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RP-US FTA: Trade Remedies, Competition Policy and Government Procurement

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Surian sa mga Pag-aaral Pangkaunlaran ng Pilipinas

RP-US FTA: Trade Remedies, Competition Policy and Government Procurement

Atty. Jeremy Gatdula, Ever Higuit and Rafael Madarang

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RP-US FTA: Trade Remedies, Competition Policy and Government Procurement[1]

By

Atty. Jeremy Gatdula, Ever Higuit and Rafael Madarang

ABSTRACT

This paper was designed to provide a policy guide in the formulation of the country's position for RP-US FTA negotiations. After sieving through the relevant treaties and legislation in both the US and the Philippines, it was concluded that the implementation of treaty commitments in trade remedies, competition policy and government procurement in an FTA scenario with the US would be a highly technical endeavor for which the Philippines may not yet have the sufficient competencies to thoroughly comply. Thus, the provisions that shall come out of the final negotiations, if the same do push through, should not bind the Philippines to specific treaty commitments that, in the long run, the country may not be able to enforce and properly abide by. Also, these possible treaty commitments should not exceed the country's existing international agreements and domestic laws so as not to burden the Philippines with another set of compliance requirements – which may divert attention from the primary FTA objective of paving wider opportunities for Philippine products to enter the US market and gearing Philippine industries towards better competitiveness

Keywords: WTO, FTA, Safeguard Measures, Anti-Dumping, Countervailing Measures, Competition Policy, Government Procurement

[1] We would like to express our deepest appreciation to PASCN and GTEB for providing us this gracious opportunity to comment on a trade policy matter now of growing importance in the international trading arena, and to developing and least-developed countries at large. We would also like to thank the students of the Arellano University College of Law and the Ateneo de Manila College of Law for their invaluable inputs.

Executive Summary

Trade remedies, competition policy and government procurement are of critical importance to any Free Trade deal, especially if the same would involve the United States, which, apart from having the global economic leverage, is also equipped with well developed institutions with a high level of experience in conducting negotiations to this effect. These three topics have been perennial fixtures in practically every FTA the US has entered into and it is unlikely that the one in which the Philippines would be participating in be an exception. Thus, at this critical juncture, as the country mounts an initiative to survey the potential costs or benefits of entering into an FTA with the US, it is necessary that these three specific areas of interest be given a much closer examination to identify strengths, weaknesses, opportunities, and threats that may arise and impact on Philippine interests.

With regard to trade remedies, the Philippines sees has already has adopted the provisions of the WTO Agreement on Antidumping and the WTO Agreement on Safeguards through national legislative enactments. However, the inclusion of the principles of competition policy and government procurement through an international trade agreement however would be new to the Philippine policy landscape , and the country's capability to negotiate and administer still remains to be seen. One may recall that the Philippines, along with several other developing countries, previously adopted a position at the WTO to avoid being bound by any treaty commitment specific to competition policy and government procurement at the 5th Ministerial Conference of the WTO in Cancun in 2003.

In view of the above, this paper strives to formulate a negotiating strategy that will focus on the strong points of Philippine capacity vis-à-vis that of the US, not necessarily to gain the upper hand, but more to ensure that the Philippines does not bite off more than what it could chew. Thus, the general idea espoused by this paper is for the Philippines to avoid being bound to specific treaty obligations, thus allowing it flexibility while at the same time avoiding provisions which may prevent it from exploiting the expected benefits (market access, transparency, recognition etc.) of having an FTA with the US.

Two principal recommendations may be given, in view of the foregoing information, with regard to the strategy by which the Philippines should negotiate with the US towards the end of sealing a bilateral FTA with them.

Foremost, it must be considered that in terms of bargaining strategies, the US holds the upper hand in terms of legal and institutional experience. It thus would not be surprising if the US launches a round of negotiations that is skewed in the direction of applying maximum pressure on a trade partner to allow the US to impose trade remedy measures upon it using vaguely phrased and flexible criteria. As a primary consideration, therefore, the Philippines will have to, as a minimum non-negotiable, ensure that the wordings and terminologies to be used in the trade remedy portion of an RP-US FTA would have minimal (or absolutely no) departure from the current WTO Agreements. Such should comprise the country's minimal stand. Below are the specific findings and recommendations per subject:

Trade remedies

Experience has shown that the US, in a number of occasions, managed to alter the actual wording of the certain provisions of its FTA agreements – particularly in trade remedies. An example of this may be seen in the phrasing of the portion relating to serious injury for purposes of imposing safeguard duties wherein the term "substantial cause", a term nowhere to be found in the pertinent WTO Agreements, is inserted (apparently with the consent of the other party). As this may fuel future debates on terminologies it is better advised for the Philippines to block any proposals that depart from the exact provisions of the WTO Agreements (to which the country is already committed) and ensure that the avenue to raise any possible future issues arising from the FTA to the WTO Dispute Settlement and Appellate Bodies remains clear and open.

Finally, whilst the Philippines should be adamant in requiring complete transparency and adherence to the WTO Agreements as a minimum demand from the US, it may also consider an even more aggressive negotiating stance. Such could be the inclusion among its demands for RP exports to the US to be granted at least a temporary reprieve from trade remedy measures. Nevertheless, drawing from our comparative knowledge regarding the capability of both countries, what should be given utmost priority is the access of Philippine products to the US market rather than restricting US goods from entering the country. Therefore, a temporary reprieve from safeguards, anti-dumping, and/or countervailing duties for Philippine products may be proposed so as to establish closer economic ties and confidence between the Philippines and the US, while providing wider market access for Philippine products. This would mark a step towards arriving at a semblance of equal footing or an even pitch in the rules governing RP-US trade relations, at least as far as trade remedies are concerned.

Competition Policy

In view of the generally regarded economic benefits of having a comprehensive competition policy on both producers and consumers, it is highly recommended that efforts to restrict uncompetitive conduct be enacted in the Philippine scenario. However,

these may have to be undertaken at a pace and timing of the Philippines' own choosing - taking into account its economic and political eccentricities vis-à-vis the US. It must be considered that, although a codified and comprehensive competition or anti-trust legislation is yet to be compiled and enacted, there already are snippets of competition policy distributed scantly among various congressional enactments and administrative orders. Yet, notwithstanding these provisions, utilization and prosecution of uncompetitive business conduct on the basis these existing laws has been surprisingly sparse. This supports the contention that there is still a need for the country to be brought to speed on the necessity to effectively enforce these existing provisions before yet another set of legislation is done.

The Philippines therefore will have to avoid being encumbered by a treaty obligation for it to legislate an anti-trust law within a specified amount of time dictated by the US and with specified type of provisions. What the competition policy portion of the RP-US FTA should contain is a set of general policy declarations against uncompetitive behavior and a general recognition that competition is an important business/economic component, which the country should strive for considering its own special economic and political conditions. The country should not be pressured to enact a comprehensive anti-trust policy (despite the apparent need for such), if the prevailing conditions are not yet adequate to sustain and implement it. This is a cautious strategy that must be employed so as not to rush the passage of critical economic legislation only to be eventually defeated by questions and arising confusion as to its implementation.

Government procurement

Despite its WTO membership, the Philippines as of yet, has not acceded to the WTO Agreement on Government Procurement – the latter being a plurilateral agreement. Just two years ago however, the country ratified a new Government Procurement Law (RA 9184), which endeavors to foster more transparency in the tendering process to curb corruption and collusion during public biddings by directing all government procurement processes along a set of common principles and uniform standards to be implemented across all procuring entities. However, given the long tedious process of implementing RA 9184, with all procuring entities having to realign their procedures according to the new guidelines established, time must still be allowed for the effectiveness of the new law to be monitored and assessed.

If an RP-US FTA is to be realized therefore, it would be prudent for the country's negotiators to ensure that its government procurement provisions, should it ever be proposed, would not bind the country to any treaty commitment (as this would defeat the country's non-participatory status to the Agreement on Government Procurement) and should be a set of general declarations which would not overstep the present guidelines stipulated in RA 9184.

TABLE OF CONTENTS

I. Introduction

1. Issues
2. Scope and methodology

II. WTO and FTA Backgrounder

1. WTO and Developing Countries
2. FTAs and the consequences of non-participation

TRADE REMEDIES

III. Kinds of Trade Remedies Available Under the WTO

1. Safeguard Measures
2. Anti-Dumping
3. Countervailing Duties

IV. Significance of Trade Remedies

1. Effective implementation
2. Compliance under WTO

V. RP law on Trade Remedies

VI. US Free Trade Agreements on Trade Remedies

1. Australia
2. Chile
3. Singapore

VII. US FTAs Evaluation

1. Trade Remedy Provisions
2. Similarities and differences
   a. Free Trade Agreement Matrix

VIII. ASEAN Free Trade Agreement (AFTA)

IX. Recommendation for Trade Remedies

COMPETITION POLICY

X. Introduction
1. Competition Policy Defined
2. Why do countries need a competition policy?

XI. The WTO and Competition Policy

XII. Competition Policy and Developing Countries

XIII. State of Competition Policy in the Philippines

Survey of Laws that contain competition policy
2. Pending House Bills on competition policy

XIV. Competition Policy in the US FTAs

1. US-Australia
2. US-Chile
3. US-Singapore
4. Analysis

XV. Recommendations for Competition Policy

GOVERNMENT PROCUREMENT

XVI. Introduction

- Trade Aspect of Government Procurement

XVII. WTO and Government Procurement

XVIII. Developing Countries

XIX. US and Government Procurement

XX. APEC and Government Procurement

XXI. The Philippines and Government Procurement

XXII. Recommendations for Government Procurement

RP-US FTA

Trade Remedies, Competition Policy and Government Procurement

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Philippines and United States Free Trade Agreement
TRADE REMEDIES, COMPETITION POLICY and GOVERNMENT PROCUREMENT
2004

TABLE OF CONTENTS

TRADE REMEDIES

XVI. Introduction

1. Issues
2. Scope and methodology

XVII. WTO and FTA Backgrounder

1. WTO and Developing Countries
2. FTAs and the consequences of non-participation

XVIII. Kinds of Trade Remedies Available Under the WTO

4. Safeguard Measures
5. Anti-Dumping
6. Countervailing Duties

XIX. Significance of Trade Remedies

3. Effective implementation
4. Compliance under WTO

XX. RP law on Trade Remedies

XXI. US Free Trade Agreements on Trade Remedies

4. Australia
5. Chile
6. Singapore

XXII. US FTAs Evaluation

3. Trade Remedy Provisions
4. Similarities and differences
   a. Free Trade Agreement Matrix

XXIII. ASEAN Free Trade Agreement (AFTA)

XXIV. Recommendation for Trade Remedies

COMPETITION POLICY

XXV. Introduction

1. Competition Policy Defined
2. Why do countries need a competition policy?

XXVI. The WTO and Competition Policy

XXVII. Competition Policy and Developing Countries

XXVIII. State of Competition Policy in the Philippines

1. Survey of Laws that contain competition policy
2. Pending House Bills on competition policy

XXIX. Competition Policy in the US FTAs

5. US-Australia
6. US-Chile
7. US-Singapore
8. Analysis

XXX. Recommendations for Competition Policy

GOVERNMENT PROCUREMENT

XVI. Introduction

- Trade Aspect of Government Procurement

XVII. WTO and Government Procurement

XVIII. Developing Countries

XIX. US and Government Procurement

XX. APEC and Government Procurement

XXI. The Philippines and Government Procurement

XXII. Recommendations for Government Procurement

I. Introduction

Issues

Trade remedies, competition policy and government procurement are trade topics of immediate relevance to any country intending to negotiate a bilateral deal with the United States, taking into cognizance the latter's extensive experience in the said areas both at the multilateral (under GATT and the WTO), regional (NAFTA, FTAA, etc.), and the bilateral levels (US-Australia, US-Singapore, US-Chile etc). Although the implications of an FTA are of farther reaching consequences across multiple economic sectors and legal areas, the coverage of this paper will stay within the province of the above topics in accordance with the mandate of this research effort, commissioned under the auspices of the Philippine Institute for Development Studies.

These three topics have been perennial fixtures in practically every FTA the US has entered into and it is unlikely that the one in which the Philippines would be participating in be an exception. Thus, at this critical juncture, as the country mounts an initiative to survey the potential costs or benefits of entering into an FTA with the US, it is necessary that these three specific areas of interest be given a much closer examination to identify strengths, weaknesses, opportunities, and threats that may arise and impact on Philippine interests.

Verily, trade remedies, competition policy, and government procurement have been viewed through different lenses by various trade officials and academics from the quarters of developing countries. In this regard, the developing world may have either of two perspectives of these issues. First would be that these are impediments to the cross-border flow of goods and the WTO principle of non-discrimination in which developed countries, such as the US, may employ to circumvent international trade rules. The other possible viewpoint would be that the said issues are a key to strengthening the existing trade rules among countries resulting in more a harmonized and transparent pitch for all participating member states.

This paper does not resolve to determine which of the two arguments would hold greater credence and veracity but rather takes both perspectives into consideration and the prevailing circumstances confronting both the Philippines and the US, with a view to establishing a viable negotiating strategy that the former may employ to stay within the bounds of national interest.

