



# The Impact of Economic Nationalism on FDI in the Philippines from the Legal Perspective

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**Abstract.** Compared to other countries in the Association of Southeast Asian Nations, positive effects on Philippine economic growth and foreign direct investment (FDI) is limited recently, which might result from the policy of economic nationalism. This paper reviews related articles to investigate why the Philippines' constitutional and legislative framework for FDI lowers the benefits of foreigners and what can be done to promote the effect of FDI in the future. This paper can provide reference and policy enlightenment for similar developing countries. Through reviewing related articles, this paper finds that under the legislative framework of economic nationalism, foreign investors' ability to safeguard their investment positions and interests in arbitration is restrictive. More policy proposals in terms of legislation on freeing restrictions on foreign investors should be proposed in the future.

**Keywords:** Foreign Direct Investment · Economic Nationalism · Legislative Framework

## 1 Introduction

Over the past 20 years, foreign direct investment (FDI) in the Philippines has increased tremendously. However, compared with other countries in the Association of Southeast Asian Nations (ASEAN), the growth of foreign direct investment appears moderate tendency. The Philippines has made disappointing progress over the past 2 decades when evaluating the effect from the point of overall well-being of the domestic households, like income inequality, corruption, and so on.

There are several reasons for the gap between the increase in foreign direct investment and little improvement in overall domestic well-being. Focusing on the legal framework of foreign direct investment in the Philippines, some scholars believe that the Philippines not only does not accept liberal trade and free competition particularly in the Filipino market, the Constitution and legislation also promote the “economic nationalism” system, which brings consequent restrained scope of domestic foreign direct investment in this country.

“Economic nationalism” refers to the policy of a independent country which keep its possession right of land and other resources and certain key industries to its domestic households and companies controlled by domestic people [1]. Therefore, international

investors may eventually find themselves at a disadvantage. Long-term investments, in particular, are vulnerable to domestic laws and government policies, which can change quickly. Economic nationalism claims to welcome foreign direct investment as long as it complies with constitutional and legal requirements. More precisely, supporting foreign direct investment is based on the assumption that such investment is consistent with the government's economic planning goals. Depending on applicable laws and current economic considerations, these targets might be reassessed in as little as one or two years. As new presidents take office, the latter might drastically change.

Some academics holds that the legislative structure of FDI in Philippines is actually protection faction, which has played a part in restricting foreign direct investment into entering the country. This point explains why foreign direct investment in the Philippines is more finite compared with other ASEAN countries. This statement will further demonstrate that restricting FDI under the name of economic nationalism, which means that common citizens can't fully have their original interests on free trade and competition based on enlarging investment scale from foreign investors. Oppositely, unequal systems are likely to help corruption and cronyism increase and thus have little effect on addressing widespread income inequality. Since then, the Philippines has signed nearly 40 bilateral investment treaties (bits). Bilateral investment treaties usually stipulate that foreign investment must comply with Philippine law in order to enjoy the benefits of bilateral investment treaties. Thus, bilateral investment treaties strengthen economic nationalism policies. The above situation restricts foreign investors from settlement of substantive disputes in Filipino courts or via commercial arbitration around the globe. Therefore, this paper will focus on the bilateral investment treaty of the Philippines and investigate how the relevant legal framework corrects FDI and how to solve this problem. Answering this question can provide more reference for ensuring the benefits of increasing foreign direct investment in the Philippines.

There is no similar studies in this topic till now but some academics apply data from the World Bank database and make comparison between the Philippine and ASEAN countries, including Indonesia, Thailand and Vietnam.

The scholars don't make empirical analysis but employ a model of economic nationalism to prove that in spite of the verbal welcome of foreign investors, the Philippine legal framework is actually not beneficial to them. Moreover, the scholars choose some samples on investment treaty arbitration of FDI in the Philippines to make analysis and examines whether the legal region is conducive to FDI on basis of the arbitration result. In addition, scholars have directly analyzed the judicial action before Philippine courts or international commercial arbitration to investigate whether the interests of foreign investors can be protected in this way. Through review, this paper can provide reference for the similar developing countries. Meanwhile, discussion on the policy proposal can also offer some enlightenments.

