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## Working Paper

Analysis of Specific Legal and Trade-related Issues in a Possible PH-EU Economic Partnership: The Philippine Constitution, Competition Policy, Government Procurement, Intellectual Property Rights, Dispute Settlement, and Trade Remedies

PIDS Discussion Paper Series, No. 2015-23

## Provided in Cooperation with:

Philippine Institute for Development Studies (PIDS), Philippines

*Suggested Citation:* Barcenas, Lai-Lynn Angelica B. (2015) : Analysis of Specific Legal and Trade-related Issues in a Possible PH-EU Economic Partnership: The Philippine Constitution, Competition Policy, Government Procurement, Intellectual Property Rights, Dispute Settlement, and Trade Remedies, PIDS Discussion Paper Series, No. 2015-23, Philippine Institute for Development Studies (PIDS), Makati City

This Version is available at:

<https://hdl.handle.net/10419/127028>

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Philippine Institute for Development Studies  
*Surian sa mga Pag-aaral Pangkaunlaran ng Pilipinas*

## Analysis of Specific Legal and Trade-related Issues in a Possible PH-EU Economic Partnership

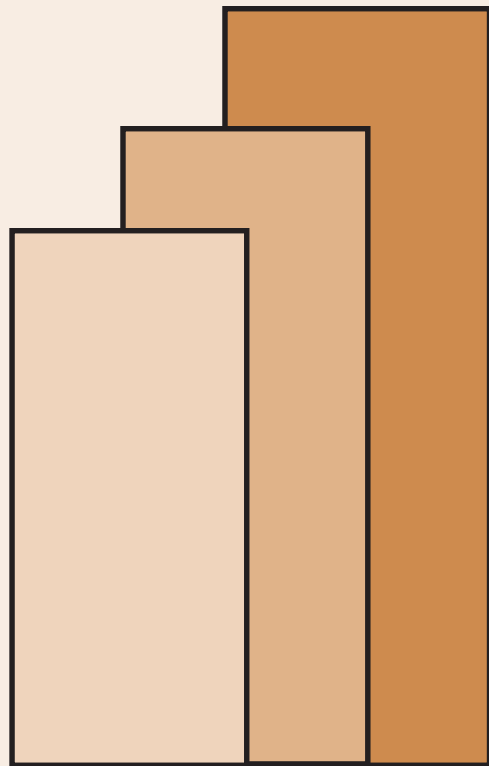
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March 2015

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**ANALYSIS OF SPECIFIC LEGAL AND TRADE-RELATED  
ISSUES IN A POSSIBLE PH-EU ECONOMIC PARTNERSHIP:  
THE PHILIPPINE CONSTITUTION, COMPETITION  
POLICY, GOVERNMENT PROCUREMENT,  
INTELLECTUAL PROPERTY RIGHTS, DISPUTE  
SETTLEMENT AND TRADE REMEDIES<sup>1</sup>**

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**Abstract**

This paper provides an overview of the Philippines' defensive and offensive interests in a Free Trade Agreement with the European Union in the areas of Competition Policy, Government Procurement, Intellectual Property Rights, Dispute Settlement and Trade Remedies. It examines these interests in accordance with the mandate of the Philippine Constitution, and the Philippine position vis-à-vis the goals and strategies of the European Union with respect to its trade relations with its trading partners.

**Keywords:** Philippine-EU Free Trade Agreement, Trade Negotiations, Philippine Constitution, Competition, Government Procurement, Intellectual Property Rights, Dispute Settlement, Anti-Dumping, Countervailing Measures, Safeguards

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## EXECUTIVE SUMMARY

The paper provides a broad overview of the mandate of the Philippine Constitution in relation to commitments made under free trade agreements and compares this to the EU mandate as a means of assessing the underlying development goals of each party and, in particular, the strengths and weaknesses of the Philippines' trade-related policies and institutional structures. The objective is to highlight not only potential areas of strengths and weaknesses, but areas that will need further study, analysis and review. Further study will be needed to identify the necessary preparatory work needed for Philippine negotiators and policy makers for the impending negotiations, and policy adjustments moving forward.

Using the Philippine Constitution, and EU interests as a guidepost to analyze Philippine interests, the paper examines some special areas of trade that are not usually covered in the more basic aspects of trade in goods and services. It should be noted that with trade liberalization under the multilateral trade regime market access across countries significantly increased over the past more than six decades. Such opening up gave rise to so-called "second generation" issues and unfair trade practices affecting market access.

### *"Second Generation" Issues*

Among such second generation and trade-related "within-the-border" issues are competition policy and government procurement. Multilateral efforts to incorporate these into the WTO Agreements met with strong resistance and generally failed. With the failure to address these at the multilateral level, countries, such as the EU and the United States began to include these in their bilateral and regional free trade agreements with their trading partners. Competition policy, in particular, is one of the areas of cooperation identified under the Philippine-EU Partnership and Cooperation Agreement ("PH-EU PCA"). This is an indication of EU interest to include this in any PH-EU FTA negotiations.

To provide negotiators with an overview of issues and interests that could potentially arise in the process of negotiations, the paper reviews the state of the laws on competition policy and government procurement in both the Philippines and the EU, analyzes their effects to a PH-EU FTA and identifies the Philippines' defensive and offensive interests.

### *Remedies Against Unfair Trade and the Adverse Effects of Fair Trade*

To address unfair trade practices and the adverse effects of fair trade, trade law has provided several remedies. The paper reviews four of these remedies, namely: intellectual property protection, dispute settlement and other trade remedies, i e., anti-dumping duties, countervailing duties and safeguard measures. It also identifies potential issues of interest for both the Philippines and the EU, and recommends possible negotiating strategies and courses of action.

## PHILIPPINE CONSTITUTION

### *Analysis of Constitutional Mandates*

In relation to negotiating free trade agreements, the Constitution mandates that negotiators and policy makers ensure that the trade agreement:

- Promotes inclusive and sustained growth;
- Is consistent with a market-driven economy subject to regulation to protect stakeholders, especially Filipinos, from unfair competition and unfair trade practices;
- Maintains Philippine independence from foreign control;
- Respects the limits on protected strategic industries; and
- Promotes equality and reciprocity with the Philippines' trading partner.

These goals are not always compatible and consistent with each other. For example, if the main objective of the State is to promote inclusive and sustained growth, some of the restrictions in the Constitution that at the time of its framing were still relevant, may no longer be relevant under current global conditions. Promoting equality and reciprocity would also be inconsistent with the protection of strategic industries if the Philippines' trading partner would wish to open up their equivalent industry to the Philippines.

Considering the above, there is a need for Philippine policymakers to carefully study and determine the long-term direction for as it undertakes to promote inclusive and sustained growth. In doing so, they need to calibrate plans and objectives based on realities on the ground. These realities include the Constitutional ambiguity noted above as well as present capacities, resources and the political will to implement programs and courses of action.

On the policy side, once clear policy directions are determined, and these Constitutional provisions are found to hinder the implementation of these policies, then Constitutional amendments should be considered. However, for purposes of the PH-EU trade negotiators, consideration should also be given to the political realities on this issue. This includes an assessment of how and whether the Philippines will be able to meet any trade commitment being proposed considering existing political constraints.

The challenge then to policymakers is to find the balance among these seemingly contradictory Constitutional mandates and realities, and establish coherent long-term policy directions that will guide Philippine negotiators in calibrating their demands and concessions in the process of negotiations. For Philippine negotiators, in the absence of coherent policy directions, the challenge is to ensure that the free trade agreement will maximize trade benefits to the Philippines while at the same time ensuring sufficient policy space for those areas where further development is required.

#### *Analysis of PDP 2011-2016 and PEDP 2011-2013 in Relation to the Constitutional Mandates*

A reading of the PDP 2011-2016 and the PEDP 2011-2013 could provide guidance on how to approach the trade negotiations with the EU. The focus of the PDP 2011-2016, as far as trade and economic development is concerned is to promote inclusive growth and increase the competitiveness of the Philippine market. This is consistent with the Constitutional mandate of promoting inclusive growth. Increasing Philippine competitiveness dovetails into the focus of PEDP 2011-2013 in its core product and market strategies.

However, the focus on quality rather than quantity should probably be clarified as not all Philippine industries are ready and equipped to move up the value chain. Industries, such as BPO, electronics and garments, may be among the few industries at this time that show potential and are, in fact, already moving up the value chain. However, there may be a need to apply a different strategy to growing industries, particularly, those involving small and medium enterprises (SMEs).

The challenge for Philippine policymakers is in providing clear and coherent direction on how the government intends to achieve inclusive growth and competitiveness through trade. As the PDP 2011-2016 only establishes a medium-term development plan, it may not be sufficient to provide a long-term view for Philippine negotiators during the negotiations.

The challenge for Philippine negotiators, on the other hand, is how to incorporate inclusive growth objectives into its negotiating strategy. This would require clear policy direction and an understanding of the country's employment promotion policies, and SME development policy, among others. The focus of the PEDP 2011-2013 on supporting SMEs only with respect to finished goods marketing is rather limited, given the vast potential of Philippine SMEs to contribute to the Philippine economy.

### *The EU Mandate*

The EU's trade strategy, particularly in response to the global financial crisis, is to gain access to the largest and fastest-growing economies through ambitious trade agreements and will seek to promote its competitive advantage in high technology products, innovation, research and development in the fast evolving global knowledge economy. Among those specifically targeted are the fast growing ASEAN economies including the Philippines.

To this end, it will seek to: (a) promote trade openness and discourage protectionism; (b) enhance its competitiveness in the global market by continuously innovating and moving up the value chain; (c) ensure better protection of its intellectual property rights (IPR); (d) promote genuine market opening and the transparent application of international rules; and (e) secure meaningful commitments from the Philippines.

Thus, the Philippines should expect that the EU will be pushing for greater market access to its products and services where it has a competitive advantage, such as in green technologies, agriculture, and other industries where they have strong innovative capacities.

Necessarily, it will want to ensure strong protections for its intellectual property rights, a level playing field for its products that should be protected by a strong competition law and enforcement, and access to government procurement in services where its industries are particularly strong, such as water utilities.

It will also want to make sure that trade remedies would be used sparingly by the Philippines and if used, should be based on transparent procedures and predictable standards. Hence, the EU generally adopts WTO trade remedy rules to ensure harmonization across the WTO discipline and its various FTAs.

### *Analysis and Assessment of Interests*

The Philippine Constitution, existing related laws and the current national development plans provide a framework for Philippine negotiators to assess the country's offensive and defensive interests in a free trade agreement negotiation. However, these suffer from the following constraints:

- While there is a clear mandate for inclusive and sustained growth, the more specific provisions of the Constitution may, in practical terms, be incompatible or inconsistent with this mandate. There is, thus, a greater challenge for policymakers and negotiators to find

coherence in these provisions to guide the country's negotiating strategy.

- The absence of an effective evaluation and monitoring mechanism that will inform negotiators of aspects in implementation that are weak and would need sufficient policy space for the country to adjust to the impacts of a new free trade agreement;
- The absence of a long-term development plan that ensures continuity in policy direction, plans and programs. Like all other administrations before it, the present administration has put together a medium-term development plan that covers only a period of five (5) years with no certainty of continuity in the next administration. The challenge for negotiators is that they cannot take a long-term view in ensuring safeguards and opportunities for the Philippine economy under the free trade agreement.

#### A. Philippine Defensive Interests

In general, when entering into a free trade agreement the Philippines would want to ensure that it is able to maximize the long-term economic benefits of such agreement. For this purpose, it would want to ensure that:

- it has sufficient policy space to promote inclusive and sustained growth as mandated by the Constitution;
- local viable industries that could potentially be affected by import surges and lowering of prices resulting from the implementation of the PH-EU FTA have sufficient safeguards and time to adjust to the increase in competition;
- losing industries have access to resources and adequate time to re-invent themselves and invest in other viable industries;
- it would be able to maintain an environment where new local entrants in an industry can build capacity to compete with like EU imported products in the long-term; and
- its small and medium enterprises are provided opportunities and policy space to grow and take advantage of the more advanced technology and financial resources of the EU.

#### B. Philippine Offensive Interests

As a trading partner of the EU, the Philippines would have an interest to maximize the benefits of gaining entry into EU markets. In particular, it would be interested to gain access to:

- EU technology and know-how; and
- EU markets, which includes support in complying with its import requirements, such as its TBTs and SPS'.

### **COMPETITION POLICY**

The fact that EU has a relatively developed competition policy and exceptions regime would allow it to better manage its negotiating strategy in a PH-EU FTA negotiation. The lack of clarity in Philippine competition policy places the Philippines at a disadvantage. The country will face challenges in determining how it can protect social and economic values enshrined in the Constitution, and calibrating demands and concessions in the process of negotiations.

In establishing its own competition policy and law framework and institutions, the Philippines faces the following challenges:

- Establishing a competition policy that is responsive to the goals of inclusive and sustained growth enshrined in the Constitution, while calibrating its implementation according to current realities and capacities;
- Determining the most effective institutional framework that will implement and enforce a competition law;
- Calibrating the implementation of a competition law in such a way that it does not discourage investment and free enterprise, while ensuring that abuses are curtailed;
- Managing competing interests that are resistant to the passage of a competition law, as well as regulatory capture in the process of implementation.

#### A. Philippine Defensive Interests

Keeping these challenges in mind, the Philippines would have an interest in ensuring that:

- while the above challenges exist, the PH-EU FTA will not narrow the policy space for the country in navigating the development of its own competition policy and law;
- the exceptions to the application of the EU competition law will not effectively bar Philippine products to enter and compete in the EU market;
- the exceptions noted above do not effectively disadvantage the domestic industries against EU imports; and
- the Philippines has sufficient and accessible remedies against anti-competitive conduct committed in the EU or by EU firms that affect the Philippine market.

#### B. Philippine Offensive Interests

On the other hand, the Philippines would also be interested in ensuring that:

- it creates a business climate that is transparent and predictable that would attract and keep EU investments. These investments will not only be a source of capital but also technical capacity that would strengthen the skills of the Philippine labor force and business; and
- its products are competitive in the EU market and not artificially barred from entry by unnecessary barriers to trade.

### **GOVERNMENT PROCUREMENT**

The limitations on foreign participation in Philippine government procurement will most likely be an issue that the EU will raise during the process of negotiations. Since these limitations are simply statutory, there is a greater flexibility for the Philippine government to amend them if found to be beneficial to the economy in the long-term. However, on a policy level, this will require a careful assessment on the part of the government of the benefits of liberalizing; and a review of the rationale for imposing these limitations in the first place and whether these were achieved.

The Philippines should also assess the potential impact of the draft regulations on government procurement being considered by the EU on the access of Philippine suppliers into the EU market. Given the requirement of reciprocity, the Philippines may conduct a cost-benefit analysis of the potentials of accessing the EU market and ensuring the foothold of the domestic industry in the Philippine market.



#### A. Philippine Defensive Interests

In negotiating in this area under a PH-EU FTA, the Philippines would be interested in ensuring that:

- it has sufficient space to pursue any development objectives related to government procurement;
- domestic suppliers and contractors are not effectively eased out by more sophisticated and skilled suppliers and contractors from the EU; and
- the domestic industry continues to flourish and build capacity to compete with new foreign entrants.

#### B. Philippine Offensive Interests

On the other hand, the Philippines should also be mindful of the potential benefits of opening up government procurement to the EU. To maximize these benefits, it would be interested in:

- gaining access to EU capital, skill and technology in supplying government contracts with the objective of minimizing costs and ensuring the highest quality of products that may be supplied by EU firms;
- benefitting from technology transfer from more advanced EU firms to domestic firms;
- in the long-term, expanding the market for the domestic contractors' industry beyond the Philippines and into the EU market.

### **INTELLECTUAL PROPERTY PROTECTION**

The PH-EU PCA reflects the primary interest of the EU on intellectual property matters in the Philippines at the time of the negotiation of the PCA. This can be summarized into: (a) IP enforcement, (b) protections against IP infringements, and (c) IP protection of geographical indications and plant varieties. At a minimum, the Philippines should expect these matters to come up in the negotiations.

Note, however, that with the EU's current initiative to harmonize and upgrade its internal intellectual property rights regime, matters of concern that they intend to address during the upgrading process may also be raised during the PH-EU FTA negotiations. Of particular interest to the EU in relation to the Philippines would be:

- IPR valorisation to determine the accounting valuation of IPR assets for purposes of leverage financing. IP valorisation is essential to IP structuring for purposes of financial leveraging. In Southeast Asia, particularly in Singapore, IP rights structuring is becoming a means for securing financing and minimizing tax exposure. While in the Philippines, the development of its IPR system has not yet reached the stage similar to Singapore's, the process of integration within the ASEAN region could lead to the growth of networks of IP assets where firms maximize the value of their IP and tax regimes in the region. If the EU sees this potential, they could try to include this in a PH-EU FTA. Philippine negotiators should understand the implications of this system in order to maximize its benefits and manage potential administrative and regulatory costs for the Philippine government and business if IPR valorisation would entail additional financial reporting requirements for businesses.

- Protection of intangible assets. These assets include trade secrets and parasitic copies, and non-agricultural geographical indications. If the South Korea-EU FTA is any indication, the EU would most likely push for WTO-plus protections for geographical indications, beyond the current protection for wines and spirits. What is notable with the South Korea-EU FTA is South Korea's mutual interest in protecting its own geographical indications.
- The challenges of digital, technological and online developments to IPR. This would include technology and database management, handling of user-generated content (i. e., social networking), private copying levies, accessing Europe's cultural heritage, and protecting performers' rights, audio visual works, and artists' resale rights. The EU would also most likely want to address the potential of online service providers for facilitating infringements.

On the other hand, the Philippines would be most interested in maximizing technology transfer arrangements, the protection and commercialization of its own genetic resources, traditional knowledge and folklore, protecting its own geographical indications, the potential value of IPR valuation to its IPR holders, and protections for its plant varieties.

#### A. Philippines' Defensive Interests

In negotiating with the EU, the Philippines would need to ensure that:

- it can protect its own genetic resources, traditional knowledge, folklore and plant varieties and ensure that its commercialization benefits its owners, producers and natural beneficiaries;
- it has sufficient policy space to develop its own IP valuation mechanism and to manage the additional cost it would entail to both the government and business;
- it manages the costs of IP enforcement and additional IP protections that the EU may want to include in the PH-EU FTA; and
- it provides effective protections for its own geographical indications.

#### B. Philippines' Offensive Interests

On the other hand, the Philippines could maximize the benefits that the EU can offer by ensuring that:

- it has access to advanced EU technology in protecting and commercializing genetic resources, traditional knowledge, folklore and plant varieties;
- It secures support for developing its own IP valuation mechanisms that would benefit local business and IP holders; and
- it is able to secure support in developing its own IP holders/owners that are able to benefit from EU financing without giving up the benefits over the same. This could include providing mechanisms for angel investments and protections for start-ups.

### **DISPUTE SETTLEMENT**

While negotiating an international agreement, Parties may agree on different dispute settlement mechanisms that may include mediation, consultations, and arbitration. For free trade agreements, while elements of these dispute settlement modes have been adopted, Parties usually rely on the model provided by the WTO Dispute Settlement Understanding.

In the negotiations for a PH-EU FTA, the EU would most likely push for DSU consistent procedures. Being essentially a multilateralist and a strong advocate of the WTO system, the EU has always tried to ensure that, at a minimum, provisions of the WTO are incorporated in its regional or bilateral free trade agreements, including dispute settlement mechanisms.

Under a PH-EU FTA, for the Philippines, the basic concerns are:

- the potential costs to accessing or protecting its interests through the dispute settlement mechanism of a PH-EU FTA;
- its potential exposure to different venues over the same cause of action or dispute.

The Philippines should thus be able to ensure that:

- efforts at settling disputes will not result to any substantial cost to the country; and it is not exposed to unlimited liability due to the availability of different concurrent remedies and venues to the Parties.

## **TRADE REMEDIES**

Anti-dumping, countervailing and safeguard measures under EU FTAs generally follow the substantive provisions of the WTO Agreements. However, considering Philippine and EU interests and the trends in some EU FTAs, the following matters may be considered in a PH-EU FTA negotiation:

- On anti-dumping and countervailing, the EU may push for WTO-plus provisions covering protections against circumvention of anti-dumping and countervailing rules. Particular focus may be made on the following activities:
  - slight modification of the description of the product, without changing its essential characteristics, to remove it from the tariff line subject to anti-dumping duty;
  - consignment of the product through third countries; and
  - re-organization of the channels of sales and productions among exporters and producers of the exporting country in such a way that the product is exported to the EU through exporters enjoying lower duties and not covered by the anti-dumping duty.
- On safeguards, global (that provided under Article XIX of GATT 1994 and the Agreement on Safeguards), bilateral and agricultural safeguards mechanisms. In agreeing to the application of global safeguard measures, the Philippines must be mindful of the seeming “textual obsolescence” of the substantive conditions for the application of global safeguard measures and the consequent lack of success of Members of the WTO in securing a favorable resolution for the application such global safeguard measures under the WTO Appellate Body (the “Appellate Body”).

To reiterate, the conditions under Article XIX of GATT 1994 and the Agreement on Safeguards, to wit:

- an import surge of particular products and other conditions (may include a fall in import prices);
- causing or threatening to cause serious injury to domestic producers
- of like or directly competitive products
- as a result of:

- unforeseen developments and
- the effects of the obligations incurred under GATT

particularly for States who have been GATT 1947 signatories and thereafter, but before the entry into force of GATT 1994, provide some difficulties in interpretation. The GATT 1947 text as it was written reflects the original intent and expectations of the negotiating parties in 1947.

When negotiations were concluded in 1947, the expectation was that the GATT was a temporary agreement which will be replaced within a few years by a new institution, the International Trade Organization (ITO). However, as political support for the ITO fizzled out, the GATT became the governing agreement over international trade until the creation of the WTO in 1994.

Within the context of this intent, the requirement that the sudden import surge should arise from “unforeseen developments” and the showing of causation for such surge between the “serious injury” and the “trade concessions” would make more sense. In other words, “the unforeseen import surge, resulting from the trade concession, had to be responsible for serious injury.”<sup>3</sup> Within a short time period, the baseline for determining whether there was an unforeseen import surge which can be attributable to the trade concessions are easily identifiable. This would be the import levels prior to the effectivity of the trade concessions.

However, upon the entry into force of GATT 1994 and the Agreement on Safeguards, the Appellate Body ruled that the provisions of these agreements should be interpreted as an “inseparable package of rights and disciplines,” and merged the requirements of these two provisions. Thus, when the provisions are read together, the conditions mirror the original GATT 1947 Article XIX, including the concept of “unforeseen development.”

But when viewed from a longer time frame, justifying an import surge as caused by “unforeseen developments” does not seem to have any logical basis. How can one be expected to foresee developments that are decades away at the time the obligation was incurred? In addition, what baseline should one use in determining if there was indeed an import surge? Between the effectivity of the trade concessions in 1947 and 30 years later for example, imports would have fluctuated a number of times already as a result of different factors, which would not necessarily be directly attributable to the application of the trade concessions 30 years ago.

Given this difficulty of interpretation, the Appellate Body has not, at this time been able to provide clear guidance on how to prove “unforeseen developments” and have generally rejected relevant evidence presented by the parties to a dispute.

It would thus benefit the Philippines to focus on negotiating for a bilateral safeguards regime that would avoid this interpretation.

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<sup>3</sup> Sykes, *The Safeguards Mess*, 4.

## **PART I. INTRODUCTION**

As the Philippines prepares for a negotiation with the European Union (EU) on a Philippine-EU Free Trade Agreement (“PH-EU FTA”) it is important at the outset to identify its negotiating parameters. These parameters are defined by the Philippine Constitution, existing relevant laws and current implementing plans and programs. It is likewise, important to understand the negotiating parameters of the EU. An understanding of both parties’ negotiating mandate will allow Philippine negotiators to effectively formulate a negotiating strategy and work with policymakers on how to calibrate demands and concessions during the negotiation process.

A review of the strengths and weaknesses of the country’s trade-related policies and institutional structures will also aid policymakers in assessing the necessary policy adjustments for the Philippines to ensure that the benefits of a PH-EU FTA will be maximized and its adverse effects minimized. With this in mind, the paper will present an overview of the Philippines’ and EU’s negotiating mandate for a PH-EU FTA, as well as the underlying development goals of each party.

The objective is to highlight not only potential areas of strengths and weaknesses, but areas that will need further study, analysis and review to determine necessary policy adjustments moving forward. It should be noted that a free trade agreement is only one of the many mechanisms that a state can use to pursue its broader development goals. Thus, for Philippine negotiators to negotiate effectively, they will need to be equipped with a clear understanding of such broader development goals and related government policy direction both from the Philippines and EU perspectives.

Using the Philippine Constitution as a guidepost to analyze Philippine interests, the paper will also examine some special areas of trade that are not usually covered in the more basic aspects of trade in goods and services. It should be noted that with trade liberalization under the multilateral trade regime market access across countries significantly increased over the past more than six decades. Such opening up gave rise to so-called “second generation” issues and unfair trade practices affecting market access.

### *“Second Generation” Issues*

Among such second generation and trade-related “within-the-border” issues are competition policy and government procurement. Multilateral efforts to incorporate these into the WTO Agreements met with strong resistance and generally failed. With the failure to address these at the multilateral level, countries, such as the EU and the United States have begun to include these in their bilateral and regional free trade agreements with their trading partners. Competition policy, in particular, is one of the areas of cooperation identified under the Philippine-EU Partnership and Cooperation Agreement (“PH-EU PCA”). This is an indication of EU interest to include this in any PH-EU FTA negotiations.

To provide negotiators with an overview of issues and interests that could potentially arise in the process of negotiations, the paper will thus review the state of the laws on competition policy and government procurement in both the Philippines and the EU, analyze their effects to a PH-EU FTA and identify the Philippines’ defensive and offensive interests. In doing so, it will also be mindful of the negotiating parameters of both countries as guideposts in formulating strategy.

### *Remedies Against Unfair Trade and the Adverse Effects of Fair Trade*

To address unfair trade practices and the adverse effects of fair trade, trade law has provided several remedies. The paper will discuss four of these remedies, namely: intellectual property protection, dispute settlement and other trade remedies, i e., anti-dumping duties, countervailing duties and safeguard measures.

To encourage innovation and creativity, the laws of intellectual property protection embodied in international trade agreements and incorporated in domestic laws are intended to ensure that creative output is properly credited and compensated. Thus, infringement of intellectual property rights are prohibited and penalties are imposed for violation of the same.

In general, where a state violates the rights of another state party to a free trade agreement, such agreement provide for dispute resolution mechanisms to provide a venue for resolving the dispute.

In addition, state and enterprise conduct that are trade restrictive or effectively stifle market competition are also subject to the remedies of anti-dumping and countervailing duties. Enterprises that sell their products at lower than their normal value (as determined by trade rules) in another state may be subjected to anti-dumping duties by that state. On the other hand, countries that provide certain subsidies to specific industries or enterprises may expose such enterprises to countervailing duties imposed by a state importing their products.

Trade rules also provide remedies against the adverse effects of fair trade. These usually take the form of general safeguard measures for non-agricultural products and and special safeguard measures for agricultural products.

The paper will look at these trade remedies, identify potential issues and interests for both the Philippines and the EU, and recommend possible negotiating strategies and courses of action.

## PART II. PHILIPPINES AND EUROPEAN UNION NEGOTIATING MANDATE

### A. Parameters Set by the Philippine Constitution

To assess Philippine readiness to negotiate with the EU and to determine its offensive and defensive interests, it is necessary to understand, at the outset, the negotiating parameters provided by the Constitution and applicable laws, as well as the government units authorized to negotiate and enter into free trade agreements.

The examination of the general parameters adopted in the Philippines requires an understanding of the legal framework that governs the formulation of the country's economic and development policies. These are generally discussed below.

#### I. Philippine Legal Framework

The Philippine legal framework consists of the 1987 Philippine Constitution, laws enacted by Congress, international agreements either through treaties or executive agreements, jurisprudence or judicial decisions, executive orders issued by the President, and Rules and Regulations issued by the different government agencies.