As far as its existing treaty obligations on trade remedies are concerned, the Philippines sees little hindrance to applying the same at a regional level since the country already has adopted the provisions of the WTO Agreement on Antidumping and the WTO Agreement on Safeguards through national legislative enactments. For the latter two however (competition policy and government procurement), the inclusion of these principles in an external trade pact would be a novelty, for which the country's capability to negotiate and administer the same have yet to be proven and tested. It should be considered that the Philippines, along with several other developing countries, previously adopted a position at the WTO to avoid being bound by any treaty commitment specific to competition policy and government procurement. The country's voice as part of the G-22 which opposed the discussion of the so-called "Singapore issues" in Cancun last September 2003, eloquently dramatized this position.

Therefore, as a guiding principle, this paper aims at the formulation of a negotiating strategy that will amount to the incorporation of provisions in the proposed RP-US FTA on trade remedies, competition policy and government procurement, which the Philippines will need to have the capabilities to implement and enforce in a manner allowing us to keep up with the US. Thus, the general idea espoused by this paper is for the Philippines to avoid being bound to specific treaty obligations, thus allowing it flexibility while at the same time avoiding provisions which may prevent it from exploiting the expected benefits (market access, transparency, recognition etc.) of having an FTA with the US.

Scope and Methodology

Before delving into the FTA agreements, however, this paper will first discuss the World Trade Organization (WTO) and the General Agreement on Tariffs and Trade (GATT) which, by international law, the provisions of all FTAs (among them trade remedies, competition policy and government procurement) involving WTO member countries will have to conform with.[2] Then the general coherence of such regional and bilateral FTA Agreements with the WTO Agreements will be touched upon.

To arrive at a possible and general negotiating stance for the country, this paper - by mandate - will focus on trade remedy, competition policy, and government procurement provisions of three of the existing FTAs that the US is party to (i.e., Australia, Chile, and Singapore). These countries were picked out of the whole slew of US FTAs in existence for three reasons particular to each of the countries. Australia was chosen in acknowledgement of its large agricultural sector which the Philippines likewise shelters. Chile was also selected due to the

[2] See Article XXIV of GATT 94

resemblance - albeit general - it has to the Philippines' level of economic development. Lastly, Singapore was also included due to its unique reputation as the only member of ASEAN, as of the present, that has successfully negotiated an FTA with the US.

A gap analysis will be done, together with a survey of the relevant provisions of said three FTAs. Included in this analysis is a look at the specific commitments that the partner countries will have to undertake and the timelines they will have to abide by. Notably, in the process of looking at the trade remedy provisions, the general consistency of the wordings of the FTAs as regards to the WTO Agreements on Safeguards and Anti-dumping will be the line of focus. Based on the results of this gap analysis, the recommendations on the salient points of the Philippine position will be discussed thereafter.

II. WTO and FTA Backgrounder

World Trade Organization

Nations have, since 1947, been driven by a common desire to harmonize and unite the standards of the global trading system with the expected benefit of improving their respective economies. Thus, at the outset of the Bretton-Woods conference after World War II, the General Agreement on Tariffs and Trade (GATT) was brought into existence. This multilateral agreement served as the forerunner of the present World Trade Organization (WTO), which further institutionalized the GATT, and sought to expand coverage to include trade remedies and non-tariff barriers to trade in separate Agreements.[3] It also established a multilateral Dispute Settlement Body (DSB) to handle disagreements over members' compliance with the Agreements. Accordingly, the WTO, which materialized 47 years after GATT in 1994, has an end in view of reducing, if not eliminating, trade barriers that curtail the free flow of goods and services affecting commercial transactions that are frequently undertaken by the member countries and establish a uniform rules based system to govern the conduct of international trade.

The Uruguay Round Multilateral Trade Negotiations in January of 1995 created and established the World Trade Organization (WTO). To date, the WTO could be considered as one of the most influential and significant international organizations, dealing not only on trade issues but also on matters having a

[3] Negotiated in various Rounds of Negotiations (the Uruguay Round being the last round which led to the establishment of the WTO.

significant impact in the development of its participating countries. Further, the General Agreement on Tariffs and Trade of 1994 (GATT 1994) or what is known as the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" provides for a multilateral framework for international trade. The aforesaid Agreement is highly technical and comprises of complex legal instruments which are required to be followed and incorporated by members into their domestic trade legislation.

Being two of the founding members of the WTO, the United States and the Republic of the Philippines have consented and agreed to be bound by the undertakings of the aforesaid Agreement, under which further negotiations were done – leading to the arrival at several other Agreements under the WTO. Both countries are also obligated to comply faithfully with the provisions contained therein.

WTO and Developing Countries

The WTO was conceptualized to provide equal market access to all member countries without discrimination. The idea was to provide reciprocal and mutual advantage in the conduct of international trade. Commitment under Article I of the GATT requires the extension of "most favoured nation"[4] (MFN) treatment to all other WTO member states.

On the matter of MFN, historically the GATT of 1947(adopted prior to the creation of the WTO), which embodied the negotiated understanding of the different countries who acceded thereto, contained no specific provision that would grant preferential trade to developing countries (although permitting a waiver of GATT obligations under Article XXV:5). Analyzing the said GATT provision, the waiver could be undertaken only under exceptionally limited circumstances and subject only to the approval of two-thirds majority of the member countries, which vote is often difficult to achieve due to diverse interests of the Member countries.

Prior to the WTO, contracting parties to GATT 1947 had a dilemma on how to deal and facilitate the trade of developing counties since any preferential treatment could potentially violated the MFN rule. In 1979, changes were made to the MFN principle. Contracting parties of the aforementioned Agreement adopted an additional rule, which allows differential and more-favourable treatment. The provision of the "enabling clause" for reciprocity and fuller participation of developing countries was further adopted.

[4] A principle of non-discrimination in which all member countries would have to extend to all WTO members the most favorable treatment it would do to any single WTO member country, as far as international trade is concerned.

The recent development in the world economies permits the contracting parties to examine proposals for differential and more favourable treatment with developing countries. The intention was to promote the trade of developing countries without raising barriers to the trade of other member countries, as well as prevent reduction and elimination of duties or other restrictions on an MFN basis. With the changes made in the Agreement, it could therefore be said that like any other applied principles and/or commitment, the MFN clause under the WTO now admits to a substantial variety of exceptions (principle of non-reciprocity, differentiation in the case of developing countries, regional arrangements, etc.).

Integrated in the MFN rule is the concept of reciprocity found under Article XXVIII *bis* of the GATT. It is declared thereon that negotiations on tariff reductions should be on a "reciprocal and mutually advantageous basis".[5] In order words, developing countries are given a fair and equal playing field by not requiring them to make any contributions that are inconsistent with their individual economic development. The said amendment is read as follows: "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiation to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties".

Another, justification that allows and provides preference or favor to developing countries is the "enabling clause" provision. Exceptions to the application of the MFN rule are stated in the different parts of the Agreements:

a. Preferential tariff treatment accorded by developed contracting parties to product originating in developing countries in accordance with the Generalized System of Preferences (GSP);

b. Differential and more favorable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provision of instruments multilaterally negotiated under the auspices of the GATT;

c. Regional or global arrangements entered into amongst less-developed contracting parties for mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the contracting

[5] it should however be remembered that the Article now allows non-reciprocal commitments

parties, for mutual reduction or elimination or non-tariff measures, on products imported from one another;

d. Special treatment of the least develops among the developing countries in the context of any general or specific measures in favor of developing countries.

Justification for the granting of preferences could be attributed to the fact that various WTO Members have different levels of economic development. Treating different States equally where each States' prevailing economic conditions are not the same (at least at the time of entry to the WTO) would be truly unfair. With the creation of the WTO, developing countries are given opportunities to participate in the framework of rights and obligations within the Organization.

With the allowance of a trade preference and special/differential treatment, proliferation of regional arrangements, including custom unions, free trade arrangements, or any interim arrangement have become popular. The said arrangements give developed, developing, and least develop countries ample opportunity to establish and create agreements which will suit their individual needs, giving each country greater power to negotiate economic areas or sectors which they desire to prioritize for development.

Regional / FTA Overview and consequences of non-participation

As discussed above, MFN treatment mandates the principle of non-discrimination among member countries in cross border transactions. This implies that any benefit granted to one member with respect to trade of goods must be similarly extended to all other members. The MFN principle should be understood to cover not only tariff concession but also to other areas of commercial undertaking such as, but not limited to, the following:

i. "charges of any kind related to import and export;

ii. the method of levying of tariff and such charges;

iii. the rules and formalities in connection with import and export;

iv. internal taxes and other internal charges;

v. the rules and requirements affecting sales, purchase, transportation, distribution or use of products."[6]

There are however, exceptions to the above MFN rule, which could be found under the General Agreements on Tariff and Trade:

a. A member can accord tariff concessions to developing countries in the course of Generalized System of Preferences (GSP), and there can be regional or global arrangements among the developing countries themselves for reduction of mutual tariff. In non-tariff measures, there can be differential and more favourable treatment to developing countries through multilaterally negotiated agreements. Besides, the developing countries can also have arrangements among themselves for reduction or elimination of non-tariff measures in accordance with the criteria, which may be prescribed. In all these cases, the concession doe not have to be extended to other members.

b. "Provisions of this Agreement shall not be construed to prevent (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic.[7]

c. "The contracting parties recognize the desirability of increasing freedom of trade and development, through voluntary agreements, of closer integration between the economies of the country parties to such agreements. They also recognize that the purpose of a custom union or of free trade area should facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties.[8]

d. "The provision of this Agreement shall not prevent, as between the territories of contracting parties the formation of a custom union or of a free trade area or the adoption of an interim agreement for the formation of custom union or of free trade area…xxx (in other words, members may enter into arrangements of custom union or free trade areas within

[6] Bhagirath Lal Das, An Introduction to the WTO Agreements, page 11
[7] Article XXIV.3, GATT of 1994
[8] ibid., Article XXIV.4

which members eliminate customs duties with respect to substantially all the trade among them). "[9]

e. "This provides for general exceptions which permit member countries from taking import restrictive measure against specific imports from definite sources. The relief can be taken for the protection of public morals, health, environment, etc"[10]

f. "Member countries for security reasons can impose restrictions on the import, which comes from specific sources."[11]

g. Charges can be imposed on a product, which are from specific country as a measure against subsidy granted by the government or on a product of an entity as a measure against dumping.

h. In a dispute settlement process, concessions can be withdrawn from a particular member that is found to be causing nullification or impairment of benefits to another member.

Subject to certain conditions, different provisions of the GATT allow the creation of custom unions and FTAs between member countries. It is, however, a requirement under the WTO that all preferential treatment granted or entered into by members should be notified to a body known as the "Committee on Regional Trade Agreements". This body oversees and evaluates existing preferential treatment to ensure that all agreements entered into by the member countries are consistent with and will not contradict the WTO rules.

FTAs including customs unions and regional trading arrangements have become significant in the overall economic dimension, which affects the trade and structural performance of any nations entering the same. FTAs at present have emerged as one of the effective tools, which enable a particular country to negotiate different facets of trade matters.

The main focus of any negotiated FTA is to eliminate tariff and non-tariff barriers which, if successful, could enhance market access between trading partners. According to the 2003 annual report by the WTO, there have been 259 regional trade agreements notified with approximately 30 nations involve in Asia-

[9] ibid., Article XXIV.5
[10] ibid., Article XX
[11] ibid., Article XXI

Pacific region. Among the reported agreements, 126 are Free Trade Agreements and 13 customs unions (which was created under Article XXIV of the GATT).

Generally, free trade agreements affect the entire trading system of the countries that have a share in a particular identified region or in another country. Special agreements such as FTAs enable contracting parties to promote stronger and sustainable growth, which could contribute to the economic and political reforms of the nation.

The nature of the Free Trade Agreement suggests that tariff preferences be only accorded to those countries that participate thereof. As a result, countries that are not covered by the arrangement could be discriminated and put at a disadvantage against foreigner suppliers. Doing business to countries having no FTA creates an issue in terms of the understanding the different existing tariff rates to be applied in a particular goods, the content requirements and the importing or custom procedures.[12]

Non-participation could result to a loss of opportunity for the expansion of the countries possible economic ties with its trading partners and their ability to promote economic growth and development. The potential benefits of expanded trade relations cannot be ignored. A number of recent economic studies concluded that as a country reduces its barriers to trade, both internal and cross border restrictions, per capita income increases significantly.[13]

In view of the foregoing, below would be a study on how the Philippines could fare with the US should the plan for a prospective FTA prosper, albeit limited to the complex topics of trade remedies, competition policy, and government procurement.

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[12] George N. Manzano and John Lawrence V. Avila, Should the Philippines Enter into a Bilateral FTA, page 8

[13] see Jeffrey Frankel and Andrew Rose, Estimating the Effect of Currency Union on Trade Output, NBER Working paper 7857, August 2000

III. Kinds of Trade Remedies available under the WTO

Trade remedies are forms of relief which member countries can at any time invoke provided that the conditions and/or elements justifying its existence are present. Members of the WTO have long recognized that the goal of enhancing trade between and among nations would entail consequences, which would practically affect domestic industries competing with imported merchandize.

The WTO provides for three trade remedy measures that may be applied according to three different sets of circumstances namely: safeguard duties for import surges causing serious injury to a domestic industry, anti-dumping duties for imports that are determined to be sold at a price below normal value and causing or threatening to cause material injury to a domestic industry, and, lastly, countervailing measures for imports that are found to be illicitly subsidized at the country of export. For purposes of this paper, only safeguards and anti-dumping would be tackled as the country is yet (as of the time of this writing) to have any experience in filing and prosecuting a countervailing duty case.