## **2 Opinions and Conclusions in Related Articles**

### **2.1 Brief Introduction on Related Scholars**

To answer the question what can be done to redress the situation that the increasing FDI of the Philippines in the past 20 years didn't exert an obvious effect on social welfare,

**Table 1.** Analysis of Potential Redress Initiatives in the Philippines

Number of Reference	Impact of Economic Nationalism on Foreign Direct Investment in the Philippines	Reference
8	How Investment Treaty Arbitration is not Conducive to Foreign Investors?	[2]; [3]; [4]; [5]; [6]; [7]; [8]
3	How Domestic Litigation and International Commercial Arbitration is not Conducive to Foreign Investors?	[9]; [10]; [11]
6	Possible Future Policy to Protect the Interest of Foreign Investors	[12]; [13]; [14]; [15]; [16]; [17]

the reason why the benefits of FDI is lower than similar countries should be explained from the perspective of economic nationalism. In particular, some papers considered the extent to which the investment positions of investors from other countries can be safeguarded by appealing to the provisions of bilateral investment treaties implemented by different local governments in Philippine over the past three decades [2–8]. The grade about how investors from other economies can safeguard investment status through recourse to the local courthouses or to global commercial arbitration should be further analyzed. Because this part shows the situation of FDI under the economic nationalism. The researches of scholars like Gill and Hodgson et al. show related results [9–11]. Based on that, Arthur et al. summarizes a wide range of possible policy initiatives to encourage more foreign direct investment while addressing income inequality [12–17]. This paper will reorder them in the review analysis. Table 1 exhibits the points and references he proposes and uses in the paper.

## 2.2 How Investment Treaty Arbitration is not Conducive to Foreign Investors

Differences between the Philippines and other countries can offset these changes in economic nationalism. Scholars are concerned that investment is restricted due to the capricious economic nationalist policies, and whether aggrieved foreign investors can rely on the international legal obligations stipulated in the relevant bilateral investment treaties to take effective remedies against the Philippine government.

First, Dr Paulson’s model is that many developing countries are “rule recipients” in bilateral investment treaties. In other words, developing countries rush to sign bilateral investment treaties just following the judgement of similar lawsuit. Since lack of experience, governments without paying full attention to the risks and responsibilities inherent in the provisions of the signed instruments. Instead, they believe that bilateral investment treaties will bring more FDI and be absolutely beneficial to the countries concerned. He pointed out that this developing country model could not describe the experience of the Philippines. Because the Philippines seems to be fully aware of what it did when signing these instruments. In the bilateral investment treaty and the environmental protection act,

the Philippines clearly reserves the right to maintain its economic nationalism policy, and has always insisted that any foreign investment must conform with the constitutional restrictions in the Philippine law or constitution. Therefore, it is not just the rulemaker of investment treaties and other agreements.

Cho and Kurtz find evidence from five ICSID disputes where the entities in Philippines is involved. In addition, scholars point out that the solution of the huge costs including the impact on investment when disputes are brought to court or arbitrated is to avoid releasing policies arbitrarily and unscrupulously. This avoidance will mean increasing transparency in a country's legal and administrative structure for FDI. The tough work is not in the details. Some people believe that the fundamental matter is economic nationalism and the bureaucratic labyrinth that has been created to actualized this policy. If the judgement is reasonable, the solution must be the reduction of the restriction on the decision right of government as well as the red tape.

Through the discussion of arbitration, it can be found that the Philippines has signed a CISS agreement with SGS to try to solve the problem of corruption within the Customs Bureau, so as to improve the collection of import tariffs. Any substantive hearing on the merits of the case will refute among other things that SGS's inspection business in China has "serious problems of fraud and overcharging". In one contract, the foreign investor agreed that the Philippine courts have exclusive jurisdiction over specific disputes and may not even be able to invoke investment treaty arbitration under bit. The Philippines has hired famous international professional lawyers to defend it.

### **2.3 How Domestic Litigation and International Commercial Arbitration is not Conducive to Foreign Investors?**

In this part, scholars discussed when the investment treaty arbitration under the Philippine bilateral investment treaty can not provide too much protection for economic nationalism, can the lawsuit actions of Philippine courts or international commercial conflicts be used as an alternative means to protect the interests of foreign investors. Some find that the prospect of litigation in domestic courts might inhibit FDI. If an economy has a firm promise to the implementation of Foreign Arbitral Awards in commerce transaction affairs, negative views on the judiciary may be avoided. A firm promise to the implementation of arbitration awards will have two characteristics. Philippine courts must adhere to the principle of autonomous parties and interfere with the arbitration procedure only to the smallest extent necessary to maintain the complete procedure. Second, when taking whether to recognize or enforce the award into account, the Philippine courts should not reopen the substance of the dispute, but should restrain themselves to examining whether the underlying arbitration complied with due process and whether the award was enforced in violation of fundamental Philippine norms.

