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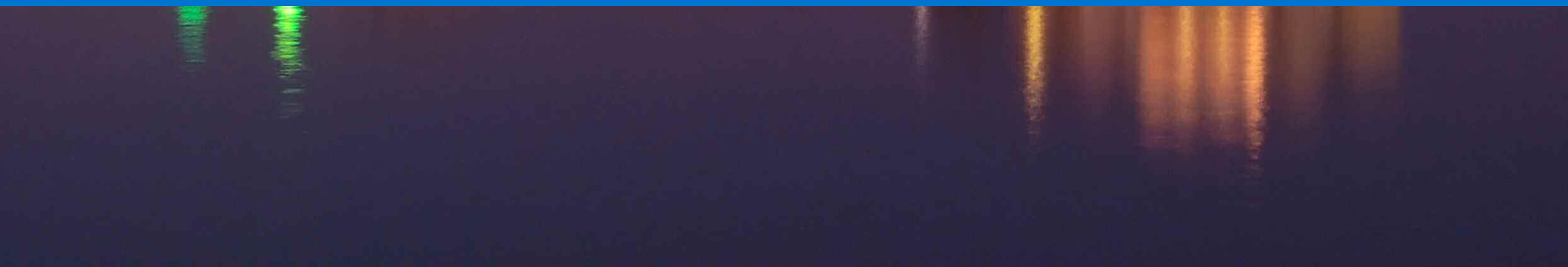
# The Philippines: Essential tips for successful investment



# The Philippines: Essential tips for successful investment

Despite its central location in the Asia Pacific region, its historic ties with the United States, its large English-speaking population, low labour costs and an economy that has grown by approximately 5% over the past ten years, the Philippines has historically attracted less foreign direct investment than other South East Asian nations. However, improved political stability and a focus on good governance and anti-corruption by the current administration could increase its attractiveness to investors.

Here are our top legal tips for successfully investing in the Philippines.

## Relationships are key

As with most other Asian countries, establishing and maintaining relationships is an important element of doing business in the Philippines. Decisions made by Philippines partners can be influenced by the strength of business relationships. It is therefore important to invest the time and effort to build trust and a rapport with your proposed Philippines partner.

## The importance of due diligence

You should conduct a comprehensive due diligence exercise to understand and evaluate the risks associated with the target and/or your proposed Philippines partner. You should also be mindful of the history of your proposed Philippines partner's other joint venture relationships, which could provide useful insights into the way it does business.

## Foreign investment restrictions

### Shares

Most mergers and acquisitions do not require special statutory or regulatory consent or approval except in certain industries such as banking, telecommunications and insurance, which are subject to special regulation.

There are foreign ownership restrictions in a number of sectors in the Philippines and the Foreign Investments Act Negative List sets out the permissible percentage of foreign ownership in particular businesses or activities. A series of Supreme Court decisions during the last years, which are not fully consistent in several respects, and subsequent announcements made by the Philippine Securities and Exchange Commission, have created uncertainty over how the percentage of the capital of a Philippines corporation held by foreign investors would be calculated to determine compliance with the foreign investment restrictions. This has important implications on the structuring of your investment. The restrictions in place do not only cover legal title but also beneficial ownership. Detailed legal advice on this should be sought from your legal advisers during the structuring process.

In addition, the Anti-Dummy Law prohibits non-Filipino nationals from participating or intervening in the management, operation, administration or control of an entity engaged in a nationalised or partially-nationalised activity, although non-Filipino nationals may serve as technical personnel with the prior approval of the Philippines Department of Justice. Non-compliance could result in criminal penalties and the forfeiture of the relevant right, franchise, privilege, property or business.

### Real property

Under Philippines law, private land can only be held by Philippines nationals, which includes corporations which are at least 60% owned by Philippines citizens or entities, (foreign equity participation in such corporations is limited to 40%). You should bear this in mind when structuring the transaction. If it is not possible to identify a suitable local partner to satisfy this requirement, you may consider structuring the transaction as a sale (to an entity which satisfies the Philippines nationality requirement) and lease-back to the target. Leasing private land for up to 75 years (initial term of 50 years, with an option to extend this term by 25 years) by foreign entities is permitted. It is also common practice for private land to be held by an entity which is at least 60% owned by a company's employee retirement fund.