Safeguard Measures

The conditions for the application of safeguard measure are specifically mentioned and outlined under Article XIX of the GATT 1947 and on the Agreement on Safeguards under the WTO. The pertinent provision is hereunder quoted as follows:

> "If the result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement party including tariff concessions, any product is 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, the contracting part shall be free, in respect of such product, 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."[14]

> "A member may apply a safeguard measure to product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."[15]

While the requirement for increased imports, either in absolute terms or relative to production, is comparatively straightforward, there is a question as to whether the import surge must be due to unforeseen developments and is the effect of the obligation incurred under GATT 1994. Article XIX of GATT 1947 explicitly imposes these criteria but the Agreement on Safeguard does not. Therefore, RA 8800, which is patterned generally after the Agreement on Safeguards, likewise does not contain these elements.

Anti-Dumping

This remedy can be found under Article VI of GATT 1947 and in the Agreement on the Implementation of Article VI of GATT of 1994. The mentioned agreements provide, among others, the detailed procedure, which helps in the identification

[14] Article XIX of the GATT of 1947
[15] Agreement on Safeguards

of and application of the remedies against dumping. The Anti-dumping measures are unilateral remedies which may be applied by member countries after an investigation and determination by the members applying the same[16]. The application procedures, however, must be strictly compliant with the provisions of the WTO Anti-Dumping Agreement, requiring the imposition of the same only if the fact of dumping has been established and that the dumped imports are causing material injury to a domestic industry producing the like product.

Dumping is said to occur whenever a product, commodity, or article imported or introduced into the commerce of another country is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country[17]. Accordingly, dumping is considered as unfair trade practice, which is regulated both under international and domestic standards.

IV. Significance of Trade Remedies

Effective implementation

Through series of negotiations made by contracting states, international rules on trade were drafted and later agreed upon by the members. The codification enables the members to identify and work with the system which will enable them to use these to their full advantage. The basic foundation of each agreement under the WTO is the consent given by each individual nation. Commitment to give full capacity compliance of the obligation is therefore set forth. Under the Marrakesh Agreement it is declared that:

> "A member who accepts this Agreement after its entry into force shall implement those concessions and obligations in the multilateral trade agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force"[18]

Clearly, the above provision mandates members to implement the obligation within their own realm. Observance of the Agreement in the national level is a crucial factor, which could measure the level of commitment given by

[16] http://www.wto.org/english/tratop_e/adp/antidum2_e.htm
[17] Article 2 Part I of the Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade 1994
[18] Article XIV (2) Marrakesh Agreement Establishing the WTO

members with respect to their responsibility under the WTO. The effective implementation of each agreement depends on the faithful compliance given by its members. The level of sincerity should not only be gauged by the action undertaken but also by the performance of each individual member.

V. RP law on Trade Remedies

Philippine membership under the WTO was rigorously pursued with an end in view of uplifting the country economically and equalizing the position of the country in the trading system with the rest of the world (or at least with other countries having the same potential as that of the Philippines). Just like any other member of the international community, the Philippines is mandated to comply with its treaty obligations. Part of that obligation is the observance of the different agreements, which were negotiated and agreed upon in the WTO.

As a member of the WTO, the Philippines is thus bound to comply with the following commitment and Agreements relating to trade remedies:

a. Section 2 Article XIV of the Marrakesh Agreement Establishing the WTO[19]

b. Agreement on Safeguards[20]

c. Agreement On Implementation of Article VI of the General Agreement on Tariff and Trade 1994[21]

d. Agreement on Subsidies and Countervailing Measures[22]

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[19] "A member which accepts this Agreement after entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force"

[20] "A member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provision set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products"

[21] An Anti dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigation initiated and conducted in accordance with the provisions of the Agreement. The following provisions govern the application of Article VI of the GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

[22] Article 10, Part V – " members shall take all necessary steps to ensure that the imposition of countervailing duty on any product of the territory of another Member is in accordance with the

In light with the foregoing commitment, the country evidently has taken action in order to fulfill its WTO obligations. The Philippines has enacted several laws which apply these three trade remedies (in conformity to the relevant WTO Agreements), although only safeguards and antidumping will be discussed in this context.

RP Safeguard Law

Congress, in its efforts to comply with Philippine obligations under the WTO, enacted Republic Act 8800, otherwise known as the Safeguards Act. Procedure for its application is outlined under the aforesaid law. Notice however that there are provisions under the Safeguard Act which is identical with Anti-dumping trade remedy. An action for the imposition and/or application of the safeguard measure can be initiated either by the President, by the resolution of the house or Senate Committee on Agriculture or the House; or Senate Committee on Trade and Commerce.

The petition should be supported by documentary evidence to prove that there is indeed an increase in imports, serious injury or threat thereof to the domestic industry producing like product, and causal link. The Secretary concerned is required under the law to determine the existence of a prima facie case, which will justify the initiation of a preliminary investigation. The Secretary should notify interested parties, who shall be required to submit their answers. A preliminary determination shall be made thereafter to determine whether the increase in imports is causing serious injury or threat thereof to the domestic industry producing the like (or similar) product.

Upon positive determination that indeed the imported products are causing serious injury or a threat thereof, a provisional measure in the form of a tariff increase either as an ad valorem or specific or combination of both shall be imposed and paid out by means of a cash bond at an amount sufficient to address or prevent serious injury to the domestic industry. The provisional measure will have a duration of 200 days starting from the date of its imposition.

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provisions of Article VI of GATT 1994 and terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and concluded in accordance with the provisions of this Agreement and the Agreement on agriculture.

The Secretary concerned shall thereafter transmit all records to the Tariff Commission for the conduct of a formal investigation. It is required of the Tariff commission that before an investigation at their level is undertaken, proper notification is given to all interested parties. Furthermore, during the formal investigation parties should be given an opportunity to be heard and present their evidence. The Tariff Commission must complete its formal investigation within one hundred twenty days from receipt of the referral by the Secretary (except in urgent cases when certified by the later in which case the investigation must be completed within sixty days).

In case the outcome of the formal investigation is positive, the Tariff Commission shall issue a report which shall contain, among others, the recommendation to impose the safeguard duties. The Secretary shall then issue a written order and/or instruction to the concerned agencies for the implementation of the appropriate action to be taken in the imposition of the safeguard measure. The safeguard measure, being a temporary recourse for the injured domestic industry, can be applied generally for four years but in no case shall this period exceed ten years.

Parties affected by the affirmative findings and orders issued by the Secretary concerned which resulted in the imposition of the safeguard measure may, if they are not satisfied with the result, file with the Court of Appeals a petition for review within thirty days from receipt of notice of imposition. The filing of the petition for review shall not stop the imposition or collection of the safeguard duty mposed upon the imported product.

In the application of the safeguard measure, under the principle of *de-minimis,* developing countries whose amount of importations of the subject product is less than three percent of the total Philippine imports shall not be subject to the safeguard measure provided that the share of developing country if taken collectively should not exceed nine percent.

RP Anti-Dumping Law

Prior to the WTO membership, there already exist provisions referring to Anti-dumping Duty. The specific provisions can be found under Section 301, Part 2 Title II, Book I of the Tariff and Customs Code of the Philippines, as amended by Republic Act No. 7843. In light with the creation and accession to the different WTO agreement, the Philippine Congress enacted Republic act 8752, thus bringing the anti-dumping provisions within the bounds and standards set out by Article VI of GATT 1947 and the Agreement Implementing Article VI of GATT 1994 (aka the Agreement on Anti-dumping). The distinctive feature of the latter law is that it provides a simpler and practical legislative framework that

could effectively address the issue of unfairly traded dumped imports. The law also identifies and clarifies the elements to be established in dumping such as, but not limited to, product comparability, price differential, material injury or threat thereof, and causal link. The law also gives a framework on how the application of the trade remedy of dumping will be carried out. It placed greater responsibilities to the Tariff Commission compared to the tasks given to the Department of Trade and Industry particularly in the conduct of the investigation leading to the propriety of either a positive or negative determination.

It is important to know the procedure outlined under the law so as to appropriately determine whether the imposition of the dumping duty is proper or not. Allegations of dumping would have to be proven before the same can be claimed. The application for dumping should be filed with the Secretary of the Department of Trade and Industry (in the case of non-agricultural products) or with the Secretary of Agriculture (in the case of agricultural products). The said application should contain information which the party can reasonably obtain such as but not limited to the following: applicant's identity, volume and value description of the applicant's domestic production of the like product, alleged dumped product description, country of origin, the identity of the foreign producers or exporters, the normal value of the product under consideration in the country of origin or export, the evolution of the volume of the alleged dumped imports, and effects of the imports on the price on the domestic market or industry. The applicant must also provide evidence of dumping, injury and a causal link between the dumped imports and the alleged injury to the domestic industry.

Republic Act 8752 and its Implementing Rules and Regulations define "Domestic Industry as referring to the producers in whole of a like product or to those collective output of the product constitute a major proportion of the total domestic production of that product except when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term domestic industry maybe interpreted as referring to the rest of the producers".

Within the period specified under R.A 8752, the Secretary, upon receipt of the petition and/or application shall examine whether there is sufficient evidence to justify the initiation of an investigation. Furthermore, the Secretary shall send notice to the Secretary of Finance, government of exporting member countries and all interested parties. If the Secretary so determines that dumping did not exist, the petition and/or application shall be dismissed and proper notification

shall be made. On the other hand, if the Secretary believes that the petition could warrant the application of the dumping measure, interested parties particularly the respondent or the party against whom dumping is alleged shall be required to submit or present his answer or evidence, failure to submit the same, the latter shall be declared in default.

On the basis of the information contained in the petition and submission of all the parties, the Secretary concerned shall make preliminary determination of the case, which shall include the determination of the price difference between the export price and the normal value of the commodity under consideration, material injury or threat thereof, and the relationship between the alleged dumped product and the material injury or threat thereof which could cause the retardation of the development of a particular domestic industry producing the like product in question. Like product, under R.A 8752, is defined as a product which is alike in all respects to the imported product under consideration, or in the absence of such product, another domestic product which, although not alike in all respect, has characteristics closely resembling those of the imported product under consideration.

If the preliminary finding of the Secretary concern is positive, it shall issue a written instruction through the Secretary of Finance to the Commissioner of Customs to impose a provisionally estimated cash bond to cover for the anti-dumping duty. However, the Secretary can at anytime suspend the application of the provisional anti-dumping measure if the same will result in a political or economic crisis, or if such imposition will cause a severe shortage of the like product in the domestic market. Within the reglamentary period of three days from the affirmative findings of dumping, the Secretary concerned is mandated under the law to transmit all records in its possession to the Tariff Commission for the conduct of a formal investigation. All parties shall again be notified of the proceeding and shall be given the opportunity to present their position before the Commission.

In the formal investigation, the Tariff Commission shall, once again, determine the margin of dumping, the presence of material injury or threat thereof, causal linkage, the appropriate anti-dumping duty to be imposed, and the duration of the application of the measure. The formal investigation is summary in nature and thus, technical rules of evidence used in regular courts are not strictly applied. Upon completion of the formal investigation, the Tariff Commission is tasked to submit a report to the Secretary concerned within the one hundred and twenty days from receipt of the record of the subject case.

If the final finding of the Tariff Commission is affirmative, the Secretary shall, within ten days, issue an Order that will impose the anti-dumping duty on the imported product. On the other hand, in the case of a negative finding by the

Tariff Commission, the Secretary shall, after the period to appeal the case before the Court of Tax Appeal (CTA) has lapsed, issue an Order to the Commissioner of Customs through Secretary of Finance for the immediate release of the cash bond to the importer. In all instances all interested parties shall be notified properly.

It should be noted that an anti-dumping duty is a special duty imposed on the product dumped in the Philippines. The definitive finding of dumping and the elements of causality and material injury will result in the imposition of an anti-dumping duty. As a rule, the measure shall remain in force as long as and only to the extent necessary to counteract the dumping which is causing or threatening to cause material injury or material retardation of the establishment of the domestic industry. The application of the anti-dumping measure should not exceed five years and must be imposed only for a limited and/or temporary period subject to the review by the Tariff Commission. Interested party adversely affected by the final determination to impose anti-dumping duty may file a petition before the Court of Tax Appeals to review such finding within the period of thirty days (30) from receipt of notice thereof. It should be considered however that the filing of the petition will not in toll, stop, suspend or otherwise hold the imposition or the collection of the anti-dumping duty on the imported product proved to be dumped in the Philippines.

VI. US Free Trade Agreements on Trade Remedies

As a developed country, the United States has been vigorously pursuing its trade interest with other countries both at the multilateral and bilateral level. The United States is one of the countries in the world whose trade remedy law is very comprehensive and covers a wide range of trade areas. For this paper, since the object of analysis would be that of a viable strategy for an RP-US FTA, US trade laws will be discussed solely on the basis of the trade remedy policies of their existing bilateral FTAs.

With the present trade development, the United States conducted a series of trade proposals with the different countries particularly in the area of industrial and commercial goods, agriculture and services. To deal with the goal of liberalizing as well as participating in world trade, the United States is opening its market at levels that appear to be best suited for them (i.e. multilaterally, regionally, and bilaterally). Through the years, the United States has exerted much effort to open export markets.

By entering into free trade arrangements or

by negotiating with the individual country or region, the United States has ensured that the resulting effect will be positive since they can readily identify with certainty which area of trade they would like to focus on or give preference to.