Second, the court's substantive delay, some arbitrators also confront same dilemma. Therefore, more capacity building among all stakeholders should boost arbitration in an efficient and equitable way to resolve disputes among foreign investors in the Philippines.

Third, the domestic consciousness of arbitration. Although the arbitration law was passed as early as 1953, Filipinos are still unfamiliar with the concept of arbitration. Most people think this is another way of litigation. In arbitration involving Filipino nationals or companies, the obvious litigation nature of Filipino court disputes is likely to be

imitated. Based on their personal experience as arbitrators in the Philippines, scholars are aware that Philippine parties and their lawyers tend to conduct arbitration, such as court proceedings, and put forward a large number of technical motions and reactionary arguments, especially at the beginning of substantive hearings. Before the settlement of the real essence of the dispute, there are many procedural positions.

#### **2.4 Possible Future Policy to Protect the Interest of Foreign Investors**

First, strengthening judicial support for international commercial arbitration. This asks for storage of judges, lawyers and end-users in the Philippines to achieve reasonable practices in international commercial arbitration. Supportive storage of judges and so on ought to build an environment where investors are comfortable pursuing claims in private arbitration without having to escalate such claims to the international level and litigate alleged breaches of investment treaty obligations in ICSID tribunals.

Secondly, the critical procedure is reconsideration of constitutional restraints on foreign land ownership and restrictions in law on foreign participation in certain industries and businesses. Laws and regulations that provide for ongoing review of foreign investment could be completely repealed or greatly reduced if restrictions were removed and foreign investment of any form and to any degree was truly welcome. In this way, Philippine and investors from other countries can compete equally in a level playing field at home. With reduced regulation and declined taxation, chances for embezzlement are a long-standing problem in the Philippines and will therefore be minimized to increase the level of trust between government and citizens and greatly improve the business environment.

However, some scholars also pointed out that it is undeniable that getting rid of constitutional limitations on foreign ownership or participation in certain businesses has not been easy. The affordability of the colonial legacy of the Philippines needs to be resolve. Any attempt at change is likely to stimulate nationalism and show aversion in political level. It is far from clear whether the referendum will get enough votes to promote the amendment. But one cannot stay in the past forever. For equitable and sustainable economic development, we must enter the 21st century. If no action is taken, it means that the Philippines' ability to attract foreign direct investment and its economic development will never be illuminating or robust when making comparison with the economic development of its neighbours. And their difference may still be widespread.

But there are some reasons for optimism. Obviously, there are discussions on fixing the Constitution to relax limitations on foreign ownership and participation. President Duterte proposed amending these restrictions to open up the economy. It was advised that this could be done by amending the phrase "unless otherwise provided by law" in a clause such as Article 12. This would encourage Congress to "bypass" the constitutional prevention and make appropriate regulations. It will allow the Philippines to better establish long-term partnerships with foreign investors, create jobs at home, enable the Philippines to maximize the bonus and interests of ASEAN zone integration and promote accession to new trade contracts. It is expected that upcoming 11th negative list of financial investments, now in its final draft and expected to be submitted to Neda for consent in 2017, will be "very liberal" in the words of Finance Minister Carlos Dominguez III, to encourage foreign investors to invest more FDI. According to

reports, Minister Dominguez said that President Duterte hopes to liberalize economic fields except land to foreign investment. If so, this will be an important step forward in President Aquino's 10th negative list of foreign investment, which contains most of the past restrictions on foreign investment in masa media, soil, as well as natural resources. If these implementations become a reality, they will be welcomed.

### 3 Conclusion

The Philippines can be better described as a "rulemaker" to ensure that any investment from foreign countries must conform with the constitutional restrictions in Philippine law or constitution, so as to maintain its economic nationalism policy. The judicial independence of the Philippines has not been given high priority and may therefore inhibit foreign direct investment. The development of lawful support for international commercial lawsuits needs to achieve best practices in international commercial arbitration through supplementing capacity-building of Philippine judges, lawyers and so on. And there is necessity to review legal constraints on foreign ground ownership and participation in certain industries and businesses.

Because it is not easy to liberalizing the constitutional restrains on ownership together with participation of foreign investors in certain undertakings, future academics should focus more on how to overcome the related difficulties in freeing restrictions on establish enterprises or other ownership owned by foreign capital. Moreover, how to promote the market competition between the domestic businesses and foreign businesses should also be a caring point in the future. In addition, scholars involved with this topic can make more empirical analysis, like policy evaluation method to provide more empirical evidence.

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