The Philippines under the doctrine of constitutional supremacy, recognizes that in the hierarchy of laws, the Constitution "*is the fundamental, paramount and supreme law of the nation, it is deemed written in every statute and contract.*"<sup>4</sup>

To this end, the Supreme Court holds that "*the primacy of the Constitution as the supreme law of the land dictates that where the Constitution has itself made a determination or given its mandate, then the matters so determined or mandated should be respected until the Constitution itself is changed by amendment or repeal through the applicable constitutional process.*"<sup>5</sup> As a consequence, the three branches of government must yield to the Constitution, unless it allows any such deviation.<sup>6</sup>

The 1987 Constitution sets four important policy guideposts for the Philippines in entering into free trade agreements. *First*, it sets general parameters that will serve as the basis for the formulation of its overall economic and development policies. *Second*, it establishes general principles on how it will pursue these policies in relation to the rest of the world. *Third*, in relation to foreign participation in the Philippine economy, it provides areas regulated and limited to foreign investments. *Lastly*, it provides the institutional framework for entering into and implementing free trade agreements with other states.

For purposes of this paper, we will be discussing the first three guideposts to provide trade negotiators guidance in identifying the priorities of the Philippine economy.

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<sup>4</sup> Manila Prince Hotel v. GSIS, G.R. No. 122156, 3 February 1997.

<sup>5</sup> Datu Michael Abas Kida, et. al. v. Senate of the Philippines, et. al., G.R. No. 196271, 18 October 2011

<sup>6</sup> *Ibid.*

## 1. Parameters for Philippine Economic and Development Policies

### a. General Development Framework

In all aspects of national development, the Constitution mandates that the Philippine state shall promote:

- a just and dynamic social order that will ensure the independence of the Philippines and freedom from poverty through policies that “provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all;”<sup>7</sup> and
- social justice.<sup>8</sup>

The concept of social justice in the 1987 Constitution has its roots from the 1935 and 1973 Constitution.

During the deliberations on the 1935 Constitution, several delegates expressed the view that the definition of the concept of social justice would be about justice to the “common tao” or the “little man.”<sup>9</sup> The concept was further clarified in the case of *Calalang v. Williams*,<sup>10</sup> where the Court ruled that:

*“Social justice is ‘neither communism, nor despotism, nor atomism, nor anarchy,’ but the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated. Social justice means the promotion of the welfare of all the people, the adoption by the Government of measures calculated to insure economic stability of all the competent elements of society, through the maintenance of a proper economic and social equilibrium in the interrelations of the members of the community, constitutionally, through the adoption of measures legally justifiable, or extra constitutionally, the exercise of powers underlying the existence of all governments on the time-honored principle of salus populi est suprema lex.”*

This concept of social justice was later adopted by the 1971 Constitutional Convention, which provided under the 1973 Constitution in Art. II, Sec. 6 that, “*The State shall promote social justice to ensure the dignity, welfare, and security of all the people. Towards this end, the State shall regulate the acquisition, ownership, use, enjoyment, and disposition of private property, and equitably diffuse property ownership and profits.*”<sup>11</sup>

The concept was further adopted and even expanded in the 1987 Constitution,<sup>12</sup> through a separate article in the Constitution, Art. XIII entitled “Social Justice and Human Rights.” Art. XIII directs Congress to prioritize measures that promote the equitable distribution of

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<sup>7</sup> Art. II Sec. 9 of the 1987 Constitution

<sup>8</sup> Art. II, Sec. 10 of the 1987 Constitution.

<sup>9</sup> 1 J. Aruego, *The Framing of the Philippine Constitution* 147 (1936)

<sup>10</sup> G. R. No. 47800. December 2, 1940.

<sup>11</sup> *Almeda v. CA*, G.R. No. L-43800 July 29, 1977.

<sup>12</sup> IV Record 864-865



wealth and political power.<sup>13</sup> This includes the creation of economic opportunities based on freedom of initiative and self-reliance.<sup>14</sup>

The concepts of a “just and dynamic social order” and “social justice” reflects the concern of the State to uplift the poorest of the poor, improve quality of life and encourage economic activity as a means of promoting a more inclusive growth. In addition, the Constitutional mandate to regulate property rights recognizes the need for the State to intervene where inequality exists and in pursuit of the public welfare.

These general constitutional parameters call for a constant balancing act on the part of the State to ensure that economic growth trickles down to the most disadvantaged in society and that it is sustained through increased productivity.

In relation to free trade agreements, these constitutional parameters set the general framework from which Philippine negotiating strategy shall be based. From an economic development perspective, the overriding and ultimate goal as reflected in the provisions cited above is the promotion of a more inclusive, equitable and sustained growth.<sup>15</sup>

### *Inclusive and Sustained Growth*

The World Bank has defined “inclusive and sustained growth” as “economic growth which is a necessary and crucial condition for poverty reduction.” It is otherwise known as pro-poor growth. It takes “a long term perspective and is concerned with sustained growth.” Inclusiveness in this sense “refers to equality of opportunity in terms of access to markets, resources and unbiased regulatory environment for businesses and individuals.”<sup>16</sup>

Inclusive growth focuses on accelerating poverty reduction. To this end, strategies adopted must necessarily be tailored to country-specific circumstances and focused on both employment and productivity growth.<sup>17</sup>

Philippine negotiators will need to develop their negotiating strategy and assess the Philippines’ offensive and defensive interests based on these general parameters. They will need to be familiar with existing relevant government policy, their manner and level of implementation and their impacts. This will enable them to determine the proper calibration to the demands and concessions they will make during the negotiations with the EU.

To understand how these general constitutional mandates will be incorporated into specific government policy and strategy, it will be useful to examine what the Constitution says specifically about national economic policy-making.

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<sup>13</sup> 1987 Constitution, Article XIII, Section 1. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

<sup>14</sup> 1987 Constitution, Article XIII, Section 2. The promotion of social justice shall include the commitment to create economic opportunities based on freedom of initiative and self-reliance.

<sup>15</sup> See 1987 Constitution, Art. II Sec. 9.

<sup>16</sup> Elena Ianchovichina, Susanna Lundstrom, “What is Inclusive Growth?,” Note for the Diagnostic Facility for Shared Growth, World Bank. 2009.

<sup>17</sup> Elena Ianchovichina, Susanna Lundstrom, “What is Inclusive Growth?,” Note for the Diagnostic Facility for Shared Growth, World Bank. 2009.

b. Framework for Economic Policy-making

Article II, Sections 19 and 20 provide the broad framework for Philippine economic policy to guide the country to achieve its goal of inclusive and sustained growth. These provisions mandate: (a) the promotion of a self-reliant and independent economy; (b) that is driven by the private sector.

Art. II Sec. 19 adopts a nationalistic approach as it mandates “*a self-reliant and independent national economy effectively controlled by Filipinos.*”<sup>18</sup> The intent, as enunciated by Constitutional Commissioner Bernardo Villegas, is for the country to avoid Philippine mendicancy in the international community.<sup>19</sup> Furthermore, “independence” was meant to refer to the freedom of the country from undue foreign control of the national economy, especially in such strategic industries as in the development of natural resources and public utilities.<sup>20</sup>

Art. II, Sec. 20, on the other hand, highlights the State’s recognition of the “indispensable role of the private sector.” An affirmation of its role as an “*indispensable engine of development.*”<sup>21</sup>

In *Tañada v. Angara*,<sup>22</sup> the Supreme Court held that the Constitution recognizes the need for business exchange with the rest of the world on the basis of equality and reciprocity and protects Filipino enterprises against unfair foreign competition and trade practices.<sup>23</sup> In such cases and whenever necessary for the promotion of the general welfare, the State is mandated to intervene.<sup>24</sup>

The Constitution envisions an economy that is primarily driven by the private sector and that is independent from foreign control. The recognition of the indispensable role of the private sector in economic development is an acknowledgment of the State’s adoption of a market economy that is regulated to prevent unfair foreign competition and trade practices. There is also a clear intent to protect strategic industries from foreign control.

c. The Goals of the National Economy

Art. XII of the 1987 Constitution on the National Economy and Patrimony provides more specific guidance in economic-policy making.

In relation to Art. XII Section 1, Commissioner Villegas explained that the provision, “*is packed with principles that shall serve as constitutional guidelines for the various branches of government for the promotion of the common good in the economic sphere.*”<sup>25</sup> It provides that the goals of the national economy are:

- A more equitable distribution of opportunities, income, and wealth.

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<sup>18</sup> Bernas, p. 88

<sup>19</sup> III Records of the Constitutional Commission 252.

<sup>20</sup> Ibid.

<sup>21</sup> Bernas, p. 88

<sup>22</sup> G.R. No. 118295. May 2, 1997

<sup>23</sup> Ibid.

<sup>24</sup> 1987 Constitution, Sec. 6 and 19, Art. XII; See *Association of Philippine Coconut Dessicators v. Philippine Coconut Authority*, G.R. No. 110526 February 10, 1998.

<sup>25</sup> III Records 252

- A sustained increase in the amount of goods and services produced by the nation for the benefit of the people.
- An expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

These goals echo the national development goals enunciated in the relevant provisions of Articles II and XIII of the Constitution as discussed in Item “a” above.

To achieve this end, the State is mandated to promote industrialization and full employment, to ensure the protection of Filipino enterprises against unfair foreign competition and trade practices, and to provide opportunities for all sectors of the economy and all regions of the country.<sup>26</sup>

Bernas notes that the provision elicits the protection of both the Filipino producers and consumers. It provides a balance by allowing foreign competition to give Filipino consumers an option while preventing harmful practices that hurt Filipino enterprises.<sup>27</sup>

While the State is mandated to promote full economic activity, the Constitution recognizes that the use of property bears a social function. These economic activities should thus serve the common good and promote distributive justice. When it fails to do so, the State is authorized to intervene.<sup>28</sup>

## 2. General Principles Governing External Economic Relations

In its external trade relations, the Constitution directs the government to adopt:

- An independent foreign policy; and
- A trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.

### a. Independent Foreign Policy

The State under Art. II, Sec. 7 of the Constitution provides that it is necessary for the State to pursue an independent foreign policy. In this regard, the foremost consideration of the state is the Philippines’ national sovereignty, territorial integrity, national interest, and its right to self-determination.

The term “foreign relations” refers to a wide scope of actions by the government. It covers the treaties and international agreements entered into by the government as well as other interactions with foreign States.<sup>29</sup> This includes free trade agreements.

### b. General Welfare, Equality and Reciprocity

The Constitution also mandates the Government to pursue a trade policy that serves the general welfare of the people while utilizing all forms and arrangements of exchange on

<sup>26</sup> See 1987 Constitution, Art. XII, Section 1.

<sup>27</sup> Bernas, 1007.

<sup>28</sup> 1987 Constitution, Art. XII, Section 6.

<sup>29</sup> The 1987 Constitution of the Philippines: A Commentary, Joaquin G. Bernas, p. 65

the basis of equality and reciprocity.<sup>30</sup> It means that the general welfare is not the only consideration for the country's trade policy but also reciprocity and equality resulting to mutual benefit<sup>31</sup> to the parties concerned.

### 3. Constitutional Limitations on Foreign Participation in the Philippine Economy

While providing certain parameters as guideposts for economic and development policy-making, the Philippine Constitution also imposes specific limitations on foreign participation in the Philippine economy in the following areas and sectors: (a) natural resources, with special rules on land ownership; (b) Constitutional limitations on certain industries; (c) statutory limitations on certain industries; (d) labor, materials and goods.

#### a. Natural Resources

Lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife flora, and fauna, and other natural resources are owned by the State. Except for agricultural land, these resources cannot be alienated. As such, the State has full control and supervision of the exploration, development, and utilization of natural resources. This means that it may:

- directly undertake the exploration, development, and utilization of the natural resources;
- enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations.
  - Such corporation or associations must be at least 60 percent owned by Filipino citizens;
  - Co-production, joint venture, or production-sharing agreements shall be for a maximum period of twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may provided by law.
- enter into technical or financial assistance agreements for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils with foreign-owned corporations, subject to the following conditions:
  - according to the general terms and conditions provided by law,
  - based on real contributions to the economic growth and general welfare of the country; and
  - it is necessary for the agreement to promote the development and use of local scientific and technical resources.<sup>32</sup>

Marine resources found in the archipelagic waters, territorial sea, and exclusive economic zone of the Philippines are also protected by the State. It is reserved for the exclusive use and enjoyment of Filipino citizens.<sup>33</sup>

#### *Land Ownership*

The Constitution limits land use and ownership to the following:

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<sup>30</sup> Art. XII, Sec. 13 in the

<sup>31</sup> III Record 670-673

<sup>32</sup> Art. XII, Sec. 2 Philippine Constitution

<sup>33</sup> Art. XII, Sec. 2 Philippine Constitution

**Table 1. Limits to Land Use and Ownership**

Type of Land	Private corporations or associations	Individuals
Inalienable land of the public domain	<ul style="list-style-type: none"> <li>• Cannot be alienated</li> <li>• Subject to the provisions on natural resources in (a) above</li> </ul>	<ul style="list-style-type: none"> <li>• Cannot be alienated</li> <li>• Subject to the provisions on natural resources in (a) above</li> </ul>
Agricultural land (alienable land of the public domain)	<ul style="list-style-type: none"> <li>• Lease for a maximum period of 25 years, renewable for another 25 years</li> <li>• Not to exceed 1,000 hectares</li> </ul>	<ul style="list-style-type: none"> <li>• Philippine citizens</li> <li>• Lease up to a maximum of 500 hectares</li> <li>• Acquire up to a maximum of 12 hectares</li> </ul>
Private lands	<ul style="list-style-type: none"> <li>• may acquire private lands</li> <li>• at least 60% of the capital stock or any interest therein must be owned by Philippine citizens</li> </ul>	<ul style="list-style-type: none"> <li>• May acquire private lands</li> <li>• May be owned by an alien, if acquired by hereditary succession</li> <li>• Includes former Philippine natural-born citizens</li> </ul>

Source: Author's compilation

(b) Constitutional Foreign Ownership Limitations in Certain Industries

In addition to the above limitations, the Constitution controls foreign ownership in certain sectors in the interest of public welfare. These are as follows:

**Table 2. Other Constitutional Limitations on Foreign Participation**

Source	Allowed % of foreign ownership	Sector
Art. XVI, Sec.11.1	0%	Mass media
Art. XII, Sec. 14	0%	Practice of profession: Engineering, medicine and allied professions, accountancy, architecture, criminology, chemistry, customs brokerage, environmental planning, forestry, geology, interior design, landscape architecture, law, librarianship, marine deck officers, marine engine officers, master plumbing, sugar technology, social work, teaching, agriculture, and fisheries.
Rep. Act No. 5181 (1967) <sup>34</sup>		
Art. II, Sec. 8	0%	Manufacture, repair, stockpiling and/or distribution of nuclear weapons
Art. XVI, Sec. 11.2	30%	Advertising
Art. XII, Sec. 11	40%	Public utilities
Com. Act 146 (1936), <sup>35</sup> Sec. 16	40%	Operation and management of public utilities

<sup>34</sup> An Act Prescribing Permanent Residence and Reciprocity as Qualifications for any Examination or Registration for the Practice of any Profession in the Philippines.

<sup>35</sup> The Public Service Law.

Rep. Act No. 6957 (1990) <sup>36</sup> as amended by Rep. Act No. 7718 (1994), <sup>37</sup> Sec. 2a	40%	Project proponent and facility operator of a BOT project requiring a public utilities franchise
Art. XIV, Sec. 4	40%	Ownership/establishment and administration of educational institutions

Source: *Foreign Investments Negative List 2011*; Author's compilation

(c) Statutory Foreign Ownership Limitations in Certain Industries

The Constitution also mandates Congress and the government to:

- reserve certain areas of investment to Philippine citizens, or a certain percentage of interest in corporations or associations to Philippine citizens, as dictated by the national interest;
- enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos; and
- regulate foreign investments in accordance with the country's national goals and priorities.<sup>38</sup>

The regulated sectors, as provided by statute are summarized as follows:

**Table 3. Statutory Limitations to Foreign Participation**

Source	Allowed % of foreign ownership	Sector
Rep. Act. No. 8762, Sec. 5	0%	Retail trade enterprises with less than PhP2.5 million paid-in capital
Rep. Act No. 6938, Art. 26	0%	Cooperatives
Rep. Act No. 5487, Sec. 4	0%	Private security agencies
Rep. Act No. 7076, Sec. 3	0%	Small-scale mining
Pres. Decree No. 449, Sec. 5	0%	Ownership, operation and management of cockpits
Various treaties and international conventions to which the Philippines is a party	0%	Manufacture, repair, stockpiling, and/or distribution of biological and radiological weapons and anti-personal mines
Rep. Act No.7183 Sec. 5	0%	Manufacture of firecrackers and other pyrotechnic devices

<sup>36</sup> An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes.

<sup>37</sup> An Act Amending Certain Sections of Republic Act No. 6957.

<sup>38</sup> Art. XII, Sec. 10, Philippine Constitution. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least *sixty per centum* of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investment. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.

Rep. Act No.7042, Sec. 8.b.2	0%	Small and medium-sized domestic enterprises with paid-in capital of less than US\$200,000.00 or US\$100,000.00, as the case may be.
Rep. Act No.3846	20%	Private radio communication network
Pres. Decree No. 442, Art. 27	25%	Private recruitment, whether for local or overseas
Com. Act No. 541, Sec. 1;	25%	Contracts for construction of defense-related structure
Letter of Intent 630	25%	Contracts for the construction and repair of locally-funded public works, with certain exceptions under the BOT Law (Rep. Act No. 7718)
Pres. Decree No. 194, Sec. 5, Rep. Act No. 5762, Sec. 15	40%	Culture, production, milling, processing, trading excepting retailing. Of rice and corn and acquiring by barter, purchase or otherwise, rice and corn and the by-products thereof
Rep. Act No. 5183, Sec. 1	40%	Contracts for the supply of materials, goods and commodities to government-owned or controlled corporations, company, agency or municipal corporations
Rep. Act No.8550, Sec. 27	40%	Operation of deep sea commercial fishing vessels
Pres. Decree No. 612, Sec. 323, as amended by Pres. Decree No. 1814	40%	Adjustment companies
Rep. Act No. 4726, Sec. 5	40%	Ownership of condominium units where the common areas in the condominium projects are co-owned by the owners of the separate units or owned by a corporation

Source: *Foreign Investments Negative List 2011; Author's compilation*

### *Foreign Equity Limitations on Contractors' Industry*

In addition to the Constitutional and statutory limitations mentioned above, and through an administrative regulation, the contractors' industry is also subjected to foreign ownership limitations.

The industry is governed by Republic Act No. 4566 (1965),<sup>39</sup> otherwise known as the Contractors' License Law. Under such law, applicants for contractors' licenses are required to take the examinations required, have at least two years experience in the construction industry, and knowledgeable of the building, safety, health and lien laws of the Philippines and the rudimentary administrative principles of the contracting business. A partnership or corporation may qualify as a contractor through its responsible managing officer after the latter presents certain requirements to qualify.<sup>40</sup>

The Philippine Contractors Accreditation Board (PCAB), formerly the Philippine Licensing Board for Contractors (PLBC), exercises supervision and regulatory functions over the

<sup>39</sup> An Act Creating the Philippine Licensing Board for Contractors, Prescribing its Powers, Duties and Functions, Providing Funds Therefor, and For Other Purposes.

<sup>40</sup> RA 4566, Sections 19 and 20.

contractors industry. It is authorized to issue contractors' licenses as mandated by law. When the Contractors' License Law was passed in 1965, the PLBC was under the jurisdiction of the Board of Examiners, now the Professional Regulation Commission (PRC).<sup>41</sup>

In 1980, then President Ferdinand E. Marcos issued Presidential Decree No. 1746, "Creating the Construction Industry Authority of the Philippines," which abolished the PLBC and transferred its authority to the PCAB. PCAB was brought under the jurisdiction of the Construction Industry Authority of the Philippines (CIAP), an agency under the authority of the Department of Trade and Industry.<sup>42</sup>

In the same year (1980), President Marcos issued the Implementing Rules and Regulations of RA 4566, as amended by PD 1746 (IRR 1746). The regulations imposed an additional requirement for the issuance of a regular license, which does not appear in either RA 4566 or PD 1746. It provided that such license may be issued only to partnerships or corporations with at least 60% Filipino equity participation and existing under Philippine laws.<sup>43</sup> IRR 1746, which was intended to implement PD 1746, does not specify the rationale behind this rule and neither does this appear in PD 1746.

When the PCAB issued Board Resolution No. 605, Series of 2011, entitled "Imposition of at Least 60%-40% Filipino-Foreign Equity Participation (Peso Value) and Equivalent Management Control as Prerequisite Requirements for the Grant of the Regular Contractors' License by the PCAB," it cited as its rationale that construction contracting is a practice of profession and therefor must comply with the provisions of the Constitution.

This rationale suffers from the following defects:

- The PCAB is now under the authority of the Department of Trade and Industry and not under the Professional Regulation Commission. Thus, the construction industry cannot be described as a practice of profession, as it is not governed by the professional regulation body
- The imposition of the 60% Filipino equity requirement was made under an implementing rule and not a statute. While this was issued by President Marcos while he possessed both executive and legislative powers, it can be argued that the issuance of the rules and regulations implementing PD1746 constitutes an exercise of executive power. As such, the exercise of such power must be in accordance with the law being implemented, and cannot go beyond the parameters of such law. As PD1746 does not impose a foreign equity limitation in the contractors' industry, its implementing rules cannot do so, as well.

Despite these defects, the PCAB continues to implement Board Resolution No. 605. Given the current state of the law as outlined above, these are issues that need to be resolved for clarity both for Philippine policymakers and negotiators.

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<sup>41</sup> RA 4566, Section 2.

<sup>42</sup> PD 1746, Section 3.

<sup>43</sup> Implementing Rules and Regulations of PD 1746 (IRR 1746), Section 3.1(a), as amended by the Omnibus Investment Code of 1987, Chapter III, Book II, Article 48.



### *Foreign Investments Act*

The Foreign Investments Act of 1991 allows 100% foreign equity ownership in all other industries not included in Items (a) to (c) above, subject to the following conditions:

- export enterprises that export at least 60% of their output or products purchased domestically;<sup>44</sup> and
- domestic enterprises with:
  - US\$200,000.00 or more paid-in capital; or
  - US\$100,000.00 or more paid-in capital, if they deal in advanced technology as determined by the Department of Science and Technology, or employs at least 50 employees.<sup>45</sup>

#### (d) Filipino First Policy for Labor, Materials, and Goods

The Constitution also adopts a Filipino First policy. Art. XII, Sec. 12 mandates the State to “promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive.” To this end, the Constitution and other laws expressly promote preference for Filipino labor and goods. Among these are:

- The limitations on the practice of profession in the Philippines under Art. XII, Sec. 14 of the Constitution;
- For those qualified to practice or seek employment in the Philippines, the Labor Code requires the issuance of an alien employment permit to allow an alien to work in the country. Such permit will be issued only if no Filipino is available, able, willing and competent to perform the services required.<sup>46</sup>

#### 4. Analysis of the Constitutional Provisions in Relation to Negotiating Free Trade Agreements

The overriding mandate of the Constitution for national development is to promote ***Inclusive, Equitable and Sustained Growth*** that improve the quality of life for all, especially the poor. It aims to achieve this through a self-reliant, competitive and independent economy driven by the private sector. It also expressly prioritizes Filipinos in the enjoyment of the State’s resources.

By emphasizing the role of the private sector in promoting economic growth and encouraging their competitiveness in the domestic and foreign markets, the Constitution implicitly adopts market economy principles. However, various provisions also limit the free operation of the market as the Constitution seeks to promote other social and economic objectives, to wit:

- to protect against unfair competition and unfair trade practices;
- to promote Filipino participation in strategic industries;
- to ensure the independence of the Philippine economy from foreign control; and
- to promote distributive justice and when the common good requires.

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<sup>44</sup> Rep. Act 7042, Secs. 3(e) and 6.

<sup>45</sup> Rep. Act 7042, Secs. 3(e), 7 and 8.b.2, 2<sup>nd</sup> par.

<sup>46</sup> Presidential Decree No. 442, as amended.

In relation to trade, the Constitution mandates the development of a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of ***equality and reciprocity***.

It is clear from the above discussion that there is a need for a more nuanced approach to determining the Philippines' trade policy and trade negotiating strategy. The goal for inclusive, equitable and sustained growth does not provide any specific guidance for trade negotiators. To this end, Philippine policymakers need to carefully study and formulate a long-term strategy to promote inclusive and sustained growth. In doing so, they need to calibrate plans and objectives based on realities on the ground. These realities include not only the Constitutional ambiguities noted above, but also present capacities, resources and the political will to implement programs and courses of actions.

Once clear policy directions are determined, and these Constitutional provisions are found to hinder the implementation of these policies, then Constitutional amendments should be considered.

The challenge then to policymakers is to find the balance among these seemingly contradictory Constitutional mandates and establish coherent long-term strategies that will guide Philippine negotiators in calibrating their demands and concessions in the process of negotiations. For Philippine negotiators, in the absence of coherent policy directions, the challenge is to ensure that the free trade agreement would provide policy space for future development planning.

## **B. Framework for a Philippine Trade Policy**

### **1. The Philippine Development Plan 2011-2016**

While there exists ambiguities in the Constitutional mandate as discussed in item A above, some guidance can be had from the government's national development plans. In particular, the government has released its medium term development plan, the Philippine Development Plan 2011-2016 ("PDP 2011-2016")<sup>47</sup> issued by Pres. Benigno C. Aquino III. The plan outlines the 5-year goals of the present administration. Following the general mandate of the Constitution, i. e., to promote inclusive and sustained growth, the paper will examine only relevant sections of the PDP 2011-2016. Areas of interest can be found in Chapter 1 (In Pursuit of Inclusive Growth)<sup>48</sup> and Chapter 3 (Competitive Industry and Services Sectors)<sup>49</sup> of the PDP 2011-2016.

#### **a. Inclusive Growth**

The PDP 2011-2016 defines inclusive growth as "*growth that is rapid enough to matter, given the country's large population, geographical differences, and social complexity. It is sustained growth that creates jobs, draws the majority into the economic and social mainstream and continuously reduces mass poverty.*"<sup>50</sup>

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<sup>47</sup> Memorandum Circular No. 3.

<sup>48</sup> PDP 2011-2016: 18-34.

<sup>49</sup> PDP 2011-2016: 62-100.

<sup>50</sup> PDP 2011-2016: 18.

It, however, acknowledges that the Philippines have, so far, failed to achieve that economic ideal as it has been perennially suffering from “low growth, weak employment generation and persistently high inequality.”<sup>51</sup><sup>52</sup> It traces these weaknesses to the following factors:

- Inadequate infrastructure;<sup>53</sup>
- Poor governance;<sup>54</sup>
- Inadequate levels of human development;<sup>55</sup> and
- Poor and degraded state of the environment and natural resources.<sup>56</sup>

In the medium-term, at least over the period covered by the PDP from 2011 to 2016, the PDP 2011-2016, the Philippine government formulated a set of strategies and programs to address the above constraints. These strategies and programs cover:

- Massive investment in physical infrastructure;<sup>57</sup>
- Promotion of transparent and responsive governance;<sup>58</sup>
- Investment in human development through education reform, access to basic social services and stronger safety nets and social protections against shocks;<sup>59</sup>
- Employment generation;<sup>60</sup> and
- Implementation of complementary strategies.<sup>61</sup>

#### b. Competitiveness

Various competitiveness indicators such as the World Competitiveness Yearbook of the International Institute for Management and Development, the Global Competitiveness Index Rankings of the World Economic Forum and the Doing Business Indicators of the International Finance Corporation-World Bank<sup>62</sup> show the Philippines lagging behind its Asian and ASEAN neighbours over the past decade or so.<sup>63</sup>

While acknowledging that the country is doing well in several key sectors, particularly the business process outsourcing and tourism industries, the PDP 2011-2016 also identifies areas requiring improvement, such as in domestic and foreign investments, competitiveness of micro, small and medium enterprises (MSMEs), employment matching, and consumer policy.<sup>64</sup>

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<sup>51</sup> Philippine Gini coefficient in 2009 is 0.4484 posting a decrease of 0.0096 from 2006 (NSCB 2009). The Gini coefficient is the most commonly used measure of inequality. It “varies between 0, which reflects complete equality and 1, which indicates complete inequality”, i. e. that one person has all the income or consumption and others have none. (The World Bank, Poverty Reduction & Equity,

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20238991~menuPK:492138~pagePK:148956~piPK:216618~the SitePK:430367,00.html>). Thus, the farther the Gini coefficient is from 0, the greater the inequality.

<sup>52</sup> PDP 2011-2016: 21.

<sup>53</sup> PDP 2011-2016: 21.

<sup>54</sup> PDP 2011-2016: 22.

<sup>55</sup> PDP 2011-2016: 25.