Over recent years, trade rules have increased as trade between nations have expanded. The United States recognizes that the international rules which govern and regulate unfair trade practices should be given more focus in order to better defend their domestic interest. Indeed, the negotiation of trade remedy laws should be applied in a manner consistent with international obligations since failure to give notice to the effect of the same could damage the legitimate commercial interest of the U.S traders.

The trade policy reforms involving FTAs by the United States convey a message that they are open to trade with all regions including Latin America, Sub-Sahara Africa, the Arab nations, as well as in the Asia Pacific Region (with both developing and developed economies). In addition, the United States has launched FTA negotiations with a number of new countries. Some of these negotiations have been concluded and others are still in the bargaining process. Bilateral agreements between contracting parties have been, in some respect, considered as a building block for regional trade and investment agreements. Below are three of the FTAs that the United States has concluded for further comparison.

For this paper, the US FTAs with three countries, namely Australia, Chile, and Singapore are to be discussed. The said countries were selected out of the several bilateral FTAs that the US is currently engaged in due to three reasons applying to each country. Australia was chosen because of its strong agricultural sector which the Philippines may gain particular insight from, being a primary agricultural producer itself. Chile was also selected due to its close similarity to the Philippines' level of developments which may provide ideas as to how a fellow developing country may engage the US in a bilateral setting as far as trade remedies are concerned. Finally, Singapore is included owing to the fact that it is the only ASEAN member state that currently has a standing FTA with the US. Singapore was initially criticized for its participation in such an FTA, with Malaysia arguing that such may compromise the development of AFTA. Nevertheless Singapore's experience in pushing on with such a trade policy and the outcome of the same on trade remedies would be of significance to the Philippines in pursuing an RP US FTA.

Australia

The United States Senate and House of Representatives have approved the United States-Australian Free Trade Agreement and U.S President has

signed the implementing legislation on 3 August 2004. On the other hand, both houses of the Australian Parliament approved the implementing legislation on 13 August 2004.

Upon the entry of the free trade agreement, more than 99 percent of the United States exports to Australia shall become duty free.[23] The reduction and/or the elimination of tariff is estimated to result in more than $2 billion per year, increasing the United States exports particularly manufactured goods. In addition, it is expected that the United States agricultural export to the Australia will receive immediate duty fee access, which could be estimated worth of $400 million.

As of 2004, Australia can be considered as the 9th largest goods export market of the United States. Trade between the two countries in terms of goods and services is about $28 billion and $9 billion trade surplus respectively.

The FTA that exists between the two mentioned countries has provisions which safeguard the parties domestic industry from injurious effect brought about by the reduction or elimination of the prevailing tariff. At the outcome of the free trade agreement, if imports of goods from one of the members enter at increased quantities, in absolute or relative terms with the domestic production, and constitute substantial cause of serious injury or threat thereof to the domestic industry producing a like or directly competitive good, the affected party will have the following options: a) suspend further reduction of any rate of custom duty; and b) increase the rate of custom duty on the good to a level not exceeding the lesser of the MFN applied rate on goods in effect at the time the action is taken, and the MFN applied rate of duty on the goods in effect on the day immediately preceding the date of entry into force of the FTA. Stated in the free trade agreement is the adoption of the provision of the WTO Agreement on Safeguards. In any event, parties are given the option to impose provisional safeguard measures but are subject to the condition stated in the free trade agreement.

The party applying for a safeguard measure shall provide trade liberalizing compensation in the form of concessions having substantially equivalent trade effect or equivalent to the value of the additional duties expected to result from measure to the other party whose goods are subjected to the measure.

[23] Ibid.,

In the application of global safeguard measures, the two countries retain their rights and obligation under Article XIX of GATT 1994. It should be understood that the FTA neither provides nor confers additional rights or obligations other than those provided or stated under the WTO Agreement on Safeguards – except for the introduction of the term "substantial cause"[24] as mentioned. Also, a party invoking global safeguard measures may exclude imports of goods originating from the other party if such imports are not the substantial cause of serious injury or threat thereof.

The bilateral free trade agreement also provides for an emergency action in case the reduction or elimination of a customs duty, on textile or apparel good resulted to such increased quantities, either in absolute or relative terms to the domestic market for that good, and under such conditions as to cause serious damage, or actual threat thereof, to a domestic industry producing a like or directly competitive good, the importing Party may, to the extent and for such time as may be necessary to prevent or remedy such damage and to facilitate adjustment, take emergency action, consisting of an increase in the rate of customs duty on the good[25]

Chile

The United States has successfully concluded a free trade negotiation with the Government of Chile. The agreement is expected to encourage and promote openness which would eventually lead to the increased market access of both the contracting parties. It will also ensure that duty-free treatment of both US and Chilean goods are traded by the countries respective industries.

Immediately after the entry into force of the FTA more than 87% of the U.S bilateral trade in industrial products would become duty free. About three-quarters of farm goods will be tariff free within four years and all other tariff barriers will be phased out within 12 years. U.S farmers will have access to Chile's market and vise versa. The Agreement eliminates the use of export subsidies on US - Chilean farm trade but preserves the right to respond if third countries use export subsidies to displace U.S products in the Chilean market. An agricultural safeguard provision is available to both parties in case U.S or Chilean farmers and ranchers experience sudden surges in imports from both countries.

The provisions for trade remedies can be found under Chapter Eight of the Free Trade Agreement. Just like any other provision of FTA negotiated by the United States, the U.S –Chile FTA also requires certain conditions to be met

[24] This term does not appear in the Agreement on Safeguards
[25] Article 4, Chapter 4 United States – Australia Free Trade Agreement

before the Safeguard Measures can be imposed. The agreement further laid down the standards as well as the procedures for the investigation to be complied with by the Parties before any kind of safeguard measure is applied. The provisions of the anti-dumping and countervailing measures Agreements under the WTO are seemingly incorporated therein and made part of the agreement.

Singapore

Singapore is currently the United States' eleventh largest export market. The trade between the U.S and Singapore now exceeds $38 billion annually, with a $1.4 billion U.S surplus, and a $6 billion trade in the sector of the services.

Recognizing Singapore's large market potential, the United States entered and signed a free trade agreement, which took effect on January of 2004.[26] The United States-Singapore FTA is one of the firsts among ASEAN members and carries with it the expected result of improving both countries' standards of trade and living. The free trade agreement has thus far expanded U.S market access in goods, services, investment, government procurement, and intellectual property and provides for cooperation in promoting labor rights and the environment. The agreement is expected to serve as a hub and/or foundation for the other possible FTAs in ASEAN. The United States considers the aforesaid FTA as one of the most comprehensive and ideal FTAs that they have negotiated.

A commitment was made by the government of Singapore that, immediately upon the entry into force of the free trade agreement with the United States, it will guarantee zero tariffs on all U.S goods as well as the assurance not to increase its duties on any U.S product. On the other hand, the United States issued its commitment that duties on products coming from Singapore entering U.S territory would be phased-out-at different states with the least sensitive product entering duty free over a ten year period.

Just like any other free trade agreement, the United States-Singapore FTA has a provision referring to an emergency measure which can be invoked anytime provided that the conditions set forth therein are present or have occurred. Article 7, Chapter 7 of the free trade agreement states the condition for the application of the bilateral safeguard measure. Before the said measure can be enforced, the FTA provisions require that the following conditions must first be present: a) increase imports in absolute terms or relative to domestic production;

[26] On 06 May 2003, the President of the United States signed a Free trade agreement with Singapore. The U.S Congress later approved it in Section 101 of the United States-Singapore Free Trade Agreement Implementation Act, Public Law 108-78 Stat 948 (19 U.S.C. 3805 note)

b) "substantial cause"[27] of serious injury or threat thereof, to the domestic industry; and c) casual linkage.

It is required that prior notification be given by the party applying the measure to the other party in writing. Consultations should be conducted with a view of reviewing the information arising from the investigation, exchanging views on the measure, and reaching an agreement on compensation matters. The procedure for the conduct of an investigation should follow the standard mentioned under the WTO Agreement on Safeguards. Furthermore, in the application of the bilateral safeguard measure, parties are given options whether to: a) suspend the further reduction of any rate of customs duty identified in the FTA; or b) increase the rate of customs duty on the goods to a level specified in the FTA.[28] Duration of the measure shall not exceed two years but could be extended for another two years[29] subject to progressive liberalization at regular intervals during such application.[30] A provisional measure can also be imposed if the delay would cause damage which would be difficult to repair. The duration of such provisional measure shall not exceed 200 days.

It is noted however that, in an the application of the safeguard measure, parties applying the same shall provide the other party mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the measure. The rights and obligations of the Parties remain under Article XIX of GATT 1994 and the WTO Agreement on Safeguards.

VII. US FTAs Evaluation Relating To Trade Remedies

The United States has been pursuing trade policy in the multilateral direction for many years. With recent developments, consensus in the multilateral level however becomes rather difficult to achieve. The increasing membership in the organization has forced them to seek alternative action, if not more suitable remedies.

This portion will evaluate the trade remedy portions of the US' existing bilateral trade agreements with three countries namely Australia, Chile and Singapore.

[27] Again, this term does not appear in the Agreement on Safeguards
[28] Article 7.1, Chapter 2 Safeguards, US-Singapore Free Trade Agreement
[29] ibid., Article 7.2.6 (b)
[30] Ibid., Article 7.2.8

Notably, from the matrix below, it may be seen that the predominant specificities as far as trade remedies the US' bilateral agreements are concerned are on safeguards. Anti-dumping and countervailing measures, on the other hand, are simply refer to their respective WTO commitments.

Free Trade Agreement Matrix

Table 1: Specific provisions under the different US FTA by country

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
Australia	**Chapter Four** **Textile and Apparel** **Conditions:** a) increased quantities in absolute terms or relative to the domestic market for that good b) under such conditions as to cause serious damage, or actual		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	threat thereof, to a domestic industry producing a like or directly competitive good c) Causal linkage between increased imports and serious damage or threat thereof. **Procedure:** The importing Party may take an emergency action under this Article only following an investigation by its competent authorities. **Provisional Measure:** a) In critical circumstances where delay would cause damage which it would be difficult to repair b) there is clear evidence that imports from the exporting Party have increased as the result of the reduction or elimination of a customs duty under the Agreement c) such imports are causing serious damage, or actual threat thereof, to a domestic industry producing a like or directly competitive good d) The duration of such a provisional measure shall not exceed 200 days, during which time an investigation by its competent authorities shall be undertaken.		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	Duration: a) no emergency action against a good may be maintained for a period exceeding two years, except that the period may be extended by up to two years b) no emergency action may be taken by an importing Party against any particular good of the exporting Party more than once c) Each Party retains its rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement, and the Agreement on Textiles and Clothing **Chapter Nine** **Safeguards** **Conditions:** a) increased quantities in absolute terms or relative to the domestic market for that good b) under such conditions as to cause serious damage, or actual threat thereof, to a domestic industry producing a like or directly competitive good c) Causal linkage between increased imports and		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	serious damage or threat thereof. **Procedure/Limitations:** a) A Party shall notify the other Party in writing upon initiation of an investigation b) A Party shall take a safeguard measure only following an investigation by that Party's competent authorities in accordance with Articles 3 and 4.2(c) of the Safeguards Agreement **Provisional Measure:** a) In critical circumstances where delay would cause damage which it would be difficult to repair b) there is clear evidence that imports from the exporting Party have increased as the result of the reduction or elimination of a customs duty under the Agreement c) such imports are causing serious damage, or actual threat thereof, to a domestic industry producing a like or directly competitive good d) The duration of such a provisional measure shall not exceed 200 days, during which time an investigation by its competent authorities shall be undertaken.		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	Duration: a) no emergency action against a good may be maintained for a period exceeding two years, except that the period may be extended by up to two years d) no emergency action may be taken by an importing Party against any particular good of the exporting Party more than once e) Each Party retains its rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement **Compensation:** a) Party applying a safeguard measure shall provide mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the measure		
Chile	**Chapter Eight** **Trade Remedies** **Safeguards** **Conditions:**		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	a) a good originating in the territory of the other Party is being imported into the Party's territory in such increased quantities, in absolute terms or relative to domestic production b) substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive good c) causal link d) Imposition must be made only to the extent as may be necessary to prevent or remedy serious injury, or threat thereof, and facilitate adjustment **Standards /Limitations:** a) Neither Party may impose a safeguard measure on a good that is subject to a measure that the Party has imposed pursuant to Article XIX of GATT 1994 and the Safeguards Agreement b) A Party shall impose a safeguard measure only following an investigation by the Party's competent authorities in accordance with Articles 3 and 4.2(c) of the WTO Safeguards Agreement **Duration:** a) a safeguard measure, including any extension	Party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping measures.	Party retains its rights and obligations under the WTO Agreement with regard to the application of countervailing duties