For a sale of private land or a sale of shares of a land-owning corporation, a certificate will need to be issued by the Philippines Bureau of Internal Revenue certifying that all the relevant taxes for the sale of the land or shares have been paid. This needs to be done before the Philippines Registry of Deeds will issue new title deeds for the land, or in the case of a sale of shares, before the corporate secretary of the corporation may record the transfer in the name of the purchaser. The Philippines Bureau of Internal Revenue may take between 60 and 90 days (and sometimes longer) to issue the relevant certificate upon receipt of all requisite documents. You should be aware of the impact of this on the timing of your investment.

## Resident directors

A stock corporation, which is the most common corporate vehicle in the Philippines, is managed by its board of directors. There must be at least five directors of which a majority must be residents of the Philippines. Every director of a corporation must own at least one share of the corporation. The Anti-Dummy Law limits foreign representation in the board of directors of a corporation engaged in a nationalised or partially-nationalised activity to the proportion of the allowable participation or share in the capital of such entities. It is important to invest the time and effort to select reliable, local individuals to be directors.

## Public company issues

A mandatory tender offer must be made to all holders of the same class of shares if the acquirer (together with persons acting in concert with it) intends to acquire 35% or more of a public company (either in a single transaction or in a series of transactions), within a period of 12 months; or if the acquisition would result in the acquirer (together with persons acting in concert with it) owning more than 51% of the equity shares.

In addition, there is no statutory provision in the Philippines allowing a buyer to trigger a compulsory acquisition or minority squeeze-out. The lack of the availability of a minority squeeze-out process can pose particular difficulties in that there may be hundreds of shareholders holding small parcels of shares who simply do not follow or respond to a tender offer. You should be aware of the risk that you may not be able to acquire the entire shareholding of a company.

## Anti-trust legislation

The Philippines does not currently have any overarching or developed anti-trust legislation. The Constitution of the Philippines nonetheless prohibits unfair competition and combinations in restraint of trade. Further, the Revised Penal Code penalises monopolies and combinations in restraint of trade. There are anti-trust bills pending before the legislature which create a competition authority and prohibit abuse of market dominance, anti-competitive mergers and acquisitions and other anti-competitive behaviour. You should therefore consult your professional advisers on the risk that a transaction may be in breach of the Revised Penal Code and, when implemented, the anti-trust regulations.

## Good faith obligations

There is no specific obligation under Philippines law for parties to negotiate in good faith. However, under general principles of civil law in the Philippines, a person is required to exercise his rights in good faith, and is liable for injury resulting from an act which is contrary to morals, good customs or public policy. These general principles of law may be the basis of a cause of action for bad faith during negotiations. You should therefore consult your professional advisers to ensure that your actions are in compliance with the relevant principles of civil law in the Philippines.

## Bribery and corruption

The Philippines is ranked 85 out of 174 on the 2014 corruption perception index. There are reported concerns with facilitation payments to speed up the bureaucratic system and bribes to manipulate bidding outcomes or providing benefits to relatives of officials. Recently, the government has made efforts to strengthen the anti-bribery regime in the Philippines. With more governments around the world enforcing anti-bribery laws, you should take the time to understand the local practices of the target and/or your local partner, and review anti-corruption and sanctions compliance programs, or establish them if none exist.

## Enforcement

Foreign court judgments cannot be directly enforced in the Philippines, and a separate action must be filed in the Philippines for the foreign judgment to be recognised or enforced.

On the other hand, the Philippines is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, so foreign arbitral awards from a jurisdiction which is also party to the New York Convention should be enforceable in the Philippines. If you enter into a commercial arrangement where any dispute is to be resolved outside the Philippines, you should choose arbitration over court proceedings. For certain areas of law only domestic arbitration is recognized. You should therefore consult your professional advisers to ensure that your arbitration clause is in line with Philippine law.

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## The ASEAN Economic Community

The ASEAN Economic Blueprint was adopted in November 2007 as the master plan guiding the establishment of the ASEAN Economic Community (AEC) by December 2015. The intention is to transform the region into an EU-style economic area that will increase cross-border trade and investment as well as the flow of capital and the movement of skilled labour. In 2013, ASEAN attracted USD122 billion, accounting for 8% of the global Foreign Direct Investment (FDI). This includes increasing investments from ASEAN Members States, which at 17% of the total FDI inflows, is now the third largest source of FDI in the region. As we move closer to the December 2015 milestone, we expect business interest in the AEC to continue to rise, as more businesses benefit from such ASEAN integration efforts.

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We base our comments in this publication on our experience as international counsel representing clients in their business activities in the Philippines. We are not permitted to advise on the laws of the Philippines and should such advice be required we would work alongside local counsel.




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