<sup>56</sup> PDP 2011-2016: 25.

<sup>57</sup> PDP 2011-2016: 26.

<sup>58</sup> PDP 2011-2016: 27.

<sup>59</sup> PDP 2011-2016: 28.

<sup>60</sup> PDP 2011-2016: 29.

<sup>61</sup> PDP 2011-2016: 30.

<sup>62</sup> Citations to follow.

<sup>63</sup> See PDP 2011-2016: 63-65.

<sup>64</sup> See PDP 2011-2016: 67-79.

To increase the country's competitiveness in its industry and services, the PDP 2011-2016 formulated the following strategic framework:

**Table 3. Strategic Framework for Industry and Services**

Vision	Goals	Strategies and Action Plans
Globally-Competitive and Innovative Industry & Services Sector Contributing to Inclusive Growth and Employment Generation	1. Improved business environment	Improve governance <ul style="list-style-type: none"> <li>• Promote a consistent, predictable and responsive policy environment</li> <li>• Streamline bureaucratic procedures and foster transparency</li> <li>• Promote e-commerce and ICT-enabled automation</li> <li>• Encourage partnerships with the private sector</li> </ul>
		Strengthen economic zones
		Strengthen national brand/identity awareness
	2. Increased productivity and efficiency	Intensify the culture of competitiveness <ul style="list-style-type: none"> <li>• Develop human capital</li> <li>• Promote mutually-agreed upon work arrangements</li> <li>• Strengthen tripartite industrial peace councils</li> </ul>
		Focus interventions in key industry areas <ul style="list-style-type: none"> <li>• Implement investment promotion, industry development, and incentives in job-generating areas</li> <li>• Implement export development activities in competitive industries with high growth potential</li> </ul>
		Enhance firm-level support for MSMEs <ul style="list-style-type: none"> <li>• Provide business development services</li> <li>• Provide access to financing</li> <li>• Develop livelihood programs into sustainable micro-enterprises</li> <li>• Promote entrepreneurship among overseas Filipinos</li> <li>• Strengthen science, technology innovation for local competitiveness</li> </ul>
		Expand industry cluster development
		Increase market access through effective bilateral, multilateral and regional agreements

	3. Enhanced consumer welfare	Encourage consumer products and services satisfaction <ul style="list-style-type: none"> <li>• Intensify consumer education/advocacy</li> <li>• Intensify consumers protection and trade regulation</li> <li>• Develop standards for products and services</li> </ul>
		Improve supply chains of basic and prime commodities

Source: Figure 3.4 Strategic Framework for Industry and Services, PDP 2011-2016.

## 2. The Philippine Export Development Plan 2011-2013<sup>65</sup>

The Philippine Export Development Plan of 2011-2013 (“PEDP 2011-2013”) outlines the Philippines’ export strategy up to 2016 (even while the plan only covers up to 2013). By 2016, it aims to achieve total exports that will exceed US\$120 billion. It plans to achieve this by developing key export sectors from current business. These are: IT-BPO and other services; electronics; agribusiness products; minerals; shipbuilding; motor vehicle parts; garments and textiles; homestyle products; and wearables. “Green exports” will also be promoted and developed.

To promote the growth of exports, in general, the PEDP 2011-2013 establishes the following core product strategies:

- Move up the value chain
- Capture higher value processes in the global supply chain.
- Develop product linkages for natural, organic and certification-enabled products.

It also establishes the Philippines’ market strategy that covers:

- Maximizing the benefits of Free Trade Agreements.
- Targeting high-growth emerging markets.
- Attracting the migration of supply chain nodes to the Philippines.

It also plans to integrate tourism, services and merchandise trade into its export promotion strategy. The strategy also focuses on quality rather than quantity. It includes providing “SME assistance in finished goods marketing and continuous training for workers in the exporting community.”

### *Analysis of the PDP 2011-2016 and the PEDP 2011-2013*

The PDP 2011-2016 and the PEDP 2011-2013 could provide guidance to Philippine trade negotiators in the negotiations with the EU for a free trade agreement. The focus of the PDP 2011-2016, as far as trade and economic development is concerned is to promote inclusive growth and increase the competitiveness of the Philippine market. Increasing Philippine

<sup>65</sup> PEDP 2011-2013, [http://www.philexport.ph/barterfli-philexport-file-portlet/download/phil-initiatives/Approved\\_PEDP\\_2011-2013.pdf](http://www.philexport.ph/barterfli-philexport-file-portlet/download/phil-initiatives/Approved_PEDP_2011-2013.pdf).

competitiveness dovetails into the focus of PEDP 2011-2013 in its core product and market strategies.

However, the focus on quality rather than quantity should be clarified as not all Philippine industries are ready and equipped to move up the value chain. Industries, such as BPO, electronics and garments, may be among the few industries at this time that show potential and are, in fact, already moving up the value chain. However, a different strategy should be applied to growing industries, particularly, those involving small and medium enterprises (SMEs).

The challenge for Philippine policymakers is in providing clear and coherent direction on how the government intends to achieve inclusive growth and competitiveness through trade. As the PDP 2011-2016 only establishes a medium-term development plan, it cannot provide a long-term view for Philippine negotiators in making demands and concessions during the negotiations.

The challenge for Philippine negotiators, on the other hand, is how to incorporate inclusive growth objectives into its negotiating strategy. This would require clear policy direction and an understanding of the country's employment promotion policies, and SME development policy, among others. The focus of the PEDP 2011-2013 on supporting SMEs only with respect to finished goods marketing is rather limited, given the vast potential of Philippine SMEs to contribute to the Philippine economy.

## **II. EU Trade and Development Strategy**

Part of the common commercial policy of the European Union is the contribution to the "harmonious development of world trade, the progressive abolition of restrictions on international trade and foreign direct investment, and the lowering of customs and other barriers."<sup>66</sup>

To this end, it actively supports the work of the multilateral trade system and, through the WTO, seeks to:

- Ensure new markets for European companies to promote their global competitiveness;
- Observe trade rules and ensure that others do so;
- Promote sustainable development in trade.<sup>67</sup>

At the Doha Development Round of negotiations, to further its interest and principles, the EU aims to:

- Increase market access and trade flows by cutting tariffs and harmonizing trade regulatory systems in the industrial goods sector in both developed and emerging economies.<sup>68</sup>
- Clarify and improve WTO rules on trade distorting subsidies in the production of industrial goods;
- Reform farm subsidies, where the EU offered to cut farm tariffs by 60%, reduce trade distorting farm subsidies by 80% and completely eliminate farm export subsidies;

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<sup>66</sup> TFEU, Part V, Title II, Art. 206 (ex Article 131 TEC).

<sup>67</sup> EU & WTO: Why does the EU participate in the WTO?, EC website, accessed 18 June 2012, available at <http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/>.

<sup>68</sup> EU & WTO: The Doha Round, EC website, accessed 18 June 2012, available at <http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/doha/>.

- Promote access to trade in services while respecting public interest concerns;
- Agree on a package of development measures; and
- Improve trade remedy rules, update rules on trade facilitation, and improve protection of geographical indications.<sup>69</sup>

Mindful of the challenges and opportunities brought about by globalization, EU has adopted, in 2006, an industrial and trade policy (the “2006 Growth and Jobs Strategy”) that seeks to promote its competitive advantage in high technology products, innovation, research and development in the fast evolving global knowledge economy.<sup>70</sup>

To this end, it seeks to: (a) promote trade openness and discourage protectionism among its members; (b) enhance its competitiveness in the global market by continuously innovating and moving up the value chain; (c) ensure better protection of its intellectual property rights (IPR) in third country markets, particularly, in China, ASEAN and Korea; (d) promote genuine market opening of its trade partners and the transparent application of international rules; and (e) secure meaningful commitments from the most advanced fast-growing and competitive emerging economies, such as China, Brazil, Russia, and India, which combine high growth with high entry barriers against EU exports.<sup>71</sup>

Securing meaningful commitments would entail addressing: (a) non-tariff barriers, such as restrictive government procurement rules, unregulated anti-competitive practices, excessive sanitary and phytosanitary requirements, customs rules, non-transparent, discriminatory, non-proportionate regulations to protect human health and the environment, and capacity constraints, among others; (b) export taxes and restrictions on access to resources; (c) restrictions on the permanent establishment of EU firms in emerging economies; and (d) enforcement of rules for violating IPR rights.<sup>72</sup>

### *EU Approach to International Trade and Regional Integration*

The EU enters into free trade agreements and chooses its trade partners for various reasons. For example, its agreements with countries in Eastern and Southern Europe are intended to further its foreign policy and security interests. Those entered into with African, Caribbean and Pacific (ACP) countries, on the other hand, are driven by development goals.<sup>73</sup>

Other EU FTAs are commercially-motivated. Woolcock identifies three broad commercially-motivated reasons for EU’s entry into free trade agreements, to wit: (a) “neutralizing potential trade diversion resulting from FTAs” with rival third countries, such as the US and Japan; (b) “forging strategic links with countries or regions experiencing rapid economic growth;” and (c) “enforcement of international trade rules.”<sup>74</sup>

<sup>69</sup> EU & WTO: The Doha Round, EC website, accessed 18 June 2012, available at <http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/doha/>.

<sup>70</sup> See Global Europe: Competing in the World, A Contribution to the EU’s Growth and Jobs Strategy. Brussels: European Commission (Commission Staff Working Document/Annex to the Communication to the Council, the European Parliament, and the European Economic and Social Committee and the Committee of the Regions/ SEC 2006 1230) 4 October [http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130370.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130370.pdf).

<sup>71</sup> Global Europe, 6-7.

<sup>72</sup> Global Europe, 8-10.

<sup>73</sup> Stephen Woolcock, European Union policy towards Free Trade Agreements, ECIPE Working Paper No.03/2007 <<http://www.felixpena.com.ar/contenido/negociaciones/anexos/2010-09-european-union-policy-towards-free-trade-agreements.pdf>>.

<sup>74</sup> Woolcock, 3.

With the rapid growth of a significant number of ASEAN states, the EU is pursuing an FTA, either regionally or with each individual state to strengthen strategic links with a rapidly growing region that is expected to be an important market in the future.<sup>75</sup>

While promoting its trade and commercial interests in its relations to third countries, the EU is committed to strengthening the multilateral rules-based system under the WTO. It believes that the multilateral system is the most effective means of expanding trade. With its commitment to the multilateral system, the EU approaches these negotiations as a means to build and promote multilateral liberalization.<sup>76</sup>

Its key economic criteria for choosing trade partners are: (a) their market potential as reflected in their economic size and growth; and (b) the level of protection against EU export interests. Using this criteria, EU has determined ASEAN (as noted above), Korea and Mercosur as priorities for bilateral free trade agreements.<sup>77</sup> To this end, the EU has already signed a Free Trade Agreement with Korea, which became effective on July 01, 2011.<sup>78</sup>

In 2007, the European Council issued a negotiating directive for negotiations on a free trade agreement with ASEAN.<sup>79</sup> However, negotiations were stalled due, among others, to EU's reluctance to negotiate with Myanmar, and the ASEAN's internal requirement that all regional decisions should be arrived at through consensus. (See ASEAN Charter).

EU, however, remained engaged in the region and decided to pursue bilateral negotiations with ASEAN states. It has already launched negotiations with Singapore and Malaysia in 2010,<sup>80</sup> entered into Partnership and Cooperation Agreements with Indonesia and the Philippines, and is preparing for bilateral trade negotiations with the Philippines.

### *Impact of the Global Financial Crisis*

The onset of the 2007-2008 global financial crisis and the consequent debt crisis that has been plaguing EU to this day precipitated a rethinking of its long-term development strategy. In 2010, the European Commission issued a Communication entitled, "Europe 2020: A strategy for smart, sustainable and inclusive growth."<sup>81</sup>

The Communication recognized that: (a) the crisis has eroded recent economic progress of the EU; (b) the EU's structural weaknesses were exposed; and (c) global challenges, in the form of competition from emerging economies, defects in the global financial markets, and climate change and resource constraints, are intensifying.<sup>82</sup>

To address these challenges, EU identified three key priorities to its strategy, to wit:

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<sup>75</sup> Woolcock, 4.

<sup>76</sup> Global Europe, 15-16.

<sup>77</sup> Global Europe, 16.

<sup>78</sup> See Kelly Olsen, South Korea-EU free trade agreement takes effect, Associated Press, 01 July 2011, accessed 24 June 2012, available from <http://news.yahoo.com/south-korea-eu-free-trade-agreement-takes-effect-010216569.html>; See also European Commission, International affairs: Free Trade Agreements, accessed 24 June 2012, available from [http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index\\_en.htm](http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm)

<sup>79</sup> Draft EU-ASEAN FTA negotiating directive (2007), accessed 24 June 2012, available from <http://www.bilaterals.org/spip.php?article8211>

<sup>80</sup> European Commission, International affairs: Free Trade Agreements, accessed 24 June 2012, available from [http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index\\_en.htm](http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm)

<sup>81</sup> COM (2010) 2020, Brussels, 3.3.2010.

<sup>82</sup> Europe 2020, 5-6.



- smart growth - developing an economy based on knowledge and innovation;
- sustainable growth - promoting a more resource efficient, greener and more competitive economy
- inclusive growth - fostering a high-employment economy delivering economic, social and territorial cohesion.<sup>83</sup>

These strategies are interlinked and build on each other. In particular, the focus on building a knowledge economy driven by research and innovation necessarily promotes the goals of sustainable growth as EU seeks to retain its competitiveness in innovation and advanced technologies.

The Communication of the European Commission entitled, “Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU’s 2020 Strategy,”<sup>84</sup> sets out as a trade policy priority gaining access to the largest and fastest-growing economies through ambitious free trade agreements. Among these are agreements with ASEAN countries.<sup>85</sup>

If it successfully concludes its target free trade agreements with these economies, it is looking at: (a) half of its external trade being covered by free trade agreements, (b) a fall of average tariff on its external trade by about one half (around 1.7%), and on imports by about one-fifth (around 1.3%); (c) together, these are expected to add 0.5% to EU GDP in the long term.<sup>86</sup>

Thus, as the Philippines prepares to negotiate with the EU it should keep in mind that the EU will be pushing for greater market access to its products and services where it has a competitive advantage, such as in green technologies, agriculture, and other industries where they have strong innovative capacities.

Necessarily, it will want to ensure strong protections for its intellectual property rights, a level playing field for its products that should be protected by a strong competition law and enforcement, and access to government procurement in services where its industries are particularly strong, such as water utilities.

It will also want to make sure that trade remedies would be used sparingly by the Philippines and if used, should be based on transparent procedures and predictable standards. Hence, the EU generally adopts WTO trade remedy rules to ensure harmonization across the WTO discipline and its various FTAs.

### **III. Analysis and Assessment of Interests**

The Philippine Constitution, existing related laws and the current national development plans provide a framework for Philippine negotiators to assess the country’s offensive and defensive interests in a free trade agreement negotiation. However, these suffer from the following constraints:

- While there is a clear mandate for inclusive and sustained growth, the more specific provisions of the Constitution may, in practical terms, be incompatible or inconsistent with

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<sup>83</sup> Europe 2020, 8.

<sup>84</sup> COM(2010)612.

<sup>85</sup> Trade Growth and World Affairs: 9-10.

<sup>86</sup> Trade Growth and World Affairs: 10.

this mandate. There is, thus, a greater challenge for policymakers and negotiators to find coherence in these provisions to guide the country's negotiating strategy.

- The absence of an effective evaluation and monitoring mechanism that will inform negotiators of aspects in implementation that are weak and would need sufficient policy space for the country to adjust to the impacts of a new free trade agreement;
- The absence of a long-term development plan that ensures continuity in policy direction, plans and programs. Like all other administrations before it, the present administration has put together a medium-term development plan that covers only a period of five (5) years with no certainty of continuity in the next administration. The challenge for negotiators is that they cannot take a long-term view in ensuring safeguards and opportunities for the Philippine economy under the free trade agreement.

### C. Philippine Defensive Interests

In general, when entering into a free trade agreement the Philippines would want to ensure that it is able to maximize the long-term economic benefits of such agreement. For this purpose, it would want to ensure that:

- it has sufficient policy space to promote inclusive and sustained growth as mandated by the Constitution;
- local viable industries that could potentially be affected by import surges and lowering of prices resulting from the implementation of the PH-EU FTA have sufficient safeguards and time to adjust to the increase in competition;
- losing industries have access to resources and adequate time to re-invent themselves and invest in other viable industries;
- it would be able to maintain an environment where new local entrants in an industry can build capacity to compete with like EU imported products in the long-term.
- its small and medium enterprises are provided opportunities and policy space to grow and take advantage of the more advanced technology and financial resources of the EU.

### D. Philippine Offensive Interests

As a trading partner of the EU, the Philippines would have an interest to maximize the benefits of gaining entry into EU markets. In particular, it would be interested to gain access to:

- EU technology and know-how;
- EU markets, which includes support in complying with its import requirements, such as its TBTs and SPS'.

## PART III. COMPETITION POLICY

### A. Introduction

The existence of competition policy necessarily implies the operation of a market economy where goods and services are freely exchanged and prices are dictated by how consumers respond to available goods and services in the market.

The underlying model of a competitive market-driven economy is the concept of perfect competition. It recognizes “consumer sovereignty” as the driver of market activity. It aims for the ideal perfectly competitive market that assumes:

1. The existence of numerous market players (buyers and sellers) where no one person or group of persons have the power to significantly impact market prices;
2. There is no collusion among buyers or sellers;
3. Consumer preferences are reflected through the prices of the goods and services in the market;
4. All relevant prices are known to producers,
5. All information on available inputs that will produce different variations of outputs that will allow producers to maximize profits are equally and generally accessible to all producers;
6. Producers make production decisions solely to maximize profits; and
7. All producers have equal access to sources of inputs and no artificial barriers exist to the production of any product.<sup>87</sup>

The assumption is that all market players have equal access to inputs and outputs, as well as information on prices. Where information, goods and services are accessible, producers are able to make the best profit-maximizing decision that will meet consumer preferences. The result would be an efficient perfectly competitive economy.

This is not the case in the real world. Real world markets are imperfect markets that are characterized by, among others, state and private monopolies, inadequate information, market segmentation, immobile and/or scarce factors, failing price mechanisms, and other artificial and structural barriers to entry. Competition policy is intended to address these imperfect market structures to create an environment that promotes efficiency and competition.

However, achieving market efficiency is only one of the many goals of a state. While the adoption of competition policy reflects state recognition of the conditions of an imperfect market that constrains competition, the content of these policies and their implementation varies among economies. How a state adopts economic and development policies are also shaped by various social and economic values existing at the time of their adoption.<sup>88</sup>

For example, the passage of the United States Sherman Act of 1890, which criminalized agreements in restraint of trade and monopolization was a response to the proliferation of cartels and trusts that set high prices to maintain desired margins. The Clayton Act of 1919, on the other hand, sought to address the effect of the Sherman Act that encouraged firms to form mergers to avoid the prohibitions directed against trade restrictive agreements among individual

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<sup>87</sup>Phillip Areeda and Louis Kaplow, “Antitrust Analysis: Problems, Texts and Cases, Little, Brown and Company, Boston and Toronto. 1988, 8-9.

<sup>88</sup> See Michal Gal, “The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries”, (2004). *New York University Law and Economics Working Papers*. Paper 10. <[http://lsr.nellco.org/nyu\\_lewp/10](http://lsr.nellco.org/nyu_lewp/10)>

firms. These legislations were intended to address the abuse of market power of dominant firms existing at that time.<sup>89</sup>

In Germany, on the other hand, at the time of the adoption of its first competition law, the Cartel Law of 1923, greater value was placed on the freedom of contracting. Cartels were generally regulated and discouraged only in extreme cases.<sup>90</sup> In the meantime, in South Africa, with its history of apartheid, the ideals of Black Economic Empowerment (BEE)<sup>91</sup> were incorporated in its Competition Act of 1999. The objectives of the Competition Act include the promotion of “a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.” This reflects more public interest considerations (i. e., equitable distribution of wealth) rather than economic efficiency.<sup>92</sup>

## **B. Competition Policy under the Multilateral and Regional Regimes**

With the establishment of the multilateral trade regime and efforts of various regional groupings to integrate, such as the EU and the Association of Southeast Asian Nations (ASEAN), competition policy has gained importance in international trade. As economies removed or reduced tariff and non-tariff barriers, structural limitations and statutory and regulatory constraints in domestic markets limited market access to imported goods. In addition, regulation of anti-competitive behavior and abuses of dominant position became a challenge as firms expanded their presence to various markets. These allowed these firms to take advantage of economies with weak competition regimes and gain control over these markets.

While various economies, particularly developing countries, are still grappling with the challenges to open their markets to competition and prevent market abuses, developments in international trade also highlighted the need to develop harmonized international competition policies.

Efforts to introduce competition policy within the international trade framework were first initiated during the failed negotiations for the International Trade Organization (ITO) in 1948. The interaction between trade and competition policy was again raised in the Singapore Ministerial Conference of the World Trade Organization (“WTO”) in 1996. At the Conference, a Working Group on the Interaction between Trade and Competition Policy was established and mandated to “study the issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.”<sup>93</sup>

In the Doha Development Round, it was initially agreed to negotiate the modalities on negotiations on competition policy.<sup>94</sup> However, WTO members failed to reach consensus on the

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<sup>89</sup> See Chapter 1: Competition Policy: History, Objectives and the Law. <<http://www.mef.gub.uy/competencia/documentos/cap1.pdf>>; See also William E. Kovacic and Carl Shapiro, “Antitrust Policy: A Century of Economic and Legal Thinking.” 2000. *Journal of Economic Perspectives*, Vol. 14, Number 1: 43-60. <<http://faculty.haas.berkeley.edu/shapiro/century.pdf>>

<sup>90</sup> See Chapter 1: Competition Policy: History, Objectives and the Law. <<http://www.mef.gub.uy/competencia/documentos/cap1.pdf>>;

<sup>91</sup> Defined by the Black Economic Empowerment Commission as “an integrated and coherent socio-economic process within the context of the national transformation programme which is aimed at redressing the imbalances of the past by substantially and fairly transferring the ownership, management and control of South Africa’s financial and economic resources to the majority of its citizens.” – BEECom Report, 2001, cited in Neo Chabane, “An Evaluation of the Influence of BEE on the Application of Competition Policy in South Africa.” 2003. Development Policy Research Unit. School of Economics, University of Cape Town

<sup>92</sup> Competition Act (1999), Section 2 (f); Neo Chabane, “An Evaluation of the Influence of BEE on the Application of Competition Policy in South Africa.” 2003. Development Policy Research Unit. School of Economics, University of Cape Town

<sup>93</sup> Singapore Ministerial Declaration, para. 20.

<sup>94</sup> Doha Ministerial Declaration, paras. 23-25.

modalities due to irreconcilable disagreements. Thus, after the deadlock in the 2003 Cancun Ministerial Conference, the WTO General Council decided to shelve negotiations in 2004.<sup>95</sup>

Despite the stalled WTO negotiations on competition policy, initiatives at the bilateral, regional and international level are bringing competition policy within the international trade framework. At the international level, the Organization for Economic Cooperation and Development (OECD) has been actively promoting international cooperation and communication through its Competition Law and Policy Committee.<sup>96</sup> Bilateral and regional trade agreements have also incorporated provisions on competition policy.

In ASEAN, efforts to establish an ASEAN Economic Community (AEC) by 2015<sup>97</sup> are already underway. Among the goals of the AEC is to establish a competitive economic region. One of the tasks set to achieve this was to develop regional guidelines on competition policy by 2010.<sup>98</sup> The ASEAN Experts Group on Competition (AEGC) was established to prepare the guidelines, which was released in 2010.<sup>99</sup>

The ASEAN Regional Guidelines on Competition Policy (Regional Guidelines) is intended to provide a guide and a framework for ASEAN countries in adopting and implementing their respective competition laws and policies. The Regional Guidelines was based on country experiences and international best practices. It is not mandatory for ASEAN states to follow the guidelines. This is intended as a reference for ASEAN countries in adopting and implementing each state's competition laws and policies, based on their respective levels of development.<sup>100</sup>

Drawing on country experiences and international best practices, the Regional Guidelines defines competition policy as "a governmental policy that promotes or maintains the level of competition in markets, and includes governmental measures that directly affect the behavior of enterprises and the structure of industry and markets."<sup>101</sup>

It basically covers two elements: (a) establishing a set of policies that promote competition in markets including through trade policy, elimination of restrictive trade practices, removing barriers to market entry and exit, reducing unnecessary government intervention, and relying on market forces; (b) a competition law that is aimed at preventing anti-competitive business practices, abuse of market power and anti-competitive mergers.<sup>102</sup>

Presently, only Indonesia, Singapore, Thailand and Vietnam have their own competition laws and competition regulatory bodies. Malaysia has sector-level regulations that regulate competition.<sup>103</sup> Various Philippine laws, including the Philippine Constitution, the Revised Penal Code and the Civil Code, provide for the regulation of monopoly power and prohibition against anti-competitive practices. Several sectors are also governed by competition rules. However, these laws are usually never enforced or implemented.

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<sup>95</sup> July 2004 package, adopted 01 August 2004.

<sup>96</sup> Bernard Hoekman (2002), Competition Policy and Preferential Trade Agreements, World Bank and Center for Economic Policy Research, The International Bank for Reconstruction and Development/World Bank, Washington, DC. <http://cdi.mecon.gov.ar/biblio/docolec/tb1015.pdf>, 04 July 2012.

<sup>97</sup> See ASEAN Economic Community (AEC) Blueprint, Public Affairs Office, The ASEAN Secretariat. Jakarta; See also Declaration on the ASEAN Economic Community Blueprint, 13<sup>th</sup> ASEAN Summit, 2007, Singapore.

<sup>98</sup> AEC Blueprint: 18.

<sup>99</sup> ASEAN Regional Guidelines on Competition Policy, ii.

<sup>100</sup> ASEAN Regional Guidelines on Competition Policy, 1-2.

<sup>101</sup> ASEAN Regional Guidelines on Competition Policy, 3.

<sup>102</sup> ASEAN Regional Guidelines on Competition Policy, 3.

<sup>103</sup> AEC Blueprint, 18, footnote 1.

The Philippines legislature, both in the House of Representatives and the Senate, is currently considering different versions of a competition bill. Features of these and the existing Philippine competition provisions will be discussed further below.

### C. Philippine Competition Policy

Section 19, Article XII (National Economy and Patrimony) of the Philippine Constitution provides guidance on the parameters of a competition law and policy in the Philippines. It provides that, “The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.”

The provision against monopolies, combinations in restraint of trade and unfair competition first appeared in the 1973 Constitution in Sec. 2, Article XIV. However, elements of these prohibitions were actually already in Philippine statute books as early as 1930. Act 3815 (1930) or the Revised Penal Code of the Philippines in Articles 185<sup>104</sup> and 186<sup>105</sup> penalizes, bid-rigging, combinations in restraint of trade, monopolies that restrain free competition in the market, horizontal and vertical arrangements and price fixing. In addition, the Civil Code of the Philippines (1949) also provides a cause of action for civil liability for unfair competition in certain sectors.<sup>106</sup>

However, despite these laws, there is very little jurisprudence interpreting their application as very few cases have been filed under these laws. Among the most significant Supreme Court decisions on anti-competitive practices are the cases of *John Gokongwei, Jr. V. Securities and*

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<sup>104</sup> Art. 185. *Machinations in public auctions.* - Any person who shall solicit any gift or promise as a consideration for refraining from taking part in any public auction, and any person who shall attempt to cause bidders to stay away from an auction by threats, gifts, promises, or any other artifice, with intent to cause the reduction of the price of the thing auctioned, shall suffer the penalty of *prision correccional* in its minimum period and a fine ranging from 10 to 50 per centum of the value of the thing auctioned.

<sup>105</sup> Art. 186. *Monopolies and combinations in restraint of trade.* — The penalty of *prision correccional* in its minimum period or a fine ranging from 200 to 6,000 pesos, or both, shall be imposed upon:

1. Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market;
2. Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize and merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market;
3. Any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, of any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, or imported merchandise or object of commerce is used.

If the offense mentioned in this article affects any food substance, motor fuel or lubricants, or other articles of prime necessity, the penalty shall be that of *prision mayor* in its maximum and medium periods it being sufficient for the imposition thereof that the initial steps have been taken toward carrying out the purposes of the combination.

Any property possessed under any contract or by any combination mentioned in the preceding paragraphs, and being the subject thereof, shall be forfeited to the Government of the Philippines.