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	thereof shall not exceed three years b) Regardless of its duration, the measure shall be terminate and at the end of the transition periods. c) Neither Party may impose a safeguard measure more than once on the same good. **Compensation:** b) Party applying a safeguard measure shall provide mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the measure. c) Consultations shall begin within 30 days of the imposition of the measure. d) Unable to reach agreement on compensation within 30 days after the consultations commence, the exporting Party shall be free to suspend the application of substantially equivalent concessions to the trade of the Party applying the safeguard measure.		
Singapore	**Article 5.9** **Bilateral Textile and Apparel Safeguard Actions**		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	Conditions: a) a textile or apparel good benefiting from preferential tariff treatment under the Agreement is being imported into the territory of a Party in such increased quantities, in absolute terms or relative to the domestic market for that good; b) under such conditions that imports of such good from the other Party constitute a substantial cause of serious damage or actual threat thereof, to a domestic industry producing a like or directly competitive good; c) Causal link; and d) to the extent and for such time as may be necessary to prevent or remedy the serious damage and to facilitate adjustment by the domestic industry: **Procedure/Limitations:** a) No action may be maintained for a period exceeding two years except that the period may be extended by up to two years. b) No action may be taken by a Party against any particular good of the other Party more than		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	once during the transition period. c) The Party taking an action shall provide to the Party against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the emergency action. d) Nothing in this Article shall be construed to limit the ability of a Party to restrain imports of textile and apparel goods in a manner consistent with the WTO Agreement on Textiles and Clothing or the WTO Agreement on Safeguards. **Chapter 7** **Safeguard Measure** Conditions: a) an originating good of the other Party is being imported into the territory of a Party in such increased quantities, in absolute terms or relative to domestic production; b) under such conditions that the imports of such originating good from the		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	other Party constitute a substantial cause of serious injury or threat thereof, to a domestic industry producing a like or directly competitive good; c) Causal link **Procedure/Limitations:** a) A Party shall notify the other Party in writing upon initiation of an investigation b) A Party shall take a measure only following an investigation by that Party's competent authorities in accordance with Articles 3 and 4.2(c) of the WTO Agreement on Safeguards c) Each Party retains its rights and obligations under Article XIX of GATT 1994 and the WTO Agreement on Safeguards **Duration:** a) No measure may be maintained for a period exceeding two years; except that the period may be extended by up to two years. b) Where the expected duration of the measure is over one year, the importing Party shall progressively liberalize it		

Country	Safeguards	Anti-Dumping Measures	Countervailing Measures
	at regular intervals during the period of application. **Provisional Measure:** a) In critical circumstances where delay would cause damage which it would be difficult to repair b) there is clear evidence that imports from the exporting Party have increased as the result of the reduction or elimination of a customs duty under the Agreement c) such imports are causing serious damage, or actual threat thereof, to a domestic industry producing a like or directly competitive good e) The duration of such a provisional measure shall not exceed 200 days, during which time an investigation by its competent authorities shall be undertaken. **Compensation:** The Party applying a measure shall provide to the other Party mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the measure.		

Table 2: A comparative matrix on the FTAs entered by the U.S. on selected countries.

Country	Safeguards	Countervailing Measures	Anti-Dumping Measures
Australia	Agricultural Safeguard Measures (for beef and horticulture), may impose additional customs duties on agriculture as provided in the agreement, price Based Safeguard for Horticulture (based on FOB, US may impose measures if below the trigger price), Quantity Safeguard for Beef (US may impose measure in years 9 thru 18 if exceeds aggregate volume set in the agreement, effect of measure until end of calendar year only), Price-Based Safeguard for beef (may impose staring year 19 if price fall below trigger price as provided); Safeguard (chapter 9 of FTA)- If during the transition period, there is a sudden increase in imports, affected country may suspend reduction of customs duties or increase duties but it is not to exceed the MFN rate, also provides safeguards for seasonal goods, also provides for provisional safeguard measures; note that all safeguard measures are during transition only	Agreed to eliminate export subsidies in agriculture; right to action under the WTO regarding countervailing measures still applies with respect	Right to action under WTO on anti-dumping still applies
Chile	Provides for safeguards in case of sudden increase of imports during the transition period by suspending the reduction of rates	Right to action under the WTO regarding countervailing measures still applies with respect	Right to action under WTO on anti-dumping still applies

Country	Safeguards	Countervailing Measures	Anti-Dumping Measures
	of by increasing the customs duty/ tariffs not exceeding the MFN rate		
Singapore	For textiles- if there is a sudden surge during the reduction period, either may suspend further reduction or increase tariffs to not higher than MFN rates; same measure apply to other products except that it has provision for seasonal customs duty for goods; provisional measures are also available	Right to action under the WTO regarding countervailing measures still applies with respect	Right to action under WTO on anti-dumping still applies

Table 3: Advantages and disadvantages / similarities and differences

Country	Advantages	Disadvantages	Similarities	Differences
Australia	National treatment and Market Access for goods, tariff/ Customs duty elimination; progressively eliminate export subsidies in agriculture and may not introduce additional customs duty unless provided; MFN treatment for Textile and Apparel; provides for sanitary and phyto-sanitary measures;	Compensation is required when safeguard measures are implemented in the form of concessions (Art. 9.4); safeguard measures apply only during transition		Provides a chapter on safeguards but non for the other trade remedies

Country	Advantages	Disadvantages	Similarities	Differences
	provision governing technical barriers to trade and trade facilitation; provides for cross border trade in services with MFN and National Treatment features			
Chile	National treatment of goods and tariff elimination; has a provision addressing technical barriers to facilitate trade in goods	No commitment to remove agricultural subsidies, no provision for provisional safeguard measures	The chapter on trade remedies is closely identical to the chapter on safeguards with the Australian FTA	No chapter on safeguards but has a chapter on trade remedies; does not provide for safeguard measures for seasonal products unlike in Australia
Singapore	National treatment for goods and market access by minimizing and/or eliminating customs duty and disallowing any increase; specific provision to address technical barriers to trade; provision for temporary entry of business persons in the territory of the other party; provision for electronic commerce	Both parties may not charge export tax on good originating from their country bound for the other; compensation for safeguard measures in the form of trade concessions	Has provisions for seasonal customs duties for goods and provisional safeguard measures like Australia; has provision for anti-competitive conducts and for designated monopolies; provision for electronic commerce	Singapore does not allow the entry of chewing gum into the country except those with therapeutic value; specific provisions exist for cotton, man-made fibers and textiles; has provision for temporary entry of business persons in the territory of another; provision for government monopolies more detailed than others

VIII. ASEAN Free Trade Agreement (AFTA)

Many governments around the world are simultaneously involved in multilateral and bilateral trade negotiations. Currently, the World Trade Organization has 148 members. Under the WTO Agreements certain restrictions are imposed in order to ensure faithful compliance therewith. WTO rules have established that the purpose of bilateral or regional trade agreements should be to facilitate trade between constituent counties and not to raise barriers to the trade of other WTO members who are parties to whatever FTA they sign up on.

As already discussed above, the Philippines has been negotiating bilateral free trade agreements but to date has not signed with other nations except with the ASEAN region or the ASEAN Free Trade Agreement (AFTA). Herein, the provisions of trade remedies in the sole FTA which the Philippines is party to (that of AFTA) will be discussed after a short background introduction.

It has been acknowledged that developing countries, in order to effectively deal with developed countries, must ideally merge together to establish a conglomeration which would increase their collective bargaining power. In January 1992, the ASEAN heads of government formally agreed to establish an ASEAN Free Trade Area (AFTA). Thereafter, The ASEAN Economic Ministers signed the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for AFTA. The purpose of creating the AFTA are: a) to increase ASEAN's competitive edge as a production base geared for world market; b) to eliminate intra-regional tariffs and non-tariff barriers; and c) to attract foreign direct investments into the region.[31]

Under the ASEAN Free Trade Agreement a mechanism was established to reduce trade barriers within the region called the Common Effective Preferential Tariff or the "CEPT". The said mechanism was adopted to strengthen discipline under the AFTA. Under the CEPT, products are categorized under different listings.[32]

The main thrust of the CEPT Agreement is to push ASEAN countries to reduce their intra-regional tariffs on all manufactured items and remove non-tariff barriers over a 15-year period commencing 1 January 1993 leading to the establishment of a tariff free region by 2010.

The CEPT provides for an emergency measure to counter the possible effect of the tariff liberalization under AFTA. Article 6 of the CEPT provides that:

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[31] http://www.aseansec.org., ASEAN Secretariat, Jakarta, November 199

[32] This must be taken into consideration particularly in reduction and/or termination of the tariff. The information enumerated under the table are copied from the Official website of the ASEAN.

1. “If, as a result of the implementation of this Agreement, import of a particular product eligible under the CEPT Scheme is increasing in such a manner as to cause or threaten to cause serious injury to sectors producing like or directly competitive products in the importing Member States, the importing Member States may, to the extent and for such time as may be necessary to prevent or to remedy such injury, suspend preferences provisionally and without discrimination, subject to Article 6(3) of this Agreement. Such suspension of preferences shall be consistent with the GATT.

2. Without prejudice to existing international obligations, a Member State, which finds it necessary to create or intensify quantitative restrictions or other measures limiting imports with a view to forestalling the threat of or stopping a serious decline of its monetary reserves, shall endeavor to do so in a manner, which safeguards the value of the concessions agreed upon.

3. Where emergency measures are taken pursuant to this Article, immediate notice of such action shall be given to the Council referred to in Article 7of this Agreement, and such action may be the subject of consultation as provided for in Article 8 of this Agreement."

To suspend the application of the concessions under Article 6 and to justify the application of the Emergency Measure, it is required that the following elements be proven: a) increase in imports; b) such increase causing or threatening to cause serious injury to the sector producing like or directly competitive products; and c) that the imposition of the emergency measure is necessary to prevent or to remedy such injury. Notification shall be filed with the ASEAN Secretariat, who shall act as the central registry of notifications, including written comments and the results of official discussions.

The Suspension of preferences shall be consistent with Article XIX (Emergency Action Imports of Particular Products) of GATT 1994. (It must be taken into consideration that the grounds for the application or suspension of preference under the Agreement on the CEPT Scheme for the ASEAN Free Trade Area provides for a lower standards than that under the GATT (i.e., surges

are not required but merely increase in imports). The phrase "such suspension of preferences shall be consistent with the GATT" refers only to the procedure on how the emergency measures are actually imposed (i.e., procedure and notification). The basis of the imposition of the emergency measure, however, seemingly is to be taken primarily from Article 6.) Further, Article XIX allows a country affected by the emergency action to withdraw substantially equivalent concessions. In any event, even if the CEPT rate is suspended, the MFN rate shall be applied immediately. Lastly, the period of suspension shall not exceed 4 years.

IX. Recommendation for Trade Remedies

Two principal recommendations may be given, in view of the foregoing information, with regard to the strategy by which the Philippines should negotiate with the US towards the end of sealing a bilateral FTA with them.

Foremost, it must be considered that in terms of bargaining strategies, the US holds the upper hand in terms of legal and institutional experience. It thus would not be surprising if the US launches a round of negotiations that is skewed in the direction of applying maximum pressure on a trade partner to allow the US to impose trade remedy measures upon it using vaguely phrased and flexible criteria. As a primary consideration, therefore, the Philippines will have to, as a minimum non-negotiable, ensure that the wordings and terminologies to be used in the trade remedy portion of an RP-US FTA would have minimal (or absolutely no) departure from the current WTO Agreements. Such should comprise the country's minimal stand.

Experience has shown that the US, in a number of occasions, managed to alter the actual wording of the trade remedy provisions of its FTA agreements. An example of which would be the phrasing of the portion relating to serious injury for purposes of imposing safeguard duties. According to the FTA agreements with Australia, Chile and Singapore, consultations shall be held between them and the US if "a product is being imported in such increased quantities as to be a <u>substantial cause</u> of serious injury or the threat to domestic producers." Conspicuously, the term "substantial cause" appears nowhere in the WTO Agreement on Safeguards. Nevertheless, the said phrase - which alone could spew new debates in terminologies and subsequent application - was inserted, albeit presumably to the complete comprehension and consent of the party on the other side of the negotiating desk. To avoid any potential complication over terminologies and procedure, it is best advised for the Philippines to stay clear of any proposals to alter the provisions of the WTO Agreements in adopting them into the FTA and ensure that the avenue to raise any possible future issues

arising from the FTA to the WTO Dispute Settlement and Appellate Bodies remains clear and open.

Finally, whilst the Philippines should put its foot down in requiring complete transparency and adherence to the WTO Agreements as a minimum demand from the US, it may also consider pushing the envelope further in its negotiating stance. For one, it may include among its demands that RP exports to the US be granted at least a temporary reprieve from trade remedy measures. At this point in time, in view of the vast arsenal and experience that the US has in restricting trade and the relative inexperience of the Philippines in such, what should be given utmost priority is the access of Philippine products to the US market rather than restricting US goods from entering the country. Thus, a temporary reprieve from safeguards, anti-dumping, and/or countervailing duties for Philippine products may be broached so as to establish closer economic ties and confidence between the Philippines and the US, while providing wider market access for Philippine products. This would mark a step towards arriving at a semblance of equal footing or an even pitch in the rules governing RP-US trade relations, at least as far as trade remedies are concerned.

COMPETITION POLICY

X. Introduction

Competition Policy: An overview

A full analysis of the Philippine economy requires an understanding of how that economy interacts with other economies of the world and how our existing laws and other policies affect this interaction. This will help us a lot in the formulation of comprehensive economic reforms and trade policies that will work toward the achievement of a national economic well-being. It is only through this that we will be able to come up with very meaningful positions on issues such as deregulation, liberalization, privatization, and competition policy.

While other countries worry about the differences in their respective competition policies and how best these may probably be harmonized, the Philippines has yet to define and set out its own comprehensive competition policy. Economic gains arising from clear-cut policies may not be sustained or

may not happen at all unless we adopt complementary measures that can work to our advantage.

