount and method of payment of compensation shall be subject to review by due process of law without expressly referencing the reviewing authority.
- 30 Note that the Iran BIT specifies that the investments should be 'in a comparable position.'
- 31 It is generally implied that such protection only extends to investors/investments in like circumstances. The ASEAN-India treaty details what is meant by 'like circumstances'.
- 32 See, eg, The Australia, Bangladesh, Canada, Czech Republic, Denmark, Finland, Germany, Italy, Myanmar, Pakistan, Romania, the Russian Federation, Sweden, Switzerland, Thailand, United Kingdom and Vietnam BITs, the China-ASEAN, the Korea-ASEAN and the ASEAN Investment treaties, and the Japan-Philippines EPA. The language in the treaties varies slightly.
- 33 The Australia, BLEU, Cambodia, China, Denmark, Italy, Myanmar, Netherlands, Pakistan, Romania, Russian Federation, Spain, Taiwan, United Kingdom and Vietnam BITs.
- 34 The Cambodia, Korea, Thailand BITs also refer to 'monetary union.'
- 35 The Thailand BIT extends the scope of these exclusions to 'the adoption of an agreement designed to lead to the formation or extension of such a union or area within a reasonable length of time'.
- 36 Note that the Germany BIT further provides that the MFN/national treatment obligation 'do[es] not oblige a Contracting State to extend to natural persons or companies resident in the territory of the other Contracting State tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to natural persons and companies resident in its territory.'
- 37 The ASEAN Investment Agreement excludes MFN treatment to '(a) any sub-regional arrangements between and among Member States; or (b) any existing agreement notified by Member States to the AIA Council...'
- 38 For instance, MFN treatment is excluded in certain industries, including aviation, fisheries and financial services. National treatment does not cover pre-existing non-conforming measures, among other things.
- 39 The Argentina, Austria, BLEU, Cambodia, Czech Republic, Finland, Germany, India, Mongolia, Romania, Switzerland BITs.
- 40 The Australia, Canada, Chile, Denmark, Italy, Korea, Myanmar, Pakistan, the Russian Federation, Saudi Arabia, Sweden, Taiwan, Thailand, Turkey, United Kingdom, Vietnam BITs.
- 41 The Bangladesh, Canada, Czech Republic, Denmark, Finland, Germany, Myanmar, Netherlands, Portugal, Russia, Switzerland and the United Kingdom BITs.
- 42 The Australia, Austria, Chile, India, Italy, Korea, Mongolia, Pakistan, Romania, Saudi Arabia, Spain, Sweden, Taiwan and Turkey BITs, all of the ASEAN treaties, and the Japan-Philippines EPA.
- 43 The BLEU BIT explains that the protection covers 'any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof.'
- 44 See, eg, Argentina, Bangladesh, Finland, Germany, Mongolia, Portugal, Romania, Spain, Sweden, Switzerland, Turkey BITs. The language in the various BITs differs slightly.
- 45 But see, eg, The Bangladesh and China BITs, which do not include national treatment with respect to the non-impairment obligation.
- 46 See, eg, the China-ASEAN, Korea-ASEAN, and India-ASEAN treaties.
- 47 See, eg, the India-ASEAN, China-ASEAN and Korea-ASEAN treaties, and the AANZ FTA.
- 48 See, eg, the China, Denmark and UK BITs do not expressly require that free transfers be done without delay.
- 49 See, eg, the AANZ FTA and Korea ASEAN treaties.
- 50 See, eg, the Argentina, Australia, Austria, Bangladesh, BLEU, Cambodia, Czech Republic, Finland, France, Germany, India, Mongolia, and Switzerland BITs.
- 51 See, eg, the Australia and Russia BITs and the India-ASEAN treaty.
- 52 See, eg, the India-ASEAN and Korea-ASEAN treaties, and the Japan-Philippines EPA.
- 53 See, eg, the China-ASEAN, India-ASEAN, Korea-ASEAN treaties.
- 54 See, eg, Australia, Austria, Sweden and Switzerland BITs.
- 55 See, eg, the BLEU, Chile, Netherlands, Sweden, Switzerland and UK BITs.
- 56 See, eg, the Cambodia, Chile, Czech Republic, Finland, Germany, India, Iran, Italy, Mongolia, Pakistan, Portugal, Russia, Spain, Sweden, Switzerland, Turkey and Vietnam BITs, and the China-ASEAN, Korea-ASEAN, India-ASEAN treaties.
- 57 'International Law is the great equalizer' says PH Ambassador to US, Republic of the Philippines Philippine Information Agency, January 11, 2015.
- 58 ICSID Membership, Philippines, available at <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST110>.