Whenever any of the offenses described above is committed by a corporation or association, the president and each one of its agents or representatives in the Philippines in case of a foreign corporation or association, who shall have knowingly permitted or failed to prevent the commission of such offense, shall be held liable as principals thereof.

<sup>106</sup> Article 28. Unfair competition in agricultural, commercial or industrial enterprises or in labor through the use of force, intimidation, deceit, machination or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who hereby suffers damage.

Exchange Commission, et al (“Gokongwei v. SEC”),<sup>107</sup> Philippine Ports Authority v. Hon. Rafael L. Mendoza, et al (PPA v. Mendoza),<sup>108</sup> and Francisco S. Tatad v. The Secretary of the Department of Energy (“Tatad v. Secretary of DOE”).<sup>109</sup>

In *Gokongwei v. SEC*, the Court disallowed interlocking directors between competing companies recognizing the “anti-competitive dangers which may arise when an individual simultaneously acts as a director of two or more competing corporations.” In doing so, it relied on the general prohibition against combinations in restraint of trade in the 1973 Constitution. It also cited as persuasive support RPC Article 186, relevant provisions of the US Clayton Act and American related jurisprudence.

In *PPA v. Mendoza*, the Supreme Court allowed the compulsory merger of arrastre-stevedoring services in Philippine Courts. On objections raised against its constitutionality for creating a monopoly, it ruled that monopolies *per se* are not prohibited. It acknowledges that “*there are areas where for special reasons the force of competition, when left wholly free, might operate too destructively to safeguard the public interest.*” In the case of public utilities, the Court ruled that “*by their very nature, certain public services or public utilities such as those which supply water, electricity, transportation, telegraph, etc. must be given exclusive franchises if public interest is to be served.*”

In *Tatad v. Sec. of DOE*, the Court opined that “*the Constitution committed us to the free enterprise system but it is a system impressed with its own distinctness. Thus, while the Constitution embraced free enterprise as an economic creed, it did not prohibit per se the operation of monopolies which can, however, be regulated with public interest. Thus, too, our free enterprise system is not based on a market of pure and unadulterated competition where the State pursues a strict hands-off policy and follows the let-the-devil devour the hindmost rule. Combinations in restraint of trade and unfair competition are absolutely proscribed and the proscription directed both against the State as well as the private sector. This distinct free enterprise system is dictated by the need to achieve the goals of our national economy as defined by Section 1, Article XII of the Constitution which are: more equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.*”

The Constitutional provisions, related general statutes and case law from the early 1970s indicate that over the past four decades, the Philippines as a matter of policy has been committed to a free market economy but reserves the right to regulate private enterprise in the public interest and to promote economic goals.

However, from the 1970s to the 1980’s the Philippine economy was characterized by a protectionist trade regime, high levels of market concentration in various industries, import substitution policies, misdirected incentives and government supports, and concentration of economic power among a small circle of elites that perpetuated their dominance through political linkages. Such competition-inhibiting environment began to unravel in the 1980s that drove the country into recession.<sup>110</sup>

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<sup>107</sup> G. R. No. L-45911, April 11, 1979.

<sup>108</sup> G. R. No. L-48304, September 11, 1985.

<sup>109</sup> G. R. No. 124360, December 3, 1997.

<sup>110</sup> Helen Cabalu, Noelle Doss, Stephanie Fryer-Smith, Peter Kenyon, Paul Koshy, Vicar Valencia, and Nick Wills-Johnson, and Emmanuel Cruz, “Issues in the Implementation of Competition Policy in the Philippines,” Institute for Research into International Competitiveness, 2001: 1-3.

It was only after President Corazon Aquino's accession to power in 1986, that significant market reforms to promote competition were established. Early reforms included gradual reduction of tariffs and removal of quantitative restrictions arising from the Philippines' commitments under the WTO, ASEAN Free Trade Agreements and Asia-Pacific Economic Cooperation, foreign investment liberalization through the Foreign Investments Act of 1991<sup>111</sup> and foreign exchange liberalization.<sup>112</sup>

Under the Ramos, Estrada and Arroyo administrations, significant market reforms in several sectors were implemented. This included the following sectors:

**Table 4. Significant Market Reforms**

Sector	Law	Description	Year Passed	Some Significant Pro-Competitive Reforms
Banking	Rep. Act No. 7653	The New Central Bank Act	1993	Monetary Board shall be composed of 7 members, 5 of whom would come from the private sector
	Rep. Act No. 7721	Foreign Bank Liberalization Act	1994	Foreign banks may acquire or invest in up to 60% of the equity of a domestic bank; or establish a branch in the Philippines, subject to certain conditions
Telecommunications	EO No. 59	Compulsory Interconnection of Telecommunications Networks	1993	Telecommunications network/facilities were made available to qualified entities, thus dismantling PLDT monopoly in the telecommunications industry
	Rep. Act No. 7925	Public Telecommunications Policy Act of the Philippines	1995	Provides a policy framework for ensuring that all telecommunications operators have access to the facilities necessary to be financially viable and offer affordable rates to consumers

<sup>111</sup> Rep. Act No. 7042 (1991).

<sup>112</sup> See Helen Cabalu, Noelle Doss, Stephanie Fryer-Smith, Peter Kenyon, Paul Koshy, Vicar Valencia, and Nick Wills-Johnson, and Emmanuel Cruz, "Issues in the Implementation of Competition Policy in the Philippines," Institute for Research into International Competitiveness, 2001: 3.

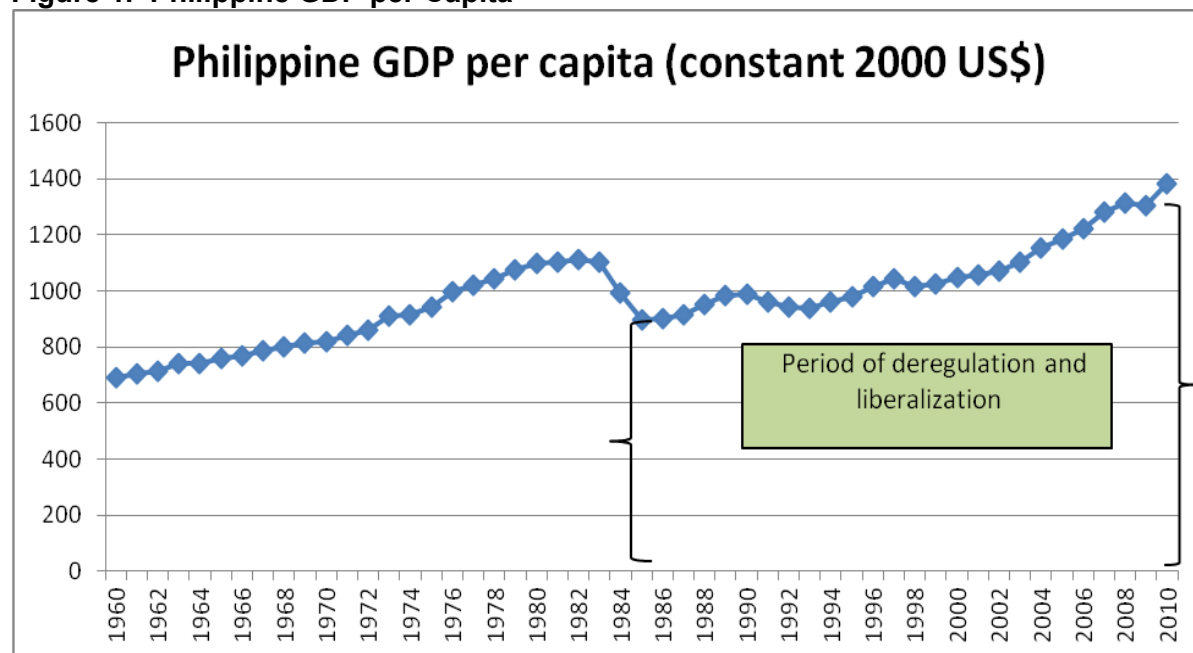


Civil Aviation	EO No. 219	Domestic and International Civil Aviation Liberalization Policy	1995	International Air Transport: Allowed a minimum of 2 official carriers; and International air carriers were allowed to operate within the Philippines as dictated by the national interest and reciprocity Domestic Air Transport: Minimum of 2 operators shall be allowed to operate in each route, and tariffs and fares were liberalized
Port Services	EO No. 212	Accelerating the Demonopolization and Privatization Program For Government Ports	1994	Allowed entry of new port operators and encouraged the participation of the private sector in the operation, maintenance and development of government ports
Downstream Oil	Rep. Act No. 8479	The Downstream Oil Industry Deregulation Act	1998	Established a policy framework to liberalize the downstream oil industry, and promote and encourage new entrants to ensure a competitive market under a regime of fair prices, and adequate and continuous supply of petroleum products.
Retail Trade	Rep. Act No.8762	Retail Trade Liberalization Act	2000	Foreign-ownership of entities engaged in retail trade was allowed subject to certain capitalization requirements
Energy	Rep. Act No. 9136	Electric Power Industry Reform Act	2001	Competition introduced in the generation and supply sectors; the Energy Regulatory Commission was designated as the agency to promote competition, encourage market development, ensure customer choice and penalize abuse of market power.

Source: Author's compilation

Despite these reforms, GDP growth per capita from the start of reforms to 2010 (a period of 24 years) was sluggish, increasing only from US\$903 in 1986 to US\$1,383 in 2010 or an increase of US\$480.00.

**Figure 1. Philippine GDP per Capita**



Source: *World Development Indicators*

Other than motherhood statements found in the Constitution on the Philippines' commitment to a free market economy, the recognition of the dangers of monopolies and combinations in restraint of trade and unfair trade practices, and regard for the public welfare and national economic goals, the Philippines does not have a coherent or comprehensive policy on competition.

The sectoral reforms implemented since the late 1980s comprise a set of disparate rules with no coherent competition framework.

### *Pending Congressional Bills*<sup>113</sup>

Efforts to fill this gap are underway as the two houses of Congress consider separate bills on competition. These are House Bill No. 4835 ("HB 4835") and Senate Bill No. 3098 ("SB 3098"). Both bills seek to promote economic efficiency and competition in the market, prevent undue economic concentration in the hands of a few, and penalize all forms of anti-competitive behavior.<sup>114</sup> Both apply to all areas of trade, industry and commercial economic activity, and economic actors within the Philippines, as well as acts committed outside the Philippines with economic effect within the country. However, SB 3098 expressly exempts liner shipping agreements among vessel-operating ocean carriers that have operated historically in Philippine foreign trade, or are otherwise intended to promote efficiency in industry operations.<sup>115</sup>

<sup>113</sup>These are pending bills as of 2012 under the 15th Congress. Bills have since been refiled under the current 16th Congress and pending with the responsible House and Senate Committees.

<sup>114</sup> HB 4835 and SB 3098, Section 2.

<sup>115</sup> HB 4835 and SB 3098, Section 3.

Both HB 4835 and SB 3098 also prohibit and penalize anti-competitive agreements and conduct, abuse of dominant position and anti-competitive mergers.<sup>116</sup> They provide for a leniency program, non-adversarial administrative remedies, remedies under regular courts<sup>117</sup> and administrative and criminal penalties for violation of the law.<sup>118</sup>

The most significant distinction between the two Congressional bills is in the establishment of the relevant competition authority. HB 4835 provides for the creation of an independent Philippine Fair Competition Commission with its own set of Commissioners and staff that will be under the Office of the President for budgetary purposes. SB 3098, on the other hand, establishes an Office for Competition attached to the Department of Justice.<sup>119</sup> Both these bodies have investigative, administrative, disciplinary and general oversight powers over competition matters.<sup>120</sup>

#### *PH-EU Partnership and Cooperation Agreement.*

For PH-EU FTA negotiations, the PH-EU Partnership Cooperation Agreement (“PH-EU PCA”) could provide guidance on potential areas of negotiation. Article 17 of the PH-EU PCA provides:

- “1. *The Parties shall promote the establishment and maintenance of competition rules and authorities to implement them. They shall promote the application of these rules in an effective, non-discriminatory and transparent way in order to foster legal certainty in their respective territories.*
2. *To this end, the Parties will engage in capacity building activities in the area of competition policy subject to the availability of funding for such activities under the Parties’ cooperation instruments and programmes.”*

As noted above, the Philippines does not have a comprehensive competition law and policy. It is presently in the process of passing a competition bill in both houses of Congress with no certainty of passage. Acknowledging this reality, the parameters set by the PH-EU PCA covers the establishment of such law and policy, enforcement mechanisms, and support for capacity building.

#### **D. Competition Policy in EU FTAs and EU Competition Policy**

The EU is among the strongest pushers for the inclusion of competition policy within free trade agreements (FTAs). However, while most of the recent EU FTAs have a competition component, there is no fixed template for these provisions.

##### a. Competition Policy in EU FTAs

The 2011 South Korea-EU Free Trade Agreement (the “South Korea-EU FTA”),<sup>121</sup> for example, has a whole chapter<sup>122</sup> devoted to it. Both parties commit to maintain

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<sup>116</sup> HB 4835 and SB 3098, Sections 8, 9 and 10.

<sup>117</sup> HB 4835, Sections

<sup>118</sup> HB 4835, Sections 11 and 12; SB 3098, Sections 11 and 21.

<sup>119</sup> HB 4835 and SB 3098, Section 5.

<sup>120</sup> HB 4835, Sections 6, 13 and 15; and SB 3098, Sections 6, 12 and 13.

<sup>121</sup> Effective July 2011.

respective competition laws to regulate restrictive agreements, concerted practices (as determined by each party's competition laws), abuse of dominance,<sup>123</sup> and maintain competition authorities that will enforce each party's competition laws.<sup>124</sup> The South Korea-EU FTA also prohibits anti-competitive agreements,<sup>125</sup> abuse of dominant position,<sup>126</sup> and monopolies or oligopolies that impede effective competition.<sup>127</sup> The same FTA also provides for rules on public enterprises and state monopolies, cooperation, consultation and dispute settlement mechanisms to address competition issues between the Parties, and the application of competition laws in removing distortions to competition caused by subsidies.<sup>128</sup>

South Korea has quite well-developed competition law and enforcement mechanisms.<sup>129</sup> It participates in discussions for cooperation in competition law and policy in the Organization for Economic Cooperation and Development (OECD), International Competition Network (ICN), Asia Pacific Economic Cooperation (APEC), United Nations Conference on Trade and Development (UNCTAD), and other multilateral fora. It is a Bureau member of the OECD Competition Committee since 2001, and a member of the Steering Group of ICN since its inception in 2001.<sup>130</sup>

It has also recently signed a bilateral agreement with the European Union in 2009 entitled, "Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities."<sup>131</sup>

It is thus not surprising that provisions of the FTA generally reflect international standards, particularly, on regulated entities and prohibited actions.

The 2000 Mexico-EU Free Trade Agreement ("Mexico-EU FTA"),<sup>132</sup> on the other hand, simply mandates the Parties to agree on appropriate measures to "*prevent distortions or restrictions of competition that may significantly affect*" their bilateral trade. To this end, it mandates the Joint Council<sup>133</sup> to establish mechanisms for coordination and cooperation between each country's authorities to ensure transparency of enforcement of competition laws and policies.<sup>134</sup> The Joint Council is also mandated to decide matters covering: (a) agreements, decisions and concerted practices by and between undertakings; (b) abuse of dominant position; (c) mergers; (d) commercial state monopolies; (e) public undertakings enjoying special and exclusive rights.<sup>135</sup>

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<sup>122</sup> South Korea-EU FTA, Chapter Eleven.

<sup>123</sup> South Korea-EU FTA, Article 11.1 (2).

<sup>124</sup> South Korea-EU FTA, Article 11.3 (1).

<sup>125</sup> South Korea-EU FTA, Article 11.1 (2)(a).

<sup>126</sup> South Korea-EU FTA, Article 11.1 (2)(b).

<sup>127</sup> South Korea-EU FTA, Article 11.1 (2)(c).

<sup>128</sup> South Korea-EU FTA, Articles 11.4 to 11.11.

<sup>129</sup> See Monopolies and Restrictive Trade Practices Act (MRTPA) of 1969.

<sup>130</sup> Korea Fair Trade Commission. 2011. Annual Report.

<sup>131</sup> See Official Journal of the European Union, L.202/36, 4.8.2009.

<sup>132</sup> <<http://eur.lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:202:0036:0041:EN:PDF>>.

<sup>133</sup> Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part (Mexico-EU FTA), Official Journal of the European Communities, L. 276/45, 28.10.2000.

<sup>134</sup> The body established to supervise the implementation of the Mexico-EU FTA.

<sup>135</sup> Mexico-EU FTA, Article 11.1.

Mexico-EU FTA, Article 11.2.

Based on an assessment of the OECD in 1998,<sup>136</sup> there was not a very strong competition law enforcement at around the time of the adoption of the Mexico-EU FTA in 2000. While the country adopted the Federal Law of Economic Competition (“LFCE”) and created the Federal Competition Commission (“CFC”) as its enforcing agency, the OECD report noted the weak support for and enforcement of the CFC.<sup>137</sup> Hence, the emphasis on coordination, cooperation and transparency, and actions that will bring Mexico to compliance to international standards.

## b. EU Competition Policy

While there are no fixed templates on competition policy provisions in EU FTAs, EU competition policy could provide a gauge to Philippine negotiators on EU specific interests in pushing for the establishment and maintenance of competition policy in the Philippines through the Philippine-EU FTA.

The competition policy of the EU may be found in Arts. 101 (ex Art. 81 TEC)<sup>138</sup> and 102 (ex Article 82 TEC)<sup>139</sup> of the Treaty on the Functioning of the European Union.

Articles 101 and 102 prohibit anti-competitive agreements and the abuse of dominant position in the EU market. This includes price fixing, limitation and control of markets, arrangements to share markets or supply, discrimination against trading partners and tie-in arrangements. Anti-competitive agreements are considered null and void.<sup>140</sup>

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<sup>136</sup> Competition Law and Policy in Mexico, OECD Policy Brief, June 2004. <<http://www.oecd.org/dataoecd/11/15/31969311.pdf>>.

<sup>137</sup> Competition Law and Policy in Mexico, OECD Policy Brief, June 2004. <<http://www.oecd.org/dataoecd/11/15/31969311.pdf>>.

<sup>138</sup> Article 101.1 The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) Limit or control production, markets, technical development or investment;
  - (c) Share markets or sources of supply;
  - (d) Apply dissimilar conditions to equivalent transaction with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) Make the conclusion of contracts subject to acceptance by the other trading parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provision of paragraph 1 may, however, be declared inapplicable in the case of:
- Any agreement or category of agreements between undertakings;
  - Any decision or category of decisions of associations of undertakings;
  - Any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
    - (a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
    - (b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>139</sup> Article 102. Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular consist in:

- (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) Limiting production, markets or technical development to the prejudice of consumers;
- (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

<sup>140</sup> Art. 101.1 and 2.

State aid that distorts or threatens to distort competition is also prohibited under Article 107 (ex Article 87 TEC) of the TFEU. However, those that promote some social and economic values form part of EU competition policy and are exceptions to Article 107.

Other than state aid exceptions the TFEU provides other exceptions to the application of the prohibitions contained in Articles 101 and 102. These and state aid exceptions are summarized as follows:

- a. Anti-competitive agreements that:
  - enhances the production or distribution of goods or promotes technical or economic progress;
  - consumers share in the resulting benefit;
  - only restrictions that are indispensable to the attainment of such objectives are applied; and
  - the imposing entity does not eliminate competition on a significant portion of the relevant products.<sup>141</sup>
- b. Public enterprises or enterprises enjoying special state privileges;<sup>142</sup>
- c. Enterprises engaging in providing services of general economic interest or are revenue producing monopolies, to the extent that the prohibitions do not interfere with the performance of the services provided by these enterprises;<sup>143</sup> and
- d. State aids that are not covered by the prohibitions in Articles 101 and 102:
  - Social aid granted to individual consumers without discrimination;
  - Aid for damages caused by natural disasters or exceptional occurrences.<sup>144</sup>
- e. State aids that may not be covered by the prohibitions in Articles 101 and 102:
  - For the economic development of areas with low standards of living, serious unemployment, and in specific areas<sup>145</sup> due to their structural, economic and social situations;
  - For the execution of an important EU project or to remedy a serious disturbance in the economy;
  - To facilitate the development of certain economic activities or of certain economic areas that do not adversely affect trading conditions;
  - To promote culture and heritage conservation to the extent that the aid does not adversely affect trading conditions and competition in the EU;
  - Other categories based on the decision of the European Council on recommendation of the European Commission.<sup>146</sup>

While EU competition policy primarily relies on market forces to drive innovation and efficiency, it carves out exceptions to competition rules to promote certain social and economic values. State aid in particular has developed its own body of rules, guidelines and framework as the EU work at establishing a predictable and transparent regime. Among the areas where such rules, guidelines and framework have been developed include aid to small and medium-sized enterprises, in support of research and

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<sup>141</sup> Article 101.3.

<sup>142</sup> Art.106 (ex Article 86 TEC).1.

<sup>143</sup> Art.106 (ex Article 86 TEC).2.

<sup>144</sup> Art. 107.2.

<sup>145</sup> Areas referred to in Article 349 TFEU: Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint Martin, the Azores, Madeira and the Canary Islands due to their "remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development."

<sup>146</sup> Art. 107.3.

development, environmental protection, employment and training, regional aid and risk capital investments in small and medium-sized enterprises.<sup>147</sup>

## **E. Analysis and Assessment of Interests**

The fact that EU has a relatively developed competition policy and exceptions regime would allow it to better manage its negotiating strategy in a PH-EU FTA negotiation. The lack of clarity in Philippine competition policy places the Philippines at a disadvantage. The country will face challenges in determining how it can protect social and economic values enshrined in the Constitution, and calibrating demands and concessions in the process of negotiations.

In establishing its own competition policy and law framework and institutions, the Philippines faces the following challenges:

- Establishing a competition policy that is responsive to the goals of inclusive and sustained growth enshrined in the Constitution, while calibrating its implementation according to current realities and capacities;
- Determining the most effective institutional framework that will implement and enforce a competition law;
- Calibrating the implementation of a competition law in such a way that it does not discourage investment and free enterprise, while ensuring that abuses are curtailed;
- Managing competing interests that are resistant to the passage of a competition law, as well as regulatory capture in the process of implementation.

## **C. Philippine Defensive Interests**

Keeping these challenges in mind, the Philippines would have an interest in ensuring that:

- while the above challenges exist, the PH-EU FTA will not narrow the policy space for the country in navigating the development of its own competition policy and law;
- the exceptions to the application of the EU competition law will not effectively bar Philippine products to enter and compete in the EU market;
- the exceptions noted above do not effectively disadvantage the domestic industries against EU imports; and
- the Philippines has sufficient and accessible remedies against anti-competitive conduct committed in the EU or by EU firms that affect the Philippine market.

## **D. Philippine Offensive Interests**

On the other hand, the Philippines would also be interested in ensuring that:

- it creates a business climate that is transparent and predictable that would attract and keep EU investments. These investments will not only be a source of capital but also technical capacity that would strengthen the skills of the Philippine labor force and business; and

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<sup>147</sup> See Regulation (EC) 800/2008; Regulation (EC) 1998/2006; Rescue and Restructuring Guidelines (OJ 2004 C244/02); Regional Aid Guidelines (OJ 2006 C54/13); Research and Development Aid Framework (OJ 2006 C323/03); Environmental Protection Aid (OJ 2008 C82/01); and Risk Capital Guidelines (OJ 2006 C194/02).

- its products are competitive in the EU market and not artificially barred from entry by unnecessary barriers to trade.



## PART IV. GOVERNMENT PROCUREMENT

### A. Government Procurement under the Multilateral Trade System

Under the General Agreements on Tariffs and Trade of 1947 (“GATT 1947”), government procurement was initially excluded from its application owing to the then prevailing Keynesian orthodoxy that domestic spending and consumption translates to larger national income. This, together with nationalist and protectionist sentiments, discouraged import spending and opened government procurement only to the domestic market. It was only in 1979 during the Tokyo Round of multilateral negotiations that a first Agreement on Government Procurement (“AGP”) was signed and entered into force in 1981. The AGP only bound the signatories to it and did not apply to all GATT contracting parties.<sup>148</sup> It covered central government entities and procurement in goods. It was amended again in 1987, which came into force in 1988.<sup>149</sup>

The parties to such agreement continued another round of negotiations during the Uruguay Round. This resulted to the WTO Government Procurement Agreement (“GPA”), which was signed in 1994 and came into force on January 1, 1996. The GPA expanded the coverage of the AGP to include purchases by sub-central government entities and other public enterprises and to services and construction services.<sup>150</sup>

The GPA is a plurilateral agreement that, like the AGP, bound only the parties to it. To date, the parties to the GPA are: Armenia, Canada, the European Union (including its 27 members), Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States. The Philippines is not presently a signatory. Nine other countries are currently negotiating accession to the GPA. These are: Albania, China, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, and Ukraine. Thirteen others are accepted as observers.<sup>151</sup>

The work of the WTO in government procurement substantially cover:<sup>152</sup>

- a. The WTO Government Procurement Agreement. The GPA is based on the principles of trade liberalization, national treatment and non-discrimination, transparency, fair, prompt and effective enforcement, and special and differential treatment for developing countries.<sup>153</sup> The text provide for specific rules and procedures to implement such principles in the trade relations among the parties. On December 15, 2011, the parties to the GPA agreed on the terms of a revised text of the GPA which they formally adopted on March 30, 2012 through the adoption of the Decision on the Outcome of the Negotiations

<sup>148</sup> Simon J. Evenett, “Multilateral Disciplines and Government Procurement,” Bernard Hoekman, Aaditya Mattoo, and Philip English, eds., *Development, Trade and the WTO*. 2002. The World Bank. Washington D. C.: 417-427; General overview of WTO work on government procurement, WTO website <[http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm)>.

<sup>149</sup> General overview of WTO work on government procurement, WTO website <[http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm)>.

<sup>150</sup> General overview of WTO work on government procurement, WTO website <[http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm)>.

<sup>151</sup> Parties and observers to the GPA, WTO website <[http://www.wto.org/English/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/English/tratop_e/gproc_e/memobs_e.htm)>. The thirteen GPA observers are: Argentina, Australia, Bahrain, Cameroon, Chile, Colombia, Croatia, India, Mongolia, New Zealand, Saudi Arabia, Sri Lanka, and Turkey.

<sup>152</sup> General overview of WTO work on government procurement, WTO website <[http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm)>.

<sup>153</sup> See GPA Preamble.

under Article XXIV:7 of the Agreement on Government Procurement. The new text will also be the basis for the accession of additional parties.<sup>154</sup>

The new agreement reiterated the need for greater liberalization and transparency in government procurement, as well as the recognition of the special needs of developing countries. In addition, it seeks to promote integrity and predictability in government procurement and the use of electronic means for procurement.<sup>155</sup>

- b. Negotiations on government procurement in services. Under the General Agreement on Trade in Services, the parties were mandated to negotiate on government procurement in services within two years from the entry into force of the WTO Agreement.<sup>156</sup> Work on this is carried on by the Working Party on GATS Rules. No agreement has been reached on this area of government procurement.<sup>157</sup>
- c. Work on transparency in government procurement. The 1996 Singapore Ministerial Conference established the Working Group on Transparency in Government Procurement. It was mandated to study transparency issues in government procurement to serve as a guide for a potential agreement on transparency in government procurement.<sup>158</sup>

## **B. Philippine Government Procurement Laws**

### **a. Government Procurement Laws**

Government procurement is covered by two laws in the Philippines. These are:

- i. The Government Reform Procurement Act of 2002 (Rep. Act No. 9184);

The Government Reform Procurement Act (GRPA) applies to all “procurement of infrastructure projects,<sup>159</sup> goods<sup>160</sup> and consulting services,<sup>161</sup> regardless of sources of funds, *whether local or foreign*,” by all branches of government, including

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<sup>154</sup> The re-negotiation of the Agreement on Government Procurement (GPA), WTO website <[http://www.wto.org/english/tratop\\_e/gproc\\_e/negotiations\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm)>; See GPA/113 for text of the new GPA.

<sup>155</sup> The Revised Text of the Agreement on Government Procurement, GPA/112.

<sup>156</sup> GATS, Art. XIII:2. There shall be a multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

<sup>157</sup> General overview of WTO work on government procurement, WTO website <[http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm)>.

<sup>158</sup> General overview of WTO work on government procurement, WTO website <[http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm)>.