This section particularly focuses on what and how the Philippines should position itself in terms of competition policies with the United States, one of its biggest trading partners, when it comes to drawing up a bilateral free trade area agreement. To achieve this goal, we will first define "competition policy" according to the framework laid by the World Trade Organization (WTO), particularly the competition policies prescribed for developing countries, like the Philippines. Then, we will try to review the basic principles governing US competition policies, which may have a bearing on the free trade agreements the US forged, bilaterally, with other countries around the world. A review of Philippine competition policies or laws that allude to it will follow the discussion. This juxtaposition of policies will help us outline recommendations for possible considerations and steps in drawing up a Philippine competition policy.

Competition Policy defined

Competition policy broadly refers to all laws, government policies, and regulations aimed at establishing competition and maintaining the same. It includes measures intended to promote, advance, and ensure competitive market conditions by the removal of control, as well as to redress anti-competitive results of public and private restrictive practices. In general, the purpose of competition policy is to make sure that no entity would have market power it can abuse and, where necessary, to implement competition rules that would emulate the competitive process and make up for the market's failure to perform its price-allocation function efficiently.[33] To the extent that legislation is made to promote these goals, the areas of concern with regard to the creation of competition policy are the following:[34]

a) preventing enterprises from entering into agreements which do not have any beneficial features which will restrict competition, either amongst themselves or between them and third parties;

b) controlling attempts by monopolists or dominant firms from abusing their market position and preventing new firms from entering the market;

[33] A Competition Policy Framework for the Philippines, Philippine Development Studies 1999
[34] Taken from the Tariff Commission Website on "What is competition policy"

c) ensuring that workable competition is maintained in oligopolistic industries; and

d) monitoring mergers between independent enterprises, where the effect of the merger may result in market concentration and reduction in competition.

When it comes to international economics, a core element of competition policy is the removal of as many barriers[35] to entry in as many sectors as is practically possible, as long as this is for the public interest. In sum, any competition policy has the element of regulating monopolies or the creation thereof, mergers and other firm behavior that would be tantamount to anti-competitive practice, consumer protection, and state entry barriers when it comes to trade.

Why Do Countries Need a Competition Policy?

Common belief has it that trade can make countries better off and for this to be realized we need to set up markets that do not hinder perfect competition. This is possible, according to Adam Smith, because, ideally, when market forces are left alone, when prices and self-interest guide the consumers' and the producers' decisions, it will ultimately bring about over-all economic well-being. A perfectly competitive market has the

[35] Artificial Barriers refer to barriers created by firms to prevent other firms from entering or operating within an industry. These ultimately impact on customers through the higher prices and/or lower product quality that result from the lack of competition. Examples of practices include price fixing, cartels, discrimination between different markets and exclusive dealing. They are the preserve of traditional antitrust policy, which addresses issues arising when firms treat each other in an egregious manner.

Natural Barriers refer to barriers which are intrinsic to sectors of the economy with high sunk costs. Natural barriers to entry occur because the minimum efficient scale of production is a single firm. However, these barriers can be ameliorated through the provision of access regimes and the regulation of assets which exhibit natural barriers to entry.

Government Imposed Barriers include two elements. The first of these is legislation which creates barriers, such as licenses and government franchises. The second is conduct by government which raises barriers to entry, such as policy decisions favoring one set of firms over others and activities by government owned business enterprises which disadvantage private competitors. Government barriers can be addressed by legislative reform and competitive neutrality programs and through the application of anti-trust measures to the public sector.

following characteristics: (1) There are many buyers and many sellers in the market; (2) the goods offered by the various sellers are largely the same; and (3) firms can freely enter or exit the market[36].

Competition policy aims at ensuring that competition in the marketplace is not restricted in a way that is detrimental to society[37]. Although markets are usually a good way to organize economic activity, this rule has some important exceptions. We need interventions from the government when markets, when left on its own, fails to allocate resources efficiently. Competition policies are especially important when a market failure is caused by a single person (or a small group of people) to have substantial influence on market outcomes[38]. Aside from natural monopolies, markets would also fail when there are firms who hold dominant positions because of sunk cost industries, lock-in effects and switching costs, and network effects.

Also, we need competition policy because - when unmonitored - firms may resort to actions that increase their profits but harm society, such as collusion, mergers which lessen competition, predatory behavior, and exclusionary behavior.[39]

It is also important to note that competition policies are not regulation tactics. Though both aim to prevent market failures, they differ in terms of procedure and control rights, timing of oversight, and information intensiveness.[40] Unlike regulation, competition policies do not intervene on market structures but, instead, it facilitates competition through behavioral remedies.

Another distinction must be made, this time, between competition policy and competition law. Competition policy comprises all national government policies that are aimed directly at increasing competition in markets, including deregulation, privatization, international trade, foreign direct investment, and intellectual property. Essentially, one may regard these policies as those which promote competition and as a result reduce the scope for anti-competitive behavior, whereas national competition (anti-trust) laws are designed to combat any business conduct that is alleged to be unacceptable in competition terms. Competition law is therefore a subset of competition-promoting policies and acts as a safeguard for promoting competitive behavior[41].

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[36] Mankiw, G. (2001). Principles of Economics. 2nd ed. P. 292
[37] www.iue.it/Personal/Motta/courses/ Amato-Motta/1-IntroductionCompetitionLaw.pdf
[38] Mankiw, p. 11
[39] www.iue.it/Personal/Motta/courses/ Amato-Motta/1-IntroductionCompetitionLaw.pdf
[40] ibid.
[41] Vauttier, K. et. al. Competition Policy, Developing Countries and the WTO.

Overall, competition policy aims to safeguard, protect, and promote competition and the competitive process to ensure that the market is able to function effectively and bring about economic efficiency. Its two-fold task is to make sure that no entity would have market power it can abuse and, where necessary, to implement competition rules that would emulate the competitive process and make up for the market's failure to perform its price-allocation function efficiently. Its core element is the removal of as many barriers to entry in as many sectors as is practically possible, as long as this is in the public interest.

XI. The World Trade Organization and Competition Policy

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business[42].

The WTO has no explicit objective relating to the promotion of competition. It does not regulate the competition laws of its members and it imposes no obligation on members to have national competition laws. It does, however, have a number of provisions relating to areas of international competition among private producers who trade goods and services and rules relating to nullification and impairment of negotiated concessions that might, in some circumstances, be used to enforce national competition laws[43].

There is no multilateral competition framework in the WTO yet but like the two-fold task of competition policies in the microeconomic level a possible multilateral competition framework in the WTO, also, has a two-fold task. And its objectives are (1) to establish competition in the domestic market in order to provide a certain degree of contestability that ensures that market access, gained from trade concessions, is not nullified by domestic anti-competitive practices and (2) to discipline cross-border restrictive business practices undertaken by private companies that affect the prices and availability of goods to Member countries.[44]

Although no framework has been put into place yet, these objectives should serve as the basis of a framework among WTO member countries that

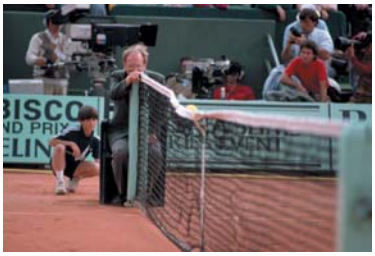
[42] http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm
[43] Vauttier, K. et. al. Competition Policy, Developing Countries and the WTO.
[44] Nikomborirak, D. Competition Policy in the World Trade Organization: How to Make it a Developing Country's Agenda.

would specify the rights and obligations of concerned countries. Especially, since both developing and developed countries are anxious about having a guarantee that they will not be subjected to abusive conduct and unfair practices.

XII. Competition Policy and Developing Countries

It is important for developing countries to have a competition policy which is designed to take appropriate account of their level of development and the long term objective of sustained economic growth. This is in part due to the potential effects of the international merger movement and also because of privatization, deregulation, and liberalization which have occurred in domestic economies of most developing countries[45].

Mergers pose a threat to developing countries for two reasons. First is that mergers are potentially anti-competitive in the sense that it has the capacity to give rise to monopolies and cartels. These entities could gain market power and it would easily hinder market efficiency. And second, mergers could create unequal competition between multinational and domestic corporations in developing countries, the former having the advantage of integrated international operations. Most developing countries will find it difficult to stop anti-competitive behaviors by local subsidiaries of merging large corporations in industrial countries because of the lack of machinery to prove such activities. Merging large corporations may behave differently across economies but developing countries are more vulnerable to such bad behavior. The US, with all its regulatory machinery and extraterritorial reach, is not even spared by cartels that charge high market prices on their goods. All the more is the concern with which developing countries have with regard to their ability to adequately police abuses.[46]



Likewise, privatization of public assets and deregulation of industries also pose serious threats in the economies of developing countries. Through the espousal of liberalization and globalization ideologies, many countries subjected themselves to economic reforms that are geared towards considerable diminution in the direct role of the state in economic activities.[47] And as such, many state-owned enterprises currently enjoy monopoly power in the market. In such a situation the absence of a competition policy and

[45] Singh, A. **Competition Policy, Development, and Developing Countries.**
[46] Ibid.
[47] Ibid.

an adequate regulatory mechanism will simply mean the transfer of monopoly power from the public to the private sector. This is likely to harm the interests of consumers, especially the poor[48].

Competition policy has an important role to play in developing countries, both in promoting a competitive environment, and in building and sustaining public support for a pro-competitive policy stance by the government.[49] Liberal trade and investment policies are a key element of a good competition policy and priority should be given to eliminating barriers to trade and foreign direct investment. However, in many sectors of the economy the threat of foreign competition will remain limited, and there is need to apply competition law to ensure that firms do not behave collusively and that market power is not exploited. This can and should be done independently of the WTO - no international disciplines are needed[50].

Evidence may not be overwhelming but indications suggest that competition policy and law are likely to be beneficial to people, especially in developing countries. Furthermore, in this age of globalization, where many anti-competitive practices have cross-border origin, countries ignore the importance of competition policy and law at their own peril[51].

It is not suggested that there is one formula for everyone and that developing countries should adopt the model used by developed countries or proposed by WTO. On the contrary, every country needs to tailor its competition policy and law to its own specific set of needs and conditions. The most important factor is that the law should be realistic and implementable. Introducing a law that cannot be properly implemented is not only futile but may also be counterproductive. If the competition authority is seen as being incapable of discharging its role, then people may lose faith in the effectiveness of competition policy and law as a whole[52].

Provisions in the law should be appropriate as well as realistic. There is scope for exceptions and exemptions in the competition law and countries should make careful use of them.

XIII. The state of competition policy in the Philippines

[48] Mehta, P. **Competition Policy in Developing Countries: An Asia-Pacific Perspective.**
[49] Hoekman, B. and Holmes, P. **Competition Policy, Developing Countries and WTO.**
[50] Ibid.
[51] Mehta, P. **Competition Policy in Developing Countries: An Asia-Pacific Perspective.**
[52] Ibid.

XI. The state of competition policy in the Philippines

The concept of competition policy and more particularly antitrust is not new to the Philippines. No less than the Philippine Constitution[53] enunciates policy on trade practices while separate legislative acts address elements of competition policy in some way. A plethora of laws, is present to address concerns of maintaining competition nevertheless, it has been observed that enforcement of competition policy is weak almost to the point of non-existent in the absence of a general antitrust law. It has been commented that the absence of antitrust law in the Philippines may be attributed to the penal nature of the laws. In connection with the penal nature of the law is that enforcement of any action therewith would require a quantum of evidence of proof beyond reasonable doubt for a case to prosper, not to mention the presence of witnesses and/or aggrieved parties interested in pursuing the case despite the long tedious legal process involved.[54] What compounds the problem of enforcing competition policy in the Philippines is the absence of a central competition authority. Moreover, the fines and penalties are too minimal that a violation of any provision on competition policy goes unnoticed.

Despite the absence of a comprehensive law, the Philippines still has taken measures in ensuring that competition is promoted through the imposition of laws that would prevent unfair trade practices as well as protect consumers. The Philippine government has implemented comprehensive reforms and trade liberalization measures in terms of lowering of tariff rates and removal of import controls as exemplified by the Tariff Reform Programs (TRPI-IV). The trade policy regime has changed substantially during the past two decades. On the domestic level, reforms were made through the deregulation of certain industries and the implementation of laws designed to promote both foreign and domestic investments. Other major reforms that made an impact on the state of competition in various markets include:[55]

(1) abolition of a number of regulatory bodies

(2) privatization

(3) demonopolization of the telecommunications industry

[53] Art. XII, specifically § 1, 10, 13 & 19 on the protection of Filipino enterprises from unfair foreign competition and trade practices; the prohibition or regulation of monopolies when the public interest so requires and the disallowance of combinations in the restraint of trade or unfair competition .

[54] Comment of Atty Abad as contained in a paper of Medalla

[55] Erlinda Medalla paper

(4) some deregulation in the shipping and airline industries

(5) oil deregulation

(6) easing of entry of foreign banks

(7) easing the foreign equity limits, and restoring to a much less restrictive negative list of activities where foreign equity is limited

(8) the retail trade law

As mentioned above, competition policy intends to regulate the market behavior of firms to ensure that such firms do not engage in anti-competitive conduct. The Philippines has numerous laws addressing issues of conduct in restraint of trade or any conduct or arrangement made between firms that would reduce or eliminate competition.