<sup>159</sup> Infrastructure projects include the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, communication facilities, civil works components of information technology projects, irrigation, flood control, and drainage, water supply, sanitation, sewerage, and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings, hospital buildings and other related construction projects of the government. (GRPA, Article I, Section 5.k)

<sup>160</sup> Goods refer to all items, supplies, material and general support services, except consulting services and infrastructure projects, which may be needed in the transaction of public businesses or in the pursuit of any government undertaking, project or activity, whether in the nature of equipment, furniture, stationary, materials for construction, or personal property of any kind, including non-personal or contractual services such as the repair and maintenance of equipment and furniture, as well as trucking, hauling, janitorial, security, and related or analogous services, as well as procurement of materials and supplies provided by the procuring entity for such services. (GRPA, Article I, Section 5.h)

<sup>161</sup> Consulting services refers to services for infrastructure projects and other types of projects or activities of the Government requiring adequate external technical and professional expertise that are beyond the capability and/or capacity of the government to undertake such as, but not limited to: (i) advisory and review services; (ii) pre-investment or feasibility studies; (iii) design; (iv) construction supervision; (v) management and related services; and (vi) other technical services or special studies. (GRPA, Article I, Section 5.f)

government-owned and controlled corporations.<sup>162</sup> (*Italics supplied*) It is governed by the principles of: transparency, competitiveness, streamlined procurement process, system of accountability and public monitoring.<sup>163</sup>

To promote transparency, competitiveness, efficiency and accountability in the procurement process the law provides for:

- Rules on competitive bidding,<sup>164</sup> and alternative methods of procurement<sup>165</sup>;
- Utilization of information and communications technology in the conduct of the procurement procedures;<sup>166</sup>
- Sanctions against both government and bidders for violations or tampering of the mechanisms under the law,<sup>167</sup> and
- A bid protest mechanism to appeal decisions of the Bids and Awards Committee.<sup>168</sup>

While the GRPA opens government procurement to foreign bidders, preference may be given to domestic sources that meet the specified or desired quality in the interest of availability, efficiency and timely delivery of goods.<sup>169</sup>

ii. The Build-Operate-and-Transfer Law of 1990 (Rep.Act No. 6957), as amended

Rep. Act No. 6957, or An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and For Other Purposes, as amended by Rep. Act No. 7718 (1994), entitled An Act Amending Certain Sections of Republic Act No.6957 governs the partnership between the government and the private sector in infrastructure and development projects normally financed by the government.<sup>170</sup> It is informally known as the Build-Operate-and-Transfer Law (“BOT Law”).

Private sector infrastructure or development projects<sup>171</sup> covered by the BOT Law include the following contractual arrangements:

- Build-Operate-and-Transfer (BOT). A contractual arrangement where the project proponent undertakes the Construction, including financing, of a given infrastructure facility, and its operation and maintenance. The project proponent operates the facility for a fixed term not to exceed fifty (50) years

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<sup>162</sup> GRPA, Article I, Section 4.

<sup>163</sup> GRPA, Section 3.

<sup>164</sup> See GRPA, Articles IV to XII.

<sup>165</sup> GRPA, Article XVI.

<sup>166</sup> GRPA, Article III, Section 8.

<sup>167</sup> GRPA, Article XXI.

<sup>168</sup> GRPA, Article XVII.

<sup>169</sup> GRPA, Article XII, Section 43.

<sup>170</sup> BOT Law, Section 1.

<sup>171</sup> Defined as “The general description of infrastructure or development projects normally financed and operated by the public sector but which will now be wholly or partly implemented by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads, and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be authorized by the appropriate agency/LGU pursuant to this Act. Such projects shall be undertaken through contractual arrangements as defined . . .and such other variations as may be approved by the President of the Philippines.” (BOT Law, Section 2.a)

during which it charges facility users appropriate tolls, fees, rentals and charges to the extent that it recovers on its investment and the operation and maintenance of the facilities. It then transfers the facility to the government agency or local government unit concerned at the end of the fixed term.<sup>172</sup>

- Build-and-Transfer (BT). A contractual arrangement where the project proponent undertakes the financing and construction of an approved project and after its completion turns it over to the government agency or local government unit, which will in turn pay the proponent its investment in the project plus a reasonable rate of return.<sup>173</sup>
- The Build-Own-and-Operate (BOO). A contractual arrangement where the project proponent is authorized to finance, construct, own, operate and maintain an infrastructure or development facility from which the Project Proponent is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users. The proponent who owns the assets of the facility may assign its operation and maintenance to a Facility operator. Such projects are also approved by the President of the Philippines upon recommendation of the National Economic Development Authority.<sup>174</sup>
- The Build-Lease-and-Transfer (BLT). A contractual arrangement where a project proponent is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the government agency or local government unit concerned on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to government agency and local government unit.<sup>175</sup>
- Build-Transfer-and-Operate (BTO). A contractual arrangement where a government agency or local government unit contracts out the construction of an infrastructure facility to a private entity such that the contractor builds the facility on a turnkey basis, assuming cost overruns, delays, and specified performance risks. Once the facility is commissioned satisfactorily, title is transferred to the implementing government agency or local government unit. The contractor, however, operates the facility on behalf of the implementing government agency or local government unit under an agreement.<sup>176</sup>
- Contract-Add-and-Operate (CAO). A contractual arrangement where the project proponent adds to an existing infrastructure facility which it is renting from the government and operates the expanded project over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the project proponent.<sup>177</sup>
- Develop-Operate-and-Transfer (DOT). A contractual arrangement where favorable conditions external to a new infrastructure project which is to be built

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<sup>172</sup> BOT Law, as amended, Section 2.b.

<sup>173</sup> BOT Law, as amended, Section 2.c.

<sup>174</sup> BOT Law, as amended, Section 2.d.

<sup>175</sup> BOT Law, as amended, Section 2.e.

<sup>176</sup> BOT Law, as amended, Section 2.f.

<sup>177</sup> BOT Law, as amended, Section 2.g.

by a project proponent are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates such as higher property or rent values.<sup>178</sup>

- Rehabilitate-Operate-and-Transfer (ROT). A contractual arrangement where an existing facility is turned over to the project proponent to refurbish, operate and maintain for a franchise period, at the expiry of which the legal title to the facility is turned over to the government. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.<sup>179</sup>
- Rehabilitate-Own-and-Operate (ROO). A contractual arrangement where an existing facility is turned over to the project proponent to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity.<sup>180</sup>

To ensure fairness and transparency, the law requires competitive public bidding through fixed procedures. This requires the publication of an invitation for prospective project proponents to participate, once every week for three (3) consecutive weeks, in at least two (2) newspapers of general circulation and in at least one (1) local newspaper that is circulated in the region, province, city or municipality in which the project is to be constructed.

However, while public bidding is generally required, unsolicited proposals are also allowed. This is only used though if the following conditions are met. First, the project should be a new concept or technology and is not part of the list of priority projects. Second, that there is no direct government guarantee, subsidy, or equity that is required to implement it. And lastly, that the implementing agency or local government unit has openly invited other prospective project proponents through publication for three consecutive weeks in a newspaper of general circulation to propose a better proposal.<sup>181</sup>

#### a. Foreign Participation and Limitations under Government Procurement Laws

While the BOT Law allows the project proponent to obtain financing from either a Filipino or foreign source and/or engage the services of a foreign and/or Filipino contractor during the construction stage, it provides the following limitations on foreign participation and preferential treatment for Filipinos:

- for infrastructure or a development facility operations requiring a public utility franchise, the facility operator must be Filipino or if a corporation, it must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos;
- in case of foreign contractors, Filipino labor shall be employed or hired in the different phases of the construction where Filipino skills are available;
- build-and-transfer or build-lease-and-transfer arrangements give preference to

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<sup>178</sup> BOT Law, as amended, Section 2.h.

<sup>179</sup> BOT Law, as amended, Section 2.i.

<sup>180</sup> BOT Law, as amended, Section 2.j.

<sup>181</sup> Sec. 4-A, R.A. 6957

Filipino contractors when such contractors submit an equally advantageous bid with exactly the same price and technical specifications as those of a foreign contractor;<sup>182</sup>

- in a build-operate-and-transfer arrangement that involves a supply-and-operate situation, i. e., where the supplier of the equipment and machinery of an infrastructure facility operates the facility, the supplier is required to provide technology transfer and training to Filipino nationals;<sup>183</sup> and
- in cases of difficulty in sourcing funds, the project may be financed partly from direct government appropriations and/or from Official Development Assistance [ODA] of foreign governments or institutions that may not exceed fifty percent [50%] of the project cost. The balance may then be provided by the project proponent.<sup>184</sup>

### C. EU Government Procurement Policies

In line with its 2020 Strategy, the European Commission issued a *“Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries”* (“Proposed Government Procurement Regulations”) in 2012.<sup>185</sup> While not yet adopted by the European Parliament and Council, the proposed regulation would provide Philippine negotiators information on what the EU would be aiming for in a free trade agreement negotiation with the Philippines.

The proposal is part of the EU’s advocacy to open international public procurement markets, particularly as third countries are unwilling to open their procurement markets to international competition. This causes the EU to lose its leverage when dealing with its trading partners, particularly those from emerging economies. The proposal seeks to improve business opportunities for EU firms at a global scale, thereby creating new jobs and promoting innovation in line with the EU 2020 strategy.<sup>186</sup>

The proposed regulation:

- lays down rules on the access of third-country goods and services to the public procurement market of the EU; and
- establishes procedures that will support EU negotiations for access of EU goods and services in the public procurement markets of third countries.<sup>187</sup>

To this end, it proposes:

- Rules of Origin. The origin of a service shall be determined on the basis of the origin of the natural or legal person providing it;<sup>188</sup>

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<sup>182</sup> Sec. 5, R.A. 6957 as amended.

<sup>183</sup> Sec. 2 (b), R.A. 6957, as amended.

<sup>184</sup> BOT Law, as amended, Section 2.a, 2<sup>nd</sup> para.

<sup>185</sup> European Commission, Brussels, 21.3.2012, COM(2012) 124 final, 2012/0060 (COD).

<sup>186</sup> European Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2012), 2012/0060 (COD) (Proposed Government Procurement Regulations)

<sup>187</sup> Proposed Public Procurement Regulations, Chapter I, Article 1.1.

<sup>188</sup> Proposed Public Procurement Regulations, Chapter I, Article 3.1.

- Treatment of Covered Goods and Services. Goods and services originating in a country with which the EU has concluded an international agreement on public procurement including market access commitments, as well as those originating from least-developed countries, shall be treated equally to goods and services originating from the EU;<sup>189</sup>
- Treatment of Non-Covered Goods and Services. Goods and services originating in a country with which the EU has not concluded an international agreement covering public procurement including market access commitments or those originating from countries with which the EU has such international agreement but does not apply to the relevant good or service shall be treated as follows:
  - Subject the relevant goods and services for contracts estimated at equal to or more than EUR 5.000.000, exclusive of value added tax, and exceeds 50% of the total value of the goods and services constituting the tender, to restrictive measures, in accordance with certain rules and conditions;
  - Where a third country has entered into substantive negotiations with the EU on an international agreement covering public procurement, its goods and services may be exempted from the restrictive measures mentioned above, upon adoption by the Commission of an implementing act on temporary access;<sup>190</sup>
- Rules on Abnormally Low Tenders. Where non-covered goods and services offered to EU entities operating in the water, energy, transport and postal services sectors are abnormally low tenders, and the value of such goods and services exceeds 50% of the total value of goods and services constituting the tender, the EU entity shall explain to other tenderers in writing the reasons for the abnormally low price and costs charged.<sup>191</sup>

#### **D. Survey of European Union Free Trade Agreements**

A survey of the most recent European Union Free Trade Agreements shows that it has in most cases included government procurement in its negotiations with its trading partners. Examples of these are as follows:

- The EU – South Africa Trade, Development, and Cooperation Agreement dedicates an article on government procurement. It states that the Parties shall cooperate to ensure that access to the Parties' procurement contracts is governed by a system that is fair, equitable, and transparent. It further provides that the Cooperation Council created under the agreement shall periodically review the progress of both Parties.<sup>192</sup>
- The EU – Mexico Economic Partnership, Political Coordination and Cooperation Agreement also provides a separate article on public procurement. The article provides for gradual and mutual opening of agreed government procurement markets on a reciprocal basis between the Parties.
  - It also mandates the Joint Council, created under the agreement, to provide the arrangements and timetable for the coverage of the agreed liberalization, non-

<sup>189</sup> Proposed Public Procurement Regulations, Chapter II, Article 4, in relation to Article 2.1.e.

<sup>190</sup> Proposed Public Procurement Regulations, Chapter II, Article 5 and 6.

<sup>191</sup> Proposed Public Procurement Regulations, Chapter III, Article 7.

<sup>192</sup> Art. 45, EU – South Africa Trade, Development, and Cooperation Agreement, < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:311:0003:0297:EN:PDF>>

discriminatory access to the agreed markets, the threshold values, the fair and transparent procedures, the clear challenge procedures, and the use of information technology.<sup>193</sup>

- The EU – South Korea Free Trade Agreement (FTA) provides the most comprehensive procurement provisions among the three. The EU – South Korea FTA dedicates a full chapter on government procurement. The agreement reaffirms and recognizes the rights and obligations of the Parties under the WTO Agreement on Government Procurement (GPA). It then reiterates the Parties' willingness to expand and promote bilateral trading opportunities through international liberalization and rules-based international trading systems.<sup>194</sup> The agreement also expands the coverage of the GPA which further covers, build-operate-transfer (BOT) contracts and public works concessions.<sup>195</sup>

The agreement then provides for the creation of a Government Procurement Working Group that is mandated to consider issues regarding government procurement, BOT contracts and public works concessions. This working group is also mandated to exchange information relating to the government procurement and BOT contacts or public works concessions opportunities between the EU and South Korea. Lastly, it is also mandated to discuss operation matters for government procurement.

## **E. Analysis and Assessment of Interests**

The limitations on foreign participation in Philippine government procurement will most likely be an issue that the EU will raise during the process of negotiations. Since these limitations are simply statutory, there is a greater flexibility for the Philippine government to amend them if found to be beneficial to the economy in the long-term. However, on a policy level, this will require a careful assessment on the part of the government of the benefits of liberalizing; and a review of the rationale for imposing these limitations in the first place and whether these were achieved.

The Philippines should also assess the potential impact of the draft regulations on government procurement being considered by the EU on the access of Philippine suppliers into the EU market. Given the requirement of reciprocity, the Philippines may conduct a cost-benefit analysis of the potentials of accessing the EU market and ensuring the foothold of the domestic industry in the Philippine market.

## **C. Philippine Defensive Interests**

In negotiating in this area under a PH-EU FTA, the Philippines would be interested in ensuring that:

- it has sufficient space to pursue any development objectives related to government procurement;
- domestic suppliers and contractors are not effectively eased out by more sophisticated and skilled suppliers and contractors from the EU; and

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<sup>193</sup> Title V, Article 10, EU – Mexico Economic Partnership, Political Coordination and Cooperation Agreement < [http://www.esf.be/new/wp-content/uploads/2009/06/eu-mx\\_fta.pdf](http://www.esf.be/new/wp-content/uploads/2009/06/eu-mx_fta.pdf)>

<sup>194</sup> EU – South Korea Free Trade Agreement (FTA), Chapter Nine, Art. 9.1-9.3 < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:EN:PDF>>

<sup>195</sup> EU – South Korea Free Trade Agreement (FTA), Chapter Nine, Art. 9.1-9.3 < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:EN:PDF>>



- the domestic industry continues to flourish and build capacity to compete with new foreign entrants.

#### D. Philippine Offensive Interests

On the other hand, the Philippines should also be mindful of the potential benefits of opening up government procurement to the EU. To maximize these benefits, it would be interested in:

- gaining access to EU capital, skill and technology in supplying government contracts with the objective of minimizing costs and ensuring the highest quality of products that may be supplied by EU firms;
- benefitting from technology transfer from more advanced EU firms to domestic firms;
- in the long-term, expanding the market for the domestic contractors' industry beyond the Philippines and into the EU market.

## PART V. INTELLECTUAL PROPERTY RIGHTS

### A. Intellectual Property Right Protection under the Multilateral Trade Regime

Among the agreements negotiated and completed during the Uruguay Round of negotiations of the General Agreements on Tariffs and Trade (“GATT”) in 1994 (“GATT 1994”) was the Agreement on Trade Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”). The TRIPS does not derogate the existing obligations of the WTO members who are also signatories to the Paris Convention for the Protection of Industrial Property (the “Paris Convention”) (1967), the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) (1971), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the “Rome Convention”) (1961), and the Treaty on Intellectual Property in Respect of Integrated Circuits (1989).<sup>196</sup>

These Conventions are briefly described below:

- The Paris Convention provides for rules on protections, registrations, and cross-border treatment of industrial property, which covers: patents, utility models, industrial designs, trademarks, service marks, trade names, geographical indications, and unfair competition involving these properties.<sup>197</sup>
- The Berne Convention designates as protected works “*every production in the literary, scientific and artistic domains,*” including “*books, pamphlets and other writings, lectures, addresses, sermons and other works of the same nature, dramatic or dramatico-musical works, choreographic works and entertainment in dumb shows, musical composition with or without words, cinematographic works x x x, works of drawing, painting, architecture, sculpture, engraving and lithography, photographic works x x x, works of applied art, illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.*”<sup>198</sup> It also covers protections for alterations of original works, collections of literary or other written works. New and items of press information are, however, not protected.<sup>199</sup> The Convention also provides rules on such protection, including cross-border treatment of these protected works.
- The Rome Convention provides for intellectual property protection of artistic or literary output other than by copyright. The works protected by this Convention are the outputs of performers, producers of phonograms and transmissions of broadcasting organizations. It provides the minimum rights protected by these producers, their rights when their outputs are reproduced or rebroadcast, and some permitted exceptions.<sup>200</sup>
- The Washington Treaty on Intellectual Property in Respect of Integrated Circuits (“TIPRIC”) provides for intellectual property protection for lay-out designs<sup>201</sup> of integrated circuits.<sup>202</sup> Such protections are granted to original creations coming out of the creators’ intellectual effort.<sup>203</sup>

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<sup>196</sup> TRIPS, Article 2:2

<sup>197</sup> See Paris Convention.

<sup>198</sup> Berne Convention, Article 2:1.1

<sup>199</sup> Berne Convention, Article 2:1.3, 5 and 8.

<sup>200</sup> See Rome Convention.

<sup>201</sup> Lay-out designs (topography), “means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.” TIPRIC, Article 2:ii.

<sup>202</sup> Integrated circuit, “means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function.

<sup>203</sup> TIPRIC, Article 3:2.a.

## *Basic Principles*

The TRIPS Agreement is concerned primarily with the trade-related aspects of intellectual property protection. To this end, it adopts the following principles:

- the national treatment principle that requires the equal treatment of the intellectual property rights of both nationals and foreigners within a Member state's jurisdiction;<sup>204</sup>
- the most-favored-nation treatment principle that requires the equal treatment of the intellectual property rights of the nationals of WTO trading partners;<sup>205</sup>
- the principle of balanced protection, where the protection and enforcement of intellectual property rights should contribute to technological innovation and the transfer of technology that is mutually beneficial to users and producers and the enhancement of economic and social welfare.<sup>206</sup>

## *Basic Protections*

The TRIPS Agreement provides some basic rules on intellectual property protection that seeks to complement the relevant intellectual property conventions mentioned above. These protections cover:

- *Copyright and Related Rights.* Except for the protection of the author's moral rights over his work, the TRIPS adopted the principles and protections provided under the Berne Convention. It also specifically included computer programs and compilations of data under the protection of the Berne Convention. In addition, authors of computer programs and producers of cinematographic works are granted rental rights over their works. Protections for copyrighted works of performers, producers of phonograms and broadcasting organizations are also addressed in the TRIPS. The effective period of protection for copyright range from at least thirty (30) years to fifty (50) years.<sup>207</sup>
- *Trademarks.* The TRIPS defines protectable marks, the rights of trademark owners, the treatment of well-known marks, as well as of service marks.<sup>208</sup>
- *Geographical Indications.* Geographical indications are defined as "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.*"<sup>209</sup> These are considered as industrial property protected under the Paris Convention. The TRIPS provide for additional and higher levels of protections for wines and spirits, but provide Members the option to enter into bilateral or multilateral negotiations to provide individual protection for other products.<sup>210</sup> Note, however, that the rights of the owner of trademarks that have been applied for or registered in good faith before the application of the TRIPS or before the geographical indication has been protected will be upheld and respected.<sup>211</sup>

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<sup>204</sup> TRIPS, Article 3.

<sup>205</sup> TRIPS, Article 4.

<sup>206</sup> TRIPS, Article 7.

<sup>207</sup> TRIPS, Part II, Section 1.

<sup>208</sup> TRIPS, Part II, Section 2.

<sup>209</sup> TRIPS, Part II, Section 3, Article 22:1.

<sup>210</sup> TRIPS, Part II, Section 3, Articles 23 and 24:1

<sup>211</sup> TRIPS, Part II, Section 3, Article 24:3

The issue of geographical indications is part of the Doha Development Agenda and debates are ongoing on whether to extend protections beyond wines and spirits.<sup>212</sup>

- *Industrial Designs.* Owners of industrial designs are granted the right to prevent third parties from making, selling or importing articles embodying such industrial design without their consent. The duration of protection for such designs is ten (10) years.<sup>213</sup>
- *Patents.* Patent protection is “available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.”<sup>214</sup> The term of protection for patents twenty (20) years from the date of filing of the patent application.<sup>215</sup>

The TRIPS Agreement also provides for conditions when compulsory licensing may be applicable. Under a compulsory licensing, the subject matter of the patent may be used without the authorization of the owner during a national emergency or other occasions of extreme urgency or in cases of public non-commercial use. Such unauthorized use will, nevertheless, entitle the patent owner the right to be paid adequate remuneration. In addition, products manufactured from a compulsory license shall only be used in the domestic market where the license was issued and should not be exported, subject to certain exceptions.<sup>216</sup>

- *Lay-out Designs (Topographies) of Integrated Circuits.* This section in the TRIPS Agreement is the subject of the TIPRIC. While the TIPRIC has not yet entered into force, the TRIPS Agreement have already added protections for lay-out designs, integrated circuits where a protected lay-out design is incorporated, or articles containing such lay-out designs. The term of protection for such designs is ten (10) years.<sup>217</sup>
- *Protection of Undisclosed Information.* The TRIPS Agreement also provides protections for trade secrets and undisclosed information against unfair commercial use.<sup>218</sup>
- *Control of Anti-competitive Practices in Contractual Licenses.* While the TRIPS Agreement allows copyright, trademark, patent and other intellectual property owners to issue licenses for the use of their intellectual property, Member states are allowed to intervene when licensing practices “constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.”<sup>219</sup>

### *Intellectual Property Enforcement*

Under the TRIPS Agreement Member states are obligated to pass domestic laws providing for protection of intellectual property rights, enforcement measures through civil administrative and criminal procedures, and mechanisms for indemnification and recovery of damages.<sup>220</sup>

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<sup>212</sup> Doha WTO Ministerial 2001: Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1, par. 18.

<sup>213</sup> TRIPS, Part II, Section 4, Article 26:1 and 3.

<sup>214</sup> TRIPS, Part II, Section 5, Article 27:1.

<sup>215</sup> TRIPS, Part II, Section 5, Article 33.

<sup>216</sup> TRIPS, Part II, Section 5, Article 31.

<sup>217</sup> TRIPS, Part II, Section 6, Articles 36 and 38:1.

<sup>218</sup> TRIPS, Part II, Section 7.

<sup>219</sup> TRIPS, Part II, Section 8.

<sup>220</sup> TRIPS, Part III, Sections 1, 2, and 5.

## B. Philippines Intellectual Property Right Protection

As early as 1947, intellectual property protection is already found in the statute books of the Philippines, particularly covering patents and trademarks. These were Republic Act No. 165 otherwise known as “An Act Creating a Patent Office, Prescribing its Powers and Duties, Regulating the Issuance of Patents and Appropriating Funds Therefor” and Republic Act No. 166 otherwise known as “An Act to Provide for the Registration and Protection of Trade Marks, Trade Names and Service Marks, Defining Unfair Competition and False Marking and Providing Remedies Against the Same, and for other Purposes.”

IPR protection was further echoed in the 1973 Constitution which provides under Art. XV Sec. 9 (3) that “*The exclusive right to inventions, writings, and artistic creations shall be secured to investors, authors and artists for a limited period.*”<sup>221</sup> This is reiterated under the 1987 Constitution. Article XIV Sec. 13 of the 1987 Constitution reads that, “*The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.*”

In compliance with these Constitutional mandates, as well as its international obligations under the Paris (entered into force on 27 September 1965),<sup>221</sup> Berne (entered into force on 01 August 1951),<sup>222</sup> and Rome (entry into force on 25 September 1984)<sup>223</sup> Conventions and the TRIPS Agreement (01 January 1995), of which it is a signatory, the Philippines passed several related legislations.<sup>224</sup> It is also a signatory to other international agreements on intellectual property protection, particularly, the 2001 Patent Cooperation Treaty (PCT), the 2002 World Intellectual Property Organization (WIPO) Copyright Treaty, the 2002 World Intellectual Property Organization Performances and Phonograms Treaty,<sup>225</sup> and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (“Madrid Protocol”) to which the Philippines has just acceded on 27 March 2012.<sup>226</sup>

Among these agreements, the TRIPS Agreement is the “*most comprehensive multilateral agreement on intellectual property.*”<sup>227</sup> Thus, in adopting it into its domestic laws, the Philippines codified all previous intellectual property laws, with additional modifications to comply with the provisions of the TRIPS Agreement. Republic Act No. 8293 (“RA 8293”) otherwise known as the Intellectual Property Code (“IPC”) was passed on 06 June 1997 and took effect on the 01 January 1998. In addition to adopting the principles of the TRIPS Agreement,<sup>228</sup> the law also created the Intellectual Property Office,<sup>229</sup> and repealed the laws that were inconsistent with the TRIPS agreement, specifically Republic Act No. 165, as amended,

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<sup>221</sup> WIPO, Contracting Parties, [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=139C&start\\_year=ANY&end\\_year=ANY&search\\_what=C&treaty\\_id=15&treaty\\_id=2&treaty\\_id=17&treaty\\_id=29](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=139C&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15&treaty_id=2&treaty_id=17&treaty_id=29)

<sup>222</sup> WIPO, Contracting Parties, [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=139C&start\\_year=ANY&end\\_year=ANY&search\\_what=C&treaty\\_id=15&treaty\\_id=2&treaty\\_id=17&treaty\\_id=29](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=139C&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15&treaty_id=2&treaty_id=17&treaty_id=29)

<sup>223</sup> WIPO, Contracting Parties, [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=139C&start\\_year=ANY&end\\_year=ANY&search\\_what=C&treaty\\_id=15&treaty\\_id=2&treaty\\_id=17&treaty\\_id=29](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=139C&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15&treaty_id=2&treaty_id=17&treaty_id=29)

<sup>224</sup> Republic Acts No. 422, 623, 5354, and 8293, A.O. No. 94, PD 721, PD 1263, E.O. 133, EO 60, DAO 5 and 6.

<sup>225</sup> The IP Coalition Report I: Copyright in the Philippines 2004, The IPC Philippine Report Series, 6 (2004)

<sup>226</sup> “Philippines is Now a Member of the Madrid Protocol,” Philippine Chamber of Commerce and Industry website

<<http://www.philippinechamber.com/index.php/advicacy/ip/>

<sup>227</sup> Understanding the WTO- Intellectual Property: Protection and Enforcement <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm)> Accessed: 30 June 2012

<sup>228</sup> Part I, Sec. 3, id.

<sup>229</sup> Part. I, Sec. 5, id.

Republic Act No. 166, as amended, and Articles 188 and 189 of the Revised Penal Code; Presidential Decree No. 49, including Presidential Decree No. 285, as amended.<sup>230</sup>

Since the passage of RA 8293, the Philippines also enacted other laws covering intellectual property rights. These are RA 8731 otherwise known as the Indigenous Peoples Rights Act, RA 8792 also known as Electronic Commerce Act, RA 9150 also known as An Act for the Protection of Layout designs of Integrated Circuits, RA 9168, also known as New Plant Varieties Protection Act, RA 9239 also known as the Optical Media Act, and most recently Republic Act No. 10088 also known as the Anti-Camcording Act of 2010.

The President through the National Committee on Intellectual Property Rights (NCIPR), the Philippine Intellectual Property Office, the Department of Interior and Local Government, and various local government units currently implement these laws.

However, due to inadequate and insufficient legal protection provided by the government, the slow and inadequate judicial process and lax enforcement of IP rights laws,<sup>231</sup> the Philippines faces several challenges in effectively providing protection to intellectual property rights. Among the most significant problems encountered by the country is in curtailing smuggling activities, and piracy.

### **C. Intellectual Property Rights Protection in the EU, the PH-EU Partnership and Cooperation Agreement and EU FTAs**

The EU is a strong advocate for intellectual property protections in the international arena and maximizing the economic potential of intellectual property rights to boost its global competitiveness.

Under Community laws, intellectual property is divided into copyright and industrial properties. Copy rights cover literary and artistic works, while industrial properties includes inventions, trademarks, industrial design, and geographical indications. In addition to these, it has specific policies on consumer and data protection, and enforcement measures against piracy and counterfeiting.<sup>232</sup> In 2011, the EU Commission issued a Communication entitled, “A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe”<sup>233</sup> (the “IPR Communication”). The IPR Communication seeks to establish a Single Market for Intellectual Property Rights as a means harnessing the creative and innovative potential of the EU. It is part of the EU 2020 Agenda and its Annual Growth Survey intended to sustain EU’s recovery from the economic and financial crisis. This reflects the EU’s overall strategy of maximizing its competitive advantage in creative and innovative industries.<sup>234</sup>

To this end, the IPR Communication establishes the following key policy initiatives:

- Reform the EU patent system and accompanying measures. This will involve establishing a unitary patent protection, a unified patent litigation system, and an IPR valorisation instrument (“valorisation” refers to valuing intangible assets in accounting terms and

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<sup>230</sup> Part V, Sec. 239, RA 8239

<sup>231</sup> Intellectual Property Rights: Talking Points for RP-US FTA Negotiations, Delia S. Tantuico and Errol Wilfred Zshornack, Philippine Institute for Development Studies, Discussion Paper Series No. 2006-12, 23.

<sup>232</sup> The EU Single Market, Intellectual Property, [http://ec.europa.eu/internal\\_market/top\\_layer/intellectual-property/index\\_en.htm](http://ec.europa.eu/internal_market/top_layer/intellectual-property/index_en.htm)

<sup>233</sup> COM (2011) 287 final, Brussels, 24.5.2011.

<sup>234</sup> IPR Communication: 3.

- increasing the opportunities to get better value out of IPR and leverage financing).
- Modernisation of the EU trade mark system.
- Creation of a comprehensive framework for copyright in the digital single market. This will involve overhauling the European copyright and governance system, establishing unified and harmonised systems for technology and database management, handling user-generated content (i. e., social networking), private copying levies, accessing Europe’s cultural heritage, and protecting performers’ rights, audio visual works, and artists’ resale rights.
- Complementary protection of intangible assets. Rights over intangible assets are rights at the fringes, usually found between the boundaries of industrial property protection and other areas of law. This includes trade secrets and parasitic copies, and non-agricultural geographical indications.
- Enhanced fight against counterfeiting and piracy
- The international dimension of IPR. This reflects the EU concern for IP infringements at the global level. To this end, the EU is currently reviewing the Commission’s 2004 “Strategy for the Enforcement of Intellectual Property Rights in Third Countries.” Among the proposed strategies of the EU in this area are multilateral initiatives, including coordination with international organisations, inclusion of IPR enforcement in bilateral free trade negotiations and through cooperation on IP protection with third countries, and enhanced IPR protection and enforcement at the EU border.<sup>235</sup>

### *The PH-EU Partnership and Cooperation Agreement*

Based on a 2006 enforcement survey conducted by the EU on the Philippines, it concluded that *“the overall evolution of the local IPR enforcement situation seems to have improved, and competent authorities have shown quite strong commitment to fight violations of IPR. However, further political will to properly enforce IP laws is still needed, as deficient enforcement (including border control measures) remains the main weakness of the current system.”*<sup>236</sup>

This concern is reflected in the PH-EU Partnership and Cooperation Agreement (“PH-EU PCA”). Under the PH-EU PCA, both the Philippines and the EU agreed to implement measures that ensure the adequate and effective protection and enforcement of intellectual property rights consistent with best practices and international standards. The Parties also agreed to enhance cooperation on Geographical Indications, including their protection as well as protection of plant varieties. The Parties also agreed to “exchange information and experience on intellectual property practices, the prevention of infringements of IP rights – in particular the fight against counterfeiting and piracy – namely through customs cooperation and other appropriate forms of cooperation, and the establishment and strengthening of organizations for control and protection of such rights.”<sup>237</sup>

The above general agreements reflect more the EU concern to protect its IPR, than Philippine interests. The one area that would most likely benefit the Philippines is the agreement in the PH-EU PCA to promote technological innovation, voluntary technology transfer and human resource training and cooperation in the implementation of the Development Agenda in the World Intellectual Property Organization (WIPO).<sup>238</sup>

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<sup>235</sup> IPR Communication: 7-22.

<sup>236</sup> Summary of 2006 Enforcement Survey Relating to the Philippines  
 <[http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc\\_143751.pdf](http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143751.pdf)> Accessed: 30 June 2012

<sup>237</sup> P.H-EU PCA, Article 19:1, 3-4.

<sup>238</sup> P.H-EU PCA, Article 19: 2.

## *Selected EU FTA's*

The most recent (entered into force in 2011) and most comprehensive and first Asian FTA of the EU is the South Korea-EU FTA. For purposes of this paper, and to assess how current EU concerns in IPR are reflected in bilateral free trade agreements, the paper will examine the South Korea-EU FTA.

The South Korea-EU FTA generally adopted the substantive provisions of the Rome Convention, the Berne Convention, the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Phonograms Treaty.<sup>239</sup> It also protects the following IPRs: copyright, including copyright in computer programs and in databases, and related rights; patent rights; trademarks; service marks; designs; lay-out designs (topographies) of integrated circuits; geographical indications; plant varieties and protection of undisclosed information. Such protection includes protection of industrial property against unfair competition under the Paris Convention.<sup>240</sup>

The FTA also includes, among others, additional provisions on:

- Transfer of technology. Efforts to this end will include adopting measures to facilitate information flows, business partnerships, licensing and subcontracting. Particular attention shall be paid to creating an enabling environment for technology transfer including measures to develop human capital and the appropriate legal framework. Efforts shall also be made to prevent licensing practices and conditions that may adversely affect the international transfer of technology and which amount to an abuse of IPR.<sup>241</sup>
- Cooperation on collective management of rights. The Parties will endeavor to establish arrangements to facilitate easy access and delivery of content between the Parties, and transfer of royalties.<sup>242</sup>
- Artists' resale rights.<sup>243</sup>
- Protection of technological measures.<sup>244</sup>
- Protection of rights management information.<sup>245</sup>
- Protection of geographical indications for agricultural products and foods stuffs for Korea and wines and spirits for the EU,<sup>246</sup> as well as an agreement to add other protected geographical indications.<sup>247</sup>
- Protections for plant varieties.<sup>248</sup>
- Protections for genetic resources, traditional knowledge and folklore.<sup>249</sup>
- Liability of online service providers for facilitating infringements.<sup>250</sup>

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<sup>239</sup> South Korea-EU FTA, Article 10.5.

<sup>240</sup> South Korea-EU FTA, Article 10.2.

<sup>241</sup> South Korea-EU FTA, Article 10.3.

<sup>242</sup> South Korea-EU FTA, Article 10.8.

<sup>243</sup> South Korea-EU FTA, Article 10.10.

<sup>244</sup> South Korea-EU FTA, Article 10.12.

<sup>245</sup> South Korea-EU FTA, Article 10.13.

<sup>246</sup> South Korea-EU FTA, Article 10.18.

<sup>247</sup> South Korea-EU FTA, Article 10.24.

<sup>248</sup> South Korea-EU FTA, Article 10.39.

<sup>249</sup> South Korea-EU FTA, Article 10.40.

<sup>250</sup> South Korea-EU FTA, Article 10.62 to 10.66.



#### **D. Analysis and Assessment of Interests**

The PH-EU PCA reflects the primary interest of the EU on intellectual property matters in the Philippines at the time of the negotiation of the PCA. This can be summarized into: (a) IP enforcement, (b) protections against IP infringements, and (c) IP protection of geographical indications and plant varieties. At a minimum, the Philippines should expect these matters to come up in the negotiations.

Note, however, that with the EU's current initiative to harmonize and upgrade its internal intellectual property rights regime, matters of concern that they intend to address during the upgrading process may also be raised during the PH-EU FTA negotiations. Of particular interest to the EU in relation to the Philippines would be:

- IPR valorisation to determine the accounting valuation of IPR assets for purposes of leverage financing. IP valorisation is essential to IP structuring for purposes of financial leveraging. In Southeast Asia, particularly in Singapore, IP rights structuring is becoming a means for securing financing and minimizing tax exposure. While in the Philippines, the development of its IPR system has not yet reached the stage similar to Singapore's, the process of integration within the ASEAN region could lead to the growth of networks of IP assets where firms maximize the value of their IP and tax regimes in the region. If the EU sees this potential, they could try to include this in a PH-EU FTA. Philippine negotiators should understand the implications of this system in order to maximize its benefits and manage potential administrative and regulatory costs for the Philippine government and business if IPR valorisation would entail additional financial reporting requirements for businesses.
- Protection of intangible assets. These assets include trade secrets and parasitic copies, and non-agricultural geographical indications. If the South Korea-EU FTA is any indication, the EU would most likely push for WTO-plus protections for geographical indications, beyond the current protection for wines and spirits. What is notable with the South Korea-EU FTA is South Korea's mutual interest in protecting its own geographical indications.
- The challenges of digital, technological and online developments to IPR. This would include technology and database management, handling of user-generated content (i. e., social networking), private copying levies, accessing Europe's cultural heritage, and protecting performers' rights, audio visual works, and artists' resale rights. The EU would also most likely want to address the potential of online service providers for facilitating infringements.

On the other hand, the Philippines would be most interested in maximizing technology transfer arrangements, the protection and commercialization of its own genetic resources, traditional knowledge and folklore, protecting its own geographical indications, the potential value of IPR valuation to its IPR holders, and protections for its plant varieties.

#### **A. Philippines' Defensive Interests**

In negotiating with the EU, the Philippines would need to ensure that:

- it can protect its own genetic resources, traditional knowledge, folklore and plant varieties

and ensure that its commercialization benefits its owners, producers and natural beneficiaries;

- it has sufficient policy space to develop its own IP valuation mechanism and to manage the additional cost it would entail to both the government and business;
- it manages the costs of IP enforcement and additional IP protections that the EU may want to include in the PH-EU FTA; and
- it provides effective protections for its own geographical indications.

#### B. Philippines' Offensive Interests

On the other hand, the Philippines could maximize the benefits that the EU can offer by ensuring that:

- it has access to advanced EU technology in protecting and commercializing genetic resources, traditional knowledge, folklore and plant varieties;
- It secures support for developing its own IP valuation mechanisms that would benefit local business and IP holders; and
- it is able to secure support in developing its own IP holders/owners that are able to benefit from EU financing without giving up the benefits over the same. This could include providing mechanisms for angel investments and protections for start-ups.

## PART VI. DISPUTE SETTLEMENT

### A. Introduction

When the terms of an agreement are breached, the importance of dispute settlement mechanisms comes to light. In this regard, there are several mechanisms that could be adopted. Some of the mechanisms may be gleaned in the words of Justice Florentino Feliciano where he elucidates that:

*“A more traditional way of looking at the settlement of disputes between states would be to examine the degree to which a third party intervenes in the process of settlement. If the process by which settlement is reached is purely bilateral, the exercise is characterized as negotiations. A third party may intervene for a strictly limited purpose, say, to bring the parties to sit together and begin inter se negotiations (good offices). In addition to bringing the parties together, the third party may transmit proposals from one party to another; in this case, the process is called mediation. Should the third party be authorized to initiate motu proprio independent proposals for the settlement of the dispute, the process is called conciliation. The third party could, alternatively, be authorized to determine the antecedent facts, or the facts constituting a dispute; in this case, the third party is known as an inquiry commission. If a third party intervenes because he has been authorized to resolve the dispute on his own, there is either arbitration or judicial settlement, depending on whether the third party is chosen on an ad hoc basis, or is part of an institutionalized framework and standing system that is specifically designed for dispute resolution. The third party in this context may be an individual arbitrator, an arbitral board or tribunal, or a judge or court.”<sup>251</sup>*

The mechanisms mentioned by Justice Feliciano above are adopted under some of the international instruments that the country has adopted. Examples would be WTO Dispute Settlement Understanding, the 1958 New York Convention, the Convention on the Settlement of Investment Dispute, the UN Commission on International Trade Law and UNCITRAL Model, and the International Court of Arbitration of the International Chamber of Commerce.<sup>252</sup> Dispute settlement mechanisms of good offices, arbitration, mediation, and conciliation may also be adopted independent of the abovementioned instruments.

States have the option of choosing what model could be adopted by virtue of the principle of free choice of means that is provided under Article 33, paragraph 1 of the Charter of the United Nations. Article 33 states that *“parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”* This principle is further echoed in the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations that provides that *“States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other means of their choice, In seeking such a settlement the*

<sup>251</sup> Dispute Settlement Under the Aegis of the World Trade Organization, in “Odyssey and Legacy: the Chief Justice Andres R. Narvasa Centennial Lecture Series,” at 180 (1999) as cited in Toward the Formulation of a Philippine Position in Resolving Trade and Investment Disputes in APEC, PASCN, Ma. Lourdes Sereno, Discussion Paper No. 2001-15.

<sup>252</sup> Toward the Formulation of a Philippine Position in Resolving Trade and Investment Disputes in APEC, PASCN, Ma. Lourdes Sereno, Discussion Paper No. 2001-15, 6

*parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.*<sup>253</sup> This is further expanded by the Manila Declaration on the Peaceful Settlement of International Disputes,<sup>254</sup> which added good offices among the mechanisms that may be adopted for an early and equitable settlement of international disputes.

The discussion below will review the dispute settlement mechanisms under multilateral trade regimes, including those under bilateral and regional trade agreements involving the Philippines and the EU.

## **B. Dispute Settlement Mechanism under the Multilateral Trade Regime**

### **a. WTO Dispute Settlement**

One of the integral parts of the “The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations” otherwise known as the Marrakesh Agreement of 15 April 1994 (the “WTO Agreements”) is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

The DSU provides the structures and procedures for prompt settlement of disputes in the event of breach by any of the WTO contracting parties of any of their obligations under the WTO Agreements. It prevents members from making unilateral determinations of violations and resorting to the suspension of concessions.

The DSU adopts elements of a quasi-adjudicative model of dispute settlement that has both political and adjudicative elements.<sup>255</sup> Its political element is reflected in the authority of the Members to settle the dispute prior to the establishment of a Panel through the consultation process. This is also reflected in the authority of the Members to decide the composition of the members of the Panel.

On the other hand, the adjudicative elements of the DSU is reflected in the following: *first*, the compulsory jurisdiction of the Panel or Appellate Body;<sup>256</sup> *second*, the requirement that Panel or Appellate Body decisions should be based on legal reasoning, the nature of these decisions as a basis and references for future decisions, and the nature of their finality (when decided by the Appellate Body or when adopted by the Members);<sup>257</sup> *third*, the negative consensus mechanisms in the Panel formation, the adoption of Panel or Appellate Body rulings, and the quasi-automatic authorization for retaliation;<sup>258</sup> and *lastly*, from the clear framework and stages provided in the agreement.<sup>259</sup>

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<sup>253</sup> UN General Assembly, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, <<http://www.unhcr.org/refworld/docid/3dda1f104.html>> Accessed: 01 July 2012

<sup>254</sup> UN General Assembly, Manila Declaration on the Peaceful Settlement of International Disputes. 15 November 1982, A/RES/37/10, <<http://www.unhcr.org/refworld/docid/3b00f4782.html>> Accessed: 01 July 2012

<sup>255</sup> Political & Quasi-Adjudicative Dispute Settlement Models in European Free Trade Agreements: Is the quasi-adjudicative model a trend or is it just another model? Edna Ramirez Robles, Staff Working Paper ERSD-2006-09 (2006), 24-25

<sup>256</sup> Political & Quasi-Adjudicative Dispute Settlement Models in European Free Trade Agreements: Is the quasi-adjudicative model a trend or is it just another model? Edna Ramirez Robles, Staff Working Paper ERSD-2006-09 (2006), 24-25

<sup>257</sup> Political & Quasi-Adjudicative Dispute Settlement Models in European Free Trade Agreements: Is the quasi-adjudicative model a trend or is it just another model? Edna Ramirez Robles, Staff Working Paper ERSD-2006-09 (2006), 25.

<sup>258</sup> Political & Quasi-Adjudicative Dispute Settlement Models in European Free Trade Agreements: Is the quasi-adjudicative model a trend or is it just another model? Edna Ramirez Robles, Staff Working Paper ERSD-2006-09 (2006), 25.

<sup>259</sup> Political & Quasi-Adjudicative Dispute Settlement Models in European Free Trade Agreements: Is the quasi-adjudicative model a trend or is it just another model? Edna Ramirez Robles, Staff Working Paper ERSD-2006-09 (2006), 25.

## DSU Procedure

The stages and time frames in the DSU process are as follows:

**Table 5. DSU Process**

Stage	Process	Time Frame
First	Consultation. This allows the Parties discuss and determine if the dispute can be resolved between them.	60 days
	Mediation. If consultation fails, the parties may ask for mediation by the WTO director-general or undertake other means of dispute resolution. However, if they decide not to be mediated or make use of other means of dispute resolution and if no mutually acceptable result is unattainable, a Panel shall be formed.	
Second	Formation of the Panel. The Dispute Settlement Body composed of the Members of the WTO shall decide the composition of the three-member Panel. For disputes under plurilateral agreements, only parties to such agreements will decide the composition of the Panel.	45 days
Third	The Panel Decides the Dispute. The Panel decides the dispute based on the agreements cited by the parties and submits its findings and recommendations to the Dispute Settlement Body (DSB)	6 months; in urgent cases, it may be shortened to 3 months
Fourth	Consideration by the DSB of the Panel Reports	20 days after Panel Reports are issued to DSB Members
	Adoption of the Panel Reports by the DSB	60 days after issuance of Panel Reports to DSB Members
	Or in the alternative	
	Notice to Appeal the Panel Report to the DSB by the losing party.	
Fifth	Establishment of the Appellate Body. Appeal to the Appellate Body, however, shall be limited to issues of law and legal interpretations covered by the Panel Report.	
Sixth	Issuance of Decision	Within 60 days from notification of appeal
Seventh	Adoption of the Appellate Body Report by the DSB	Within 30 days from issuance to DSB Members

Eighth	Implementation of Appellate Body Report as adopted by the DSB. If a party is found to have violated any of the WTO agreements, such party shall withdraw the measures that are in breach of its obligations	If immediate compliance is not possible, within 45 days from the adoption of the Appellate Body or through arbitration within 90 days from such adoption
Ninth	Evaluation by the DSB of the implementation of the Appellate Body Report	
	Aggrieved party/ies may ask for compensation or the suspension of concessions in the event of non-implementation. Hence, within a specified time frame, the parties can enter into negotiations to agree on mutually acceptable compensation.	
	If no agreement is reached, a party to the dispute may request authorization of the DSB to suspend concessions or other obligations to the other party concerned.	To be granted by DSB within 30 days from the expiry of the agreed time frame for implementation
	In case of disagreements as to the proposed level of suspension, arbitration may be entered into.	
	The suspension of concessions should cover the same sector as it was set in issue in the case before the Panel. However, if it is impossible or it won't be effective, the suspension may cover a different sector albeit within the same agreement. In cases when it may be impossible or is ineffective under the same agreement, the suspension may be under another agreement.	

Source: DSU Agreement; Author's compilation

The Dispute Settlement Body ("DSB") is mandated to monitor the implementation of adopted recommendations or rulings. Any member of the WTO may raise the implementation of adopted recommendation or rulings at the DSB any time following their adoption. It shall also be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time provided under Article 21 paragraph 3<sup>260</sup> and until the issue is resolved.

<sup>260</sup> Art. 21 (3). At a DSB meeting held within 30 days (11) after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,  
(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,  
(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings (12). In such arbitration, a guideline for the arbitrator (13) should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

The DSU recognizes the possible impact of violations to developing countries. It provides that in matters raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances by considering not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

b. The Dispute Settlement Mechanism under the Philippines-Japan Economic Partnership Agreement (PJEPA)

On 09 September 2006, Former Japanese Prime Minister Junichiro Koizumi and Former Philippine President Gloria Macapagal-Arroyo inked the Philippines-Japanese Economic Partnership Agreement (PJEPA). It was subsequently ratified by the Philippine Senate on 08 October 2008.

The PJEPA consists of 16 Chapters, which covers the promotion of investments, trade of goods and services, and movement of natural persons. It also contained a chapter on dispute avoidance and settlement.

While providing for a similar yet distinct dispute settlement mechanism from that of the DSU, the PJEPA has primarily political elements. Nonetheless, the DSU is given priority in cases where an infringement of the obligations assumed under the PJEPA is an obligation that is also assumed under the WTO Agreement.

The PJEPA has similarities with the DSU. It provides the Parties the choice of dispute settlement mechanism by giving them a right of recourse to dispute settlement procedures available under any other international agreement to which both are parties. Options for good offices, conciliation or mediation are also available. Once the choice is made, however, the Parties are precluded from adopting any other procedure for that particular dispute. Nonetheless, this shall not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute and if the Parties expressly agree to the use of more than one (1) dispute settlement procedure in respect of a particular dispute.

The DSU and the PJEPA are also similar as both allows a party to request for a consultation with regard to any matter on the interpretation or application of the respective agreements. Similar to the DSU, the PJEPA arbitral tribunal is also composed of three members. The distinctions between the two dispute settlement mechanisms lie in the periods, levels of appeal available for the parties, and the provision requiring the submission of a draft award.

Under the PJEPA, failing to settle the dispute in consultation results in the establishment of an arbitral tribunal. This arbitral tribunal shall, within ninety (90) days after the date of its establishment or within an extended time frame agreed upon by the parties, submit a draft award to the parties that includes its description of the dispute, its findings and conclusions. Upon proper examination of the Parties, the arbitral tribunal shall issue its award within thirty (30) days after the date of receipt of the draft award by the Parties. The arbitral tribunal shall then decide by consensus or if it is not possible, through a majority vote. The award of the arbitral tribunal shall be final and binding on the Parties.

The arbitral tribunal may however be terminated or suspended at any time by the Parties, which shall jointly notify the chair of the tribunal.

The awards of the Arbitral Tribunal must be complied with promptly and the Complying party should within forty five (45) days after the date of issuance of the original award, notify the other Party in writing, the period of its compliance. The other Party may request consultations if it considers the period notified to be unacceptable, in which case the Parties shall enter into consultations within thirty (30) days after the date of receipt of the request.

Exceptions are also allowed when an implementing Party considers it impracticable to comply with the original award within the implementation period. In this case, the implementing Party shall no later than the expiry of that implementation period enter into consultations with the other Party, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within forty-five (45) days after the date of expiry of that implementation period, the other Party may notify the implementing Party that it intends to suspend the application to the implementing Party of the obligations of the other Party under this Agreement.

Further consultations may be made to ensure the compliance of the implementing Party. If the award or recommendation remains unfulfilled as confirmed by the arbitral tribunal, the other Party may, upon notification to the implementing Party, suspend the application to the implementing Party of the obligations of the other Party under the PJEPA.

#### b. European Union Dispute Settlement Model

The EU has traditionally adopted dispute settlement models that contain political elements. However, in 2000, a quasi-adjudicative dispute settlement model was introduced through the EU- Mexico FTA<sup>261</sup> which was followed by the EU-South Korea Free Trade Agreement.

##### i. EU – South Korea<sup>262</sup>

The EU and Republic of Korea Free Trade Agreement (EU-South Korea FTA) is deemed as the “*most ambitious*” trade agreement that was entered into by the European Union.<sup>263</sup> It is the first free trade agreement entered into by the EU with an Asian Nation and was provisionally applied between the parties since 01 July 2011.

The EU-South Korea FTA has been noted for its comprehensiveness as it covers market liberalization and facilitation of trade in goods and services and investment, opening of government procurement markets, establishment of electronic commerce, promotion of competition and foreign direct investment, enforcement and protection of intellectual property rights, elimination of custom duties on originating goods of each party and according the national treatment to goods of the other party, as well as cooperating for the promotion of cultural diversity between the Parties.

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<sup>261</sup> Robles, 3.

<sup>262</sup> EU-SOUTH KOREA FREE TRADE AGREEMENT: A QUICK READING GUIDE OCTOBER 2010 <[http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc\\_145203.pdf](http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145203.pdf)> Accessed: 01 July 2012

<sup>263</sup> The EU-Korea Free Trade Agreement in Practice, European Commission on Trade, European Union Publication, 2011, 1



The Dispute Settlement mechanism under this Agreement<sup>264</sup> is based on the model of the WTO Dispute Settlement Understanding, hence, it also contains quasi-adjudicative elements.

Its political elements are the provisions that allows the Parties the choice of dispute settlement mechanism, subject to certain limitations and the option to propose individuals in the list of Arbitrators, as well as those who will be part of the arbitration panel.

On the other hand, the Agreement's adjudicative nature is reflected in the existence of a fixed structure, procedures, and time frame. It is also reflected in its adoption of customary rules of interpretation of public international law and interpretations of the Panel and Appellate Body under the DSU for the interpretation and adjudication of cases, and mechanisms to break possible deadlocks due to consensus requirements.

## ii. CARIFORUM-EU EPA

The Economic Partnership Agreement between the CARIFORUM<sup>265</sup> States and the EU, ("CARIFORUM-EU EPA")<sup>266</sup> was provisionally implemented since 29 December 2008.<sup>267</sup> It adopts a dispute settlement mechanism similar to the EU-South Korea Free Trade Agreement. It provides a clear procedure of consultation and arbitration within specified periods. It similarly provides for the interpretation of the provisions of the EPA using the customary rules of interpretation under Public International Law. Lastly, it provides for the qualifications of arbitrators as well. The stark contrast however, would be the inclusion of mediation in the procedure. The EPA also precludes the adjudication of the WTO rights and obligations of the parties.

## iii. Mexico-EU EPA

In 1997, the EU and Mexico adopted the Economic Partnership, Political Coordination and Cooperation Agreement between Mexico and the European Union ("Mexico-EU EPA") This Agreement entered into force in October 2000.

The Mexico-EU EPA is the EU's first trans-Atlantic free trade agreement while this is Mexico's second most significant treaty after the North American Free Trade Agreement (NAFTA). It is characterized as a WTO+ agreement by virtue of its breadth, covering agreements based on NAFTA, the WTO, and other plurilateral agreements (the Singapore issues, investments, public procurement, trade facilitation and rules for competition).<sup>268</sup>

It also contains a dispute settlement procedure.

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<sup>264</sup> Text of the EU-Korea Free Trade Agreement, Official Journal of the European Union, L127 Volume 54, 14 May 2011, < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:EN:PDF>> Accessed: 02 July 2012

<sup>265</sup> Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago.

<sup>266</sup> Official Journal of the European Union, L 289. 30.10.2008.

<sup>267</sup> NEPAIU, UKAID <[http://nepaiu.gov.gd/index.php?option=com\\_content&view=article&id=124&itemid=194](http://nepaiu.gov.gd/index.php?option=com_content&view=article&id=124&itemid=194)>.

<sup>268</sup> The EU-Mexico Free Trade Agreement Seven Years On: A Warning to the Global South, Rodolfo Aquirre Reveles and Manuel Peres Rocha L., Debate Paper Alternative Regionalisms, 8 Available at < <http://www.rmalc.org.mx/documentos/eumexicofta.pdf>> Accessed: 30 June 2012

The Agreement's Dispute Settlement Mechanism creates a Joint Council that shall decide the establishment of a dispute settlement procedure that is consistent with the WTO.<sup>269</sup> The dispute settlement mechanism as adopted in the Decision 2/2000121 of the Joint Council is quasi-adjudicative as it contains similar political and adjudicative elements as that of the DSU.

It is political as it grants the parties the option to arrive at a mutually satisfactory resolution of any matter that might affect their operation through cooperation and consultations prior to filing a Complaint. At the same time, it also allows the complaining Party to withdraw its complaint any time before the issuance of a final report. It also gives them an option to agree on the measures that will be adopted and the period of its adoption.