A Survey of Laws that contain Competition Policy

A. Revised Penal Code Art. 186-187 on Monopolies and Combinations in Restraint of Trade

B. Civil Code Art. 1449, 1310, 1364, 1381 & 446 on Obligations and Contracts & Liquidated Damages

C. Omnibus Investments Code (EO 226)[56],

D. Foreign Investments Act of 1991 (RA 7042) which provided for

- Registration Requirements
- Foreign Investments Negative List
- Compliance with Environmental Standards

E. Special Economic Zone Act (RA 7916)

F. Retail Trade Liberalization Act (RA 8762)[57]

[56] Wherein the State recognizes that there are appropriate roles for local and foreign capital to play in the development of the Philippine economy and that it is the responsibility of the Government to define these roles and provide the climate for their entry and growth.

G. Export Development Act of 1994 (RA 7844)

H. Price Act (RA 7851)[58]

I. Intellectual Property Code (RA 8293)

J. Consumer Act (RA 7394)

Pending house bills on competition policy:

There are three pending house bills which are pending before the Congress which seek to protect free trade and commerce against undue restraint, monopolies, and other trade malpractices. House Bills 2439 sponsored by Representative Gerardo Espina and House Bill 198 sponsored by Representative Narciso D. Montfort were filed during the 12th session of the Congress. The most recent of the bills on competition policy is House Bill 116 or the Philippine Competition Act which was sponsored by Representative Joey Sarte Salceda.

Unlike House Bills 198 and 2439, House Bill 116 clearly defined what a monopoly is. Section 40 of the bill points out that monopoly exists when a person has one-third or more of the share on any market. The person who is deemed to be in a position to monopolize is prohibited from engaging in the following acts namely:

a. refusing to deal with any other business except for normal commercial probity reasons

b. engaging in exclusive dealing unless such conduct has been authorized

c. engaging in unconscionable conduct in its dealing with other business or consumers

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[57] Here, Philippine Retail Industry is liberalized to encourage Filipino and foreign investors to forge an efficient and competitive retail trade sector in the interest of empowering the Filipino consumer through lower prices, higher quality of goods and better services

[58] Whereby the policy of the State to ensure the availability of basic necessities and prime commodities; said law institutes penalties for illegal price manipulation and mechanisms to protect consumers from inadequate supply and unreasonable price increase; and Illegal Acts of Price Manipulation include hoarding, profiteering and cartel

d. selling below cost except in a seasonal sale

e. engaging in any discriminatory conduct whether or not that conduct is predatory

With this, it can be seen that monopoly per se is not considered as illegal. It is only when the person who is deemed to be in position to monopolize engages in the aforementioned prohibited acts that he is held liable for monopolization or unfair trade practice by the Competition Commission.

The other two house bills namely 198 and 2439 attempted to define the term monopoly but they only succeeded in describing the acts and practices which constitute monopoly. House Bill 198 for instance compounded in one category prohibited practices of monopolies, cartels, combinations or contracts in restraint of production, trade, commerce, or industry. It did not define the term monopoly but rather considered acts amounting to monopoly as prohibited and unfair. These acts are described as follows under Section 4 of House Bill 198 namely:

a. the monopoly or any move to monopolize any kind of consumer products, goods, commodity or object of trade, commerce or industry including all the equipment, its replacement parts thereof, essential to the operations of public service and utility entities or collusive action of a person with another person to monopolize in whole or in part the aforementioned objects of trade, commerce or industry in any place in the Philippines.

b. The monopoly either by direct or indirect ownership, arrangement, combination, collusion with other person or through leases of any enterprises operated for the purpose of providing public service or convenience by air, land and water, including cold storage facilities, electric plants, radio and television stations, movie or beta film production or exhibition, telegraphic, wireless and other forms of electric communication service, common carriers of merchantable items and all other business coupled with public interest.

On the other hand, House Bill 198 also enumerates prohibited practices of monopolies, cartels, combinations or contracts in restraint of production, trade, commerce, or industry as follows:

a. any form of collusion or combination that will result in the raising, lowering, destabilizing, pegging or fixing the price of any commodity, goods, merchandise, article or items of trade, commerce or industry in the local market

b. any deceptive or unfair method of competitive acts in trade, commerce, or industry leading to the elimination of free competition, or the encouragement of the formation of monopolies, cartels and combinations restraining trade, commerce or industry working against small businesses or concentrate economic power in the hands of a few.

c. Any kind of merging of capital in the form of trust or otherwise, which may result in the consolidation of economic advantage in the hands of a few tending to influence the condition of production, trade, commerce or industry or maneuver market trends and the interplay of market forces to the prejudice of a free market

d. Any combination or collusion on the side of suppliers not to market or make available for sale any consumer products, goods, merchandise, commodity or articles of trade, commerce, or industry especially food, fuel, lubricants, or other materials of prime necessity.

e. Any employment of directors, officers, or employees who are at the same time employed by another business company or enterprise whose line of business activities are in competition with each other.

f. Any acquisition by any natural or juridical person or manufacturing entities engaged in the production of consumer goods or objects of commerce that will eventually lead in manipulation of prices, restraint of trade, unfair competition or monopoly of the business.

On the other hand, House Bill 2439 attempted to define the term monopoly as such dominant ownership or control over the means of production or the market supply or output of an article of trade or commerce, or service within a relevant market as to stifle competition, restraint the freedom of commerce, and give the monopolist control over price with respect to that article of trade or commerce. The definition however is too vague and all-encompassing that it is hard to determine the persons guilty of monopoly. House Bill 2439 enumerated the acts, which if committed by a person who has the monopoly or who is in the position to control the relevant market, are prohibited. These are:

> a. limit the production of such goods, merchandise, commodity, article or object of trade or commerce or the supply of services to increase the prices thereof to the detriment of the consuming public
>
> b. make any predatory acts towards competitors, such as but not limited to using below-cost-pricing to eliminate competition, or making use of any other article, device or scheme to exclude competition
>
> c. acquisition of all or substantially all of the assets of its competitors in order to lessen or eliminate competition and thereby control and monopolize the industry.
>
> d. Imposition of unreasonable restrictions or conditions in the distribution of such goods, commodities, articles or products or services which tend to lessen or affect negatively the supply thereof in the market.
>
> e. Discriminatory pricing or terms and conditions in the supply or purchase of goods or services including agreements between enterprises, even if engaged in different industries, which provide for terms and conditions not made available to similar transactions with other enterprises, resulting in restraint of trade
>
> f. Having interlocking directors, officers or employees with competitors whose lines of

businesses are effectively or in substantial competition with each other

g. Any act or course of conduct which obstructs, delays or adversely affects the free interplay of trade, commerce, or industry or the movement of goods and services in trade.

On the issue of cartels, House Bill 116 explicitly states that cartels per se are illegal. This is another important contribution because House Bills 198 and House Bill 2439 do not contain any provision which penalizes the mere existence of cartels. House Bill 2439 however gives a definition of a cartel as a combination of organizations or entities resulting from some agreement, contract, or other form of coordination and so extensive and unified so as to suppress competition, acquire dominance in the market, and secure power to control prices with respect to any commodity or service.

Meanwhile, the three pending house bills on competition policy clearly provide that monopolies and cartels are not the prohibited trade practices. They point out that there are trade practices which are prohibited because they restrict competition among the different businesses. House Bill 2439 penalizes a person who engages in unfair trade practices though he is not engaged in a monopoly or though he is not in a position to control the relevant market for a particular good or service of goods. It also penalizes any government official who knowingly supports or strengthens the existence of monopolies, oligopolies or any combination in restraint of trade or who shall knowingly issue government policies and rulings which tend to lessen, eliminate, or exclude competition in such trade, commerce, or industry.

On the other hand, House Bill 116 penalizes persons who engage in:

a. primary boycott- engage in a conduct that hinders or prevents the supply of goods or services by a third person to a fourth person or the acquisition of products by a third person from a first person if it results in substantial lessening of competition in the market. The House Bill defines the term substantially lessening competition in the market as the fixing, controlling, or maintaining of the price for a discount, rebate, or credit in relation to products supplied or acquired or to be supplied or acquired by the parties to the agreement in competition with each other.

b. Misuse of market power- a person that has a substantial degree of power in the market shall not take advantage of that power for the purpose of :

- eliminating or substantially damaging a competitor of the person or if the person is a corporation of a related corporation in that or any other market

- preventing the entry of a person into that or any other market

- deterring or preventing a person from engaging in competitive conduct in that or any other market

- substantially lessening competition in any market or markets.

c. Resale price maintenance- supplier induces a second person not to sell at a price less than a price specified by the supplier. The bill likewise prohibits the withholding of supply to the second person and compelling the second person to agree to the price specified. The bill states that suppliers can only recommend the prices but there is no obligation to comply with the recommendation.

d. Acquisition that will result in lessening competition- a person shall not directly or indirectly acquire the shares in the capital of a body corporate or acquire any assets of a person if the acquisition will have the effect of substantially lessening competition in the market.

XIV. Competition policies in the US FTAs

The US has in place various domestic legislation against uncompetitive behavior.[59] However, for purposes of this paper and due to the nature of the topic at hand, discussion on this item will not touch upon local competition policies in the US but shall instead focus on the provisions specified in 3 of the selected US

[59] Such as the Sherman and Clayton Anti-trust Acts

bilateral FTA agreements (i.e., Australia, Chile and Singapore), particularly the provisions thereof which relate to competition policy. This follows the pattern and rationale of the trade remedy discussion earlier.

US-Australia FTA

Chapter 14 provides for competition policy. The purpose of this provision is stated as: "to promote economic efficiency and consumer welfare". Following this are relevant wordings from that provision.

Competition law and anti-competitive business conduct

- Each party shall maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto.

- Each party shall maintain authorities responsible for the enforcement of its national competition laws. The enforcement policy includes treating non-nationals no less favorably than nationals in like circumstances.

- The parties shall cooperate in the enforcement of competition laws and policy i.e. through mutual assistance, notification, consultation, exchange of information, etc.

- The parties recognize their existing mechanisms for cooperation in relation to competition law enforcement, specifically:

    1. The Agreement between the Government of Australia and the Government of the United States of America relating to Cooperation on Antitrust Matters of 1982; and

    2. The Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance of 1999.

- The parties shall examine the scope for the effective enforcement of each other's competition laws and policies.

- A joint working group shall be established, with the goal of seeking to reach a common view of appropriate steps to enhance their respective legal and regulatory regimes in that regard.

Designated monopolies

- The parties recognize that designated monopolies should not operate in a manner that creates obstacles to trade and investment. Nothing in this chapter shall be construed as preventing a party from designating a monopoly.

- This Article does not apply to government procurement.

State enterprises and related matters

- The parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment.

- The U.S. shall ensure that anticompetitive activities by sub-federal state enterprises are not excluded from the reach of its national antitrust laws.

- Australia shall take reasonable measures, including through its policy of competitive neutrality to ensure that governments do not provide competitive advantage to government business simply because they are government-owned.

US-Chile FTA

Chapter 16 of this agreement provides for competition policy and is worded summarily and topically as follows:

Anti-Competitive Business Conduct

- Each party shall maintain or adopt measures to proscribe anticompetitive business conduct, to promote economic efficiency and consumer welfare, and take appropriate action with respect thereto.

- Each party shall maintain authorities responsible for the enforcement of its national competition laws.

- Nothing in this chapter shall be construed to infringe each Party's autonomy in developing competition policies and enforcement thereof.

- The parties agree to cooperate in the area of competition policy.

Designated monopolies

- Nothing in this chapter shall be construed to prevent a party from designating a monopoly.

- Guidelines are provided regarding the designation of privately-owned monopolies.

- This Article does not apply to procurement.

State enterprises

- Each party shall ensure that its state enterprise acts in a manner not inconsistent with the Party's obligations under this Agreement.

- State enterprise must accord non-discriminatory treatment in sale of goods or services to covered investments.

US-Singapore FTA

Chapter 12 provides for policy regarding anticompetitive business conduct, designated monopolies and government enterprises, having the following salient points.

Anti-competitive business conduct

- Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct with the objective of promoting economic efficiency and

consumer welfare, and shall take appropriate action with respect to such conduct.

- Each Party shall establish or maintain an authority responsible for the enforcement of its measures to proscribe anticompetitive business conduct. The enforcement policy of the Parties' national authorities responsible for the enforcement of such measures includes not discriminating on the basis of the nationality of the subjects of their proceedings. Each Party shall ensure that a person subject to the imposition of a sanction or remedy for violation of such measures is provided with the opportunity to be heard and to present evidence, and to seek review of such sanction or remedy in a domestic court or independent tribunal.

Designated monopolies and government enterprises

- Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly.

- Where a Party designates a monopoly and the designation may affect the interests of persons of the other Party, the Party shall:

  (i) At the time of the designation endeavor to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits in the sense of Article 20.4.1(c) (Additional Dispute Settlement Procedures); and

  (ii) Provide written notification, in advance wherever possible, to the other Party of the designation and any such conditions.

- Singapore shall enact general competition legislation by January 2005, and shall not exclude enterprises from that legislation on the basis of their status as government enterprises.

Government enterprises

- Nothing in this Agreement shall be construed to prevent a Party from establishing or maintaining a government enterprise.

- Each Party shall ensure that any government enterprise that it establishes or maintains acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

Cooperation

- The Parties recognize the importance of cooperation and coordination to further effective competition law and policy development in the free trade area and agree to cooperate on these matters.

Transparency and information request

- The Parties recognize the value of transparency of their competition policies.