It is adjudicative as it provides for fixed stages and procedures, as well as quasi-automatic mechanisms in cases where consensus may not be reached. It also provides that the final report of the arbitration panel regarding the existence of the violation, the determination of non-conformity to the final report, the ruling for suspension of benefits, and the subsequent determination of non-conformity, even after the suspension of benefits, is binding.

#### iv. South Africa-EU Trade, Development and Cooperation Agreement

The Agreement on Trade, Development and Cooperation between the European Community and its Member States and the Republic of South Africa ("South Africa-EU TDCA"),<sup>270</sup> provides the least adjudicative model for the agreements provided in this paper. It was signed on 11 October 1999.<sup>271</sup>

While the Agreement provides for a dispute settlement provision, it lacks the necessary structure and details. The Agreement relies on the Cooperation Council to resolve the dispute and interpret the Agreement. It is also dependent on the Council to establish the working procedures for arbitration. Moreover, it is also problematic because it does not provide for mechanisms to break possible deadlocks when consensus is necessary or when there is inaction by one party.

#### c. Philippine WTO DSU Institutional Framework

Disputes covering Philippine rights and obligations under the World Trade Organization are elevated by the Department of Trade and Industry as the Chair of the Tariff and Related Matters Committee.<sup>272</sup>

For other matters, the party who is entitled to elevate the dispute depends on the law, treaty or agreement deemed to have been violated.<sup>273</sup>

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<sup>269</sup> Art. 50, EU-Mexico FTA, < [http://www.esf.be/new/wp-content/uploads/2009/06/eu-mx\\_fta.pdf](http://www.esf.be/new/wp-content/uploads/2009/06/eu-mx_fta.pdf)> Accessed: 01 July 2012

<sup>270</sup> Official Journal of the European Communities, L 311. 4.12.1999 <<http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:1999:311:0003:0297:EN:PDF>>.

<sup>271</sup> European Commission website < <http://ec.europa.eu/trade/creating-opportunities/bilatera-relations/countries/south-africa/>>.

<sup>272</sup> Does the Philippines Need A Trade Representative Office? Gloria O. Pasadilla and Christine Marie M. Liao, DISCUSSION PAPER SERIES NO. 2005-26, Philippine Institute for Development Studies, 8

<sup>273</sup> Ibid.

The country is then represented by the Department of Justice as the legal counsel and prosecution arm of the Government<sup>274</sup> and by the Office of the Solicitor General who shall represent the Government of the Philippines, its agencies and instrumentalities and its officials and agents in any litigation, proceeding, investigation or matter requiring the services of lawyers, and, upon the instructions of the President, to also the Republic of the Philippines in international litigations, negotiations or conferences where the legal position of the Republic must be defended or presented.<sup>275</sup>

### **C. Analysis and Assessment of Interests**

While negotiating an international agreement, Parties may agree on different dispute settlement mechanisms that may include mediation, consultations, and arbitration. For free trade agreements, while elements of these dispute settlement modes have been adopted, Parties usually rely on the model provided by the WTO Dispute Settlement Understanding.

In the negotiations for a PH-EU FTA, the EU would most likely push for DSU consistent procedures. Being essentially a multilateralist and a strong advocate of the WTO system, the EU has always tried to ensure that, at a minimum, provisions of the WTO are incorporated in its regional or bilateral free trade agreements, including dispute settlement mechanisms.

Under a PH-EU FTA, for the Philippines, the basic concerns are:

- the potential costs to accessing or protecting its interests through the dispute settlement mechanism of a PH-EU FTA;
- its potential exposure to different venues over the same cause of action or dispute.

The Philippines should thus be able to ensure that:

- efforts at settling disputes will not result to any substantial cost to the country; and
- it is not exposed to unlimited liability due to the availability of different concurrent remedies and venues to the Parties.

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<sup>274</sup> Executive Order No. 292 (Administrative Code), as amended, Book IV, Title III, Chapter 1, Sec. 1.

<sup>275</sup> Ibid, Book IV, Title III, Chapter 12, Sec. 35

## PART VII. TRADE REMEDIES

### A. Introduction

While the WTO Agreement promotes trade liberalization and greater market access among its Members, it also provides remedies against unfair trade practice and the adverse effects of fair trade. These remedies consist of: antidumping duties, countervailing duties and safeguards mechanisms.

Antidumping and countervailing duties, seek to address “unfair trade” practices, i. e., those that provide foreign exporters undue advantage over domestic producers of importing countries. Safeguard mechanisms, on the other hand, are “fair trade” remedies, that is, those aimed at addressing the adverse consequences of trade liberalization.

### B. Anti-Dumping Measures

#### a. Anti-dumping Measures under the Multilateral Trade Regime

The act of dumping itself is not prohibited under the WTO. What is prohibited is dumping that causes or threatens to cause injury to the domestic industry for like products of the importing country. Thus, WTO members may only impose anti-dumping measures when they are able to show by objective evidence that the dumping by a foreign exporter into an importing country is injurious to the affected domestic industry.<sup>276</sup>

The rules on anti-dumping are provided under Article VI of GATT 1994 and the Anti-Dumping Agreement (“ADA”).<sup>277</sup> Under these rules, an importing country may impose anti-dumping measures on the products of an exporting country if the following conditions are present:

- i. There is dumping, that is, where products are introduced in another country at less than normal value, i. e., less than:
  - the domestic price in the ordinary course of business
  - in the absence of domestic price:
    - the highest comparable export price to a third country in the ordinary course of trade or
    - the production costs in country of origin plus selling cost plus profit<sup>278</sup>
- ii. There is injury<sup>279</sup> that:
  - Causes or threatens material injury to an established industry of a like product<sup>280</sup>;
  - or
  - Materially retards the establishment of a domestic industry of a like product (GATT 1994, Art. VI[1])

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<sup>276</sup> Van den Bossche, Peter, “The Law and Policy of the World Trade Organization, Texts, Cases and Materials,” Cambridge University Press, New York: 513, 516.

<sup>277</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>278</sup> GATT 1994, Article VI.1.

<sup>279</sup> ADA, Article 3.1.

<sup>280</sup> “Like product” is interpreted to mean a product which is identical, i. e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration (ADA, Art. 2.6).

iii. There exists a causal link between the dumping and the injury.<sup>281</sup>

Under the ADA, remedies against injurious dumping are limited to:

- Provisional measures.<sup>282</sup> These measures may take the form of a provisional duty or cash deposit or bond equal to the estimated anti-dumping duty. They are usually imposed for a short period of time with maximum periods between four to nine months.<sup>283</sup>
- Price undertakings.<sup>284</sup> These are voluntary undertakings of any exporter in the dumping state to revise its export price to the importing state. Such revision should satisfy the authorities of the importing state that the injury to the affected domestic industry is eliminated. This follows a preliminary determination of the authorities of such state that injury is caused by the dumping.<sup>285</sup>
- Definitive anti-dumping duties.<sup>286</sup> These duties are imposed after a final determination of the existence of injurious dumping.<sup>287</sup> The maximum allowable duty is equal to the margin of dumping, that is, the normal value minus the export price.<sup>288</sup> It is also imposed only for as long as and to the extent that it neutralizes the injurious effects of the dumping.<sup>289</sup>

### *Proving Injurious Dumping*

Determination of injury should be based on positive evidence and an objective examination of (a) the volume of the dumped imports and their price effects on like products in the domestic market; and (b) the impact of these imports on domestic producers of the like products.<sup>290</sup> On the other hand, authorities determining a threat of material injury to a domestic industry are required to base such determination on facts and not on mere allegations. Factors such as the significant rate of increase of dumped imports, increased capacity of the export, and whether prices of imports would have a significant depressing or suppressing effect on domestic prices, among others, provide guidance in determining a threat of material injury. However, the ADA provides that it is the totality of related factors that should lead to the conclusion of an imminent threat to the domestic industry.<sup>291</sup>

### *Internal Procedures for Anti-Dumping Actions*

A domestic industry that is affected by the anti-dumping behavior of exporters of another country has the right to initiate anti-dumping actions within its country through the country's designated authorities. For this purpose, the ADA provides for procedures for initiating, investigating and making determinative findings on the existence of injurious dumping. These are outlined in summary as follows:

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<sup>281</sup> ADA, Article 3.5

<sup>282</sup> ADA, Article 7.

<sup>283</sup> ADA, Article 7.4.

<sup>284</sup> ADA, Article 8.

<sup>285</sup> ADA, Article 8.1 and 8.2.

<sup>286</sup> ADA, Article 9.

<sup>287</sup> ADA, Article 9.1.

<sup>288</sup> GATT1994, Article VI.2.

<sup>289</sup> ADA, Article, 11.1.

<sup>290</sup> ADA, Article 3.1.

<sup>291</sup> ADA, Article 3.7.

- i. Initiation of the anti-dumping investigation. An anti-dumping investigation is initiated either by the filing of a written application by or on behalf of an affected domestic industry<sup>292</sup> or upon *motu proprio* investigation conducted by the designated authorities.<sup>293</sup>
- ii. Conditions for investigation. Anti-dumping investigations will be initiated by the authorities under the following conditions:
  - there is sufficient evidence to justify the initiation of an investigation;<sup>294</sup>
  - it is supported by or made in behalf of the affected domestic industry;<sup>295</sup>
  - if the margin of dumping is not *de minimis*.<sup>296</sup>
- iii. Notification requirements. Before proceeding to an investigation, the authorities shall notify the government of the exporting country concerned.<sup>297</sup> All interested parties shall also be given notice of the information required and shall be given a chance to present their evidence in support of their claims.<sup>298</sup>
- iv. Duration of the investigation. Anti-dumping investigations shall be for a period of one year. Under special circumstances, it may extend to no longer than 18 months after initiation;<sup>299</sup>
- v. Preliminary determination. After an investigation has been initiated, the designated authorities shall make a preliminary determination of the existence of dumping and the consequent injury to a domestic industry. It may then determine the necessity of imposing provisional measures to prevent the injury while investigation is pending.<sup>300</sup>
- vi. Final determination. Before a final determination is made, the authorities shall inform all interested parties of the essential facts under consideration which will be the basis of the decision to apply definitive measures. Parties will be given sufficient time to defend their interests.<sup>301</sup> Once a positive finding of the existence of injurious dumping is made the designated authorities shall impose definitive dumping duties which may remain in force as long as the dumping causing the injury exists, which shall not be later than five (5) years subject to periodic review and certain conditions.<sup>302</sup>

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<sup>292</sup> ADA, Article 5.2. The application shall contain the following information: evidence of dumping, injury and the causal link between the dumping and alleged injury; the identity of the applicant, or the affected domestic industry, as the case may be, and a description of the volume and value of the domestic production of the like product of the applicant or affected domestic industry; description of the alleged dumped product, the country/ies of origin of the product, the identity of each known exporter or foreign producer and a list of known importers of the product; information on domestic prices of the alleged dumped product in the country of origin or export, or export prices of such product, or the resale price of the product in the importing country; and information on the volume of importations of the dumped product, its effect on domestic prices of like product in the importing country, and the consequent impact of the same on the domestic industry.

<sup>293</sup> ADA, Article 5.8.

<sup>294</sup> ADA, Articles 5.3 and 5.6.

<sup>295</sup> ADA, Article 5.4. It shall be deemed to be supported by the industry if domestic producers having a total collective output of more than 50% signify their support for the application. Support from producers accounting for less than 25% of the total collective output will, however, not be entertained

<sup>296</sup> ADA, Article 5.8. Less than 2 per cent of the export price and volume of imports from the exporting country of like products is less than 3 per cent of imports, subject to certain conditions.

<sup>297</sup> ADA, Article 5.5.

<sup>298</sup> ADA, Articles 6.1 and 12.

<sup>299</sup> ADA, Article 5.10.

<sup>300</sup> ADA, Article 7.1.

<sup>301</sup> ADA, Article, 6.9.

<sup>302</sup> ADA, Articles 9.1, 11.1,11.2 and 11.3.

## b. Philippine Law on Anti-dumping

Four years after its entry into the World Trade Organization in 1995,<sup>303</sup> the Philippines passed Rep. Act No. 8752, otherwise known as the the Anti-Dumping Act of 1999 (the “Anti-Dumping Act”), which amended Sec. 301 of the Tariff and Customs Code.<sup>304</sup>

The Anti-Dumping Act adopted the substantive provisions of the WTO ADA. It also outlined the specific procedures for filing an application for the imposition of anti-dumping duty or *motu proprio* review of the designated authorities in accordance with the provisions of the WTO ADA.

The initial application or action shall be filed with the Secretary of the Department of Trade and Industry, for non-agricultural products, or the Secretary of the Department of Agriculture, for agricultural products. After notices are sent to concerned parties and the exporting country, and submission of evidence, the Secretary, as the case may be, will issue a preliminary determination of the existence of dumping, material injury to a domestic industry and the causal link between the dumping and material injury.<sup>305</sup>

The preliminary finding will then be forwarded to the Tariff Commission, which will commence formal investigation and render a final determination of the existing of injurious dumping. After determining such existence, it will determine the anti-dumping duty to be imposed and the duration of such imposition, which shall not exceed five (5) years, subject to certain conditions.<sup>306</sup> Based on the finding of the Tariff Commission, the Secretary will impose the definitive anti-dumping duty.<sup>307</sup>

Remedies against injurious dumping under the RA 8752 also cover provisional measures,<sup>308</sup> voluntary price undertakings<sup>309</sup> and definitive anti-dumping duties.<sup>310</sup>

## c. EU Law on Anti-Dumping

After the effectivity of the WTO Agreement, , the European Community (now the European Union) passed Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community. This has since been amended periodically and subsequently codified under Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (“Anti-Dumping Regulations”).<sup>311</sup>

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<sup>303</sup> Understanding the WTO: Organization, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm). Accessed 14 November 2012. Philippines' entry is on 01 January 1995.

<sup>304</sup> Republic Act No. 8752 (RA 8752), “An Act Providing the Rules for the Imposition of an Anti-Dumping Duty, Amending for the Purpose Section 301, Part 2, Title II, Book I of the Tariff and Customs Code of the Philippines, as Amended by Republic Act No. 7843, and For Other Purposes.”

<sup>305</sup> See Tariff and Customs Code, Sec. 301 (a) to (f), as amended by RA 8752.

<sup>306</sup> See Tariff and Customs Code, Sec. 301 (h) and (o), par. 5, as amended by RA 8752.

<sup>307</sup> Tariff and Customs Code, Sec. 301 (a), as amended by RA 8752.

<sup>308</sup> Tariff and Customs Code, Sec. 301 (f), last par., as amended by RA 8752.

<sup>309</sup> Tariff and Customs Code, Sec. 301 (j), as amended by RA 8752.

<sup>310</sup> Tariff and Customs Code, Sec. 301 (l), as amended by RA 8752.

<sup>311</sup> Official Journal of the European Union, L 343/51.

The Anti-Dumping Regulations essentially legislated the provisions of the WTO ADA into EU law similar to the Philippine legislation. However, it went even further by providing detailed guidance in:

- calculating normal values, distinguishing between market and non-market economies for purposes of applying its rules of normal value calculation;
- determining material injury to the Community industries;
- due process requirements and an administrative system for applying for anti-dumping duties;
- implementation of the various remedies of provisional measures, price undertakings and imposition of definitive anti-dumping duties;
- treatment of confidential information; and
- monitoring of the effect of anti-dumping remedies imposed.<sup>312</sup>

In addition to the above, the Anti-Dumping Regulations also included provisions on circumvention of anti-dumping measures although these do not appear in the WTO ADA.<sup>313</sup> The issue of circumvention has been referred to the Committee on Anti-Dumping Practices,<sup>314</sup> but with the failure of the Doha Round negotiations, this has not yet been incorporated in the WTO ADA.

The Anti-Dumping Regulations defines circumvention as “*a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that remedial effects of the duty are being undermined in terms of the prices and/or quantities of like product, and where there is evidence of dumping . . .*”<sup>315</sup>

Examples of circumvention cited include:

- slight modification of the description of the product, without changing its essential characteristics, to remove it from the tariff line subject to anti-dumping duty;
- consignment of the product through third countries; and
- re-organization of the channels of sales and productions among exporters and producers of the exporting country in such a way that the product is exported to the EU through exporters enjoying lower duties and not covered by the anti-dumping duty.

#### d. Anti-Dumping in EU Free Trade Agreements

The anti-dumping provisions of most EU FTAs generally provide for compliance with Article VI of GATT 1994 and the Anti-Dumping Agreement (“ADA”).<sup>316</sup> Some modifications appear, for example, stating that if an anti-dumping measure is imposed by a state under the WTO Agreement within the regional grouping, a similar regional

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<sup>312</sup> Anti-Dumping Regulations, Preamble, pars. (4) to (21) and (23) to (34).

<sup>313</sup> Anti-Dumping Regulations, Preamble, par.(22), Article 13.

<sup>314</sup> Decision on Anti-Circumvention, [http://www.wto.org/english/docs\\_e/legal\\_e/39-dadp1\\_e.htm](http://www.wto.org/english/docs_e/legal_e/39-dadp1_e.htm).

<sup>315</sup> Anti-Dumping Regulations, Article 13.1.

<sup>316</sup> See for example Trade, Development and Cooperation Agreement Between the European Community and South Africa, Article 23; Economic Partnership Agreement Between the CARIFORUM States and the European Community (CARIFORUM-EU EPA), Article 23;



measure on the same product shall not apply to such state.<sup>317</sup> Minor modifications also include the language to be used in the documents filed for an anti-dumping action, as in the South Korea-EU Free Trade Agreement.<sup>318</sup>

## C. Countervailing Duties

### a. Countervailing Duties under the Multilateral Trade Regime

The rules on countervailing duties are provided under Article VI of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (“SCM”).<sup>319</sup> Under these rules, an importing country may impose countervailing duties on the products of an exporting country where the existence of certain subsidies are shown.

Subsidies under the WTO Agreement and the SCM are as follows:

- i. Prohibited subsidies. These are subsidies that are in themselves trade restrictive, hence expressly prohibited by the WTO Agreements. These are:
  - export subsidies, that is, those granted conditioned, solely or as one of several other conditions, on export performance; and
  - import substitution subsidies, that is, those that are granted conditioned on the use of domestic over imported goods.<sup>320</sup>
- ii. Actionable subsidies. These are subsidies that cause adverse effects to the trade interests of other WTO Members. For these subsidies, the affected state will need to make a determination of the adverse effects of such subsidies on its domestic industry dealing in a like product. To determine this, the authorities of the affected state must find sufficient evidence of:<sup>321</sup>
  - the existence of a subsidy in the form of a:
    - financial contribution, direct transfer of funds by the government, foregone government revenue, government provision of goods and services, government payment to a funding mechanism (may be implemented by a private body); or income or price support; and
    - a benefit is conferred thereby;<sup>322</sup>
  - the existence of:
    - injury to domestic industry of another Member
    - nullification or impairment of benefits enjoyed by other Members
    - serious prejudice to interests of another Member;<sup>323</sup> and
  - a causal link between the subsidy and the injury, nullification or serious prejudice to another Member.

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<sup>317</sup> CARIFORUM-EU EPA, Article 23.4.

<sup>318</sup> South Korea-EU FTA, Article 3.8.3.

<sup>319</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>320</sup> SCM, Article 3.1.

<sup>321</sup> SCM, Article 11.2.

<sup>322</sup> SCM, Article 1.1.

<sup>323</sup> SCM, Part III.

Like the ADA, remedies against prohibited and actionable subsidies are limited to:

- Provisional measures.<sup>324</sup> These measures may take the form of a provisional duty or cash deposit or bond equal to the provisionally calculated amount of subsidization. They are usually imposed for a short period of time with a maximum period of four months.<sup>325</sup>
- Voluntary undertakings.<sup>326</sup> These are undertakings of either the government of the exporting state to eliminate or limit the effects of the subject subsidy measures, or any exporter in the exporting state to revise its export price that will satisfy the investigating authorities of the importing state of the elimination of the injurious subsidy.<sup>327</sup>
- Definitive countervailing duties.<sup>328</sup> These duties are imposed after a final determination of the existence of injurious subsidies.<sup>329</sup> The maximum amount of countervailing duties allowed under the WTO Agreement is equal to the direct or indirect estimated bounty or subsidy.<sup>330</sup> It is also imposed only for as long as and to the extent that it neutralizes the injurious effects of the subsidization.<sup>331</sup>

### *Proving Actionable Subsidies*

In proving that an actionable subsidy exists, the investigating authorities must determine that such injury is specific<sup>332</sup> and substantiated by positive evidence.<sup>333</sup> The requirement of specificity imposed by the SCM means that not all financial contribution granted by a state that confers a benefit will be considered actionable subsidies. The SCM simply requires that the subsidy must be shown to be “specific to an enterprise, or industry or group of enterprises or industries within the jurisdiction of the granting authority.”<sup>334</sup>

A finding of injury to the importing country must be arrived at through objective examination and based on positive evidence of the volume of subsidized imports and significant increase in subsidized imports, price effect of subsidized imports, significant price undercutting or depressed prices to a significant degree or prevent price increases on domestic producers of like products.<sup>335</sup>

A finding of a causal link between the subsidy and the injury must also be based on the examination of all relevant evidence before the authorities.<sup>336</sup>

### *Internal Procedures for Countervailing Actions*

A domestic industry that is adversely affected by subsidies granted by an exporting country that benefits its exports to the importing country has the right to initiate countervailing actions within its country through the country's designated authorities.

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<sup>324</sup> SCM, Article 17.

<sup>325</sup> SCM, Article 17.2 and 17.4.

<sup>326</sup> SCM, Article 18.

<sup>327</sup> SCM, Article 18.1.

<sup>328</sup> SCM, Article 19.

<sup>329</sup> SCM, Article 19.1.

<sup>330</sup> GATT 1994, Article VI.3.

<sup>331</sup> SCM, Article, 21.1.

<sup>332</sup> SCM, Article 1.2.

<sup>333</sup> SCM, Article 2.4.

<sup>334</sup> SCM Article 2.1.

<sup>335</sup> SCM, Article 15.2.

<sup>336</sup> SCM, Article 15.5.

For this purpose, the SCM provides for procedures for initiating, investigating and making determinative findings on the existence of injurious subsidies.

- i. Initiation of the countervailing investigation. A countervailing investigation is initiated either by the filing of a written application by or on behalf of an affected domestic industry<sup>337</sup> or upon *motu proprio* investigation conducted by the designated authorities.<sup>338</sup>
- ii. Conditions for investigation. Countervailing investigations will be initiated by the authorities under the following conditions:
  - there is sufficient evidence to justify the initiation of an investigation;<sup>339</sup>
  - it is supported by or made in behalf of the affected domestic industry;<sup>340</sup>
  - if the amount of subsidy is not *de minimis*.<sup>341</sup>
- iii. Notification requirements. All interested parties shall be given notice of the information required and shall be given a chance to present their evidence in support of their claims.<sup>342</sup>
- iv. Duration of the investigation. Countervailing investigations shall be for a period of one year. Under special circumstances, it may extend to no longer than 18 months after initiation,<sup>343</sup>
- v. Preliminary determination. After an investigation has been initiated, the designated authorities shall make a preliminary determination of the existence of a subsidy and the consequent injury to a domestic industry. It may then determine the necessity of imposing provisional measures to prevent the injury while investigation is pending.<sup>344</sup>
- vi. Final determination. Before a final determination is made, the authorities shall inform all interested parties of the essential facts under consideration which will be the basis of the decision to apply definitive measures. Parties will be given sufficient time to defend their interests.<sup>345</sup> Once a positive finding of the existence of injurious dumping is made the designated authorities shall impose definitive dumping duties which may remain in force as long as the dumping causing the injury exists, which shall not be later than five (5) years subject to periodic review and certain conditions.<sup>346</sup>

Unlike the ADA, the SCM provides that products not imported directly from the subsidizing state but from an intermediary state shall be treated as if these were imported from the former state for purposes of applying the provisions of the SCM.<sup>347</sup>

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<sup>337</sup> SCM, Article 11.2. The application shall contain the following information: evidence of a subsidy, injury and the causal link between the subsidy and alleged injury; the identity of the applicant, or the affected domestic industry, as the case may be, and a description of the volume and value of the domestic production of the like product of the applicant or affected domestic industry; description of the alleged subsidized product, the country/ies of origin of the product, the identity of each known exporter or foreign producer and a list of known importers of the product; evidence with regard to the existence, amount and nature of the subsidy in question; and evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies.

<sup>338</sup> SCM, Article 11.6.

<sup>339</sup> SCM, Article 11.3 and 11.6.

<sup>340</sup> SCM, Article 11.4. It shall be deemed to be supported by the industry if domestic producers having a total collective output of more than 50% signify their support for the application. Support from producers accounting for less than 25% of the total collective output will, however, not be entertained

<sup>341</sup> SCM, Article 11.9. Where the amount of subsidy is less than 1 percent ad valorem or the where the volume of subsidized imports, actual or potential, or the injury is negligible.

<sup>342</sup> SCM, Articles 12.1 and 22.

<sup>343</sup> SCM, Article 11.11.

<sup>344</sup> SCM, Article 17.1.

<sup>345</sup> SCM, Article, 12.8.

<sup>346</sup> SCM, Articles 19.1, 21.1,21.2 and 21.3.

<sup>347</sup> SCM, Article 11.8.

### *Non-Actionable Subsidies*

As noted above, not all subsidies are prohibited or actionable under the WTO Agreement. States may grant subsidies as long as they are:

- Not specific, i. e., it does not particularly benefit an enterprise, or industry or group of enterprises or industries within the jurisdiction of the granting authority;<sup>348</sup> or
- Intended for the following:
  - Research activities conducted by firms or higher education or research establishments, under certain conditions;
  - Disadvantaged regions pursuant to a regional development framework and are non-specific, subject to certain conditions;
  - Assisting firms to adjust to additional constraints or financial burdens arising from a new law or regulation, subject to certain conditions.<sup>349</sup>

#### b. Philippine Law on Subsidies and Countervailing Duties

In 1998, the Philippines passed Republic Act No. 8751<sup>350</sup> amending Section 302 of the Tariff and Customs Code, which provided for the basis and procedures for countervailing investigations (the “Countervailing Act”).

Like the ADA, the Countervailing Act adopted the substantive provisions of the WTO SCM. It also outlined the specific procedures for filing an application for the imposition of countervailing duty or *motu proprio* review of the designated authorities in accordance with the provisions of the WTO SCM.

The procedures for initiating an investigation under an application for countervailing duties is essentially similar to the procedures for filing an application for anti-dumping duties.<sup>351</sup> Remedies against injurious dumping under the RA 8751 also cover provisional measures,<sup>352</sup> voluntary price undertakings<sup>353</sup> and definitive anti-dumping duties.<sup>354</sup>

#### c. EU Law on Subsidies and Countervailing Duties

The European Community (now the European Union) also passed Council Regulation (EC) No. 2026/97 of 06 October 1997 on protection against subsidised imports from countries not members of the European Community. Like the Anti-Dumping Regulations, this earlier regulations have undergone several amendments which was finally codified through Council Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (“Countervailing Regulations”).<sup>355</sup>

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<sup>348</sup> SCM, Article 8.1.

<sup>349</sup> SCM, Article 8.2.

<sup>350</sup> An Act Strengthening the Mechanisms for the Imposition of Countervailing Duties on Imported Subsidized Products, Commodities or Articles of Commerce in Order to Protect Domestic Industries from Unfair Trade Competition, Amending for the Purpose Section 302, Part 2, Title II< Book I of Presidential Decree No. 1464, Otherwise Known as the Tariff and Customs Code of the Philippines, As Amended.

<sup>351</sup> See Tariff and Customs Code, Sec. 302 (A) to (G), (L) to (P), as amended by RA 8751.

<sup>352</sup> Tariff and Customs Code, Sec. 302 (fE, last par., as amended by RA 8751.

<sup>353</sup> Tariff and Customs Code, Sec. 302 (M), as amended by RA 8751.

<sup>354</sup> Tariff and Customs Code, Sec. 302 (O), as amended by RA 8751.

<sup>355</sup> Official Journal of the European Union, L 343/51.