- Each Party, at the request of the other Party, shall make available public information concerning the enforcement of its measures proscribing anticompetitive business conduct, and information concerning government enterprises, and designated monopolies, public or private.

Consultations

- To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, at the request of the other Party, enter into consultations regarding representations made by the other Party.

Analysis

It is worth noting that all three bilateral agreements with the US contain provisions that deal with anti-competitive business conduct (including the establishment of authorities for the enforcement of such policies), the regulation of designated monopolies and the operation of state enterprises. The latter two, being monopolistic in their nature, are not prohibited by the existing competition policy laws. This goes to show the continued recognition of state monopolies, which are set in place to favor and safeguard the interests of sensitive economic groups and products.

On the other hand, while most of the provisions related to competition policy in the FTA's discussed, it was observed that certain fundamental differences likewise exist among the three FTAs mentioned. Primarily, the US-Singapore FTA contains a provision that binds the Singapore to a timeframe within which it will have to legislate a comprehensive comprehension policy law (January 2005). Such a provision is not found in the other two FTAs. Also, the US-Singapore FTA makes specific reference to the transparency and consultation with the relevant parties, is not emphasized in the other two FTAs.

XV. Recommendations on Competition Policy

Given the accepted economic benefits of having a comprehensive competition policy on both producers and consumers, it is definitely recommended that such policies restricting uncompetitive conduct be enacted in the Philippine scenario. However, such will have to be undertaken at a pace and timing of the Philippines' own choosing - taking into account its economic and political eccentricities vis-à-vis the US. It must be considered that, although a codified and comprehensive competition or anti-trust legislation is yet to be compiled and enacted, there already are fragments of competition policy scattered among various congressional enactments and administrative orders (as discussed above). Yet, notwithstanding these provisions, utilization and prosecution of uncompetitive business conduct on the basis these existing laws has been surprisingly sparse. There is still a need for the country to be brought to speed on the necessity to effectively enforce these existing provisions before yet another set of legislation is done.

Therefore, what the Philippines will have to avoid in an FTA scenario with the US with regard to competition policy, is to be encumbered by a treaty obligation for it to legislate an anti-trust law within a specified amount of time dictated by the US and with specified type of provisions. What the competition policy portion of the RP-US FTA should contain is a set of general policy

declarations against uncompetitive behavior and a general recognition that competition is an important business/economic component, which the country should strive for (albeit at its own pace).

The country should not be pressured to enact a comprehensive anti-trust policy (despite the apparent need for such), if the prevailing conditions are not yet adequate to sustain and implement it. This is a cautious strategy that must be employed so as not to rush the passage of critical economic legislation and eventually bungling up its implementation at the end.

Moreover, it is worth remembering that the country, along with 21 other nations blocked the inclusion of competition policy (which counts among the 4 Singapore issues) during the failed WTO Ministerial conference at Cancun in September of last year. Such a gesture showed the solid resolve of developing countries to resist pressures from developed countries trying to aggressively advance their own agenda. Given such a position last year, it would be distressingly inconsistent for the country to compromise very easily in an FTA proposal with the US in the area of competition policy.

Nevertheless, it is high time for the country to get its act together and start prioritizing the passage of a competition policy law to temper Philippine industries into competitiveness and to render the country as a viable investment destination.

Having thoroughly discussed trade remedies and competition policy and how the Philippines may have to manage these issues in the context of RP-US FTA negotiations, this paper will now venture into government procurement, yet another topic of proportionate significance in this regard.

GOVERNMENT PROCUREMENT

XVI. Introduction

Trade Aspect of government procurement

Government procurement is another critical topic of imminent consequence to the objective of establishing a free trade area between the Philippines and the US. It has to be considered that the government of both countries figure in as a significant consumer of goods and services from both domestic and international sources, thus pointing to the possible incentive for either country to limit or manipulate the course of trade through preferences for local purchases to the unwarranted exclusion of other foreign products and services. In this situation, Philippine exports to the US, which the US government may have otherwise purchased, could possibly be discriminated against and lorded over to favor US made products. By way of example, a preference for locally produced textiles for the production of uniforms for branches of the government service (e.g. armed forces) would therefore remove the possibility for foreign players to enter that potentially lucrative market and eliminate any consideration that other sources could have provided better quality

textiles at less cost to government and taxpayers. This situation is aggravated by strong internal political pressures which could sway governments into undertaking selections on other criteria other than efficiency and quality.

XVII. WTO and government procurement

Protectionism by means of tweaking government procurement policies to discriminate against foreign products has been an issue that the WTO has sought to address ever since the Tokyo Round of Negotiations. Presently, there is the plurilateral Agreement on Government Procurement, which at present has 28 members. The Agreement was meant to obtain a commitment for contracting parties to ensure that the policies, procedures, and practices which governments abide by in the procurement of products are transparent and do not provide undue protection for local industries and discrimination against foreign goods.

The general rules and obligations of the Agreement, so as to foster expanded trade and policies transparent to all WTO members, concern itself mostly with supplier accreditation, technical specifications, tendering procedures, and the selection process. There is even a mechanism in place which would allow private bidders adversely affected by an decision to challenge procurement decisions and have available recourse to contest decisions for which doubts as to their conformity with the Agreement are raised.

The coverage of the present agreement encompasses transactions of both national government and local government units having collective purchases in the hundred billion dollar annual levels. For each contracting party, a specific Appendix I is assigned which is further subdivided into a set of 5 annexes containing the list of government entities, and services which are to be covered. Footnote 1 of the Agreement is quoted as follows:

> "For each party, Appendix I is divided into five Annexes:
>
> - Annex 1 contains central government entities
> - Annex 2 contains sub-central government entities
> - Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
> - Annex 4 specifies services whether listed positively or negatively, covered by this Agreement.
> - Annex 5 specifies covered construction services
>
> Relevant thresholds are specified in each Party's Annexes."

XVIII. Developing countries

Article V of the Agreement on Government Procurement provides for special and differential treatment for developing countries. Among its subsections is one referring to exclusions in which countries may:

> "…negotiate with other participants in negotiations under this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case"[60].

Moreover, the Agreement places a responsibility upon all developed country contracting parties to provide, upon the request of any developing country, technical assistance as it sees fit for the latter to effectively resolve any arising problems on government procurement[61].

XIX. US and Government Procurement

The US is a signatory to the Agreement on Government Procurement and has specific provisions under its FTAs with other countries pertaining to Government Procurement. In the survey conducted, the US-Australia, US-Chile, and US-Singapore FTAs all contained provisions on Government Procurement resembling the WTO Agreement on Government Procurement and were primarily focused on the tendering processes so as to ensure that foreign players are not unduly discriminated against.

XX. APEC and government procurement

At the regional level, the ASEAN does not elicit any commitment (binding or not) from its members to measure up its policies against a common

[60] Article V, Section 4 of the Agreement on Government Procurement
[61] Article V, Section 8-10 of the Agreement on Government Procurement

government procurement agreement. On the other hand, APEC maintains under its auspices, a Government Procurement Experts Group which drafted non-binding principles on government procurement which centers on three fundamental guidelines namely: transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination.[62]

XXI. The Philippines and Government Procurement

The WTO and APEC once described government procurement in the Philippines as "highly decentralized" since each government entity handles its own purchases in accordance to the rules and regulations that have been instituted for each.

> "Procuring agencies have their respective procurement committees to conduct the bidding and contract award process, e.g. the Prequalification, Bids and Award Committee in the case of goods/supplies and civil works contract procurement and the Prequalification, Evaluation and Awards Committee for consulting services. Final contract approval rests on the respective head of agency. For procurement of common use supplies, material and equipment, the Procurement Service implements and operates a central procurement system for the government nationwide. An inter-agency Procurement Policy Board supervises this centralized procurement."[63]

At this time, the Philippines already provided for a "2.5% preferential margin (not to exceed US$ 40,000 worth of preferences per tender) in respect of international lenders for government procurement of goods and auxiliary services from untied loans submitted by ASEAN countries vis-à-vis non-ASEAN countries [APEC 1998 p. 53]."[64]

RA 9184

The landscape of government procurement in the Philippines has continued changing. In December of 2002, RA 9184, otherwise known as an "Act

[62] http://www.apec-iap.org/document/CDA_2003_Government_Procurement.htm
[63] http://www1.apecsec.org.sg/govtproc/gp_phl.html
[64] Paragraph 58 of the Report of the Trade Policy Review Body on the Philippines, 27 August 1999

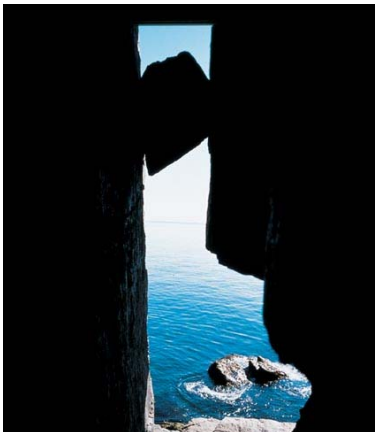
Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes" was enacted. This law establishes common and uniform principles by which all procurement processes done by the government should abide by.

Section 3 of the said law promulgates the principles by which Government procurement should be undertaken. Notably, the said principles conform to the principles established by the WTO Agreement on Government Procurement. Thus:

> "SEC. 3. *Governing Principles on Government Procurement*. - All procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or -controlled corporations, government financial institutions and local government units, shall, in all cases, be governed by these principles:
>
> a) Transparency in the procurement process and in the implementation of procurement contracts.
>
> b) Competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in public bidding.
>
> c) Streamlined procurement process that will uniformly apply to all government procurement. The procurement process shall be simple and made adaptable to advances in modern technology in order to ensure an effective and efficient method.
>
> d) System of accountability where both the public officials directly or indirectly involved in the procurement process as well as in the implementation of procurement contracts and the private parties that deal with government are, when warranted by circumstances, investigated and held liable for their actions relative thereto.
>
> e) Public monitoring of the procurement process and the implementation of awarded contracts with the end in view of guaranteeing that these contracts are awarded pursuant to the provisions of this Act and its

> implementing rules and regulations, and that all these contracts are performed strictly according to specifications."

So as to pursue to the above guidelines, a Government Electronic-Procurement system, was crafted, which strives to streamline and render more transparent and efficient all government procurement transactions.



Interestingly, despite the ratification of RA 9184, the Philippines is not yet a contracting party to the Agreement on Government Procurement[65], and thus is not bound to comply with its provisions as of yet. To note, the text of RA 9184 mainly focuses on the entire procurement process, aiming to create a level field for all bidders and mitigating corruption in the process. The primary thrust of RA 9184, in the first place, was to prevent collusion and open the market of government purchases to all eligible private bidders both local and foreign alike. Nevertheless, this bears and adheres cogently upon the principles of the WTO Agreement on Government Procurement.

It must also be considered in light of the above that although efficiency and timely delivery of goods is taken into account, preference for domestically produced and manufactured goods still maintains a conspicuous presence in the letter of the law. Thus Section 43 states that:

> "SEC. 43. *Procurement of Domestic and Foreign Goods.* – Consistent with the country's obligations under international treaties or agreements, Goods may be obtained from domestic or foreign sources and the procurement thereof shall be open to all eligible suppliers, manufacturers and distributors. However, in the interest of availability, efficiency and timely delivery of Goods, the Procuring Entity may give preference to the purchase of domestically produced and manufactured goods, supplies and materials that meet the specified or desired quality".

[65] Which is possible since the Agreement on Government Procurement is a Plurilateral Agreement to which accession is not mandatory, unlike all the other WTO Agreements.

Before an RP-US FTA does come into fruition, the above preference for local manufactures may possibly be contested and requested for modification.

XXII. Recommendations on Government Procurement

The Philippines as of yet, as mentioned earlier, is not a signatory to the WTO Agreement on Government Procurement. It has however, just two years ago, ratified a new Government Procurement Law (RA 9184), which endeavors to foster more transparency in the tendering process to, as a primordial objective, curb corruption and collusion during public biddings. The new law, directs all government procurement processes along a common principles and uniform standards to be implemented across all procuring entities.

Given the long tedious process of implementing RA 9184, with all procuring entities having to realign their procedures according to the new guidelines established, time must still be allowed for the effectiveness of the new law to be monitored and assessed.

Thus, if an RP-US FTA is to be realized, it would be prudent for the country's negotiators to ensure that its government procurement provision, should it ever be proposed, would not bind the country to any treaty commitment (as this would defeat the country's non-participatory status to the Agreement on Government Procurement) and should be a set of general declarations which would not overstep the present guidelines stipulated in RA 9184. Again it should be noted that the Philippines, together with 21 other countries opposed the inclusion of Government Procurement in the Doha Development Agenda, deeming it as a non-priority at this particular juncture. Thus, with reason, this consistency should be maintained.

In the end, it may be said that the implementation of treaty commitments in trade remedies (although to a lesser degree), competition policy and government procurement in an FTA scenario with the US would be a highly technical endeavor for which the Philippines has yet to fully develop the competencies to thoroughly comply with. Thus, the provisions that shall come out of the final negotiations, if the same do push through, should not bind the Philippines to specific treaty commitments that, in the long run, the country may not be able to enforce and properly abide by. At the bottom line, the Philippines will have to see to it that the wordings of the FTA will allow for flexibilities in that the Philippines may invoke along the road to full compliance so as to pave wider opportunities for Philippine products to enter the US market and make Philippine industries more competitive.

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