While providing more specific and detailed guidance to the provisions of the WTO SCM,<sup>356</sup> the Countervailing Regulations, like the Anti-Dumping Regulations, also added WTO plus provisions covering remedies against circumvention of the the Countervailing Regulations (“circumvention provisions”). These provisions provide for similar procedures as that provided by the Anti-Dumping Regulations.<sup>357</sup>

#### d. Countervailing in EU Free Trade Agreements

The countervailing provisions of most EU FTAs generally provide for compliance with Article VI of GATT 1994 and the SCM.<sup>358</sup> Some modifications appear, for example, stating that if a countervailing measure is imposed by a state under the WTO Agreement within the regional grouping, a similar regional measure on the same product shall not apply to such state.<sup>359</sup> Minor modifications also include the language to be used in the documents filed for an anti-dumping action, as in the South Korea-EU Free Trade Agreement.<sup>360</sup>

### D. Safeguard Measures

#### a. Safeguard Measures under the Multilateral Trade Regime

Article XIX and by extension, the Agreement on Safeguards, is one of several mechanisms within the WTO regime that allow contracting parties to adjust the GATT bargain in the face of changing circumstances.<sup>361</sup> Mavroidis characterizes the safeguard mechanism as among the “business exceptions” to the basic GATT discipline of non-discrimination (i. e., consists of the Most-Favored-Nation<sup>362</sup> and National Treatment<sup>363</sup> principles).<sup>364</sup>

This mechanism, however, is distinguished from other GATT-sanctioned trade protection, such as, antidumping and countervailing duties by the trade problems they are used to remedy.<sup>365</sup> Safeguard mechanisms are “fair trade” remedies, that is, those aimed at addressing the adverse consequences of trade liberalization. Antidumping and countervailing duties, on the other hand, seek to address “unfair trade” practices, i. e., those that provide foreign exporters undue advantage over domestic producers of importing countries.

#### *Safeguards Mechanism in the WTO*

The safeguard mechanism in the WTO consists of Article XIX, the Agreement on Safeguards, and the relevant provisions of the Agreement on Agriculture, the former

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<sup>356</sup> Countervailing Regulations, Preamble, pars. (5) to (19) and (21) to (33).

<sup>357</sup> Countervailing Regulations, Article 23.

<sup>358</sup> See for example Trade, Development and Cooperation Agreement Between the European Community and South Africa, Article 23; Economic Partnership Agreement Between the CARIFORUM States and the European Community (CARIFORUM-EU EPA), Article 23;

<sup>359</sup> CARIFORUM-EU EPA, Article 23.4.

<sup>360</sup> South Korea-EU FTA, Article 3.8.3.

<sup>361</sup> Alan O. Sykes, *The WTO Agreement on Safeguards: A Commentary* (Oxford University Press, 2006): 5.

<sup>362</sup> GATT 1994, Article I.

<sup>363</sup> GATT 1994, Article III.

<sup>364</sup> The other three being antidumping, countervailing, infant industry protection and re-negotiations of tariff bindings, See Petros C. Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (Oxford University Press, 2005): 23.

<sup>365</sup> Chad P. Brown and Meredith a. Crowley, “Safeguards,” in *The World Trade Organization: Legal, Economic and Political Analysis*, eds. Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (Springer US, 2005).

having been adopted from GATT 1947 Article XIX, and the latter, negotiated and agreed to at the conclusion of the Uruguay Round in 1994.

## 1. GATT 1947 Article XIX

Safeguard measures first appeared in GATT 1947 under Article XIX as emergency mechanisms that were intended to address exigent circumstances, i. e. circumstances that may be deemed too urgent to wait for the next negotiating round. The provision is similar to the “escape clause” in the US-Mexico trade agreement of 1942. The escape clause in that agreement provided:

If, as a result of unforeseen developments and of the concessions granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury.<sup>366</sup>

While seeking a renewal of his negotiating authority under the Reciprocal Trade Agreements Act in 1945, the U. S. Congress expressed concerns to the President about possible injury to U. S. industries as a result of trade concessions. The President responded by promising Congress that he would insist on an “escape clause” in future trade agreements similar to the US-Mexico trade agreement of 1942. Thereafter, the President issued Executive Order No. 9382<sup>367</sup> requiring an escape clause in future agreements issued in 1947. Thus, during the negotiations over the GATT and the ITO Charter, US representatives urged the inclusion of an escape clause modeled after the above noted US-Mexico trade agreement.<sup>368</sup>

As a result, the text of Article XIX:1(a), of which GATT 1947 is a part of,<sup>369</sup> bears a striking similarity to the escape clause of the U. S. - Mexico trade agreement, to wit:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

The above provision sets out the basic conditions existing in the domestic market of an importing party that would justify the imposition of safeguard measures against selected imports. These conditions are:

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<sup>366</sup> Sykes, 3-4, citing Reciprocal Trade Agreement with Mexico., December 23, 1942, Art. XI, 57 Stat 833 (1943).

<sup>367</sup> Sykes, 3-4, citing February 25, 1947, 3 C. F. R. §624 (1947).

<sup>368</sup> Sykes, 3-4.

<sup>369</sup> Argentina - Safeguard Measures on Imports of Footwear (Argentina-Footwear), WT/DS121/AB/R, 14 December 1999, para. 80.

- (a) an import surge of particular products and other conditions (may include a fall in import prices);
- (b) causing or threatening to cause serious injury to domestic producers
- (c) of like or directly competitive products
- (d) as a result of:
  - (i) unforeseen developments and
  - (ii) the effects of the obligations incurred under GATT.

When these conditions exist, a party may suspend, withdraw or modify its concessions under the GATT “to the extent and for such time as may be necessary to prevent or remedy such injury.” But before doing so, the importing party must negotiate with the other contracting parties, particularly foreign exporters whose trade will be substantially affected by the measures, for “substantially equivalent concessions” that the importing party will provide in exchange for the withdrawal or modification of its existing concessions.

Where parties are not able to reach agreement, or where no prior negotiation is made, the importing party may still impose the safeguard but the other contracting parties may impose “substantially equivalent concessions.”<sup>370</sup>

However, after the adoption of 1947 GATT up to the Uruguay Round in 1994, safeguard measures were rarely used. From 1947 to 1994, only about 150 Article XIX cases resulted in protection.<sup>371</sup> While this would have been a good thing, the prevalent use of different protectionist policies that were not regulated or loosely regulated by the GATT regime severely undermined the goals of trade liberalization. The fact that the requirements of Article XIX are too vague for strict enforcement as well may mean that some of the 150 Article XIX reported cases may also have been used as instruments of protection.

#### The Problem of “Compensation”

Brown and Crowley note that “while affected countries may not have frequently resorted to retaliation, perhaps more importantly, many economists believe that the threat of retaliatory tariffs probably led countries to avoid using formal safeguard measures when the conditions otherwise may have been appropriate to do so.”<sup>372</sup>

As tariffs fell in the 1960s and 1970s, it also became increasingly difficult for countries to agree on compensation packages. This undoubtedly contributed to the rise of voluntary export restraints (VERs), export restraint agreements (ERAs), and orderly marketing agreements (OMAs) in the 1980s. While the GATT did not specifically allow their use, it did not explicitly prohibit these measures either. Consequently, they came to be called ‘grey-area measures.’<sup>373</sup>

In addition, while the safeguards mechanism was intended to be temporary and is an emergency measure aimed at addressing conditions that “cause or threaten to cause a

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<sup>370</sup> See Article XIX: 2 and 3.

<sup>371</sup> Chad P. Brown and Meredith A. Crowley, “Safeguards,” in *The World Trade Organization: Legal, Economic and Political Analysis*, eds. Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (Springer US, 2005): 44

<sup>372</sup> Brown and Crowley, 46-47.

<sup>373</sup> Brown and Crowley, 47

serious injury” to a domestic industry,<sup>374</sup> Article XIX did not provide for specific rules for determining injury or a time limit for such application. As a result, parties were able to justify any condition as qualifying under Article XIX and maintained these measures indiscriminately and indefinitely.<sup>375</sup> For example, Brown and Crowley refers to Jackson quoting an unidentified European trade official as saying, “we can always find ‘injury’ whenever we need to for political purposes.”<sup>376</sup>

### The Problem of “Textual Obsolescence”

In addition to the gaps mentioned above, Sykes<sup>377</sup> notes as well that there were difficulties in the interpretation of Article XIX as a result of the drafting of the text. The text as it is written reflects the original intent and expectations of the negotiating parties in 1947.

When negotiations were concluded in 1947, the expectation was that the GATT was a temporary agreement which will be replaced within a few years by a new institution, the International Trade Organization (ITO). However, as political support for the ITO fizzled out, the GATT became the governing agreement over international trade until the creation of the WTO in 1994.

Within the context of this intent, the requirement that the sudden import surge should arise from “unforeseen developments” and the showing of causation for such surge between the “serious injury” and the “trade concessions” would make more sense. In other words, “the unforeseen import surge, resulting from the trade concession, had to be responsible for serious injury.”<sup>378</sup> Within a short time period, the baseline for determining whether there was an unforeseen import surge which can be attributable to the trade concessions are easily identifiable. This would be the import levels prior to the effectivity of the trade concessions.

But when viewed from a longer time frame, justifying an import surge as caused by “unforeseen developments” does not seem to have any logical basis. How can one be expected to foresee developments that are decades away at the time the obligation was incurred? In addition, what baseline should one use in determining if there was indeed an import surge? Between the effectivity of the trade concessions in 1947 and 30 years later for example, imports would have fluctuated a number of times already as a result of different factors, which would not necessarily be directly attributable to the application of the trade concessions 30 years ago.

Countries responded to this “textual obsolescence” as Sykes calls it, by ignoring it completely. In national laws governing the use of safeguard measures in domestic law, such as Section 201 of the U. S. Trade Act of 1974 and relevant European legislation, no requirement for “unforeseen developments” was imposed.<sup>379</sup>

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<sup>374</sup> As the title of Article XIX suggests, i. e., “Emergency Action on Imports of Particular Product.”

<sup>375</sup> See Akira Kotera and Tomofumi Kitamura, “On the Comparison of Safeguard Mechanism of Free Trade Agreements,” RIETI Discussion Paper Series 07-E-017 (March 2007)

<sup>376</sup> Brown and Crowley, 47, citing John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 3<sup>rd</sup> ed., 1997).

<sup>377</sup> See Alan O. Sykes, “The Safeguards Mess: A Critique of WTO Jurisprudence,” John M. Olin Law and Economics Working Paper No. 187 (2D Series) (May 2003).

<sup>378</sup> Sykes, *The Safeguards Mess*, 4.

<sup>379</sup> Sykes, 18.



To summarize, the distortions in the implementation and interpretation of GATT 1947 Article XIX that caused its disuse are as follows: (a) countries were using quotas and tariff-rate quotas instead of tariffs when they implemented safeguards; (b) discriminatory, non-MFN application of safeguards was distorting world-wide trade flows; (c) compensation and retaliation provisions were leading countries to use grey-area measures that automatically provided compensation to exporting firms; (d) policymakers feared that “temporary” safeguards might be applied “permanently,” and (e) the injury criteria were vague.<sup>380</sup>

## 2. Agreement on Safeguards

The Agreement on Safeguards sought to remedy this, recognizing the “need to clarify and reinforce the disciplines of GATT 1994 and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control.”<sup>381</sup> It does not, however, supersede Article XIX. What it does is to “establish rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.”<sup>382</sup>

Article 2:1 of the Agreement on Safeguards provided four basic conditions that will justify the imposition of safeguard measures. These are:

- (a) import surge of a product, in absolute or relative terms;
- (b) that cause or threaten to cause serious injury to a domestic industry
- (d) producing like or directly competitive products.

However, with the reference to Article XIX noted above, the Appellate Body interpreted Article XIX and the Agreement on Safeguards,<sup>383</sup> in *Argentina-Footwear* as being ‘integral parts’ of the same treaty, the WTO Agreement, that are binding on all Members. Therefore, the provisions of Article XIX and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement. They apply equally and are equally binding on all WTO Members. And as these provisions relate to the same thing, namely the application by Members of safeguard measures, “Article XIX and the Safeguards Agreement must *a fortiori* be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction.” Yet a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. And, an appropriate reading of this “inseparable package of rights and disciplines” must, accordingly, be one that gives meaning to all the relevant provisions of these two equally binding agreements.<sup>384</sup>

After having decided that Article XIX and the Agreement on Safeguards are an “inseparable package of rights and disciplines” the Appellate Body in subsequent decisions merged the requirements of these two provisions. Thus, when the provisions are read together, the conditions mirror the original GATT 1947 Article XIX, including the concept of “unforeseen development.”

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<sup>380</sup> Brown and Crowley, 47-48.

<sup>381</sup> Agreement on Safeguards, Preamble, second par.

<sup>382</sup> Agreement on Safeguards, Article 1.

<sup>383</sup> See Art. II:2: The agreements and associated legal instruments included in Annexes 1, 2, and 3 (hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of this Agreement, binding on all Members.’

<sup>384</sup> *Argentina-Footwear*, para. 81.

In applying the current reading of Article XIX and the Agreement on Safeguards, the Appellate Body in US-Lamb,<sup>385</sup> ruled that requirement of Article 3.1 for competent authorities to disclose the findings and reasoned conclusions on ‘all pertinent issues of fact and law’ in their published report after the safeguards investigation, coupled with the requirement in Article XIX:1(a) that ‘unforeseen developments’ must be demonstrated, as a matter of fact, for a safeguard measure to be applied means that the published report of the competent authorities, under Article 3.1, must contain a ‘finding’ or ‘reasoned conclusion’ on ‘unforeseen developments.’” But without clear parameters on what “unforeseen developments” entail, parties would find it difficult to comply with this requirement.

As a result, in four<sup>386</sup> of the six cases on safeguards brought before the Appellate Body, the body found the importing country to be non-compliant with the “unforeseen developments” requirement enunciated above. It generally found that the importing party was unable to demonstrate “unforeseen developments” as a matter of fact. It is not clear though how “unforeseen developments” is to be determined, or the parameters against which facts should be applied. So far, none of the importing countries brought before the Dispute Settlement Body (DSB) of the WTO for safeguards non-compliance have been able to satisfy the Appellate Body’s requirement for a showing of “unforeseen developments.”<sup>387</sup>

This means that the current safeguards regime is burdened by the same dilemma as the GATT regime which the Uruguay Round sought, albeit unsuccessfully, to remedy, i. e., how to give content to the “unforeseen developments” clause of Article XIX. This has become more difficult under the current trade regime since as a result of the tightening of the rules and monitoring requirements over safeguard measures, member states can no longer simply ignore it.

#### Improvements in Safeguard Discipline

In accordance with the mandate of the Agreement of Safeguards and to address the trade distortions created as a result of protectionist policies established outside the GATT system, the following improvements to the safeguard disciplines were made by the Agreement on Safeguards:

- (a) It set a time limit to the period of applicability of safeguard measures. As an improvement to GATT 1947 Article XIX, the Agreement on Safeguards specified time limits for its use. While adopting the same rule in the prior provision that the measures shall be applied “only for such period of time as may be necessary to

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<sup>385</sup> United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R & WT/DS177/AB/R, 01 May 2001, para. 76.

<sup>386</sup> See Korea-Definitive Safeguard Measure on Imports of Credit Dairy Products (Korea-Dairy), WT/DS98/AB/R, 14 December 1999, Argentina - Safeguard Measures on Imports of Footwear (Argentina-Footwear), WT/DS121/AB/R, 14 December 1999, United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US-Lamb Meat), WT/DS177/AB/R and WT/DS178/AB/R, 01 May 2001, WT/DS202/AB/R, 15 February 2002, and United States - Definitive Safeguard Measures on Imports of Certain Steel Products (US-Steel Safeguards), WT/DS248-254 and 258-259/AB/R, 10 November 2003.

<sup>387</sup> Note though that between 1995 to 2008, 89 safeguard measures have been applied by WTO members. These could have been effected through the “compensation” mechanism where members states simply negotiate with each other on the safeguards to be imposed and the concessions applied; See Statistics on Safeguard Measures. WTO website, Accessed 06 May 2009. Available from WTO website.

prevent or remedy serious injury and to facilitate adjustment,<sup>388</sup> it nevertheless provided time limits for its application, with a maximum period not exceeding 8 years,<sup>389</sup> as well as other conditions that limit the extent to which total imports shall be reduced.<sup>390</sup>

Subsequent case law has also confirmed the original intent of the framers of GATT 1947 Article XIX that safeguards are extraordinary remedies designed to address an emergency situation as defined in the same article. In *Korea - Dairy*, the Appellate Body notes that the “the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, ‘emergency actions.’ And, such ‘emergency actions’ are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not “foreseen” or “expected” when it incurred that obligation. . . . Thus, Article XIX is clearly an extraordinary remedy.<sup>391</sup>

In emphasizing the nature of Article XIX as an emergency measure, the Appellate Body in *Argentina - Footwear* points out that the “object and purpose of Article XIX is to allow a Member to readjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with ‘unexpected’ and, thus, ‘unforeseen’ circumstances which lead to the product ‘being imported’ in ‘such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.’”<sup>392</sup>

- (b) In keeping with the Most-Favored-Nation principle of GATT 1994 Article I, the Agreement on Safeguards required that “safeguard measures shall be applied to a product being imported irrespective of source.”<sup>393</sup> This has now become a contentious issue in regional trade regimes, however, as will be discussed below.
- (c) Before imposing safeguard measures, the competent authorities of the member seeking to impose these will have to make an investigation, with due notice and hearing to all parties concerned, to assess whether the action is warranted. After the investigation, the authorities are required to publish a report “setting forth their findings and reasoned conclusions reached in all pertinent issues of fact and law.”<sup>394</sup>
- (d) To address the vagueness of the old safeguards rule, the Agreement on Safeguards set specific rules on the determination of “serious injury or threat thereof.”<sup>395</sup> First, the Agreement on Safeguards defined certain key word and phrases. “Serious injury” is defined as “a significant overall impairment in the position of a domestic industry.” A “threat of serious injury” is meant such injury that is clearly imminent, which determination must “be based on fact and not merely on allegation, conjecture

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<sup>388</sup> Agreement on Safeguards, Article 5(1).

<sup>389</sup> Agreement on Safeguards, Article 7(1) and (3).

<sup>390</sup> Agreement on Safeguards, Article 5(1).

<sup>391</sup> *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, 14 December 1999, WT/DS98/AB/R, para. 86.

<sup>392</sup> *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, para. 94.

<sup>393</sup> Agreement on Safeguards, Article 2:2.

<sup>394</sup> Agreement on Safeguards, Article 3:1.

<sup>395</sup> Agreement on Safeguards, Article 4.

or remote possibility.” A “domestic industry” shall mean “the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.”

Second, it set specific rules on injury determination as follows:

- (i) in the investigation referred to in (c) above, the competent authorities are required to “evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry;”
  - (ii) such investigation should demonstrate, “on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.”
  - (iii) “when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.”
  - (iv) Publication of the results of the investigation, with a detailed analysis of the case as well as a demonstration of the relevance of the factors examined.
- (e) the safeguard applied should be only up to the “extent necessary to prevent or remedy a serious injury and to facilitate adjustment.” Except that when quantitative restrictions are used, it should not reduce the quantity of imports below a certain level.
- (f) similar to Article XIX, the Agreement on Safeguards also allowed the use of provisional measures when there is clear evidence that increased imports have caused or threatening to cause serious injury. However, unlike the former provision, the duration of such measure is limited to 200 days, which shall be counted as part of the total period of application of the safeguard measure.
- (g) while the importing member is required to maintain “substantially equivalent level of concessions” in favor of affected exporting members, if no agreement on concession is reached, and the increase in imports is absolute, the exporting members cannot exercise the right of suspension for the first three (3) years of the effectivity of the safeguard measure.<sup>396</sup>
- (h) safeguard measures shall not be applied to products originating from a developing country member under certain conditions.<sup>397</sup>
- (i) express prohibition against voluntary restraints, orderly marketing arrangements or any other similar measures on the export or import side.<sup>398</sup>
- (j) surveillance of safeguard measures by the Committee on Safeguards.<sup>399</sup>

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<sup>396</sup> Agreement on Safeguards, Article 8.

<sup>397</sup> Agreement on Safeguards, Article 9.

<sup>398</sup> Agreement on Safeguards, Article 11:1(a).

<sup>399</sup> Agreement on Safeguards, Article 13.

### 3. Agreement on Agriculture

The Agreement on Agriculture (“AoA”) also provides for Special Safeguard Measures (“SSM”) for agricultural products.<sup>400</sup> Agricultural products previously subject to quantitative restrictions and converted under the WTO Agreement into equivalent tariff concessions may be subject to special safeguard measures when certain conditions are met.<sup>401</sup>

Unlike the GATT 1994 Article XIX and the Agreement on Safeguards, the Agreement on Agriculture provide for more objective criteria in determining when to apply such SSMS. These criteria, in general, are as follows:

- Agreed trigger levels where an importing country may impose SSM on an imported agricultural product:
  - when the volume of imports of such product exceeds average imports over the past three years. Trigger levels for these imports range from 105% to 125% depending on the share of imports to domestic consumption;<sup>402</sup>
  - when the c. i. f. import price of the shipment in domestic currency falls below a pre-determined reference price, additional graduated duties ranging from 30% to 90% applied on the difference of the c.i.f. import price and the reference price.<sup>403</sup>
- the maximum SSM shall not exceed one third of the existing ordinary customs duty on the year it is imposed.<sup>404</sup>

#### b. Philippine Laws on Safeguards

The Philippine legislature passed the Safeguards Measures Act, Republic Act No. 8800 in 2000 covering General Safeguard Measures under GATT 1994 Article XIX and the Agreement on Safeguards, and Special Safeguard Measure for Agricultural Products under the Agreement in Agriculture.

Its provisions hew closely to the relevant provisions of the WTO Agreements mentioned in the preceding paragraph. It is worthy to note, however, that it omitted including the condition that the increase in imports must be the result of unforeseen developments and the effects of the obligations incurred under GATT. This seems to follow the trend among countries legislating their domestic safeguards statutes to completely ignore this condition.

#### c. EU Laws on Safeguards

Similar to the Philippine safeguards law, the EU law on safeguards, Council Regulations (EC) No 260/2009 of 26 February 2009 on the common rules for imports (the “Safeguards Regulations”), also omitted including the condition that the increase in imports must be the result of unforeseen developments. The substantive conditions for its application is that a product is “imported into the Community in such greatly increased quantities on such terms or conditions as to cause, or threaten to cause, serious injury to

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<sup>400</sup> AoA, Article 5.

<sup>401</sup> AoA, Article 5.1.

<sup>402</sup> AoA, Articles 5:1(a) and 4.

<sup>403</sup> AoA, Articles 5:1(b) and 5.

<sup>404</sup> AoA, Article 4, first par.

the Community producers of like or directly competing products, unless international obligations permit derogation from this rule."<sup>405</sup>

d. Safeguards in EU FTAs

A review of selected EU FTAs will indicate how the EU negotiates on matters governing safeguards. For example, the CARIFORUM-EU Economic Partnership Agreement (CARIFORUM-EU ECA) authorizes the Parties to apply the multilateral safeguards mechanism under Article XIX of GATT 1994, the Agreement on Safeguards and the Agreement on Agriculture. However, it also requires EU to exempt the CARIFORUM states from the application of any safeguard measures in light of the overall development objectives of the CARIFORUM-EU ECA<sup>406</sup> to contribute to the reduction and eventual eradication of poverty, promoting regional integration, and the gradual integration of the CARIFORUM states into the world economy, supporting conditions to increase investment and private sector initiative, among others.<sup>407</sup>

It also has its own bilateral safeguards clause that allows the Parties to impose safeguard measures "where a product originating in one Party is being imported into the territory of the other Party in such increased quantities and under such conditions as to cause or threaten to cause:

- serious injury to the domestic industry producing like or directly competitive products in the territory of the importing party; or
- disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party; or
- disturbances in the markets of like or directly competitive agricultural products or in the mechanisms regulating those markets."<sup>408</sup>

Under the CARIFORUM-EU ECA, preferential safeguard mechanisms were adopted between the parties taking into consideration the level of development, particularly, of the CARIFORUM states.

Under the South Korea-EU FTA, on the other hand, the Parties retain each of their rights under Article XIX of GATT 1994 and the Agreement on Safeguards.<sup>409</sup> In addition, they also adopted bilateral safeguard mechanisms that may be applied if the application of such FTA results to an increased quantity of imports under such conditions as to cause or threaten to cause serious injury to a domestic industry of either Party.<sup>410</sup>

It also adopts its own agricultural safeguard measures based on the existence of certain trigger levels of volume of imports. These measures shall not be applied simultaneously with safeguard measures imposed under the WTO Agreements on safeguard.<sup>411</sup>

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<sup>405</sup> Safeguard Regulations, Preamble, par. 12.

<sup>406</sup> CARIFORUM-EU ECA, Article 24.

<sup>407</sup> CARIFORUM-EU ECA, Article 1.

<sup>408</sup> CARIFORUM-EU ECA, Article 25:1 and 2.

<sup>409</sup> South Korea-EU FTA, Article 3.7.

<sup>410</sup> South Korea-EU FTA, Article 3.1.

<sup>411</sup> South Korea-EU FTA, Article 3.6.

## **E. Analysis and Assessment of Interests**

Anti-dumping, countervailing and safeguard measures under EU FTAs generally follow the substantive provisions of the WTO Agreements. However, considering Philippine and EU interests and the trends in some EU FTAs, the following matters may be considered in a PH-EU FTA negotiation:

- On anti-dumping and countervailing, the EU may push for WTO-plus provisions covering protections against circumvention of anti-dumping and countervailing rules. Particular focus may be made on the following activities:
  - slight modification of the description of the product, without changing its essential characteristics, to remove it from the tariff line subject to anti-dumping duty;
  - consignment of the product through third countries; and
  - re-organization of the channels of sales and productions among exporters and producers of the exporting country in such a way that the product is exported to the EU through exporters enjoying lower duties and not covered by the anti-dumping duty.
- On safeguards, global (that provided under Article XIX of GATT 1994 and the Agreement on Safeguards), bilateral and agricultural safeguards mechanisms. In agreeing to the application of global safeguard measures, the Philippines must be mindful of the seeming “textual obsolescence” of the substantive conditions for the application of global safeguard measures and the consequent lack of success of Members of the WTO in securing a favorable resolution for the application such global safeguard measures under the WTO Appellate Body (the “Appellate Body”).

To reiterate, the conditions under Article XIX of GATT 1994 and the Agreement on Safeguards, to wit:

- an import surge of particular products and other conditions (may include a fall in import prices);
- causing or threatening to cause serious injury to domestic producers
- of like or directly competitive products
- as a result of:
  - unforeseen developments and
  - the effects of the obligations incurred under GATT

particularly for States who have been GATT 1947 signatories and thereafter, but before the entry into force of GATT 1994, provide some difficulties in interpretation. The GATT 1947 text as it was written reflects the original intent and expectations of the negotiating parties in 1947.

When negotiations were concluded in 1947, the expectation was that the GATT was a temporary agreement which will be replaced within a few years by a new institution, the International Trade Organization (ITO). However, as political support for the ITO fizzled out, the GATT became the governing agreement over international trade until the creation of the WTO in 1994.

Within the context of this intent, the requirement that the sudden import surge should arise from “unforeseen developments” and the showing of causation for such surge between the “serious injury” and the “trade concessions” would make more sense. In other words, “the

unforeseen import surge, resulting from the trade concession, had to be responsible for serious injury.”<sup>412</sup> Within a short time period, the baseline for determining whether there was an unforeseen import surge which can be attributable to the trade concessions are easily identifiable. This would be the import levels prior to the effectivity of the trade concessions.

However, upon the entry into force of GATT 1994 and the Agreement on Safeguards, the Appellate Body ruled that the provisions of these agreements should be interpreted as an “inseparable package of rights and disciplines,” and merged the requirements of these two provisions. Thus, when the provisions are read together, the conditions mirror the original GATT 1947 Article XIX, including the concept of “unforeseen development.”

But when viewed from a longer time frame, justifying an import surge as caused by “unforeseen developments” does not seem to have any logical basis. How can one be expected to foresee developments that are decades away at the time the obligation was incurred? In addition, what baseline should one use in determining if there was indeed an import surge? Between the effectivity of the trade concessions in 1947 and 30 years later for example, imports would have fluctuated a number of times already as a result of different factors, which would not necessarily be directly attributable to the application of the trade concessions 30 years ago.

Given this difficulty of interpretation, the Appellate Body has not, at this time been able to provide clear guidance on how to prove “unforeseen developments” and have generally rejected relevant evidence presented by the parties to a dispute.

It would thus benefit the Philippines to focus on negotiating for a bilateral safeguards regime that would avoid this interpretation.

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<sup>412</sup> Sykes, *The Safeguards Mess*, 4.